

IN AND BEFORE
THE FEDERAL ELECTION COMMISSION

In Re:)
)
Conservative Solutions Project, Inc.,) MUR 6988
Robert Watkins, Treasurer,)
Pat Shortridge, President/Director,)
J. Warren Thompkins, Director, and)
Joel McElhannon, Director)
)
Respondents)

Response to Complaint and Motion to Dismiss

Conservative Solutions Project, Inc. ("CSP"), and Robert Watkins in his official capacity as treasurer, Pat Shortridge in his official capacity as President and Director, and J. Warren Thompkins and Joel McElhannon, in their official capacities as Directors (the "Respondents") hereby respond to the Complaint in the above-referenced Matter Under Review ("MUR") 6988 and deny each and every allegation in the Complaint and move for its dismissal.

The Complaint alleges that Respondents violated the Federal Election Campaign Act of 1971, as amended ("FECA")¹ by CSP's failure to file independent expenditure reports with the Federal Election Commission (the "FEC") regarding two television advertisements described below ("the Ads") during the months of September and October 2015. The Complaint alleges that the Ads constitute independent expenditures on behalf of Sen. Marco Rubio solely because the Ads reference Sen. Rubio.

The Complaint should be dismissed. The Ads do not constitute independent expenditures for or against any candidate for any office because the communications do not reference an election, voting, candidacy or other information necessary to trigger reporting under FECA.

For these reasons, as further detailed in this response, the Complaint is without merit, CSP has committed no violation of FECA and the Complaint should be dismissed.

Facts

CSP is a Delaware non-stock corporation. As stated in its Certificate of Incorporation, it is organized exclusively for the promotion of social welfare within the meaning of

¹ 52 U.S.C. § 30101, *et. seq.* "Federal Election Campaign Laws."

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section 501(c)(4) of the Internal Revenue Code of 1986, as amended. CSP's website, www.conservativesolutionsproject.com, states that its purpose is "working with bold, persuasive leaders to bring Conservative Solutions to the problems that currently plague our nation. By engaging citizens so America beats Washington, we can transform the tax code, restore our military and America's standing in the world, and shrink and restructure the federal government."

CSP's website contains a full policy agenda on nine policy issues. The website contains an in-depth policy prescription for each one of these agenda issues. The website also includes regular updates on policy items. As of the date of this response, there are approximately 260 such updates. These updates consider issues such as national security, health care, and excessive student debt. It features a number of conservative leaders, including (among others) Senator Tom Cotton (R-AR), Senator Mike Lee (R-UT), Senator Marco Rubio (R-FL) and Senator Joni Ernst (R-IA). The website also contains a study CSP commissioned in 2014 entitled the "American Electorate" which looks at the viability of certain policy positions among certain important groups of citizens.

As part of its activities, CSP (like many similar groups) is engaged in broad-based grassroots outreach and attempts to persuade individual citizens to support its policy agenda. As a newly created organization, CSP must garner support for its policy positions to generate the resources (especially contributions) to allow for continued existence. This outreach has included television advertisements on both broadcast and cable programs, including those programs where politically interested individuals view programs discussing public policy issues.

CSP engages in such efforts to advance its agenda and, also like similar organizations, seeks to identify its policy agenda with popular leaders who share its views and, conversely, CSP references national conservative leaders whose policy agenda CSP supports.

CSP also uses an e-mail collection prompt on its website in order to further communications with its supporters.

As part of its outreach, CSP aired the two television advertisements referenced in the Complaint. *Neither* of the television ads reference any election, voting, supporting a candidate, opposing a candidate, or any of the required subjects that would trigger reporting to the FEC as "independent expenditures".

The first television ad referenced in the Complaint is "Greatness". The script of the ad follows below:

Conservative Solutions Project--"Greatness":

Audio

Visual

Our greatness was not an accident.	Source: licensed footage
It didn't happen on its own.	Source: Marco Rubio 2015 CPAC speech (Public Domain)
Our greatness is the result of God's blessings...	
The sacrifices made by men and women in uniform...	Source: licensed footage
And the choices made by the people here before us.	Source: NASA/Johnson Space Center archival footage (Public Domain)
God is still blessing America.	Source: licensed footage
If ever there has been an era in human history tailor-made for us as a people, it is the 21 st century.	Source: licensed footage
What is standing in the way are outdated leaders that refuse to let go of the past.	Source: Original footage shot by Ad maker
Learn more at conservative solutions project dot com.	Source: AP licensed image

The Commission should note the absence of any reference to an election; voting, supporting or opposing a candidate, identifying a candidate for office in his or her capacity as a candidate for that office or other electoral message of any kind. It is not present.

Further, the ad was, as stated in the Complaint, aired many months before and in a different *year* than an election – and not in close proximity *to* an election.

The second television ad sponsored by Conservative Solutions Project and referenced in the Complaint is likewise *not* an election-related communication.

As with the first Ad, there is no reference in this advertisement to voting, elections, candidates, supporting or opposing candidates, or any such electoral call to action.

The advertisement focuses on a philosophical call to support, defend and expand the American Dream for future generations.

Conservative Solutions Project – “American Dream”

Audio

Visual

What we are called upon to do now is to ensure...	Source: Marco Rubio 2015 speech to CPAC (Public Domain)
...that the American Dream doesn't just survive...	Source: licensed footage
...but that it reaches more people, and changes more lives than ever before.	Source: Marco Rubio 2015 speech to CPAC (Public Domain)
New ideas for a new age.	Source: licensed footage
Throw out the tax code.	Source: licensed footage
Overhaul higher education.	Source: licensed footage
Repeal and replace Obamacare.	Source: licensed footage
You and I were left by our parents and grandparents the greatest nation in the history of the world. It is our obligation to keep it that way.	Source: Marco Rubio 2015 speech to CPAC (Public Domain)
Learn more at conservative solutions project dot com.	Source: AP licensed image

For convenience hereafter, these television advertisements are referred to as “the Ads.”

The Ads both end with a statement encouraging the viewer to visit CSP's website to learn more. Thus, the call to action is for the viewers to visit the CSP website to learn about the issues, the organization and to receive updates about both. CSP hopes and expects that visitors to the site will sign up for e-mail updates that will allow CSP to communicate with interested individuals.

Neither of the Ads reference an election or voting, the essential requirements for any ‘express advocacy’ communication, and a necessary precondition for reporting a communication to the FEC.

Allegations Contained in the Complaint and Respondents' Response

The Complaint alleges that the Ads expressly advocate for the election of Sen. Rubio for president, and thus constitute an independent expenditure pursuant to 11 C.F.R. § 100.22. Complaint ¶7.

The Complaint further alleges that because the Ads were independent expenditures, CSP has failed to file required reports of independent expenditures as required under FECA. Complaint ¶5. The Complaint requests that the Commission enjoin the Respondents from any further violations and impose the maximum fine permitted by law. Complaint ¶11.

The allegations of the Complaint are without merit and should be dismissed. Neither of the Ads constitute independent expenditures because neither of the Ads meet the definition of "express advocacy". Because the Ads did not consist of express advocacy communications, CSP has not made independent expenditures and independent expenditure reporting is not required. Further, the FEC may not enjoin CSP from future communications, regardless of whether such future communications do or do not constitute express advocacy for or against candidates for office.

Applicable Statutes, Regulation, and Case Law

The reporting requirements for independent expenditure communications apply only to those communications that meet the definition of "independent expenditures." Independent expenditures are those communications that "expressly advocate the election or defeat of a clearly identifiable candidate" that are made without cooperation or coordination with a candidate or candidate's authorized political committee. 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16(a).

The United States Supreme Court, 40 years ago this month, recognized the continuum on which political and public policy speech fall. In one of the most insightful provisions of the decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court noted that "... the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.* at 42. The *Buckley Court* noted the Court of Appeals consideration of this very point:

"Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections. 171 U.S. App. D.C., at 226, 519 F.2d, at 875."

Id. at n. 50.

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In an analogous [424 U.S. 1, 43] context, the *Buckley* Court cited to its opinion in *Thomas v. Collins*, 323 U.S. 516 (1945), in which it had observed:

“[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances 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.

“Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.” *Id.*, at 535.

Id. at 43.

The genesis of the ‘magic words’ test originated from this very discussion. The Supreme Court noted that discussion of public policy issues and principles bleeds into election-related communications, but there *is* a difference and citizens must be free to engage in advocacy of issues without fear of government regulation of such speech.

Since that test was first articulated by the *Buckley* Court, myriad ‘reformers’ have sought to dilute its clear protection of citizen speech by blurring the bright line the First Amendment requires.

The Federal Election Commission was, for too many years, part of the scheme to eliminate the *Buckley* standard for determining ‘express advocacy’ communications – until a brave cadre of FEC Commissioners took office and demanded that the Commission comply with the Constitution and federal law, and stopped the steady march toward lawlessness upon which the Commission had embarked for decades.

Such lawlessness is apparent in the Commission’s regulations defining “expressly advocating”. The first part of the regulation is the straightforward standard articulated in *Buckley* which provides that a communication “expressly advocates” when it contains a statement of support or opposition to a candidate using certain phrases such as “vote for,” “re-elect,” “cast your ballot for,” “defeat,” etc. 11 C.F.R. § 100.22(a).

The second part of the FEC regulations defining ‘express advocacy’ was promulgated more than (20) years ago, which numerous courts have since declined to enforce in the manner sought by the FEC. The provision purports that a communication expressly advocates even though it does not contain a clear statement of support or opposition to a candidate if, “[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identifiable candidate(s) because – (1) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b).

Paragraph (b) of the "express advocacy" definition in the FEC regulations is a codification of the Ninth Circuit's holding in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert denied*, 484 U.S. 850 (1987) ("*Furgatch*"). The FEC action amending 11 C.F.R. § 100.22(b) makes it clear that the FEC intended to codify the *Furgatch* decision as paragraph (b) of that regulation. 60 Fed. Reg. 35295 (July 6, 1995).

In *Furgatch*, the court considered a paid advertisement in the New York Times placed one week before the 1980 presidential election claiming President Carter was degrading the electoral process and lessening the prestige of the office. The advertisement ended with the statement "Don't Let Him Do It." In its decision, the court held that even though the advertisement did not contain a statement of opposition to President Carter's re-election or the phrases or words contained in *Buckley*, such as "vote for" or "vote against", it could still constitute express advocacy for the defeat of President Carter if it suggested as much.

However, in extending the definition of express advocacy beyond communications containing clear statements of support or opposition to a candidate, the court was careful to state that not *all* references to candidates would be express advocacy. The court cast a narrow net and emphasized the narrowness of the net. The court stated that a communication was only express advocacy when it was "unmistakable and unambiguous, suggestive of only one plausible meaning." *Furgatch* at 864. In its decision, the court repeats the narrowness of the extended definition, stating that "[the] speech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech that is merely informative is not covered by [FECA]. Finally, it must be clear what action is advocated." *Id.*

The *Furgatch* court reiterated: "We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the [FECA]'s disclosure requirements." *Id.* Thus, the court created the "reasonable minds could differ" test to limit the reach of FECA in a Constitutionally permissible manner.

The *Furgatch* standard was wishful thinking on the part of the FEC when the agency was a legal loose cannon, seeking to create standards and definitions that neither Congress nor the Supreme Court had authorized. The fact that the Commission has failed to repeal the outdated and impermissible portion of the regulation do not obviate the fact that the provision is legally unenforceable.

There are multiple examples of FEC enforcement actions and court decisions rejecting the FEC's claims of 'express advocacy' where there was no express advocacy language in the communications at issue.

In *FEC v. Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997), 52 F. Supp. 2d 45 (D.D.C. 1999) ("*Christian Coalition*"); the court rejected the FEC's definition of 'express advocacy'. The question presented was whether, in determining if the Christian Coalition made any "independent expenditures," the communication contained "express advocacy" (which must be

limited to "explicit words of advocacy" of election or defeat of a candidate, by use of phrases such as "vote for Smith") as argued by the Christian Coalition, or whether a more subjective inquiry into the "clearly intended effect" of a communication should be made, as argued by the FEC, relying on its definition adapted from *Furgatch*.

The court rejected the FEC's approach and instead adopted, consistent with other courts, a narrow 'express advocacy' test that focuses solely on the meaning of the words. See *Christian Coalition* at 61-62. ("First, the communication must in effect contain an explicit directive. . . . That effect is determined first and foremost by the words used. . . . More specifically, the 'express advocacy' standard requires focus on the verbs. . . . Second, that 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 to support the election or defeat of a clearly identified candidate."). While noting that this narrowing construction may render the FECA's regulations defining independent expenditures of limited application, the court concluded that nevertheless, the Supreme Court's decisions in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) mandated the conclusion reached by the court.

Even before the *Christian Coalition* decision, other federal courts likewise rejected FEC efforts to impose an express advocacy standard upon citizens and citizens groups who made communications that did not include a clear, electoral exhortation. See *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F. 2d 45 (2d Cir. 1980) (*en banc*); *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. V.A. 1995), *aff'd per curiam*, 92 F. 3d 1178 (4th Cir. 1996).

In *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989), ("NOW"), a 501(c)(4) organization's mailers that clearly identified candidates for election and stated opposition to these candidates' policies did not constitute express advocacy communications for purposes of applying FECA. In reaching its conclusion, the court specifically applied the "reasonable minds could differ" test promulgated in *Furgatch*. The court cited the mailers' appeals for actions other than to support or oppose candidates: join the organization, wear a special button referring to women's pay inequality, tell others about women's equality, support the organization's PAC, and sign a petition, among others. The court concluded "Because the letters are suggestive of several plausible meanings, because there are numerous pleas for action, and because the types of action are varied and not entirely clear, NOW's letters fail the express advocacy test proposed by the Ninth Circuit in *Furgatch*." *NOW* at 435. Crucially, NOW's mailers did not constitute express advocacy because, while referencing candidates, they also contained other clear encouragements for action.

Here, CSP's Ads contain *no* electoral message whatsoever, such that even the provision of the Commission's regulations incorporating *Furgatch* is inapplicable. That portion of the Commission's definition of express advocacy under paragraph (b) requires, among other elements, the existence of an 'electoral portion' within the communication. There isn't one in either of the Ads complained about by the Complainant.

There is no "unmistakable and unambiguous electoral message . . . susceptible to only one meaning...." Instead, the Ads plainly encourage the viewer to take an action other than

supporting a candidate – namely, visiting CSP’s website to learn about its views and policy advocacy and to support those views.

Argument

I. CSP’s Ads directly and explicitly encourage viewers to visit its website to support CSP’s issue advocacy. The Ads contain no electoral message in support of a candidate.

CSP was organized for the purpose of advancing a policy agenda of conservative solutions to policy issues such as tax reform, national security, repeal of Obamacare and budget restructuring. As a grassroots advocacy organization, it broadcasts its issue advocacy message to individuals to persuade citizens to support policy change related to these issues, to support legislation advanced by policy makers who share CSP’s positions, or to take action to demand change from elected officials.

The Ads constitute clear and direct advocacy for CSP and its policy program. Both Ads contain information about CSP’s viewpoint (*American Dream* contains a concise list of its agenda items) and contain a direct and explicit encouragement for the viewer to visit the organization’s website and learn more about its viewpoints and ideas. At the end of each advertisement, the viewer is directed to “learn more at conservativesolutionsproject.com”, CSP’s website. This simple statement appears on-screen and is stated by a voice-over. Like almost all modern advocacy organizations, CSP’s goal is that viewers, interest piqued by the advertisement, will visit its website, learn more about CSP and its policy proposals, and sign up for e-mail updates (to allow for follow-up communications between CSP and the viewer). In short, CSP’s goal is to assemble support and supporters for its issue advocacy.

The Ads’ encouragement that the viewer visit CSP’s website is the only explicit encouragement or call to action contained in either communication. While the Complaint alleges that the Ads constitute express advocacy in support of Sen. Rubio, any such message must be inferred from the advertisement by the viewer, because the Ads do not contain an explicit statement of support or opposition to a candidate, or even a reference to an election. For this reason, the Ads cannot constitute express advocacy under the first part of the definition contained in paragraph (a) of 11 C.F.R. § 100.22.

II. Paragraph (b) of 11 C.F.R. § 100.22 (the FEC’s express advocacy standard) is unenforceable, but even under paragraph (b), the Ads do not ‘infer’ electoral support for a candidate.

The Complaint alleges that the Ads can nonetheless be “inferred” to support Sen. Rubio’s campaign for president under the standard contained in paragraph (b) of 11 C.F.R. § 100.22 (the codification of the standard under *Furgatch*). However, as discussed above, the FEC’s reliance on this standard has been rejected by multiple courts.

But even applying the illegitimate standard contained in paragraph (b) of the Regulations, the Ads do not constitute express advocacy. Disingenuously, the Complaint does not even bother to mention the direct call to action to the viewer to visit CSP’s website. The Complaint fails to analyze how the *Furgatch* standard should be applied when, as is the case here, a

communication does not contain a direct statement of support for a candidate (one must be inferred), but the communication *does* contain an explicit and direct encouragement to take action in support of the organization sponsoring the communication.

In *NOW*, the court ruled that an issue advocacy organization may make statements that show approval or disapproval of individuals who are candidates for political office without such communications constituting express advocacy. The organization is not required to disguise or omit its opinions on leaders. Instead, under paragraph (b) of 11 C.F.R. § 100.22, these communications only become express advocacy subject to FEC jurisdiction in limited circumstances. As detailed above, several court decisions, including the court's opinion in *Furgatch*, emphasized the narrow application of the standard now codified in paragraph (b) of the Regulations.

In applying the *Furgatch* standard to a communication that contains an explicit statement in support of issue advocacy and an inference that supports a candidate, a close reading of paragraph (b) requires two separate analyses.

First, for the communication to be considered express advocacy, the suggestion or inference in support or opposition to a candidate must, without comparison to any other message contained in the communication, be "unmistakable" and "unambiguous."² The inference must be strong in an absolute sense.

Second, to meet the definition of express advocacy, the inference must also be comparatively strong compared to the other messages contained in the communication. Specifically, the inference must be significantly stronger than other messages and calls to action contained in the communication. The inference must be so strong that the communication can be "suggestive of only one meaning" (an inference of support for a candidate). The *Furgatch* standard also requires that the inference so dominate any other encouragements to other action such that reasonable minds cannot differ that the communication consists of a call to action to support the candidate.

The inference suggested by the Complaint — that the Ads constitute a call to action to vote for Rubio — fails under both analyses.

A. The inference suggested by the Complaint is not present; the only unmistakable and unambiguous inference is to view CSP's website.

The inference that the Complaint alleges to be contained in the Ads — that the viewer should vote for Rubio — is not at all "unmistakable and unambiguous". In fact, it isn't even present.

² Under a plain reading of the first prong of 11 C.F.R. § 100.22(b), the use of the conjunction "and" with the modifiers "unmistakable," "unambiguous," and "suggestive of one meaning" means that the communication must be all three to satisfy the definition.

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Greatness consists mostly of Sen. Rubio giving a speech about American greatness. The spoken content focuses on the sacrifices made by military service members, our democratic freedoms, and on America's blessings. These statements are extremely ubiquitous and completely indistinguishable from speeches made by mayors and state legislators at Rotary meetings or on Independence Day. These types of statements are also featured in furniture or car ads for Memorial Day sales. The Complaint references one statement to assert that it represents clear inference to support Rubio for president ("What is standing in the way are outdated leaders who refuse to let go of the past."), but upon review, this statement is clearly just another bead on a string of generalities.

Similar to its generic spoken content, *Greatness* features numerous patriotic shots, including a waving American flag, soldiers raising the flag at Iwo Jima, and other stock footage.

This subject matter is undeniably generic and uncontroversial. Because these statements and images are universal American rhetoric and have been used for so many different purposes — to support a presidential candidate but also to elect the local sheriff, to support veterans, or to sell cars — the statements have a limited ability to support any specific inference at all. Each statement and image can certainly be just as suggestive of supporting the CSP's direct call to action to visit its website and to join its issue advocacy efforts. The presence of a candidate repeating common statements about God Blessing America lacks the clarity of the emphatic and shrill "Don't Let Him Do It." punctuating specific criticisms of the candidate that was the subject of the *Furgatch* decision.

CSP's advertisement *American Dream* is very similar to *Greatness*. Sen. Rubio is featured as the speaker. He tells viewers that the American Dream should be expanded to include others and that the next generation has the responsibility to keep America as the greatest country in the world. Again, these are generic and oft-heard statements made by all politicians and government officials of all levels and all stripes. The Complaint asserts that Rubio's statement that "You and I were left by our parents and grandparents the greatest nation in the history of the world. It is our obligation to keep it that way." means that Rubio is suggesting that the viewer should support him for president in order to fulfill this obligation. *American Dream* also includes similar stock patriotic footage. As with *Greatness*, by their nature, these generic, well-worn rhetoric and images cannot allow for any electoral inference of any kind.

Unlike *Greatness*, *American Dream* contains some policy issues. The narrator states "New ideas for a new age. Throw out the tax code. Overhaul higher education. Repeal and Replace Obamacare." The Complaint asserts that this list supports the inference of supporting Rubio. But these issues are also CSP's policy agenda items (as well as the agenda items of numerous issue advocacy organizations). The inclusion of these policy items do not create an electoral inference to support any candidate for office.

The timing of the Ads also does not "strongly support" an inference that a viewer should support a candidate for office. The Ads were aired in late September and early October 2015 — a full three months before the beginning of the 2016 election year, with no reference to the upcoming election calendar. While in the midst of a long presidential campaign, this significant length of time before a nominating contest means that viewers are less likely to make the

inference than the readers in the *Furgatch* case may have drawn, where the communication was disseminated one week prior to the election. *Id.* at 858.

The generic rhetoric and images used in the Ads have many meanings. Combined with the presence of Sen. Rubio as speaker, a viewer may infer that CSP is supportive of Sen. Rubio's leadership on issues of concern to the organization. However, the conclusion that the advertisement is an unmistakable and unambiguous electoral message to support Sen. Rubio is also undermined by the use of generic and universal messages that lend themselves to other purposes, such as CSP's issue advocacy.

B. The Complaint's allegation that the Ads infer support for Sen. Rubio for President is preposterous when the Ad doesn't even reference a candidacy, an election, or an office sought and the only specific call to action is to visit an issue-based website.

For a communication to be express advocacy even under the *Furgatch* standard, there must be a 'strong inference' of candidate support, and stronger than any *other* potential call to action or inference. The communication must be "suggestive of only one meaning" and meet the "reasonable minds could not differ" test. Under the reasonable minds could not differ test, a communication is only express advocacy if it is sufficiently clear that the communication is encouraging the support for a candidate (as opposed to encouraging another action) such that reasonable minds could not differ as to the meaning of the communication.

The Ads clearly are not suggestive of only one meaning. In both Ads, a message other than the "support Rubio" inference is more than suggested – both Ads contain a direct, explicit and specific directive to visit CSP's website and view information about CSP so as to support CSP's issue advocacy efforts. A plain application of the phrase "suggestive of only one meaning" requires that the communication can only be interpreted to support or oppose a candidate. But the legitimate presence of an explicit encouragement to take some other action, both on screen and in voiceover, leads to the conclusion that the Ads simply do not meet this test.

This comparative aspect of the *Furgatch* standard—the comparison between an inference of supporting a candidate to the encouragement of any other action—has been interpreted to limit FEC jurisdiction from issue advocacy organizations such as CSP. When an organization can show an encouragement of other action unrelated to support or opposition to a candidate, the language in paragraph (b) of 11 C.F.R. § 100.22 and the *NOW* ruling allows the organization to operate without triggering the definition of express advocacy.

CSP's Ads are similar to the mailers at issue in *NOW* and the *NOW* holding should apply to CSP. In *NOW*, the court determined that an organization's mailers that simultaneously criticized the incumbent president and his policies in an election year while implying that supporters needed to defeat these opponents did not constitute express advocacy because the mailers also encouraged other actions. Similarly, the Ads contain references to Sen. Rubio (and like the organization in *NOW*, an astute viewer knows where CSP's sympathies lie), the key issue is that CSP's communications contain a direct and explicit encouragement to engage in action related to its issue advocacy. Because it does, the Ads are not express advocacy communications.

Conclusion and Request for Dismissal

The allegations contained in the Complaint are without merit for the reasons set forth above and there is and was no violation of FECA. Respondents respectfully request that the FEC find no reason to believe that a violation has occurred as to the Complaint, dismiss the Complaint and close the MUR.

Submitted this 20th day of January, 2016.

Respectfully Submitted,

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