RECORD NOS. 00-1252(L), 00-1332 XAP

In The

# United States Court of Appeals

For The Fourth Circuit

## VIRGINIA SOCIETY FOR HUMAN LIFE, INC.,

*Plaintiffs – Appellee/Cross-Appellant,*



v.

## FEDERAL ELECTION COMMISSION,

*Defendant – Appellant/Cross-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND



## REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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### I. This Court Has Jurisdiction to Reverse the FEC's Denial of VSHL's Rulemaking Petition.

The FEC has conceded that in 5 U.S.C. § 706, Congress has given this Court the authority to reverse the FEC's denial of VSHL's rulemaking petition. (FEC's Ans. Br. at 47). Contrary to the FEC's argument, however, a determination by this Court that 11 C.F.R. § 100.22(b) ("the FEC's implied advocacy regulation" or "the regulation") is blatantly unconstitutional does not deprive this Court of jurisdiction to also reverse the FEC's decision not to initiate a rulemaking proceeding to repeal the regulation. (See FEC's Ans. Br. at 49). The substantive determination that the FEC's implied advocacy regulation is blatantly unconstitutional and far in excess of the FEC's statutory authority *establishes* that the FEC was blind to the source of its delegated authority, which justifies reversing the FEC's denial of VSHL's rulemaking petition. *See American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987). A litigant is not deprived of standing to obtain a statutory remedy when a court determines that the litigant's legal claims are correct.

In the Administrative Procedure Act ("APA"), Congress provided for precisely the remedy sought by VSHL. Section 706 establishes this Court's "Scope of Review," and provides, in part (emphasis added):

To the extent necessary to decision and when presented, the reviewing court *shall decide all relevant questions of law, interpret constitutional and statutory provisions*, and determine the meaning or applicability of the terms of an agency action. The reviewing court *shall--*

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) *hold unlawful and set aside agency action*, findings, and conclusions found to be--

(A) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

As the Supreme Court has explained "[administrative] decisions should be set aside in this context, as in every other, only for substantial procedural or *substantive reasons* as mandated by statute . . . , not simply because the court is unhappy with the result reached." *Baltimore Gas and Electric Co., v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983)(emphasis added).

Furthermore:

> Agency action is arbitrary and capricious if the agency relies on factors that Congress did not intend for it to consider, entirely ignores important aspects of the problem, explains its decision in a manner contrary to the evidence before it, *or reaches a decision that is so implausible that it cannot be ascribed to a difference in view.*

*Bedford Cty. Mem. Hosp. v. HHS*, 769 F.2d 1017, 1022 (4th Cir. 1985)(citing *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(emphasis added).

In this case, VSHL petitioned the FEC to repeal 11 C.F.R. § 100.22(b) on the grounds that it is a blatantly unconstitutional restriction of issue advocacy speech in violation of the First Amendment and in excess of the FEC's statutory authority under the Federal Election Campaign Act, 2 U.S.C. §431 et. seq. ("FECA"), as definitively construed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986). The FEC's argument that the regulation comports with the Supreme Court's controlling construction of the FECA in *Buckley* and *MCFL* is so implausible it cannot be ascribed to a difference in view.

As this Court has recently reaffirmed:

> In an effort to alleviate uncertainty, the Supreme Court adopted a bright-line rule to determine when political expression may be regulated. This bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated. *See Buckley* at 42.

> The *Buckley* Court noted that "the distinction between the discussion of issues and candidates and advocacy and candidates may often dissolve in practical application. *Id.* at 42. The Court therefore refused to adopt a standard allowing regulation of any advertisement that mentions a candidate's stand on an issue. *See id.* at 42-43. In a footnote, the Court provided an illustrative list of terms that qualify as "express words of advocacy": "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44.

*Perry v. Bartlett*, 2000 U.S. App. LEXIS 24793, at *8 (4th Cir. Oct. 3, 2000). "[I]n contrast, the focus of the challenged definition is on what reasonable people or reasonable minds would understand by the communication. The definition does not require express words of advocacy." *Iowa Right to Life, Inc. v. Williams*, 187 F.3d 963, 968 (8th Cir. 1999)(declaring unconstitutional a state regulation modeled word-for-word on 11 C.F.R § 100.22(b)).

What's more, the FEC's reliance on *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), is likewise implausible. In *Furgatch* the Ninth Circuit laid out a three part test. In the second element of the test, the court required that a communication must contain a "clear plea for action," *Furgatch*, 807 F.2d at 864, before it would come under the FEC's jurisdiction. That second element most closely follows *Buckley's* "express-or-explicit-words" test. The FEC's implied advocacy regulation, on the other hand, omits the *Furgatch* standard's vital second element. One can only marvel at the audacity of the FEC's position that the regulation loses nothing in precision because of this omission. (See FEC's Reply Br. at 42-43).

The FEC's entire defense of the regulation is based on the obvious fiction that the regulation comports with *Furgatch*, further demonstrating agency blindness to the source of its authority. *See FEC v. Christian Action Network*, 110 F.3d 1049, 1054 n. 5 (4th Cir. 1997).

Furthermore, as VSHL pointed out in its rulemaking petition, because the FEC's implied advocacy regulation is national in application, it has a chilling effect on those speakers who wish to speak nationwide. (Rulemaking Petition; JA at 22). Under the FEC's regime, such a speaker must either choose to forego its constitutional right to speak out on issues and federal candidates to the limit guaranteed by the First Amendment. Even carefully tailoring its message from judicial circuit to judicial circuit to comply with the FEC's patchwork-quilt rendition of the First Amendment would be unavailing because the FEC has jurisdiction to enforce the FECA against a nationwide speaker where the speaker resides, transacts business or may be found. 2 U.S.C. § 437g(a)(6)(A).[1] In this

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[1] The FEC assiduously avoids discussion of the Eighth Circuit's rejection of the standard copied from 11 C.F.R. § 100.22(b) in *Iowa Right to Life, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999), as well as the Second Circuit's decisions rejecting an "implied advocacy" standard in *Vermont Right to Life, Inc. v. Sorrell*, 216 F.3d 264 (2nd Cir. 2000); *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980). Additionally, contrary to the FEC's arguments, the Seventh Circuit has recognized that *Buckley* and *MCFL* are controlling in the context of the FECA. *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 (7th Cir. 1998).

information age, where inexpensive, instantaneous, worldwide communication is at the fingertips of most Americans, the FEC's continued resistence to bringing its regulation into line with *Buckley's* unequivocal, bright-line test is intolerable. This Court has jurisdiction to resolve this case based on VSHL's Fourth Circuit/D.C. Circuit cross-circuit dilemma, and also to vindicate the First Amendment rights of others similarly situated. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.")

Additionally, repeal of the FEC's blatantly unconstitutional regulation is warranted because so long as it remains on the books, many speakers will be deterred from exercising their free-speech rights, even if the district court's nationwide injunction remains in effect. Many would-be speakers will simply read the FEC's implied advocacy regulation and conform their activities to its restrictions without ever knowing that the regulation is unenforceable. The right to exercise First Amendment freedoms should not depend on having the resources to hire an attorney that specializes in federal election law.

## II. Once the Supreme Court has Spoken the Doctrine of Inter-circuit Non-acquiescence No Longer Applies.

In its response to VSHL's cross-appeal, the FEC once again invokes the doctrine of inter-circuit non-acquiescence. (FEC's Ans. Br. at 50.). Contrary to the FEC's arguments, its steadfast reliance on this doctrine is contrary to law because the Supreme Court has already twice foreclosed the "implied advocacy" standard employed in the regulation.

The inter-circuit non-acquiescence doctrine is a prudential consideration that allows for "percolation" of an issue in the various circuit courts of appeal to give the Supreme Court the benefit of their analysis. In this case however, the FECA has already been definitively construed by the Supreme Court, not once, but twice. The authority of Congress, as limited by the First Amendment, extends only so far as those communications that contain express or explicit words of advocacy of the election or defeat of a clearly identified candidate. The FEC's authority is likewise limited. The Supreme Court could not have been more precise than it was in *Buckley* or *MCFL*. As the First Circuit has explained:

> The Supreme Court is the final authority with respect to statutory construction; therefore, an interpretation given a statute by the Supreme Court becomes the law and must be given effect. It is not the role of the FEC to second-guess the wisdom of the Supreme Court.

*Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir. 1991)(holding that Supreme Court's construction of 2 U.S.C. § 441b(a) in *MCFL*, which required express or explicit words of advocacy, was binding on the FEC.). The distinction between issue advocacy and express advocacy under the FECA was already decided when the FEC promulgated 11 C.F.R. § 100.22(b). But, the FEC erroneously argues that an agency that is dissatisfied with the unequivocal, bright-line, constitutionally-mandated standard announced by the Supreme Court, may simply adopt a regulation that obviously exceeds its authority and then the agency "has the right" to relitigate the issue in every circuit of the land. FEC's Ans. Br. at 55. The FEC's unfortunate choice of words is further evidence of its blindness to the limited scope of its *authority* in this most sensitive area involving the First Amendment *rights* of the people.

In its brief to this Court, the FEC extols the richness and flexibility of the English language in support of 11 C.F.R. § 100.22(b). FEC's Ans. Br. at 46. Another virtue of the language is that it may be employed with precision. The Supreme Court rejected a "flexible" standard and adopted a crystal-clear definition of "express advocacy" in *Buckley* and *MCFL* for the benefit of the people. The FEC refuses to acknowledge that the Supreme Court's precise, bright-line rule exists so that the speaker will know in advance precisely when its speech crosses

the line from fully protected issue advocacy into the FEC's jurisdiction over express advocacy. *Perry*, supra at *8.

It is undisputed on this record that VSHL's speech discussing issues and federal candidates will contain no express or explicit words of advocacy of the election or defeat of any candidate. Under *Buckley* and *MCFL*, that should be the end of the inquiry. VSHL, and others not before the Court, should be able to speak with confidence that the FEC lacks jurisdiction to regulate such communications.

Under the FEC's standard in 11 C.F.R. § 100.22(b), however, the FEC will look to events external to the communication and will rely on the interpretation of a hypothetical reasonable person to decide on a case-by-case basis whether to charge the speaker with a violation of the FECA. As this Court has explained, "The Supreme Court developed the express advocacy test to focus a court's inquiry on the language used in the communications; any other test would leave the speaker 'wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'" *Perry*, *supra*, at *11 (*citing Buckley*, 424 U.S. at 43)(striking down state statute

that relied on the speaker's statements of intent made external to the actual communication.)[2]

The case for reversing the FEC's decision not to initiate a rulemaking is far more compelling in this case than was the case in *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987). The extremely limited issue in that case involved a technical rule requiring the allocation of expenditures between the different accounts maintained by political parties. Although the Supreme Court had never had occasion to decide the issue, the district court ordered the FEC to promulgate a rule, and, when the FEC dallied, the court retained jurisdiction of the case and ordered the FEC to make 90 day progress reports to the court until the new regulation was promulgated. *Common Cause v. FEC*, 692 F.Supp 1397, 1402 (D.D.C. 1988).

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[2]Proximity to the election is only an example of the external events the FEC's implied advocacy regulation purports to be relevant to a determination that a particular communication is express advocacy. Because the FEC would consider other undefined "external events," like, for example, a statement of intent made by an organization's officer, 11 C.F.R. § 100.22(b) is as broad as the state statute rejected by this Court in *Perry*. Further demonstrating its blindness to its authority, the FEC suggests that it has jurisdiction over speech *after* an election when the subject of the speech is no longer a *candidate*. FEC's Ans. Br. at 46. *See FEC v. Machinists Non-partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (rejecting FEC enforcement against a committee attempting to draft a person into *becoming* a candidate). As VSHL demonstrated in its brief at page 52, the only relevance proximity to an election has in this context is regarding speech about actual candidates as the election approaches.

In contrast to the limited issue in *Common Cause*, 11 C.F.R. § 100.22(b) restricts every speaker in America that wishes to discuss federal candidates' records and positions on issues. Furthermore, 11 C.F.R. § 100.22(b) is a content-based restriction of political speech that is plainly contrary to two Supreme Court cases that are directly on point. The FEC's desire to relitigate this issue is not "reasonable grounds for reaching (or recommending)" retaining the regulation. *See* FEC's Ans. Br. at 48, *citing Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987).

## CONCLUSION

For the foregoing reasons, the FEC should be ordered to initiate a rulemaking proceeding to repeal 11 C.F.R. § 100.22(b).

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## CERTIFICATE OF COMPLIANCE

RE: Fourth Circuit Record No. 00-1252(L), 00-1332 XAP
Virginia Society for Human Life, Inc. v. Federal Election Commisson

This Reply Brief of Appellee/Cross-Appellant has been prepared using:

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## FILING AND MAILING CERTIFICATE

I hereby certify that on this 10th day of October, 2000, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand delivery, the required number of copies of this Reply Brief of Appellee/Cross Appellant and further certify that I served via UPS Ground Transportation the required number of copies of said Reply Brief to the following:

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The necessary filing and service to Counsel was performed in accordance with the instructions given me by counsel in this case.

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