IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2600

FEDERAL ELECTION COMMISSION,

Appellant,

v.

CHRISTIAN ACTION NETWORK, INC., and
MARTIN MAWYER,

Appellees.

On Appeal from the United States District Court for
the Western District of Virginia, Lynchburg Division

REPLY BRIEF FOR THE FEDERAL ELECTION COMMISSION

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

David Kolker
Attorney

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202)219-3690

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SUMMARY OF ARGUMENT

As a corporation, the Christian Action Network was prohibited from using funds from its corporate treasury to pay for political advertisements expressly advocating the defeat of Bill Clinton. CAN's expenditures for television advertisements should not escape scrutiny under the Federal Election Campaign Act simply because video communications may include a complex mix of words, sounds, and imagery. Video's power can be harnessed to eliminate ambiguity, and the district court erred by refusing to analyze the meaning of the images in CAN's advertisement. The "express advocacy" standard must examine speech from the perspective of a reasonable person, and the Court can apply this objective test without guesswork or speculation. CAN's express advocacy also cannot be shielded from regulation by combining it with issue advocacy. Contrary to CAN's arguments, the Federal Election Commission's interpretation of express advocacy is consistent with prior cases and entitled to deference.

CAN's advertisements do not qualify under the Act's "press exemption," which was created by Congress to protect the First Amendment rights of the press and which is constitutional according to controlling Supreme Court precedent.

Despite a District of Columbia Circuit decision holding the ex officio members of the Commission unconstitutional, CAN is not entitled to have this case dismissed. CAN presents no argument why this Circuit should follow the D.C. Circuit's unprecedented view that the presence of the ex officio members, who served only an advisory role, violated the separation of powers doctrine. In any event, the Act's strong severability clause requires that the Act's remaining valid applications be enforced. The Commission now operates constitutionally without the ex officio members, and only the reconstituted Commission voted, inter alia, to initiate this litigation. Even if the ex officios' presence were unconstitutional, CAN has received whatever tailored remedy it may have deserved. In addition, the Commission's past actions should be afforded de facto validity.

ARGUMENT

I. THE CHRISTIAN ACTION NETWORK WAS PROHIBITED FROM USING ITS CORPORATE FUNDS TO PAY FOR ADVERTISEMENTS THAT EXPRESSLY ADVOCATED THE DEFEAT OF BILL CLINTON

Contrary to the Christian Action Network's ("CAN") claim that (Br. 1) the Commission seeks "punishment of issue-oriented speech," the Commission seeks to enforce the Federal Election Campaign Act ("Act" or "FECA"), 2 U.S.C. §§ 431-55, to ensure that when corporations make expenditures for or against federal candidates, they abide by the applicable funding restrictions and disclosure requirements. As neither CAN nor the ACLU of Virginia ("ACLU") acknowledges, the Act, rather than precluding corporations from making contributions or expenditures, simply requires that such corporate spending be financed from a separate fund comprising voluntary donations for that purpose from stockholders or members of the corporation, rather than from the corporate treasury. 2 U.S.C. § 441b(b)(2)(C). The Act "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990). Thus, what is really at stake in this case is whether CAN should have been required to set up a separate segregated fund

and comply with the disclosure requirements applicable to expenditures from such funds, not whether it would be absolutely barred from publicizing its electoral message. The Supreme Court has "recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.' " Id. at 659 (quoting FEC v. National Conservative Political Action Committee, 470 U.S. 480, 500-01 (1985)).

A. COMMUNICATIONS THROUGH COMPLEX MEDIA CAN BE ESPECIALLY UNAMBIGUOUS AND SHOULD NOT ESCAPE SCRUTINY AS EXPRESS ADVOCACY

Although neither CAN nor the ACLU directly disputes the Commission's argument that metaphors, symbols, and imagery can constitute express advocacy, both of their briefs interpret Buckley v. Valeo, 424 U.S. 1 (1976), and FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)("MCFL"), so narrowly that it is hard to imagine any communications besides simple, literal, verbal formulations that would pass muster as express advocacy. As already explained (FEC Br. 22-25), under its ambiguous express advocacy test, the Supreme Court has found that somewhat indirect exhortations to vote can be "squarely within § 441b" (MCFL, 479 U.S. at 249-50; emphasis added), and the term "communications" in the Court's definition of express advocacy is clearly broad enough to encompass many different media and types of expression. The Supreme Court's concern in Buckley, 424 U.S. at 42-45, was that a vague definition of "expenditure" could chill protected political speech.[1] But as long as the electoral message is unambiguous and "express," i.e., "clearly indicated" and "definite,"[2] there is no reason to limit "express advocacy" to literalistic verbal formulations.

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[1] As previously discussed (FEC Br. 17-22) and not contested by CAN or the ACLU, post-Buckley statutory and administrative developments — especially the Commission's advisory opinion process, which was significantly broadened in the FECA Amendments of 1979 — have reduced the potential chilling effects that motivated the Court's decision in Buckley.

[2] Webster's II New Riverside University Dictionary 1194 (1988).

While the Commission has already demonstrated (see Br. 38-39) that video's sounds and images can be an especially powerful expressive tool, the Commission has never asked the Court to apply a "more deferential 'express advocacy' standard" to video, or asked that "[t]elevision advocacy ... be judged by a more censorial standard" (ACLU Br. 21). Moving images combined with sounds and words can undoubtedly convey express advocacy in more ways than an unadorned, typed statement, but both kinds of communications are subject to the same test. Our contention that a judicial standard must acknowledge the different methods that various media use to convey unambiguous messages is not equivalent, as the ACLU suggests (Br. 22), to contending that a message constitutes express advocacy just because it is conveyed through video.

Most fundamentally, both the ACLU and the district court err by assuming that the use of a complex communications medium necessarily creates a message that is so ambiguous that a court should hide from the task of interpreting it. The ACLU, for example, speciously argues that it is "perilous for a court" (Br. 4) to interpret "complex real-time communications" because their "sheer density ... makes it at least possible to interpret [them] ... in more ways than might be true for simpler messages" (Br. 22). This faulty reasoning echoes a similar error made by the district court when it stated (J.A. 27), "It takes little reflection to realize that messages conveyed by imagery are susceptible to even greater misinterpretation than those that are conveyed by the written or spoken word." Both of these flawed statements tell only half the story.

The medium of video is indeed much more powerful, and can be more richly textured, varied, and nuanced, than mere written words. It has the potential for more horsepower, more decibels, and more complexity. But depending upon how that potential is harnessed, it can create more or less ambiguity, more or less clarity, than the written word. The ACLU and the district court err on two critical points: (1) they confuse the complexity of the video process with the complexity of a video's message, and (2) they assume that because a video (or image) can be susceptible of greater misinterpretation, that it is inherently so. Because of these errors, the district court concluded (J.A. 27) that it "cannot accept the FEC's invitation to delve into the

meaning behind an image," essentially excluding all imagery from the FECA's reach because some imagery is harder to interpret than some texts.

Since the ACLU and district court essentially assume that a more complex medium always creates a message that can elicit numerous plausible interpretations, they fail to recognize the obvious point that the messages of some videos are as subtle as a sledgehammer and susceptible of only one reasonable interpretation. In fact, if video's full power is directed unambiguously at one specific target, like a disciplined firing squad replacing a single sharpshooter, a video's message can be more forceful and less ambiguous than a line of plain prose. The proliferation of television advertising, for both household products and political campaigns (see J.A. 71), speaks volumes about the medium's successful ability to present effective, unambiguous messages. As previously explained (FEC Br. 37-47), in this case CAN's television advertisement contained this kind of unambiguous electoral advocacy. Just as it would be perverse (see FEC Br. 25-28) to require FECA regulation to turn on the degree to which speech is literal or figurative, it would be equally perverse to exempt complex communications from scrutiny under the Act in light of their ability to present especially forceful and unambiguous messages. Neither Buckley nor MCFL suggest such an odd result, and the district court's refusal (J.A. 27) to even examine the "meaning behind an image" must be overturned.

B. THE EXPRESS ADVOCACY TEST MUST EXAMINE SPEECH FROM THE PERSPECTIVE OF A REASONABLE PERSON

Neither CAN nor the ACLU contests the Commission's argument that a communication must be understood as a whole and in context (FEC Br. 31-34), or that First Amendment analysis commonly evaluates communications from the perspective of a reasonable person (Br. 34-37). Indeed, as previously discussed (Br. 34-35), Buckley itself (see 424 U.S. at 26-28, 66-68) supports this approach because it focused on the "appearance of corruption," which can only exist in the minds of the general public.

Instead, CAN accuses (Br. 16) the Commission of "Orwellian doublespeak" when we explain (Br. 35) that an objective test uses a "reasonable person" standard that "does not bend

depending upon the sensitivity or special ignorance of particular listeners." In many areas of the law, courts routinely apply "reasonable person" tests, and courts consider them objective tests precisely because they do not depend upon the subjective understanding or feelings of any one person, including the specific people involved in the lawsuit at issue. See, e.g., Wyatt v. Cole, 504 U.S. 158, 166 (1992) (qualified immunity for certain government officials depends upon a "wholly objective standard" based on whether a "reasonable person" would have known of clearly established statutory or constitutional rights) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?"); EEOC v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992) ("Intolerability is 'assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign.' " (citation omitted)); Lee v. State Bank & Trust Co., 54 F.2d 518, 521 (2d Cir. 1931) ("the law of contracts does not judge a promisor's obligation by what is in his mind, but by the objective test of what his promise would be understood to mean by a reasonable man in the situation of the promisee"), cert. denied, 285 U.S. 547 (1932).

The ACLU also suggests (Br. 7) that the Commission is endorsing "[g]uesswork, or personal or anecdotal speculation, about the meaning of disputed speech."[3] To the contrary, the Commission is merely arguing that if, inter alia, a reasonable person would find the "electoral portion of the communication ... unambiguous, and suggestive of only one meaning" (FEC Br. 22), then it constitutes "express advocacy." Also, contrary to the ACLU's characterization

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[3] The ACLU also gratuitously and erroneously suggests (Br. 18) that there is a perception that the Commission enforces the law in a partisan fashion, and it fails to give a single citation to support its assertion that such "[c]omplaints against the FEC ... are legion." Moreover, even if it were true that there is a negative "public perception" about the FEC (id.), the ACLU again fails to cite any support for the notion that courts should more aggressively review an agency's actions because of such "perceptions," especially when the people who hold such perceptions are unidentified, the perceptions themselves are groundless, and nothing about their alleged existence or accuracy is in the record before the Court.

(Br. 7), neither Brandenburg v. Ohio, 395 U.S. 444 (1969), nor Hess v. Indiana, 414 U.S. 105 (1973) stand for the proposition that courts must take a "minimalist" approach when trying to understand the meaning of a communication. In Brandenburg, the Court indeed decided that speech at a Ku Klux Klan meeting was protected because, however offensive and suggestive, it was "mere advocacy" and did not rise to the level of "inciting or producing imminent lawless action and [being] likely to incite or produce such action" (395 U.S. at 447, 449). Although the line drawn by the Court between mere advocacy and incitement to violence may afford stringent First Amendment protection, the line is not particularly bright and it required the Court to look carefully at the specific language spoken at the Klan meeting.

In Hess, the Court delved even further into the meaning and context of an offensive remark made during an antiwar demonstration and never suggested that the Brandenburg test drew a bright line or that courts should be shy about interpreting the meaning of speech. Instead, the Court noted communicative details such as the relative body positions of the speaker and the listening sheriff (414 U.S. at 107-08) and even analyzed whether a "rational inference from the import of the language" (id. at 109) could constitute an incitement to produce imminent disorder. While the incitement to lawless action test in these two cases — like the express advocacy standard — may indeed carefully limit the amount of speech subject to government regulation, nothing in Brandenburg or Hess directs the courts to hold back in their analyses of whether particular speech meets such tests.

C. UNDER THE EXPRESS ADVOCACY TEST, EXHORTATIONS TO VOTE CANNOT ESCAPE REGULATION BY BEING COMBINED WITH OTHER MESSAGES

As the Supreme Court in MCFL explained (479 U.S. at 249), the Court "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." The Court specifically recognized that express advocacy will often be combined with issue discussion, and in MCFL itself found that a newsletter went "beyond issue discussion to express electoral advocacy" (id.). Thus, combining

express electoral advocacy with issue advocacy, including ambiguous issue advocacy, cannot insulate the express advocacy portion of the message from FECA regulation.

The parties do not dispute that the CAN television and newspaper advertisements take a position against Clinton's purported positions on gay rights and thus contain issue advocacy. But this fact, by itself, cannot answer the question whether the ads also contain express electoral advocacy. And pointing out possible ambiguity in one aspect of CAN's advertisements does not mean that their electoral message is in any way ambiguous. The ACLU illustrates this point when it candidly admits (Br. 14) that the video and print ads "should be considered together ... [and] appear to attempt, however quixotically, a dialog with the Clinton-Gore campaign on gay rights." The "reasonable person," by definition, is not stupid and recognizes that CAN's attempt to make Clinton and Gore "retract their commitments to the 'gay rights' community" (J.A. 61) is indeed quixotic. In such circumstances, CAN's issue advocacy is unmistakably understood as the proverbial tail wagging the dog. CAN's self-described pre-election "campaign" to "inform[] the voting public" (J.A. 61) is little more than an exhortation to vote against Bill Clinton, and the video's clear symbolism and explicit discussion of actions CAN seeks to prevent Clinton from being able to take as president send an unambiguous electoral message (see FEC Br. 37-49). While it may be unclear whether CAN has any genuine hope that Bill Clinton will change his policy positions, it is crystal clear that they are asking voters to oppose him. Just as the disclaimer in MCFL "[could] not negate [the] fact" that "marginally less direct" electoral advocacy went beyond issue advocacy (479 U.S. at 249),[4] here a quixotic attempt to affect Clinton's stance on an issue cannot negate the fact that the ads also contain an express message to defeat him.

[4] The disclaimer in MCFL stated, "This special election edition does not represent an endorsement of any particular candidate." Id. at 243.

D. THE COMMISSION'S INTERPRETATION IS CONSISTENT WITH PRIOR PRECEDENT AND IS ENTITLED TO DEFERENCE

The Commission readily acknowledges that the express advocacy standard is a difficult test for the government to meet, but requiring too strict a test would "preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act." FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir.), cert. denied, 484 U.S. 850 (1987). Contrary to CAN's argument (Br. 16), the Commission's interpretation, recently codified in a regulation (60 Fed. Reg. 35292-306 (1995); 11 C.F.R. § 100.22), does not "silently reject[]" the Ninth Circuit's three-prong test in Furgatch (807 F.2d at 864) and is not precluded by other prior decisions.[5] In fact, the Commission's interpretation embraces the Furgatch approach.

Like the first prong in Furgatch, the Commission's regulation requires the "electoral portion of the communication [to be] unmistakable, unambiguous, and suggestive of only one meaning" (11 C.F.R. § 100.22(b)(1)). Like the second and third prongs, the Commission's regulation requires that "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action" (11 C.F.R. § 100.22(b)(2)).[6]

The other decisions relied upon by CAN (Br. 7-12) simply did not address the kind of facts present here, and those decisions obviously do not bind this Circuit. None of those cases involved video or provocative imagery, and their facts are distinguishable. In FEC v. Central Long Island Tax Reform Immediately Comm. ("CLITRIM"), 616 F.2d 45, 53 (2d Cir. 1980) (en banc), which was decided before MCFL, the Second Circuit analyzed a printed leaflet that

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[5] As previously explained (FEC Br. 17-22), the Commission's consistent interpretation, now codified in a regulation, is entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984).

[6] See also 60 Fed. Reg. at 35295 ("[N]ew section 100.22(b) has been revised to incorporate more of the Furgatch interpretation by emphasizing that the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action.").

focused on incumbents' voting records, identified no electoral opponents, and contained "no reference anywhere ... to the congressman's party [or] to whether he is running for re-election." CAN's advertisements, on the other hand, specifically identified Bill Clinton as the "Democratic Presidential Candidate" (J.A. 61) and addressed issues that could only be relevant to the viewers if Bill Clinton became President (see FEC Br. 43-45). Of course, the leaflet in CLITRIM contained none of the imagery and charged rhetoric (see FEC Br. 37-47) that makes the CAN television advertisement an unambiguous exhortation against Clinton's candidacy.

The appellate decision in FEC v. Survival Education Fund, Inc. ("SEF"), 65 F.3d 285 (2d Cir. 1995), which CAN essentially ignores (Br. 9-10), specifically declined to affirm the district court's conclusion that the fundraising letters contained no express advocacy. The court stated that "the 'express advocacy' question [was] more difficult to resolve" and instead decided the case on SEF's status as a nonprofit, ideological corporation. 65 F.3d at 290 n.2. On the other hand, in deciding whether the solicitation was subject to the disclosure requirements of 2 U.S.C. § 441d(a)(3), the court found that the solicitation left "no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." Id. at 295. The Second Circuit's opinion certainly does not undermine the Commission's position in this case or address the appropriate treatment of imagery or television advertisements.

Finally, Faucher v. FEC, 928 F.2d 468, 471 (1st Cir.), cert. denied, 502 U.S. 820 (1991), and Orloski v. FEC, 795 F.2d 156 (D.C. Cir. 1986) are irrelevant here.[7] The First Circuit in Faucher invalidated a Commission regulation on its face because it was not limited to express advocacy, and the case did not consider whether any particular communication constituted express advocacy. Likewise, the Orloski decision contains no discussion of whether particular communications constitute express advocacy, but instead gives great deference to the

[7] Similarly irrelevant is FEC v. Colorado Republican Federal Campaign Comm., 59 F.3d 1015, 1023 & n.10 (10th Cir. 1995), petition for cert. granted, 1996 WL 4877 (U.S. Jan. 5, 1996), in which the court's brief mention of "express advocacy" appears in a footnote and is dictum.

Commission's interpretation of the Act. 795 F.2d at 164 ("The Supreme Court has held that the FEC is 'precisely the type of agency to which deference should presumptively be afforded.' ") (quoting FEC v. Democratic Senatorial Campaign Comm. ("DSCC"), 454 U.S. 27, 37 (1981)).

II. CAN'S PAID POLITICAL ADVERTISEMENTS DO NOT QUALIFY FOR THE ACT'S PRESS EXEMPTION, WHICH IS CONSTITUTIONAL

CAN's claim (Br. 18-19) that its paid political advertisements are exempt from regulation pursuant to a narrow statutory exception designed to protect the press's First Amendment rights is frivolous. The Act's so-called "press exemption" or "media exception" functions as an exception to the general prohibition on corporate expenditures. Under the Act, the "term 'expenditure' does not include—"

> any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 431(9)(B)(i) (emphasis added). This exemption is specifically limited to "any news story, commentary, or editorial" and says nothing about paid political advertising. In fact, the legislative history makes clear that this provision does not apply to political advertisements, but was only intended to assure "the unfettered right to the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974), reprinted in, FEC, Legislative History of the Federal Election Campaign Act Amendments of 1974 at 638 (1977) (quoted in Austin, 494 U.S. at 667). Indeed, interpreting the exemption in the manner suggested by CAN would completely eradicate § 441b's general prohibition on corporate expenditures, since campaign advertisements are routinely disseminated in newspapers or broadcast on television. The Supreme Court has already found it improper to construe the press exemption in a manner that, like CAN's reading, would undermine the compelling purposes of the restriction in § 441b:

> A contrary position would open the door for those corporations and unions ... to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition.

MCFL, 479 U.S. at 251. Moreover, even if the language of this statutory provision were ambiguous, CAN has presented no basis for rejecting the Commission's construction, which is entitled to deference from the courts. See DSCC, 454 U.S. at 45.

Furthermore, CAN's argument (Br. 19-20) that the press exemption is unconstitutional because it is a denial of equal protection of the laws has already been rejected by the Supreme Court. As CAN concedes (id.), the Supreme Court in Austin (494 U.S. at 666-68) rejected this argument when construing a state election law provision that was nearly identical to 2 U.S.C. § 431(9)(B)(i). Since CAN states (Br. 19-20) that it raises this issue "to preserve it for appeal and reconsideration by the Supreme Court," it appears that CAN concedes that Austin controls the present case and that CAN is not asking this Court to rule contrary to Supreme Court precedent. In light of this concession, it is sufficient to point out that when the Supreme Court rejected an equal protection claim against the state law's media exception, it explained:

> Although the press' unique societal role may not entitle the press to greater protection under the Constitution ..., it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

494 U.S. at 668 (citation omitted).

III. THE COMMISSION IS LAWFULLY AUTHORIZED TO LITIGATE THIS ENFORCEMENT ACTION

A. THE D.C. CIRCUIT'S NRA DECISION AND THE COMMISSION'S RESPONSE

Relying upon a decision by the District of Columbia Circuit, CAN erroneously contends (Br. 20-24) that the constitutional doctrine of separation of powers bars the Commission from bringing this suit. In that case, FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993)("NRA"), cert. dismissed, 115 S.Ct. 537 (1994), the D.C. Circuit held that the Commission, as then constituted with two non-voting ex officio members selected by Congress, see 2 U.S.C.

§ 437c(a)(1), violated the constitutional doctrine of separation of powers. Because the lower court had held against the NRA on the merits and the D.C. Circuit believed some relief was required, the appellate court reversed the district court's judgment (6 F.3d at 828).[8]

The D.C. Circuit, however, also held that the Act's severability clause permits the Commission to continue its administration of the Act in conformity with the NRA decision. Noting that the Act's "explicit severability clause" raises a "presumption that Congress would wish the offending portion of the statute — creating the ex officio members of the Commission — to be severed from the rest," the court concluded that no congressional action was required to reconstitute the Commission (6 F.3d at 828).

> Congress is not even required after our decision, as it was after Buckley, to amend the statute. Since what remains of the FECA is not "unworkable and inequitable," the unconstitutional ex officio membership provision can be severed from the rest of FECA.

Id. (citation omitted).

Following the NRA decision, the Commission promptly voted on October 26, 1993, to reconstitute itself as a six-member commission without ex officio members, thereby conforming with the court's decision. See FEC Exhibit 26.[9] It was this six-member Commission that ratified the earlier finding of "reason to believe," considered CAN's response to the General Counsel's Brief, see 2 U.S.C. § 437g(a)(3), and found that there was "probable cause to believe" defendants CAN and Mawyer violated the Act. J.A. 44-46; FEC Exhibit 27; 2 U.S.C. § 437g(a)(4)(A)(i). This latter determination, not the prior "reason to believe" finding (which merely initiates an investigation, see 2 U.S.C. § 437g(a)(2)), is the jurisdictional prerequisite to filing an enforcement suit. FEC v. National Rifle Association, 553 F.Supp. 1331, 1344 (D.D.C. 1983).

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[8] The Commission then sought review in the Supreme Court, and neither the D.C. Circuit nor the district court was ever asked to consider a more tailored constitutional remedy.

[9] Citations to "FEC Exhibits" refer to the numbered exhibits filed in the district court on February 14, 1995, with the Commission's Opposition to Defendants' Motion to Dismiss.

Furthermore, this same six-member reconstituted Commission engaged in conciliation attempts, authorized the filing of this suit, and is the appellant before this Court (J.A. 45-46).

B. THE COMMISSION WAS CONSTITUTIONAL EVEN WITH THE EX OFFICIO MEMBERS

CAN presents no argument as to why this Court should adopt the D.C. Circuit's admittedly unprecedented view that the separation of powers doctrine is violated by the mere possibility that the presidentially appointed FEC Commissioners might be influenced by the views expressed by two Congressional employees who served at the Commission only in an ex officio capacity, without the right to vote.[10]

The Supreme Court, however, has "never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' " Morrison v. Olson, 487 U.S. 654, 693-94 (1988)(citation omitted). To the contrary, the "principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital interest." Mistretta v. United States, 488 U.S. 361, 408 (1989). Thus, while the Court has "invalidated attempts by Congress to exercise the responsibilities of other Branches," it has "upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment." Id. at 382. The essential requirement of the separation of powers doctrine is that " 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or

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[10] The only court to reach this separation of powers issue outside the D.C. Circuit has rejected that court's view, concluding that "the Ninth Circuit's decision in Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988)[, rev'd on other grounds, 893 F.2d 205 (9th Cir. 1989) (en banc),] compels a different result." FEC v. Williams, No. CV 93-6321-ER (Bx), slip op. at 2, (C.D. Ca. Jan. 31, 1995) (FEC Exhibit 31). In contrast to the D.C. Circuit, which found that the mere presence of the ex officio members was enough to render the Commission unconstitutional, see NRA, 6 F.3d at 826-827, the Ninth Circuit, in examining a similar separation of powers issue, has held that "the critical issue is whether Congress or its agent seeks to control (not merely to 'affect') the execution of its enactments without respect to the Article I legislative process." Lear Siegler, 842 F.2d at 1108. The Third Circuit's view of separation of powers is the same as the Ninth Circuit's. See Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979, 993 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988).

indirect, of either of the others,' " Mistretta, 488 U.S. at 380 (emphasis added) (quoting Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935)).

The statutory provision authorizing two officers of Congress to serve in an ex officio role at the Commission does not violate the separation of powers principle because the statute vests them, like the Attorney General in the judicial branch's Sentencing Commission, see Mistretta, 488 U.S. at 387 n.14, only with an opportunity to offer nonbinding advice to the decisionmakers; it grants them no authority to control how the Commission exercises any part of its executive powers. Section 437c(a)(1) explicitly states that the ex officio members are "without the right to vote," and section 437c(c) requires that the Commission's powers be exercised only by a majority vote of the presidentially appointed members, who are prohibited from delegating their votes or decisionmaking authority.[11]

The voting Commissioners could disregard the advice of the ex officio members with impunity and were free to cast their votes to exercise the Commission's powers as they saw fit. In addition, section § 437g(a)(12) prohibited the ex officio members, like everyone else, from disclosing to persons outside the agency — including members of Congress — any confidential information about agency enforcement matters. See also 11 C.F.R. § 111.21. In sum, despite their nominal designation as "members" of the agency, the statute effectively precluded the ex officio members from having any control over the exercise of the Commission's executive powers or otherwise preventing the Commission from acting constitutionally.

[11]The Act also prohibits the ex officio members from serving as chairman or vice chairman, 2 U.S.C. § 437c(a)(5), and the Commission's internal rules also deny them the procedural prerogatives flowing from a right to vote. See Commission Directive No. 10, Rules of Procedure of the Federal Election Commission, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 2043, at 2512-14 (July 13, 1978).

C. EVEN IF THE EX OFFICIO MEMBERS WERE UNCONSTITUTIONAL, CAN IS NOT ENTITLED TO DISMISSAL OF THIS ACTION

1. Severability Doctrine Requires That This Suit Be Allowed To Proceed

As the Supreme Court has repeatedly held, "Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (citations and internal quotation marks omitted). See also Buckley, 424 U.S. at 108-09. Moreover, the FECA's severability provision specifically requires that when the Act is invalid as applied to a particular person or circumstance, the Act's remaining valid application to other persons shall not be reduced:

> If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

2 U.S.C. § 454 (emphasis added). The Supreme Court has characterized this language (as it appeared in the Social Security Act) as a "strong severability clause" that "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality ...." Califano v. Westcott, 443 U.S. 76, 90 (1979). In light of the Commission's actions (see supra pp. 12-13) after the NRA decision and the different underlying facts present here, even if this Court should decide to follow NRA, this lawsuit should not be dismissed.

Allowing the Commission's suit against CAN to continue is consistent with the Supreme Court's treatment of the unconstitutional, severable provision in Alaska Airlines. In that case, the Court found that the Employee Protection Program ("EPP"), which was part of the Airline Deregulation Act of 1978, contained an unconstitutional legislative-veto clause which subjected Department of Labor ("DOL") regulations to vetoes by either House of Congress. The Court also found that the offending clause was severable from the rest of the EPP, and it thus upheld the remaining EPP. 480 U.S. at 683. Notably, in so doing, the Court left intact regulations

which the Department of Labor had begun promulgating before the legislative-veto clause was severed from the Act. 480 U.S. at 683 n.4. The Court not only explicitly stated that the regulations are "now in force" (id.), but also relied upon the substance of the regulations while reaching its conclusion that Congress intended the legislative-veto clause to be severable. See id. at 689-92. The Court never suggested that the regulations had to be abandoned because they were initiated under the authority of an unconstitutional statute.

Like the DOL, the Commission here began an investigation against CAN before a provision was severed from the Act, and the Commission should be permitted to pursue its case — as DOL's regulations were allowed to remain in force — now that it is pursuing this action in accordance with the Act as severed. The Commission's actions in its lawsuit against CAN satisfy NRA's requirement that the Commission must now operate without its ex officio members, but in a manner that preserves the Act — including its application to particular persons — as much as possible.

2. CAN Has Suffered No Harm And Has Already Received Whatever Constitutional Remedy It May Have Deserved

While it is certainly understandable that CAN would prefer to escape all liability for its violations of the Act, it is not entitled to that remedy. If CAN suffered any constitutional injury, it occurred because the ex officio commissioners were still performing their limited statutory role when the six voting members decided to investigate CAN's expenditures. Any such injury was fully remedied when the NRA court severed the ex officio provision from the Act, and when the six-member Commission ratified its earlier actions concerning CAN and found probable cause to believe CAN had violated the Act. See, e.g., Irwin v. Wright, 258 U.S. 219, 224-25 (1922) (action not abated despite change in membership of governmental board); Marshall v. Dye, 231 U.S. 250, 255 (1913); Fed. R. Civ. P. 25(d) (substitution of public officers). These intervening facts resolve any question about the Commission's authority to bring this suit and completely distinguish this case from NRA, which had been prosecuted through the D.C. Circuit's decision under the authority of an eight-member commission with ex officio members.

As a "general rule ... remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." United States v. Morrison, 449 U.S. 361, 364 (1981). "An objectionable collateral consequence" would result if CAN violated the law but escapes liability, especially here where the Commission "acted in objective good faith." United States v. Leon, 468 U.S. 897, 907-08 (1984). Thus, the appropriate remedy must take into account not only the (alleged) injury suffered, but also the "interference with the ... justice system's truth-finding function" and the " 'administration of justice.' " Id. (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)). Here, dismissing the case against CAN would allow unlawful acts to go unremedied contrary to the public interest and would also threaten the Commission's ability to enforce the Act against other similarly situated parties.

The Commission has done nothing more than bring a de novo lawsuit against CAN, so the Commission is like a grand jury that has voted for an indictment. Just as indictments in criminal cases are not dismissed for harmless constitutional violations,[12] it would be unnecessary and contrary to the public interest to dismiss this civil suit, where less is at stake for the defendants and fewer constitutional protections are afforded. In the instant case, it is beyond all doubt that the presence of the ex officio members was harmless regarding the Commission's decision to investigate, and CAN has never even alleged that the ex officio members exercised any influence, much less demonstrable, prejudicial or undue influence, on the Commission's vote.

Finally, given that this case has not yet proceeded to the merits and the constitutionally valid six-member Commission has voted to find probable cause and initiate litigation, it is impossible to imagine a scenario in which the ex officio members' former presence could have any continuing effect whatsoever on an impartial judge's eventual ruling on the merits. As the Supreme Court stated in Morrison (449 U.S. at 365 n.2) (citation omitted):

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[12] See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988) ("as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants").

> There is no claim here that there [is] continuing prejudice which, because it could not be remedied by a new trial or suppression of evidence, called for more drastic treatment. Indeed there being no claim of any discernible taint, even the traditional remedies were beside the point. The [district court] seemed to reason that because other remedies would not be fruitful, dismissal of the indictment was appropriate. But ... it is odd to reserve the most drastic remedy for those situations where there has been no discernible injury or other impact.

Thus, if dismissal of an indictment is not necessary in criminal cases when harmless constitutional error has occurred, dismissal of the Commission's civil case is even more inappropriate here, where the ex officio Commissioners' role was harmless and the six-member Commission has cured any injury CAN may have suffered.

Finally, in Buckley, 424 U.S. at 142-143, the Supreme Court ruled that, even though it found that the Commission's structure violated both separation of powers and the Appointments Clause, the national interest required not only that the Commission's past actions be treated as de facto valid, but that the Commission in its original form be permitted to continue to exercise its powers, including its enforcement powers, for a limited time during which Congress could act to correct the unconstitutional features. As the NRA court recognized (6 F.3d at 823, 826-27), the separation of powers problems were far more egregious in Buckley than any found in NRA. Nonetheless, in Buckley, the actions taken by the Commission, which then had a majority of voting members whose performance of their duties violated the separation of powers doctrine, were held to be de facto valid.[13]

In this case, unlike Buckley, each of the members of the Commission who initially voted to investigate CAN was a properly appointed de jure officer of the United States on the date of

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[13]Other cases according de facto validity to the past acts of a governmental entity whose structure or membership violates the Constitution include: Connor v. Williams, 404 U.S. 549, 550-51 (1972); Texas v. White, 74 U.S. (7 Wall.) 700, 732-33 (1868); Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority, 917 F.2d 48, 57-58 (D.C. Cir. 1990), aff'd, 501 U.S. 252 (1991); In re Application of the President's Commission on Organized Crime, 763 F.2d 1191, 1201-02 (11th Cir. 1985) (Fay, J.). See also Metropolitan Washington Airports Authority Prof. Fire Fighters Ass'n v. United States, 959 F.2d 297, 304-05 (D.C. Cir. 1992).

that decision. Thus, from the beginning this matter has been considered under the authority of "duly appointed official[s] in charge of the agency, [and CAN has] therefore suffered no injury at the hands of an official who exercised power in violation of the [separation of powers doctrine]." Andrade v. Regnery, 824 F.2d 1253, 1257 (D.C. Cir. 1987). There is no reason, therefore, why this Court should not follow the Buckley precedent, and accord de facto validity to the Commission's past actions regarding CAN and Mawyer.[14]

For any or all of the above reasons, the D.C. Circuit's decision in NRA does not require dismissal of this case.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of the case.

Respectfully submitted,

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

David Kolker
Attorney

February 1, 1996

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202)219-3690

ORAL ARGUMENT REQUESTED

[14]The Supreme Court in Ryder v. United States, 115 S.Ct. 2031 (1995), refused to extend the applicability of the Buckley de facto validity holding to a different factual setting involving invalidly appointed military judges. However, there is no question about the authority of the courts in this case, and the Buckley holding is uniquely applicable to the FEC's enforcement authority, which was at issue both in Buckley and here.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL ELECTION COMMISSION,	)	
	)	
Plaintiff-Appellant,	)	No. 95-2600
	)	
v.	)	CERTIFICATE
	)	OF SERVICE
CHRISTIAN ACTION NETWORK et al.,	)	
	)	
Defendants-Appellees.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 1996, I caused to be served by U.S. Mail, postage prepaid, copies of the foregoing Reply Brief of the Federal Election Commission in the above-captioned case on the following counsel for appellee and amicus curiae:

Frank M. Northam
Webster, Chamberlain & Bean
1747 Pennsylvania Ave., N.W.
Washington, DC 20006

David William T. Carroll
261 West Johnstown Road
Columbus, OH 43230

Daniel H. Bromberg
1450 G. Street, N.W.
Washington, DC 20005

Joseph E. Sandler
Democratic National Committee
430 S. Capitol St.
Washington, DC 20003

Donald B. Verrilli
Paul M. Smith
601 Thirteenth St., N.W.
Washington, DC 20005

Stephen B. Pershing
ACLU of Virginia
6 North Sixth St., Suite 400
Richmond, VA 23219

February 1, 1996

David Kolker
Attorney

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202)219-3690