UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 00-1252, 00-1332

VIRGINIA SOCIETY FOR HUMAN LIFE, INC.,

Appellee/Cross-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellant/Cross-Appellee.

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

REPLY/ANSWERING BRIEF FOR THE FEDERAL ELECTION COMMISSION

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September 20, 2000

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. VSHL HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT THIS COURT HAS JURISDICTION UNDER ARTICLE III 5

A. VSHL HAS FAILED TO DEMONSTRATE AN INJURY IN FACT 5

1. VSHL Has Provided No Specific Facts To Support Its Argument That Its Communications Are Chilled By 11 C.F.R. 100.22(b) 5

2. Even If The Regulation Applied To VSHL's Communications, It Has No Credible Fear Of Prosecution In This Circuit 9

3. VSHL's Claim Of A Threat Of Prosecution Outside This Circuit Is Speculative 18

B. VSHL CANNOT ESTABLISH STANDING BASED ON AN ALLEGED INJURY FROM A LAWSUIT FILED UNDER 2 U.S.C. 437g(a)(8) 23

C. VSHL HAS NOT DEMONSTRATED THAT THIS CASE IS RIPE 25

II. VSHL HAS FAILED TO DEMONSTRATE WHY IT IS ENTITLED TO A NATIONWIDE INJUNCTION THAT PROTECTS EVERY PERSON IN THE COUNTRY 28

III. THE COMMISSION'S EXPRESS ADVOCACY REGULATION IS CONSTITUTIONAL 38

A. THE COMMISSION DID NOT WAIVE ITS RIGHT TO DEFEND THE CONSTITUTIONALITY OF 11 C.F.R. 100.22(b) BEFORE THE EN BANC COURT OR THE SUPREME COURT 38

B. THE REGULATION IS CONSTITUTIONAL 42

IV. VSHL'S CROSS-APPEAL THAT SEEKS TO ENJOIN THE COMMISSION TO INITIATE A RULEMAKING PROCEEDING TO REPEAL THE REGULATION SHOULD BE DENIED 47

A. STANDARD OF REVIEW 47

B. VSHL HAS NOT DEMONSTRATED A RIGHT TO HAVE THE COMMISSION ENJOINED TO REPEAL ITS REGULATION 49

CONCLUSION 55

Certificate of Compliance

Certificate of Service

TABLE OF AUTHORITIES

Page

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 26

Adventure Communications, Inc. v. Kentucky Registry of Election Finance, 191 F.3d 429 (4th Cir. 1999) 21, 22

American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1 (D.C. Cir. 1987) 51

American Mining Congress v. United States Army Corps of Engineers, 962 F. Supp. 2 (D.D.C 1997) 32

Anderson v. Heckler, 756 F.2d 1011 (4th Cir. 1985) 14

Arcadia v. Ohio Power Co., 498 U.S. 73 (1990) 41

Auer v. Robbins, 519 U.S. 452 (1997) 15

Bakker v. Grutman, 942 F.2d 236 (4th Cir. 1991) 39

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988) 14

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) 45

Bresgal v. Brock, 843 F.2d 1163 (9th Cir. 1987) 33

Broadrick v. Oklahoma, 413 U.S 601 (1973) 34, 45

Brown v. Secretary of HHS, 46 F.3d 102 (1st Cir. 1995) 47

Buckley v. Valeo, 424 U.S. 1 (1976) 11, 42, 46

Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360 (9th Cir.), cert. denied, 525 U.S. 873 (1998) 34

Califano v. Yamasaki, 442 U.S. 682 (1979) 28

Carter/Mondale Presidential Comm. v. FEC,
775 F.2d 1182 (D.C. Cir. 1985) 48

Catholic Services v. Shalala, 12 F.3d 1123 (D.C. Cir. 1994) 32

Chamber of Commerce v. FEC, 69 F.3d 600 (D.C. Cir. 1995) 16, 25

City of Houston v. Hill, 482 U.S. 451 (1987) 35

Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987) 53, 54

Crumpton v. Keisling, 160 Or.App. 406, 982 P.2d 3 (Or.Ct.App.
1999), review denied, 329 Or. 650, 994 P.2d 132 (Or. 2000) 43

Deal v. United States, 508 U.S. 129 (1993) 44

Democratic Congressional Campaign Committee v. FEC,
831 F.2d 1131 (D.C. Cir. 1987) 48

Dimension Financial Corp. v. Board of Governors
of the Federal Reserve System, 744 F.2d 1402 (10th Cir. 1984),
aff'd, 474 U.S. 361 (1986) 34

Dombrowski v. Pfister, 380 U.S 479 (1965) 35

Estate of Magnin v. Commissioner of Internal Revenue,
184 F.3d 1074 (9th Cir. 1999) 34

Faucher v. FEC, 928 F.2d 468 (1st Cir.),
cert. denied, 502 U.S. 820 (1991) 42

Federal Communications Comm'n v. Pottsville Broadcasting Co.,
309 U.S. 134 (1940) 52

FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997) ....passim

FEC v. Christian Coalition, 52 F.Supp.2d 45 (D.D.C. 1999) 8, 21, 44

FEC v. Democratic Senatorial Campaign Comm.,
454 U.S. 27 (1981) 48

FEC v. Furgatch, 807 F.2d 857 (9th Cir.),
cert. denied, 484 U.S. 850 (1987) 12, 42, 43, 51

FEC v. Massachusetts Citizens for Life, Inc.,
479 U.S. 239 (1986) 11, 42

FEC v. National Conservative Political Action Comm.,
647 F. Supp. 987 (S.D.N.Y. 1986) 21

FEC v. National Organization of Women,
713 F.Supp. 428 (D.D.C. 1989) 42

FEC v. Public Citizen, Inc., 64 F.Supp.2d 1327 (N.D. Ga. 1999) 21

FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2nd Cir. 1995) 20

Federal Power Comm'n v. Idaho Power Co.,
344 U.S. 17 (1952) 52, 53

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 9

Grayned v. City of Rockford, 408 U.S. 104 (1972) 45

Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989),
cert. denied, 493 U.S. 1056 (1990) 32

Hedge v. County of Tippecanoe, 890 F.2d 4 (7th Cir. 1989) 39

Horizons International, Inc. v. Baldrige,
811 F.2d 154 (3rd Cir. 1987) 53

Hormel v. Helvering, 312 U.S. 552 (1941) 40

Investment Company Institute v. Camp, 401 U.S. 617 (1971) 15

Johnson v. United States Railroad Retirement Bd., 969 F.2d 1082
(D.C. Cir. 1992), cert. denied, 507 U.S. 1029 (1993) 37

Kolender v. Lawson, 461 U.S. 352 (1983) 44

Laird v. Tatum, 408 U.S. 1 (1972) 6

Lewis v. City of New Orleans, 415 U.S. 130 (1974) 44

Liberty Corp. v. NCNB National Bank of South Carolina,
984 F.2d 1383(4th Cir. 1993) 39

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).....20, 26, 31

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).....20

Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).....28

Maier v. EPA, 114 F.3d 1032 (10th Cir.),
cert. denied, 522 U.S. 1014 (1997).....47

Maine Right to Life Comm., Inc. v. FEC, 114 F.3d 1309
(1st Cir. 1997), cert. denied, 522 U.S. 1108 (1998).....11, 12, 13, 31

Martin v. Occupational Safety & Health Review Comm'n,
499 U.S. 144 (1991).....15

National Customs Brokers & Forwarders Ass'n
v. United States, 883 F.2d 93 (D.C. Cir. 1989).....47

National Mining Ass'n v. U.S. Army Corps of Engineers,
145 F.3d 1399 (D.C. Cir. 1998).....32, 33

National Wildlife Federation v. Browner,
127 F.3d 1126 (D.C. Cir. 1997).....15

North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705
(4th Cir. 1999), cert. denied, 120 S.Ct. 1156 (2000).....13, 14

North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.),
cert. denied, 434 U.S. 874 (1977).....11

Orrego v. West Buena Joint Venture, 943 F.2d 730 (7th Cir. 1991) 16

PPG Industries, Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982).....14

Phelps v. Hamilton, 122 F.3d 1309 (10th Cir. 1997).....6

Radio-Television News Directors Ass'n v. FCC,
184 F.3d 872 (D.C. Cir. 1999).....48, 54

Renne v. Geary, 501 U.S. 312 (1991).....3, 25, 26, 27

Right to Life of Dutchess County, Inc. v. FEC,
6 F.Supp.2d 248 (S.D.N.Y. 1998).....10

Ruppert v. Bowen, 871 F.2d 1172 (2nd Cir. 1989) 37

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 10

Service Employees International Union v. GSA,
830 F. Supp. 5 (D.D.C 1993) 34

Singleton v. Wulff, 428 U.S. 106 (1976) 39,40

United States Civil Service Comm'n v. National Ass'n of
Letter Carriers, 413 U.S. 548 (1973) 46

United States v. Derrick, 163 F.3d 799 (4th Cir. 1998),
cert. denied, 526 U.S. 1133 (1999) 23

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 34

United States v. Mendoza, 464 U.S. 154 (1984) ..... passim

United States National Bank of Oregon v. Independent Insurance
Agents of America, Inc., 508 US. 439 (1993) 41

Virginia Society for Human Life, Inc. v. Caldwell,
152 F.3d 268 (4th Cir. 1998) 9

Walker Manufacturing Co. v. Dickerson, Inc.,
560 F.2d 1184 (4th Cir. 1977) 40

Washington Gas Light Co. v. Virginia Electric & Power Co.,
438 F.2d 248 (4th Cir. 1971) 41

Wayte v. United States, 470 U.S. 598 (1985) 24

Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987) 16,17

Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183 (7th Cir.),
cert. denied, 525 U.S. 873 (1998) 24,25

WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981) 47,49

Zwickler v. Koota, 389 U.S. 241 (1967) 35

Statutes and Regulations

2 U.S.C. 437c(c) 14, 48

2 U.S.C. 437d(a)(8) 48

2 U.S.C. 437g(a)(6) 7,45

2 U.S.C. 437g(a)(8) 2, 23, 24, 25

2 U.S.C. 441b 7

11 C.F.R. 100.22(b) ..... passim

11 C.F.R. 114.4(c)(4) 2,6,7

60 Fed. Reg. 35,292 (1995) 42

63 Fed. Reg. 8363 (1998) 12

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REPLY/ANSWERING BRIEF FOR THE
FEDERAL ELECTION COMMISSION

SUMMARY OF ARGUMENT

VSHL has failed to meet its burden of demonstrating that this Court has jurisdiction to decide this case. VSHL has not provided any specific facts to show that its vague plans for future communications would be chilled or otherwise affected by 11 C.F.R. 100.22(b), the regulation it challenges. Nor has VSHL provided examples of any of its anticipated advertisements or explained why they

would not be protected by 11 C.F.R. 114.4(c)(4), a regulation that permits corporations to distribute the voting records of Members of Congress.

Even if the regulation could be applied to VSHL's communications, this Circuit's decision in FEC v. Christian Action Network ("CAN"), 110 F.3d 1049 (4th Cir. 1997), removes any possible fear of prosecution in this Circuit. The reasoning of that case clearly explains this Court's view that 11 C.F.R. 100.22(b) is unconstitutional and is binding on future panels in this Circuit. Since CAN, the Federal Election Commission ("FEC" or "Commission") has not relied upon 11 C.F.R. 100.22(b) in this Circuit and has formally voted not to enforce the regulation in this Circuit.

VSHL also cannot demonstrate standing based upon its speculation about the possibility of contacts outside this Circuit. At most VSHL has shown that it might run a radio advertisement of unspecified content to reach listeners in northern Virginia that may also be heard in Washington, D.C. But the Commission has never brought an enforcement action based upon such de minimis contact with another jurisdiction.

Finally, VSHL cannot base its standing upon 2 U.S.C. 437g(a)(8), which would require a private party to show that the Commission had acted contrary to law in failing to prosecute VSHL in the Fourth Circuit before that party could sue VSHL directly. VSHL does not even attempt to explain how such an exercise of

prosecutorial discretion could be contrary to law in light of CAN. In addition, because no such private plaintiff is a party to the instant lawsuit, this case cannot redress any such allegedly harmful private suit because the Court cannot enjoin a party who is not before it.

VSHL effectively concedes that this case is not ripe. It makes no attempt to distinguish this case from Renne v. Geary, 501 U.S. 312 (1991), which, as we explained in our opening brief (at 29-30), is directly on point.

VSHL is not entitled to a nationwide injunction that protects every person in the country. VSHL does not seriously dispute the showing in our opening brief that it would gain nothing from an injunction against application of the regulation to others, who are not parties to this case, are located outside this jurisdiction, and have not sought any such relief. Instead, VSHL simply argues that the Supreme Court's decision in United States v. Mendoza, 464 U.S. 154 (1984), is inapposite. That decision, however, found it important that the government be permitted to bring important legal issues to more than one circuit, which is exactly what the district court's nationwide injunction prohibits the Commission from doing.

While this panel is bound by the CAN decision, if there is further judicial review, the Commission is entitled to defend the constitutionality of 11 C.F.R. 100.22(b). Contrary to VSHL's argument, the Commission has not waived the right to seek reconsideration of the regulation's constitutionality before this

Circuit sitting en banc or before the Supreme Court. The district court's opinion expressly found the regulation unconstitutional, so the Commission is entitled to seek review of that determination. The regulation itself is consistent with the Ninth Circuit's view of express advocacy (upon which it was based), permissibly incorporates an objective "reasonable person" test to evaluate a communication, and is not unconstitutionally vague.

VSHL's cross appeal seeks an order requiring the Commission to initiate a formal rulemaking proceeding to repeal 11 C.F.R. 100.22(b), but there is no basis for such relief. The Court's scope of review of the Commission's decision not to institute a rulemaking to repeal its regulation is extremely narrow, especially here since the Commission's decision was largely based on its policy decision not to abandon the regulation after only two adverse appellate decisions. Just as a nationwide injunction inappropriately precludes the Commission from seeking rulings from other circuits on the constitutionality of the regulation, so too would an injunction ordering the Commission to repeal its regulation. More fundamentally, VSHL itself would gain no additional benefit from such injunctive relief.

ARGUMENT

I. VSHL HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT THIS COURT HAS JURISDICTION UNDER ARTICLE III

A. VSHL HAS FAILED TO DEMONSTRATE AN INJURY IN FACT

VSHL does not deny that it bears the burden of demonstrating an injury in fact and that the standing requirement focuses on VSHL and its alleged injury, not on the issues it wishes to have adjudicated. See FEC Br. 16-17. VSHL also cannot explain why it faces an imminent, concrete injury, because it neither alleged nor demonstrated the requisite facts before the district court.

1. VSHL Has Provided No Specific Facts To Support Its Argument That Its Communications Are Chilled By 11 C.F.R. 100.22(b)

VSHL does not deny that it has failed to allege or prove any facts about specific actions it plans to take regarding actual candidates or actual campaign communications. Instead, VSHL repeats (Br. 6) generalities about how its "voter guides will tabulate federal candidates' positions on abortion-related issues, such as whether the candidate supports more restrictive abortion laws...." and about its (Br. 14-15) "planned communications that will compare and contrast the positions of federal candidates on public issues the week before the 2000 federal elections...." VSHL also couches its general descriptions with tentative and speculative qualifiers, explaining (Br. 6-7; emphasis added) that "[i]n some cases,

the voter guides likely will reflect that one of the candidates for a particular office agrees with VSHL's official position on these issues...." VSHL has not provided a single example of what its voter guides will look like, which candidates it will name, or how its communications might encourage any particular electoral action. But even when a plaintiff "bring[s] a facial challenge to a [regulation] on First Amendment grounds[,]... '[a]llegations of a subjective "chill" ... are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" Phelps v. Hamilton, 122 F.3d 1309, 1326 (10th Cir. 1997) (quoting Laird v. Tatum, 408 U.S. 1, 13-14 (1972)) (other citation omitted).

VSHL summarily asserts (Br. 37-38) that the "definition of 'expressly advocates' in [11 C.F.R. 100.22(b)] ... would include VSHL's planned communications that will compare and contrast the positions of candidates on public issues," but it never even attempts to explain why. Of course, it cannot demonstrate that the regulation would apply to its communications because it has not even provided concrete electoral communications for the Court to analyze.

In our opening brief, we suggested (Br. 24 n.8) that VSHL's vague description of its advertisements might well fall within 11 C.F.R. 114.4(c)(4), which permits corporations to distribute to the "general public the voting records of Members of Congress, provided that the voting record and all communications distributed with it do not expressly advocate the election or defeat of any clearly

identified candidate ...." In its response, VSHL has repeatedly confirmed (Br. 6-7) that its communications will not contain any "express or explicit words of advocacy of the nomination, election or defeat of any candidate," yet VSHL has suggested no reason why these communications would fall outside the safe harbor of 11 C.F.R. 114.4(c)(4). VSHL can't have it both ways: it can't rely upon generic descriptions of purported communications that it believes would be prohibited by 11 C.F.R. 100.22(b), when those same indeterminate descriptions could just as easily qualify for protection under 11 C.F.R. 114.4(c)(4). Because VSHL bears the burden of demonstrating a concrete and imminent injury in fact, its inability to explain why the communications it anticipates will not be protected from restriction by the voting record regulation defeats its ability to invoke this Court's jurisdiction.

Furthermore, although VSHL's brief may give the impression that the Commission is aggressively enforcing 11 C.F.R. 100.22(b), in fact the Commission has not relied directly upon the regulation in any enforcement action it has yet initiated in district court under 2 U.S.C. 437g(a)(6). Nor has the Commission relied generally on 2 U.S.C. 441b to allege in litigation that the kind of "voter guide" described by VSHL constitutes express advocacy. To the contrary, as the district court noted in the only recent Commission litigation involving guides "comparing candidates' or incumbents' positions on certain

issues," the Commission did not contend that they constituted express advocacy. FEC v. Christian Coalition, 52 F.Supp.2d 45, 48 (D.D.C. 1999); see also id. at 72-73 & n.34, 80 & n.38. As that court explained:

> Although these materials made clear which candidates the [Christian] Coalition preferred, the FEC acknowledges that most of the voter guides did not expressly advocate the election or defeat of any particular candidate. The FEC's theory is not that the election materials themselves violated the "express advocacy" limitation on independent corporate expenditures but that the Coalition's extensive consultations with the campaign staff of certain candidates regarding the distribution of its voter guides and other materials turned otherwise permissible campaign-related materials into illegal in-kind campaign contributions.

Id. at 48-49. Since Ms. Hartz has declared that VSHL's advertisements will not contain express advocacy and will not be coordinated with any federal candidate (JA 135, ¶ 6; see also JA 107-08, ¶¶ 9, 11), VSHL has provided no factual basis for speculating that the Commission would change the position it took in Christian Coalition and argue that VHSL's voter guides contain express advocacy.

Indeed, although VSHL's complaint (JA 109, ¶ 17) suggests that it suffers a "chilling effect" from the regulation, it never alleges that VSHL's behavior would actually change if the regulation were invalidated. Similarly, although VSHL's brief argues that VSHL is chilled, VSHL has presented no evidence whatsoever that any of its behavior is concretely affected by the regulation. As we previously noted (Br. 23), before the district court the only factual evidence VSHL ever

presented about any of its plans was the declaration of Louise Hartz (JA 134-35). In its brief, VSHL does not dispute this fact. Yet the Hartz Declaration does not state, either expressly or implicitly, that VSHL's intentions are being "chilled" or are in any other way contingent upon the validity of the 11 C.F.R. 100.22(b). Indeed, her declaration is entirely silent about the FECA, the regulations, and how those provisions might affect VSHL's communications. Thus, VSHL's claims about the regulation's chilling effects are entirely the creation of its counsel, but since " 'the necessary factual predicate may not be gleaned from the briefs and arguments,' " FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990) (citation omitted), such abstract legal argument does not meet VSHL's burden of demonstrating an injury in fact.

2. Even If The Regulation Applied To VSHL's Communications, It Faces No Credible Fear Of Prosecution In This Circuit

Although VSHL argues (Br. 16) that 11 C.F.R. 100.22(b) is not "moribund," that adjective is a perfect description for its status in this Circuit. FEC v. Christian Action Network ("CAN"), 110 F.3d 1049 (4th Cir. 1997), ensured its end, even if its invalidation in the Fourth Circuit has not yet been confirmed in a separate judicial decision. Because CAN precludes applying the regulation to VSHL's issue advocacy in this Circuit, VSHL is in the same situation here as it was in Virginia Society for Human Life, Inc. v. Caldwell, 152 F.3d 268, 275

(4th Cir. 1998), where this Court found that VSHL lacked standing to challenge a state election statute that did not "reach groups such as VSHL so long as they engage purely in issue advocacy."

In CAN, this Circuit ordered the Commission to pay attorney's fees because it was not "substantially justified" in arguing that a rhetorical advertisement could constitute express advocacy without using express or explicit words or language advocating the defeat of a candidate. It is true that 11 C.F.R. 100.22(b) was not itself under review in CAN, so the judgment of the Court did not directly invalidate the regulation in this Circuit. In that sense, CAN's discussion of the regulation could be considered dicta. But as the Supreme Court has explained, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67 (1996).[1]

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[1] Ironically, although VSHL argues (Br. 37-49) at length about why 11 C.F.R. 100.22(b) is invalid, repeating much of the reasoning adopted in CAN, VSHL also insists (Br. 24) that this Circuit has not adjudicated the validity of the regulation. VSHL even criticizes (Br. 27) the Commission's counsel for arguing in a footnote in a reply memorandum in Right to Life of Dutchess County, Inc. v. FEC, 6 F.Supp.2d 248 (S.D.N.Y. 1998), that CAN's discussion of 11 C.F.R. 100.22(b) was technically dicta because it was not necessary to invalidate the regulation to decide the attorney's fees issue. The reasoning that led to the Court's award of attorney's fees in CAN, however, plainly establishes the invalidity of 11 C.F.R. 100.22(b) in this Circuit. That reasoning is binding on any other panel of this Circuit and necessarily means that the panel deciding this case must reject the regulation on that basis. The Commission's formal policy of non-enforcement

In CAN, the Court's reasoning left no doubt that 11 C.F.R. 100.22(b) is unconstitutional, and future panels of this Court are bound by that reasoning. North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036, 1044 n.8 (4th Cir.) ("Ordinarily one panel of the Court does not overrule another") (citation omitted), cert. denied, 434 U.S. 874 (1977). The Court agreed with the First Circuit's decision in Maine Right to Life Comm., Inc. v. FEC ("MRTL"), 114 F.3d 1309 (1st Cir. 1997), cert. denied, 522 U.S. 1108 (1998) — which had directly found 11 C.F.R. 100.22(b) invalid — and concluded that the regulation's definition of express advocacy was, "in substance, ... the definition the FEC urged upon [the Fourth Circuit]." 110 F.3d at 1055. There was nothing unclear about the Court's conclusion that the Commission's interpretation of express advocacy was foreclosed by "unambiguous pronouncements in Buckley [v. Valeo, 424 U.S. 1 (1976),] and [FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238 (1986),] that explicit words of advocacy are required if the Commission is to have standing to pursue an enforcement action." Id. at 1061.

In the wake of this defeat, it should come as no surprise that the

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(JA 132) was thus adopted with the phrase "in effect found invalid" by this Circuit in order to candidly acknowledge this reality, while accurately reflecting the technicality that the judgment in CAN was not directly on point. Because neither party in this case believes that the panel hearing this case is free to abandon the reasoning of CAN, it is unnecessary for the Court to decide exactly what constitutes dicta in the CAN decision.

Commission has not authorized litigation relying on 11 C.F.R. 100.22(b) in either the First or Fourth Circuits. Indeed, the futility of initiating such litigation in the face of controlling circuit law to the contrary seemed so obvious that there was no reason for the Commission to formalize this position until this litigation began. Thus, when VSHL filed its complaint — after the decision in CAN — with the remarkable assertion that it felt chilled by the regulation, the Commission voted unanimously (6-0) to "formally confirm the Commission's position that because 11 C.F.R. § 100.22(b) ... has in effect been found invalid in the ... Fourth Circuit, it cannot and will not be enforced in [that circuit], unless and until the law ... is changed or overruled" (JA 132).

The Commission's acknowledgment was not a change in position, but rather a formal confirmation of its prior understanding. It had previously acknowledged the significance of CAN in 1998, when it recognized that the Fourth Circuit was one that had rejected its definition of express advocacy,[2] and again in the General Counsel's recommendation to the Commission regarding VSHL's petition for

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[2] The Commission publicly acknowledged the significance of the CAN decision in 1998 in a Notice of Disposition published in the Federal Register. 63 Fed. Reg. 8363 (Feb. 19, 1998) (JA 6). In that notice, the Commission stated that the Fourth Circuit had made a ruling in CAN similar to the First Circuit's decision in MRTL, holding 11 C.F.R. 100.22(b) invalid, and contrary to the Ninth Circuit's decision in FEC v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987), which was the basis for 11 C.F.R. 100.22(b).

rulemaking (JA 64). Moreover, as early as May 1997, when the Solicitor General filed a petition for a writ of certiorari on behalf of the Commission in MRTL, it was explained that in CAN the "Fourth Circuit has made it clear, in a published opinion, that it agrees with the First Circuit's decision" striking down 11 C.F.R. 100.22(b). Petition for Certiorari in FEC v. Maine Right to Life Comm., Inc., No. 96-1818, at 12 n.3 (filed May 1997).

VSHL's attempt (Br. 30-33) to characterize the Commission's formal policy of non-enforcement as a "post-litigation" position, therefore, is wrong factually, and also depends upon a misunderstanding of the relevant precedent. Rather than responding to the cases we discussed (Br. 19-20) where various courts have taken seriously the government's formal disavowal of an intention to prosecute, VSHL relies (Br. 30-31) primarily upon North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999), cert. denied, 120 S.Ct. 1156 (2000). But that case is not to the contrary, because the Court found there that the local prosecutors had shown no "intention of refraining from prosecuting those who appear to violate the plain language of the statute." Id. at 711. In fact, prior to the commencement of that litigation, North Carolina had told the plaintiff that it would consider its voter guide to be prohibited by the applicable state law, whereas here, the Commission had publicly acknowledged about two years before VSHL filed suit that CAN barred enforcement of its regulation.

More fundamentally, the Commission is not at liberty to simply change its mind as could the defendant in North Carolina Right to Life. VSHL suggests no reason for speculating that the Commission would change its view, but even if the Commission's unanimous policy decision were changed — a vote that would require four out of six Commissioners to change their minds (see 2 U.S.C. 437c(c)) — enforcement of its regulation would still be foreclosed by this Circuit's decision in CAN, which is the ultimate protection for VSHL, unless and until it is overturned by the en banc court or the Supreme Court. See, e.g., Anderson v. Heckler, 756 F.2d 1011, 1013 (4th Cir. 1985) ("In cases in this circuit, the secretary [of Health and Human Services] and her statutory counsel are bound by the precedents in this circuit until they are displaced by higher authority or are overruled by this Court."); PPG Industries, Inc. v. NLRB, 671 F.2d 817, 823 n.9 (4th Cir. 1982) ("We cannot ... defer to a legal determination which flouts our previous statements on the law.").

In any event, contrary to VSHL's argument (Br. 30), even if the Commission's formal position were considered "post-litigation," it is not a "litigating position" as that term was explained by the Supreme Court in Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 213 (1988). The distinction the Court drew was between a "convenient" litigation position of counsel versus a true position decided upon by the agency delegated authority from Congress:

> We have never applied the principle of [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." Investment Company Institute v. Camp, 401 U.S. 617, 628 (1971).

Id. at 212 (citations omitted). Here, of course, the Commission itself voted unanimously to recognize formally the precedential effect of CAN and to acquiesce in that decision in the Fourth Circuit; the Commission's counsel did not articulate that position for the first time in court filings while the Commission sat silent.

As explained in National Wildlife Federation v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 156 (1991)), a court can indeed refuse to defer to an agency's litigation positions if they are " 'merely appellate counsel's "post hoc rationalizations" for agency action, advanced for the first time in the reviewing court.' " But "[t]his reluctance to defer" stems from the concerns that "counsel's interpretation may not reflect the views of the agency itself," and that a position established only in litigation might have been developed hastily, without the benefit of the agency's deliberative process. 127 F.3d at 1129 (citations omitted). See also Auer v. Robbins, 519 U.S. 452, 462 (1997). Because the Commission's

non-enforcement policy was a formal agency decision, neither of those concerns apply here, and even VSHL has not suggested that the Commission failed to deliberate over its decision.

The other cases upon which VSHL relies (Br. 31) are also inapposite. In Chamber of Commerce v. FEC, 69 F.3d 600, 603 (D.C. Cir. 1995), the Commission had split 3-3 on whether to issue an advisory opinion that would have answered the plaintiffs' question about who constituted "members" of their organizations. The Commission had not disavowed an intention to enforce its existing "membership" rule, and there was no relevant court decision finding it unlawful. On those facts, the D.C. Circuit found that nothing would prevent a single Commissioner from changing his or her vote, thus creating a danger of enforcement against the plaintiffs. Here, where the Commission has unanimously and formally voted not to enforce 11 C.F.R. 100.22(b) in the Fourth Circuit and the CAN decision itself protects VSHL, there is no comparable threat of enforcement.

Orrego v. West Buena Joint Venture, 943 F.2d 730 (7th Cir. 1991), and Wilson v. Stocker, 819 F.2d 943 (10th Cir. 1987), upon which VSHL relies (Br. 31), are even more irrelevant. In Orrego, the government had promulgated a new regulation after its district court defeat, a "new position [that] reflected the government's decision not to seek reversal of the district court's holding in this

case." 943 F.2d at 732 n.2. "The agency ha[d] provided no other rationale for changing its well-reasoned ... regulation." Id. at 736. The Seventh Circuit thus found that the government's "post-litigation turnaround certainly displays no thorough analysis or consistency" and refused to defer to it. Id. In the instant case, the Commission's policy is not a "turnaround," but simply conforms to the precedent in this Circuit, and its view of CAN long predates VSHL's lawsuit.

In Wilson, the plaintiff had actually been arrested for violating the state statute that he was challenging. 819 F.2d at 947. The court rejected the Oklahoma Attorney General's argument that no case or controversy existed, even though his predecessor — who admitted that he had not personally read the relevant statute — had filed an affidavit opining that the plaintiff's proposed conduct did not violate the statute. Id. at 947 n.3. "Significantly," the Tenth Circuit found that the affidavit "equivocat[ed]" because it "made no mention of [the plaintiff's] desire to distribute campaign literature anonymously," even though that conduct was precisely what had caused his arrest. Id. Given that VSHL has not been arrested or prosecuted, that the current Commission (not its predecessor) has read its own regulation (as well as the CAN decision) and formally voted not to enforce the regulation in the Fourth Circuit, and that there is nothing equivocal about the Commission's non-enforcement policy, Wilson is clearly inapplicable to the facts of this case.

In sum, the CAN decision, combined with the Commission's formal decision not to enforce 11 C.F.R. 100.22(b) in this Circuit, eliminates any credible fear of prosecution against VSHL in the Fourth Circuit.

3. VSHL's Claim Of A Threat Of Prosecution Outside This Circuit Is Speculative

VSHL also attempts to establish standing by arguing (Br. 21-22) that it faces a credible threat of prosecution outside the Fourth Circuit, but that claim is just as speculative and weak as its other claim of injury.

First, VSHL never alleges or demonstrates (or even argues) that its voter guides will be distributed outside Virginia. See Br. 6; JA 107-08. Thus, even if VSHL could overcome the lack of specificity it has demonstrated about those communications, see supra pp. 5-9, it has presented no factual basis for concluding that those guides could lead to an enforcement action outside the Fourth Circuit.

Second, VSHL argues conditionally (Br. 21; emphasis added) that "when VSHL 'transacts business' with a radio station, printer, consultant or advertising agency in the District of Columbia to produce its communications, or enters into a joint advertising venture with a Washington, D.C.-based organization," the FEC could sue it in the District of Columbia. Although VSHL cites no legal support for this argument, its validity is irrelevant here because VSHL's conditional argument has no evidentiary foundation whatsoever. The record is utterly devoid

of any evidence that VSHL has a plan or intent to transact any such business or enter into any such joint ventures in the District of Columbia, or that it has ever done so in the past. Again, the Hartz Declaration — the sole source of factual evidence put forth by VSHL — is completely silent about any such business contacts.

Thus, the only potential factual basis for VSHL's standing based on a fear of prosecution outside the Fourth Circuit rests on its purported radio advertisements. Although the Hartz Declaration does state (JA 135, ¶ 9) that "VSHL intends to select a radio station whose radio broadcast can be received within the District of Columbia, to ensure reaching as wide a segment of the northern Virginia metropolitan area as possible," this vague "intention" does not suggest anything beyond de minimis contacts outside Virginia and admits that the focus of the broadcast would be the population of northern Virginia, not residents of Washington, D.C. In its brief, VSHL then exaggerates (Br. 35; emphasis added) this speculative, spillover communication by arguing that "[t]hose radio advertisements will be transmitted to voters in the District of Columbia .... who vote for President...." As we previously explained (Br. 24-25), these " 'some day' intentions — without any description of concrete plans, ... do not support a finding of the 'actual or imminent' injury that [the Supreme Court's] cases

require." Lujan v. Defenders of Wildlife, 504 U.S. 555, 563-64 (1992).[3]

Rather than contesting the fact (see FEC Br. 26) that the Commission has never brought an enforcement action in a jurisdiction where the only contact was a broadcast transmission that incidentally spilled over from another jurisdiction, VSHL incorrectly suggests (Br. 19-20) that the Commission routinely files civil actions where alleged violators have de minimis contacts. The cases it relies upon actually show nothing of the sort.

- Although all of the facts were not recited in the Second Circuit's published opinion in FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2nd Cir. 1995), when the complaint in that case was signed (December 16, 1988), both defendants were located in Manhattan, and during the time of the activities at issue, defendant Survival Education Fund was a non-profit corporation organized under the laws of New York and Massachusetts. The mailings

[3] VSHL also argues (Br. 35 n.3) that the "district court appropriately took judicial notice that radio broadcasts in the Northern Virginia metropolitan area can be received in the Third Circuit Court of Appeals...." VSHL never even made this argument, much less presented any factual allegations to support it, and the district court's sua sponte speculation cannot make up for VSHL's inability to satisfy its burden of demonstrating the necessary facts to establish standing. (Moreover, the district court merely assumed that a northern Virginia radio station could transmit to Pennsylvania, without actually identifying any that reaches that far or explaining why VSHL would likely choose such a station.) More fundamentally, VSHL does not even attempt to dispute our argument (Br. 26-27) that the district court erred by assuming facts for which there is no evidence and which it is VSHL's burden to prove. Specifically, VSHL does not contest our argument (id.) that the district court erroneously reversed the burden of proof by assuming that VSHL would act outside the Fourth Circuit merely because VSHL did not allege that it would not do so. The holding of Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990), clearly prohibits a court from assuming missing facts based on general allegations.

were sent from a New York address and requested donations returned to the same address.

- In FEC v. Public Citizen, Inc., 64 F.Supp.2d 1327 (N.D. Ga. 1999), the defendant was a District of Columbia corporation, but the campaign expenditures that allegedly violated the FECA took place in Georgia, in opposition to the candidacy of Congressman Newt Gingrich.

- In Christian Coalition, the alleged violations involved a number of different parts of the country. The Christian Coalition transacted significant business in the District of Columbia, and the most complicated and significant alleged violation involved the Coalition's activities in support of then-President Bush's reelection campaign, much of which transpired in Washington, D.C.

- Finally, in FEC v. National Conservative Political Action Comm., 647 F. Supp. 987 (S.D.N.Y. 1986), the expenditures at issue all took place in New York and involved a New York Senate race. The defendant had established a political action committee, named "New Yorkers Fed Up with Moynihan," to attempt to defeat Senator Moynihan. The alleged violations involved commercials run in New York urging the defeat of the Senator.

In sum, none of these cases is remotely analogous to bringing suit against a party whose only connection with the jurisdiction is a radio transmission that incidentally travels beyond the intended audience.

Finally, Adventure Communications, Inc. v. Kentucky Registry of Election Finance, 191 F.3d 429 (4th Cir. 1999), upon which VSHL also relies (Br.21), is similarly inapposite. In that case the Court analyzed whether Kentucky was "abridging [the] due process rights" of broadcasters located in West Virginia by requiring them to report certain information about sales of advertising time to

Kentucky gubernatorial candidates. Id. at 434.[4] In determining whether there were "sufficient contacts between Kentucky and the [b]roadcasters ... creating state interests such that it would not be fundamentally unfair to subject" them to Kentucky's reporting requirements, the Court found that the contacts between the broadcasters and Kentucky had been "substantial and pervasive." Id. at 437. Among other facts, one-fourth of the households receiving the relevant broadcasts were in Kentucky, and the broadcasters solicited business from the Kentucky candidates and provided regular news coverage about events in Kentucky. Id. at 438. The case thus involved the application of Kentucky law to businesses that marketed their services in that jurisdiction, received a significant percentage of their revenue from that business, and whose broadcasts into Kentucky were intended to influence elections in that state. By contrast, the Hartz Declaration posits an advertisement VSHL would run on a Virginia radio station, directed primarily to Virginia voters, whose only connection with the District of Columbia stems from the fact that some individuals there can receive radio signals from northern Virginia. The ongoing and purposeful impact on Kentucky in Adventure

[4] The case did not address whether this Circuit or the Sixth Circuit was the most appropriate jurisdiction to determine the constitutionality of the Kentucky statute. It is important to note, however, that the case was brought by a "number of nonresident television and radio broadcasters located in West Virginia," id. at 432, who were clearly located and operating within this Court's jurisdiction.

Communications is hardly comparable to the minimal connection between VSHL and the District of Columbia speculated about in the Hartz Declaration.

Thus, VSHL has failed to demonstrate any concrete and imminent plans that would subject it to a credible threat of prosecution outside the Fourth Circuit, and its standing cannot be established on the basis of such remote speculation.

B. VSHL Cannot Establish Standing Based On An Alleged Injury From A Lawsuit Filed Under 2 U.S.C. 437g(a)(8)

As we previously explained (Br. 20-22), the district court erred in relying upon 2 U.S.C. 437g(a)(8) as a basis for a potential injury to VSHL that could give rise to its standing. Although this provision creates the possibility of a private right of action, it can only accrue if the Commission is first found to have acted "contrary to law." VSHL does not even attempt to explain (see Br. 17, 22-24) how a court could find that the Commission would be acting contrary to law by declining to prosecute VSHL under 11 C.F.R. 100.22(b) in the Fourth Circuit. Obviously, given this Court's decision in CAN, a holding that such a sensible exercise of prosecutorial discretion is arbitrary and capricious would be difficult to imagine,[5] and VSHL does not suggest otherwise.

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[5] As a general matter, the "caselaw is legend from the Supreme Court and the courts of appeals that the investigatory and prosecutorial function rests exclusively with the Executive." United States v. Derrick, 163 F.3d 799, 824-25 (4th Cir. 1998), cert. denied, 526 U.S. 1133 (1999). Especially relevant here, " '[s]uch

VSHL also does not attempt to refute our argument (Br. 21-22) that standing for VSHL cannot be based on 2 U.S.C. 437g(a)(8) because VSHL cannot demonstrate that this Court can redress any threat posed by section 437g(a)(8). Because the Commission is the only defendant here, no decision in this lawsuit could bind a third party from bringing an action under section 437g(a)(8). VSHL does not dispute this point, but instead mischaracterizes (Br. 34 n.2) our reliance on Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1187 (7th Cir.), cert. denied, 525 U.S. 873 (1998). We had not relied upon that case for the "proposition that a favorable decision must relieve all of the plaintiff's injuries to meet the redressability requirement" (VSHL Br. 34 n.2). Rather, we had explained (Br. 22) that VSHL could not establish standing based on injury stemming from a potential private right of action under section 437g(a)(8) because this Court does not have the power to redress that particular form of potential injury.

In Wisconsin Right to Life, the Seventh Circuit explained this point clearly when it found no redressability in a challenge to a state campaign finance law. It recognized that no order it could issue would bind third parties not before the court, who would therefore remain free to sue Wisconsin Right to Life. In

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factors as the strength of the case' " are part of that prosecutorial decision and " 'are not readily susceptible to the kind of analysis the courts are competent to undertake.' " Id. at 825 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).

particular, the state statute allowed for a private right of action, and the court recognized that certain candidates could sue Wisconsin Right to Life and create a potential injury. 138 F.3d at 1187. However, because those same candidates were not parties to Wisconsin Right to Life itself, the Seventh Circuit recognized that it could not bind those candidates and therefore could not redress any injury that they might be able to cause Wisconsin Right to Life. That situation is identical to what VSHL argues is possible under 2 U.S.C. 437g(a)(8), and VSHL has made no attempt to argue otherwise. Thus, this Court's inability to redress any harm to VSHL that could occur from a private right of action by a party not before the Court necessarily means that such actions under section 437g(a)(8) cannot provide a basis for VSHL's standing in this case.[6]

C. VSHL HAS NOT DEMONSTRATED THAT THIS CASE IS RIPE

In response to the Commission's thorough explanation (Br. 28-30) of why this controversy is not ripe, VSHL provides one paragraph (Br. 33) of generalities and makes no attempt to distinguish this case from Renne v. Geary, 501 U.S. 312

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[6] Chamber of Commerce v. FEC, 69 F.3d 600 (D.C. Cir. 1995), upon which VSHL relies heavily (Br. 23-24), is not to the contrary. First, in that case the D.C. Circuit found that it would be "easy [for a private plaintiff under 2 U.S.C. 437g(a)(8)] to establish that ... agency action was contrary to law ... [based] on the Commission's unwillingness to enforce its own rule." Id. at 603. Here, the Commission is bound by Fourth Circuit precedent in cases litigated in this circuit, a completely different situation. Second, Chamber of Commerce is silent about the redressability issue discussed in Wisconsin Right to Life.

(1991). Renne, 501 U.S. at 323, Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967), and National Wildlife Federation, 497 U.S. at 891, all explain that a regulation is not ordinarily ripe for review until there is a concrete action applying the regulation to the plaintiff.

As we previously explained (Br. 29-30), Renne is directly on point because it involved another First Amendment challenge to an alleged restriction on political speech, and the Supreme Court rejected the challenge on ripeness grounds, even though the plaintiffs there alleged more specific plans than VSHL has alleged or demonstrated here. Renne also found that there was an inadequate threat of enforcement, and the facts there did not include the kind of formal policy statement of non-enforcement that the Commission has unanimously voted for here.

VSHL does not refute any of this, nor does it even cite Renne, let alone try to distinguish it. Instead, VSHL merely cites (Br. 33) Abbott Laboratories for the general proposition that a pre-enforcement challenge to a regulation cannot be ripe unless it is primarily legal in nature and a denial of review would cause significant hardship. But that is not the end of what Abbott Laboratories requires. As we explained (Br. 28), that case also held that the ripeness doctrine is meant to prevent premature adjudication and to protect agencies from "judicial interference

until an administrative decision['s] ... effect [is] felt in a concrete way by the challenging parties." 387 U.S. at 148-49.

In its ripeness argument, the only fact VSHL marshals in its support is the statement (Br. 33) that "VSHL has alleged that it intends to spend corporate money the week before the 2000 federal elections on communications that the regulation would unconstitutionally restrict." As explained supra pp. 5-9, VSHL has not provided enough specificity about its intentions even to determine whether 11 C.F.R. 100.22(b) would include its communications or not. But even more important, to establish ripeness VSHL needs to do much more than state that it intends to spend its money on electoral communications a week before the election. Because the Hartz Declaration (JA 134-35) fails to indicate whom its communications would be supporting, and in which election, and why the regulation would be applied to chill or prevent such communications, VSHL has fallen far short of the standard the Supreme Court set in Renne. 501 U.S. at 320-21.

VSHL's failure to respond to our argument concerning ripeness is an effective concession that this Court lacks jurisdiction under Article III.

II. VSHL HAS FAILED TO DEMONSTRATE WHY IT IS ENTITLED TO A NATIONWIDE INJUNCTION THAT PROTECTS EVERY PERSON IN THE COUNTRY

In responding to the Commission's argument (Br. 30-49) that the district court erred by ordering a nationwide injunction against the Commission's enforcement of 11 C.F.R. 100.22(b), VSHL disputes (Br. 53-59) neither the governing legal principles nor the irrelevance of a nationwide injunction to its own operations.

First, VSHL does not dispute "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," Califano v. Yamasaki, 442 U.S. 682, 702 (1979), and that "an injunction [must] be 'couched in the narrowest terms that will accomplish the pin-pointed objective' of the injunction." Madsen v. Women's Health Center, Inc., 512 U.S. 753, 767 (1994) (citation omitted).

Second, VSHL does not dispute that it has no personal need for a nationwide injunction against enforcing 11 C.F.R. 100.22(b) "against any other party in the United States of America" (JA 220), or that its organization stands to gain no benefit whatsoever from such a far-reaching injunction. VSHL does not deny that it is the only plaintiff in this case and that it has not sought standing on

behalf of its members or any persons in other jurisdictions.[7]

Third, VSHL does not dispute that this case does not present a situation where the systemic practices of the Commission must be altered to provide relief for VSHL itself. As we previously explained (Br. 36-38), while cases involving programmatic reform, such as school desegregation cases, necessarily require relief that goes beyond protecting an individual plaintiff, there is no dispute that VSHL would be completely protected by an injunction that only enjoins the Commission from enforcing 11 C.F.R. 100.22(b) against VSHL.

Fourth, VSHL does not deny that it lacks standing to request relief for parties who are not before this Court (see FEC Br. 38-39). VSHL makes no attempt to demonstrate that it has suffered any injury from the possibility that other unknown parties elsewhere in the country could face enforcement proceedings under 11 C.F.R. 100.22(b).

Fifth, VSHL does not deny that the federal courts of appeals are not bound by each other's decisions and that the district court's nationwide injunction

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[7] Indeed, before the district court, VSHL argued that it was seeking a "narrowly tailored injunction," pointing out that its complaint sought only " '[a]n injunction enjoining the FEC from enforcing 11 C.F.R. § 100.22(b) against VSHL.' This narrowly tailored injunction would not have the adverse effects the FEC fears and should be granted." VSHL's Opposition to Defendant's Cross-Motion for Summary Judgment (Nov. 2, 1999) (JA 4, Docket No. 16), at 8 (quoting Verified Complaint, JA 124, ¶ 9) (emphasis added).

effectively denies judges from other circuits the power to determine or follow the law of their own circuits regarding the constitutionality of 11 C.F.R. 100.22(b). See FEC Br. 40-42. Nor does VSHL deny that the district court is now inappropriately poised to supervise the conduct of the FEC in its efforts to enforce provisions of the Act involving express advocacy all across the country.

Finally, VSHL does not deny that United States v. Mendoza, 464 U.S. 154 (1984), and other cases (see FEC Br. 44-47), have established that important policy objectives support permitting the federal government not to acquiesce, on a nationwide basis, in one circuit's construction of the law.

Despite these concessions, VSHL argues (Br. 54) that the district court's nationwide injunction was appropriate because Mendoza is "inapposite" to this case. VSHL's primary support for this argument appears to be (id.) the irrelevant fact that VSHL itself "did not attempt to invoke nonmutual offensive collateral estoppel in this case." But that is a distinction without a difference. The reasoning and holding of Mendoza and its progeny do not depend upon whether VSHL itself is seeking to invoke nonmutual offensive collateral estoppel here. The unrefuted fact is that the effect of the district court's injunction is to prospectively authorize any other person in the country to invoke nonmutual offensive collateral estoppel against the FEC. Its overreaching order is thus flatly contrary to Mendoza and our judiciary's system of stare decisis.

VSHL also attempts to defend the nationwide injunction by arguing (Br. 54) that the injunction "is coextensive with [the court's] declaration that the administrative regulation is invalid under the APA." But that statement is a non sequitur. The fact that the district court declared the regulation invalid under the APA has nothing to do with how much of the country is to be bound by that declaration. Neither the district court nor VSHL has cited any legal authority for the unprecedented proposition that all regulatory invalidations under the APA automatically bind the entire nation. Indeed, such a doctrine would turn the result in Mendoza on its head, contradicting all of the principles so carefully explained by the Supreme Court in that opinion.

Although dissents do not provide a reliable guide to the law, VSHL's reliance (Br. 56) on Justice Brennan's dissent in National Wildlife Federation is also unwarranted because that opinion does not support VSHL's position. It is true that an individual plaintiff, if successful, can gain a court order invalidating a regulation generally rather than invalidating only its application to that plaintiff, just as we have acknowledged was the effect of the CAN and MRTL decisions in the Fourth and First Circuits. However, that principle in no way expands a circuit's jurisdiction to enable it to make such a general declaration binding on the other courts of appeals. (Of course, if the Supreme Court invalidates a regulation, it is invalidated nationwide.) We are aware of no precedent suggesting that when

a single circuit strikes down a regulation under the APA, its decision is binding on the entire nation. The footnote VSHL cites (Br. 56) from Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990), is not to the contrary and does not purport to bind other circuits. VSHL's reliance (Br. 56) on Catholic Services v. Shalala, 12 F.3d 1123 (D.C. Cir. 1994), is utterly wrong because, contrary to VSHL's parenthetical description, that decision did not hold that the "rule in question ... [was] ultra vires and void ab initio." 12 F.3d at 1125. Rather, appellants simply made that argument, which was rejected on the merits by the D.C. Circuit. Id. at 1126, 1128.

VSHL also relies (Br. 56-57) upon American Mining Congress v. United States Army Corps of Engineers, 962 F. Supp. 2 (D.D.C 1997), but ignores key distinguishing facts, as well as the decision on appeal, National Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998). The district court found that a "broad injunction [was] necessary to give the plaintiffs the relief to which they [were] entitled." 962 F. Supp. at 5. However, the plaintiffs were trade associations, including the American Road & Transportation Builders Association and the National Association of Home Builders, who presumably have nationwide membership, and who the court recognized "hire independent contractors" or who are themselves consultants who would have clients affected by the regulation at

issue. Id. Here, VSHL is the sole plaintiff with no analogous nationwide membership or clientele.[8]

Moreover, on appeal the D.C. Circuit recognized a crucial matter of law that distinguishes National Mining Ass'n from the instant case. While the court acknowledged that a broad injunction would "somewhat diminish[] the scope of the 'non-acquiescence' doctrine, under which the government may normally relitigate issues in multiple circuits," it faced a critical countervailing consideration under that statute that is not present here. 145 F.3d at 1409. Specifically, because any person adversely affected by the regulation at issue in National Mining Ass'n could seek review in the district court for the District of Columbia, the practical effect of the D.C. Circuit's "refusal to sustain a broad injunction [wa]s likely merely to [be] a flood of duplicative litigation." Id. The court thus concluded that the "resulting gap in the effective scope of the non-acquiescence doctrine" was an "inevitable consequence" of the special role of

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[8] Bresgal v. Brock, 843 F.2d 1163, 1171 (9th Cir. 1987), is similarly inapposite because that case involved "[m]igrant laborers who [we]re parties to [the] suit [who] may be involved with contractors whose operations are concentrated [outside the Ninth Circuit]." It was because it found that these workers "may travel to forestry jobs in other parts of the country under the supervision of labor contractors," that the court found that the district court did not abuse its discretion "in ordering what was is in effect nationwide relief." Id. The court had noted, however, that such breadth would be improper unless it was "necessary to give prevailing parties the relief to which they are entitled." Id. at 1170-71. As previously discussed, VSHL has alleged no such nationwide operations.

the D.C. Circuit under the governing venue rules, and not a diminution of the importance of that doctrine itself. Obviously, because neither the APA nor the FECA gives persons operating in other areas of the country the right to seek review of the Commission's regulations in the Fourth Circuit, an injunction limited to VSHL, or a declaration constituting the law of this Circuit, would not generate a flood of duplicative litigation from persons residing outside this jurisdiction.[9]

Next, VSHL inexplicably relies (Br. 55, 57-58) on cases that have nothing to do with intercircuit nonacquiescence or nationwide injunctions. Although Broadrick v. Oklahoma, 413 U.S 601 (1973), indeed relaxes the standing requirement in First Amendment cases in certain circumstances, its holding concerns neither the appropriate remedy once standing is established nor the

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[9] Neither Dimension Financial Corp. v. Board of Governors of the Federal Reserve System, 744 F.2d 1402 (10th Cir. 1984), aff'd, 474 U.S. 361 (1986), nor Service Employees International Union v. GSA, 830 F. Supp. 5 (D.D.C 1993), add anything to VSHL's argument (Br. 57). Although both cases enjoined the government, neither one discussed the scope of the injunctions or suggested that they would apply outside the respective courts' jurisdiction. This lack of "discuss[ion] in the opinion of the [c]ourt[s]" suggests that these issues were not raised by parties and means that each "case is not a binding precedent on th[ese] point[s]." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952). Accord Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1363 (9th Cir.), cert. denied, 525 U.S. 873 (1998). Cf. Estate of Magnin v. Commissioner of Internal Revenue, 184 F.3d 1074, 1077 (9th Cir. 1999) ("When a case assumes a point without discussion, the case does not bind future panels").

government's right to defend its legal position in more than one circuit. Similarly, the cases VSHL cites (Br. 57-58) regarding abstention concern deference to ongoing state proceedings, not intercircuit nonacquiescence or the scope of injunctive relief. Thus, Dombrowski v. Pfister, 380 U.S 479 (1965), Zwickler v. Koota, 389 U.S. 241 (1967), and City of Houston v. Hill, 482 U.S. 451 (1987), are simply irrelevant to the question of whether the district court's injunction improperly denies the Commission the right to present its legal position to other circuits. In any event, it is interesting to note that all three cases involve people who had already been harassed or prosecuted, while the Commission here has disavowed any intention to rely upon 11 C.F.R. 100.22(b) in the Fourth Circuit.

Finally, VSHL presents a policy argument, erroneously suggesting that federal courts can preclude intercircuit nonacquiescence if the government's position is particularly weak (Br. 58-59):

> While it may be beneficial in some contexts for the federal courts in the exercise of their discretion to allow some agencies to test the validity of their regulations in different circuits, it was entirely appropriate for the district court to end the chilling uncertainty to free speech caused by 11 C.F.R. § 100.22(b).

However, nothing in Mendoza suggests that the executive branch can engage in intercircuit nonacquiescence only at the discretion of the judicial branch; rather, Mendoza describes it as the executive branch's right. Indeed, VSHL provides no principled basis for a court to distinguish acceptable nonacquiescence from

unacceptable nonacquiescence, though it seems to suggest (Br. 59) that the government loses its right to intercircuit nonacquiescence whenever a single a district court judge believes a regulation is "blatantly" unconstitutional, whatever that might mean. Mendoza, however, has already rejected any such analysis, 464 U.S. at 162:

> The Court of Appeals did not endorse a routine application of nonmutual collateral estoppel against the government, because it recognized that the government does litigate issues of far-reaching national significance which in some cases, it concluded, might warrant relitigation. But in this case it found no "record evidence" indicating that there was a "crucial need" ...for a redetermination.... The Court of Appeals did not make clear what sort of "record evidence" would have satisfied it that there was a "crucial need" for redetermination ..., but we pretermit further discussion of that approach; we believe that the standard announced by the Court of Appeals for determining when relitigation of a legal issue is to be permitted is so wholly subjective that it affords no guidance to the courts or to the government.

In no uncertain terms, the Supreme Court then concluded that the courts of appeals do not have discretion, as VSHL argues, to pick and choose when an agency loses the opportunity to relitigate a question of national significance. "We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case." Id.

We have already cited several cases (Br. 46-47) other than Mendoza that confirm the government's right to engage in intercircuit nonacquiescence, and VSHL cites nothing to the contrary. See also Ruppert v. Bowen, 871 F.2d 1172, 1177-88 (2nd Cir. 1989). Indeed, even Johnson v. United States Railroad Retirement Bd., 969 F.2d 1082, 1090 (D.C. Cir. 1992), cert. denied, 507 U.S. 1029 (1993), upon which VSHL relies (Br. 58-59), refused to take the "dramatic step" of ordering the government not to engage in nonacquiescence — even though the Railroad Retirement Board was engaging in intracircuit nonacquiescence, an action the FEC has formally rejected in its own policy statement of non-enforcement in this Circuit. Although the D.C. Circuit expressed its disagreement with the Board's intracircuit nonacquiescence, it also discussed intercircuit nonacquiescence and acknowledged that it provides a "reasonable opportunity to persuade other circuits to reach a contrary conclusion" and allows "important legal issues [to] 'percolate' throughout the judicial system...." Id. at 1093 (quoting Mendoza, 464 U.S. at 160).

In sum, VSHL has provided no sound basis for upholding the district court's overreaching nationwide injunction, which provides no additional relief to any party to this case, but has as its only purpose the extension of relief to non-parties whose activities fall within the geographic jurisdiction of the other federal courts of appeals.

III. THE COMMISSION'S EXPRESS ADVOCACY REGULATION IS CONSTITUTIONAL

A. THE COMMISSION DID NOT WAIVE ITS RIGHT TO DEFEND THE CONSTITUTIONALITY OF 11 C.F.R. 100.22(b) BEFORE THE EN BANC COURT OR THE SUPREME COURT

Contrary to VSHL's argument (Br. 37), the Commission has not failed to preserve its right to defend 11 C.F.R. 100.22(b). What the Commission has consistently argued (see Br. 50) is simply that the district court and the panel hearing this case are bound by CAN and, therefore, have no authority to reconsider whether the regulation is unconstitutional for the reasons stated by a prior panel of this Court. Our opening brief included a concise defense of the regulation only to preserve this issue for further judicial review in a forum not bound by the CAN precedent, not because the Commission is asking this panel to uphold the regulation. Before the district court, the Commission clearly explained its position that the district court was "already obligated by controlling Fourth Circuit precedent to find that the regulation is invalid...." FEC's Rebuttal to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, at 2 (JA 4, Docket No. 17). The Commission never suggested, however, that it was waiving the right to seek reconsideration of that question if this case reaches an en banc hearing before this Court or review in the Supreme Court.

Given that VSHL itself raised the constitutionality of 11 C.F.R. 100.22(b) as a centerpiece of this litigation and that a ruling on its constitutionality was a necessary and explicit part of the district court's decision, the Commission is entitled to attack that legal basis for the decision before a reviewing court that is free to reconsider it. VSHL has obviously suffered no prejudice or surprise from the Commission's candid concession that Circuit law forecloses relitigation of the constitutionality of 11 C.F.R. 100.22(b) until this Circuit agrees to hear the case en banc or the Supreme Court grants a petition for a writ of certiorari. Moreover, the district court itself never characterized the Commission's position as having waived any right to defend the regulation before a higher tribunal (see JA 217-20).

Doctrinally, "it is well settled that the waiver rule does not prevent a party from attacking on appeal the legal theory upon which the district court based its decision." Hedge v. County of Tippecanoe, 890 F.2d 4, 8 (7th Cir. 1989) (citation omitted). In other words, "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Singleton v. Wulff, 428 U.S. 106, 120 (1976) (emphasis added). Accord Bakker v. Grutman, 942 F.2d 236, 242 (4th Cir. 1991) ("Generally, a federal appellate court may not consider an issue which was not passed upon by the trial court"); Liberty Corp. v. NCNB National Bank of South Carolina, 984 F.2d 1383, 1389 (4th Cir. 1993) (citing Singleton) (because "district court never mentioned an equitable

subrogation claim," appellate court declined to address it). It is irrefutable here, however, that the district court explicitly "passed upon" (see JA 217-20) the constitutionality of 11 C.F.R. 100.22(b), and its judgment was based explicitly upon its conclusion that the regulation is unconstitutional. As the Supreme Court explained, the reason for this rule is that litigants should not be "surprised on appeal," and they should have a chance to "introduce evidence," as well as "present whatever legal arguments [they] may have in defense" in the court below. Singleton, 428 U.S. at 120 (quoting Hormel v. Helvering, 312 U.S. 552, 556 (1941)). Since VSHL was the party that raised the constitutionality of 11 C.F.R. 100.22(b) below, it cannot argue surprise, and it certainly had ample opportunity to present whatever evidence or legal arguments it had. Nor does VSHL suggest that anything was not presented below because the Commission had not tried to defend the constitutionality of the regulation below.

Moreover, as explained in Walker Manufacturing Co. v. Dickerson, Inc., 560 F.2d 1184, 1187 n.2 (4th Cir. 1977), even the general rule discussed above has exceptions:

> Ordinarily, of course, we do not pass on questions that were not presented to or considered by the district court, but orderly rules of procedure do not require sacrifice of the rules of fundamental justice. "Indeed, if deemed necessary to reach the correct result, an appellate court may sua sponte consider points not presented to

> the district court and not even raised on appeal by any party." Washington Gas Light Co. v. Virginia Electric & Power Co., [438 F.2d 248, 250-51 (4th Cir. 1971)].

Similarly, in United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 446 (1993), the Supreme Court reviewed a case in which the parties had not "locked horns over" whether a statutory provision had been repealed decades earlier. Although the respondents had "initially accept[ed] the widespread assumption that [the provision] remain[ed] in force," the court of appeals was not "oblige[d] ... to treat the unasserted argument that [the provision] had been repealed as having been waived." Id. at 447. The respondents had "argued from the start ... that [the provision] was not authority for the Comptroller's ruling, and a court may consider an issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." Id. (quoting Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990)). Here, where the constitutionality of 11 C.F.R. 100.22(b) is antecedent to and dispositive over whether the regulation can be invalidated and what, if any, relief can be issued against the Commission, the Commission has not waived further judicial review of 11 C.F.R. 100.22(b) merely by conceding that this panel is bound by the reasoning of CAN.

B. THE REGULATION IS CONSTITUTIONAL

For purposes of further judicial review, we explained (Br. 49-59) in our opening brief why 11 C.F.R. 100.22(b) is constitutional. Here, we respond briefly to VSHL's most prominent errors.

The regulation was intended to, and in fact does, rely faithfully on the Ninth Circuit's decision in Furgatch. As the Commission explained when it adopted 11 C.F.R. 100.22(b), the regulation was intended to "provide further guidance on what types of communications constitute express advocacy of clearly identified candidates, in accordance with the judicial interpretations found in Buckley, MCFL, Furgatch, NOW [FEC v. National Organization of Women, 713 F.Supp. 428 (D.D.C. 1989)], and Faucher [v. FEC, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991)]." 60 Fed. Reg. 35,292, 35,293 (1995). Specifically, the final rule was "revised to incorporate more of the Furgatch interpretation ..." 60 Fed. Reg. at 35,295.

Contrary to VSHL's argument (Br. 47), the regulation does not "completely ignore[] the second element of the Ninth Circuit's standard by failing" to require a "clear plea for action." Rather, the regulation requires the utmost clarity because a communication's "electoral portion" must be "unmistakable, unambiguous, and suggestive of only one meaning" in order for it to be considered express advocacy. Furthermore, "reasonable minds" cannot differ as to whether this unambiguous

electoral message "encourages actions to elect or defeat" a candidate rather than encouraging "some other kind of action." Although the regulation uses the phrase "encourages actions" rather than the phrase "clear plea for action," the basic requirement is the same. In any event, in Furgatch itself, two sentences after the Ninth Circuit used the phrase "clear plea for action," the court also stated, 807 F.2d at 864 (emphasis added):

> Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Thus, the Ninth Circuit itself clearly viewed "encourages" action and "clear plea" for action as functionally synonymous. Cf. Crumpton v. Keisling, 160 Or.App. 406, 419, 982 P.2d 3, 10 (Or.Ct.App. 1999) ("heart of the Furgatch approach ... is to determine whether the nature of the publication as a whole is clearly to support or oppose a candidate for office"), review denied, 329 Or. 650, 994 P.2d 132 (Or. 2000).

VSHL also asserts (Br. 47-48) that the regulation "does not depend on the actual words used in the communication, but focuses exclusively on the reaction to the communication by those who hear or read it." As we previously explained (Br. 57-58), however, the "reasonable person" standard used in the regulation has long been recognized as an objective test that depends upon the communication's

actual words. Most English words have multiple meanings clarified only by context, which could be subject to unreasonable sophistic explanations by those trying to avoid the obvious intent of the words used.[10] VSHL has not even tried to refute our showing (Br. 57-58) of the many examples of "reasonable person" standards that are understood as objective tests; the "reasonable person" is a legal fiction whose theoretical perceptions do not depend upon the particular views of any "real" person.

Next, contrary to VSHL's contention (Br. 49-53), the regulation is not so defectively vague that it unconstitutionally encourages "arbitrary and discriminatory" enforcement. VSHL relies upon Kolender v. Lawson, 461 U.S. 352 (1983), but that case is plainly inapplicable. In Kolender, an anti-loitering statute "vest[ed] virtually complete discretion in the hands of the police to determine whether [a] suspect has satisfied the statute and must be permitted to go on his way," id. at 358, and " 'confer[red] on police a virtually unrestrained power to arrest and charge persons with a violation,' " id. at 360 (quoting Lewis v. City

[10] VSHL's "contention overlooks ... this fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." Deal v. United States, 508 U.S. 129, 132 (1993). See also Christian Coalition, 52 F.Supp.2d at 61 (the "verb or its immediate equivalent — considered in the context of the entire communication, including its temporal proximity to the election — must unmistakably exhort the reader/viewer/listener to take electoral action").

of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)). Here, however, the Commission's regulation is simply a clarification of more general terms of the FECA. Moreover, the regulation is not self-executing, and it gives no one the authority to prohibit or interfere with electoral advocacy before it takes place.[11]

Furthermore, a statute or regulation is not void for vagueness unless " 'men of common intelligence must necessarily guess at its meaning.' " Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (citation omitted) (addressing statute regulating First Amendment activities). Accord Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952) ("[N]o more than a reasonable degree of certainty can be demanded"). Even in reviewing statutes regulating political activity the Supreme Court has stated that "there are limitations in the English language with respect to being both specific and manageably brief, and ... although the prohibitions may not satisfy those intent on finding fault at any cost, [it is enough that] they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently

[11] Even if the Commission finds probable cause to believe the Act has been violated, it has no authority to adjudicate anyone's liability or otherwise to make a binding determination that a person has violated the law. After the Commission finds probable cause to believe that a person has violated the Act, its only recourse is to file a de novo lawsuit if voluntary conciliation fails. See 2 U.S.C. 437g(a)(6).

understand and comply with." United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578-79 (1973). The Commission's regulation satisfies this test. Indeed, VSHL's claim of vagueness is ironic, since the Commission's regulation provides additional clarity about what express advocacy means and explains how the Commission will make case-by-case determinations in the future.

Finally, VSHL attempts (Br. 52) to ridicule the regulation's recognition that "proximity to an election" could be an important external factor to consider when determining the meaning of the language used in a communication. VSHL invents an absurd straw man by suggesting that a "billboard advertisement could be protected issue advocacy on Tuesday and a violation of the FECA on Wednesday." VSHL does not respond, however, to our showing (Br. 56) that some of the examples of express advocacy in Buckley itself, 424 U.S. at 44 n.52, unavoidably depend on their context in an election campaign. For example, a call to "support Smith" is not likely to be about an electoral vote if it is spoken shortly after an election. But shortly before an election, it is much more likely to constitute express advocacy of an electoral result. In sum, one of the main purposes of the regulation is avoid the kind of wooden literalism that any purely formulaic approach to a language as rich and flexible as English inevitably creates.

VSHL's attempt to caricature the regulation elevates formalism over substance, which is exactly what the regulation is designed to avoid.

IV. VSHL'S CROSS-APPEAL THAT SEEKS TO ENJOIN THE COMMISSION TO INITIATE A RULEMAKING PROCEEDING TO REPEAL THE REGULATION SHOULD BE DENIED

A. STANDARD OF REVIEW

As the D.C. Circuit has explained:

> [E]xcept where there is evidence of a "clear and convincing legislative intent to negate review," an agency's denial of a rulemaking petition is subject to judicial review. However, we believe that the decision to institute rulemaking is one that is largely committed to the discretion of the agency, and that the scope of review of such a determination must, of necessity, be very narrow.

WWHT, Inc. v. FCC, 656 F.2d 807, 809 (D.C. Cir. 1981) (citation omitted). Accord Maier v. EPA, 114 F.3d 1032, 1039-40 (10th Cir.) ("Substantial prudential concerns counsel particularly broad deference in the context of review of any agency refusal to initiate rulemaking. The D.C. Circuit has repeatedly observed that, within the range of deference embodied in the 'arbitrary and capricious' standard, refusals to initiate rulemaking are at the high end.") (citations omitted), cert. denied, 522 U.S. 1014 (1997); Brown v. Secretary of HHS, 46 F.3d 102, 110-11 (1st Cir. 1995); National Customs Brokers & Forwarders Ass'n v. United States, 883 F.2d 93, 96-97 (D.C. Cir. 1989) ("[w]e will overturn an agency's decision not to initiate a rulemaking only for compelling cause").

In this case, the Commission deadlocked 3-3 when it voted on the General Counsel's recommendation not to initiate a rulemaking in response to VSHL's petition (JA 85-86).[12] In such circumstances, the reports of the General Counsel provide the substantive basis for judicial review of a Commission determination in accordance with the General Counsel's recommendation not to initiate action. FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 38-39 n.19 (1981) ("DSCC"); Carter/Mondale Presidential Comm. v. FEC, 775 F.2d 1182, 1186-87 (D.C. Cir. 1985). And "the Supreme Court has clarified that judges in court owe large deference to a Commission disposition so long as the FEC (or its General Counsel) supplied reasonable grounds for reaching (or recommending) the disposition." Democratic Congressional Campaign Comm. v. FEC ("DCCC"), 831 F.2d 1131, 1134 (D.C. Cir. 1987) (citing DSCC). Cf. Radio-Television News Directors Ass'n v. FCC, 184 F.3d 872, 880 (D.C. Cir. 1999) (during review of deadlocked decision not to repeal regulation, deference given to statement of controlling commissioners who voted against repeal).

Especially here, where the decision not to initiate a rulemaking was largely based on the policy determination that the Commission should not at this time give

[12] The Act requires an affirmative vote of at least four members of the Commission to promulgate or repeal regulations. 2 U.S.C. 437c(c), 437d(a)(8). Thus, the Commission's 3-3 vote on VSHL's petition meant that no rulemaking proceeding would be initiated.

up defending its regulation in circuits that have not yet addressed it (see discussion below), judicial review involves a legislative decision, rather than a procedural one, and deference is at its zenith. This case does not, for example, involve "statutorily imposed rulemaking requirements," WWHT, Inc. v. FCC, 656 F.2d at 819 n.21, but instead involves an agency's prerogative not to abandon defending its view of the constitutionality of one of its own regulations after two losses. "[W]e agree that judicial intrusion into an agency's exercise of discretion in the discharge of its essentially legislative rulemaking functions should be severely circumscribed...." Id. at 814.

B. VSHL Has Not Demonstrated A Right To Have The Commission Enjoined To Repeal Its Regulation

As VSHL explained (Br. 59), it has brought a cross appeal to require the Commission to initiate a "rulemaking petition ... to have the regulation repealed." Not once, however, does VSHL even attempt to explain (Br. 59-64) why it personally has standing to request this relief or how it would benefit if such relief were granted. Its argument presupposes that the regulation is invalid, so the only issue its cross appeal raises is whether — in addition to both a declaration that the regulation is invalid and an injunction preventing the Commission from enforcing it against VSHL — VSHL needs this extra relief to remedy any alleged harm to

itself. But VSHL never even argues that it will benefit from this extraordinary remedy.

In fact, VSHL would gain nothing from a repeal of the regulation, because it is already fully protected under collateral estoppel by a declaratory judgment that 11 C.F.R. 100.22(b) is invalid. Thus, all of the arguments we have made explaining why the district court erred by entering a nationwide injunction (see supra pp. 28-37 and FEC Br. 30-49), apply equally strongly to VSHL's request that the Commission be ordered to repeal its regulation.

The real impact of an injunction requiring the Commission to repeal its regulation would be to prohibit the Commission from engaging in intercircuit nonacquiescence. Thus, again, all of our arguments about why a nationwide injunction is inappropriate because it prevents intercircuit nonacquiescence (see supra pp. 30-47 and FEC Br. 39-49), are equally applicable here. Indeed, VSHL's cross appeal appears to be nothing more than an attempt to get around the Mendoza principles by obtaining the same nationwide effect under a different procedure.

The General Counsel's Memorandum (JA 63-65) to the Commission recommending against opening a rulemaking in response to VSHL's petition clearly explained that Mendoza "encouraged agencies to seek reviews in other circuits if they disagree with one circuit's view of the law...." (JA 64). It also explained that very little had changed, legally, since the Commission declined to

open a rulemaking after a similar petition was filed in 1997 (JA 64-65). The thrust of this reasoning is that it is not time to repeal the regulation after two adverse appellate decisions, and it leaves open the possibility that this action would be warranted if further litigation of the issue in other jurisdictions does not yield a more positive result. Surely, it is not arbitrary and capricious for an agency to follow the policy of intercircuit nonacquiescence approved in Mendoza rather than abandoning a regulation after two adverse appellate decisions.

VSHL does not even attempt to argue (Br. 59-64) that it is arbitrary and capricious for the Commission to follow the policy of intercircuit nonacquiescence approved in Mendoza and its progeny. Instead, VSHL simply reargues why it believes the regulation is unconstitutional. But even assuming this Court agrees with VSHL on the merits of the regulation, that is a wholly separate matter from whether the Commission is " 'blind to the source of its delegated power' " (VSHL Br. 62, quoting American Horse Protection Ass'n, Inc. v Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987)) by making the policy decision that other circuits or the Supreme Court should have an opportunity to review the regulation before it is repealed. As we have already explained (supra pp. 42-44 and FEC Br. 42, 52-59), the regulation is based on the Ninth Circuit's decision in Furgatch and the Seventh Circuit has explicitly declined to choose between the competing views of express advocacy, so it is reasonable to wait at least for those circuits to review the regulation.

Finally, if the regulation were immediately repealed, that would obviously moot any chance for Supreme Court review.

VSHL ignores the important difference between simply declaring a regulation invalid and ordering an agency to repeal one. Only the latter remedy prevents intercircuit nonacquiescence and seriously encroaches upon an agency's legislative powers. Indeed, although regulations have been declared invalid many times, VSHL does not cite a single case in which an agency was also ordered to institute a rulemaking to remove the regulation from the Code of Federal Regulations.

> A much deeper issue ... is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts inter se .... The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 140 (1940).

As the Supreme Court explained in Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20-21 (1952) (citations omitted), when it construed the judicial review provision of the Federal Power Act, which is very similar to the APA:

> [T]he guiding principle ... is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration.... The Court, it is true, has power "to affirm, modify, or set aside" the order of the Commission "in whole or in part." § 313(b). But that authority is not power to exercise an essentially administrative function.

See also Horizons International, Inc. v. Baldrige, 811 F.2d 154, 160 (3rd Cir. 1987) ("Such a construction ... might run afoul of the prohibition against imposing nonjudicial duties on Article III courts announced in cases such as Federal Power Comm'n") (other citations omitted). There is no justification for this Court to engage in the essentially legislative and executive function of deciding whether the regulation should be defended in other jurisdictions.

Contrary to VSHL's argument (Br. 63), the decision in Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987), does not support its cross appeal. In that case, the Commission had failed to promulgate a new regulation after Congress amended the Act in 1979 concerning the use of "hard" and "soft" money for certain state and local campaign expenditures. Because the court found that this failure to act "provid[ed] no guidance or supervision" regarding permissible allocations of "hard" and "soft" money, the court ordered the Commission to review Common Cause's petition for rulemaking "with an eye to revising" the Commission's regulation that had predated Congress's 1979 statutory amendments. Id. at 1396. The Common Cause court did not find what the

Commission had done ultra vires or order it deleted from the books; it found the regulation insufficiently clear and ordered it clarified but left it entirely up to the Commission to determine the substantive requirements of the regulation.

In the instant case, however, 11 C.F.R. 100.22(b) provides ample guidance; VSHL does not dispute this fact, but merely complains that this guidance is unconstitutional as a matter of substance. VSHL wants the Commission to repeal a regulation that the Commission considered extensively when it was promulgated and that the Commission wants to have reviewed by other circuits before abandoning. The court in Common Cause simply did not address such a situation, and, contrary to VSHL's implication (Br. 63), did not order the Commission to repeal an existing regulation. Rather, the court explicitly stated that it "need not go so far as to order the Commission to adopt the proposals of Common Cause," and simply remanded the matter to the Commission. Id.

Indeed, the D.C. Circuit recently declined to decide the "full scope of [its] remedial authority in cases where an agency order in a rulemaking initiated to consider repealing or modifying an existing rule fails to justify the rule." Radio-Television News, 184 F.3d at 888 n.21. In that case, rather than directing the FCC to eliminate or repeal its existing regulations — as requested by the petitioners — the court remanded the matter to the FCC. The court also noted that the FCC bore a heavier burden in that case than what the FEC bears here. Because

the FCC had actually "initiated a rulemaking premised on the conclusion that the rules may not be in the public interest and then rejected its own proposal to abrogate the rules," the court held that the FCC had to justify its ultimate inaction in a way that would have been unnecessary if it had simply "deni[ed] ... a petition for a rulemaking to repeal an existing rule." Id. at 881 (citations omitted). Here, of course, all the Commission has done is deny VSHL's petition to initiate a rulemaking to repeal 11 C.F.R. 100.22(b).

In sum, VSHL cites no relevant authority for the unprecedented proposition that the Commission should be ordered to initiate a rulemaking and repeal its regulation. VSHL is already more than adequately protected by the declaratory and injunctive relief granted by the district court, and the Commission has the right to exercise its legislative function and defend the constitutionality of its regulation in those circuits that have yet to decide this question, and ultimately, before the Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should vacate the district court's decision and remand with instructions to dismiss the case for lack of jurisdiction. In the alternative, the Court should vacate the district court's injunction and limit prospective injunctive relief solely for the benefit of VSHL.

Respectfully submitted,

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September 20, 2000

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