



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

DEC 14 2005

B. Holly Schadler, Esq. and Michael B. Trister, Esq.
Lichtman, Trister & Ross, PLLC
1666 Connecticut Avenue, N.W., Fifth Floor
Washington, DC 20009

RE: MUR 5634
Sierra Club, Inc.

Dear Ms. Schadler and Mr. Trister:

Based on a complaint filed with the Federal Election Commission on December 28, 2004, and information supplied by your client, Sierra Club, Inc., the Commission, on September 20, 2005, found that there was reason to believe Sierra Club, Inc. violated 2 U.S.C. § 441b(a).

The Office of the General Counsel is now prepared to recommend that the Commission find probable cause to believe that these violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief that you may submit will be considered by the Commission before proceeding to a vote on whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Roy Q. Lockett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Lawrence H. Norton
General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

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4 In the Matter of)
5)
6 Sierra Club, Inc.) MUR 5634
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8 **GENERAL COUNSEL'S BRIEF**
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10 **I. INTRODUCTION**

11 On September 20, 2005, the Federal Election Commission ("Commission") found reason
12 to believe that Sierra Club, Inc. ("Sierra Club") violated 2 U.S.C. § 441b(a) by making a
13 prohibited corporate expenditure for a 2004 express advocacy communication entitled "Let your
14 Conscience be your Guide." Based on a review of the facts and circumstances involving the
15 Sierra Club's communication in issue, this Office is prepared to recommend that the Commission
16 find probable cause to believe that the Sierra Club violated 2 U.S.C. § 441b(a).

17 **II. ANALYSIS**

18 **A. Background Information**

19 The Sierra Club is a non-profit corporation based in California. On its website, the Sierra
20 Club states that it has over 750,000 members and is "America's oldest, largest and most
21 influential grassroots environmental organization." www.sierraclub.org/inside/. In response to
22 the complaint, the Sierra Club acknowledged that it had distributed a pamphlet entitled "Let your
23 Conscience be your Guide" ("Conscience").

24 The "Conscience" pamphlet prominently leads with exhortations to the reader to "LET
25 YOUR CONSCIENCE BE YOUR GUIDE," and "LET YOUR VOTE BE YOUR VOICE,"
26 accompanied by pictures of gushing water, picturesque skies, a forest of tall trees, and people
27 enjoying nature. (Emphasis in original). It then compares President Bush's and Senator Kerry's

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environmental records in three categories: (1) Toxic Waste Cleanup, (2) Clean Air, and (3) Clean Water, showing a marked preference for Senator Kerry's record. For example, in the category of "Toxic Waste Cleanup," it touts Kerry as a "leader on cleaning up toxic waste sites" and credits him with co-sponsoring legislation that would unburden taxpayers and "hold polluting companies responsible for paying to clean up abandoned toxic waste sites." In contrast, the description of President Bush's record on the same subject charges that "President Bush has refused to support the 'polluter pays' principle, which would require corporations to fund the cleanup of abandoned toxic waste sites, including the 51 in Florida. Instead, he has required ordinary taxpayers to shoulder the cleanup costs." Similarly under the subject of "Clean Air," Senator Kerry is praised for "support[ing] an amendment that would block President Bush's change to weaken the Clean Air Act," and with co-sponsoring legislation "which would force old, polluting power plants to clean up." Again, in sharp contrast, President Bush's position on "Clean Air" is described as "weakening the law that requires power plants and other factories to install modern pollution controls when their plants are changed in ways that increase pollution." In each of three categories, the pamphlet assigns a "checkmark symbol" in one or two boxes next to either one or both candidates; of the two candidates, only Senator Kerry receives checkmarks in every box in all three categories (Toxic Waste Cleanup, Clean Air, and Clean Water), whereas President Bush receives only one checkmark in a single category (Clean Air), and in that category, there are two checkmarks for Kerry.

To the right of the comparisons between Kerry and Bush, the "Conscience" pamphlet also compares U.S. Senate candidates from Florida, Mel Martinez and Betty Castor, in three categories: (1) Toxic Waste Cleanup, (2) Clean Air, and (3) Energy. Ms. Castor's environmental record in all three categories is presented favorably, with a checkmark in all three boxes next to

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her position, while Mr Martinez does not receive any checkmarks¹ The pamphlet concludes with: "Find out more about the candidates before you vote. Visit www.sierraclubvotes.org." The communication states that it was "[p]aid for by the Sierra Club."²

B. There is Probable Cause to Believe the Sierra Club Violated 2 U.S.C. § 441b(a) By Making a Prohibited Corporate Expenditure for an Express Advocacy Communication

Pursuant to the Federal Election Campaign Act of 1971, as amended (the "Act"), an "independent expenditure" is an expenditure by a person expressly advocating the election or defeat of a clearly identified person that is not made in concert or cooperation with, or at the suggestion of, the clearly identified candidate, the candidate's authorized political committee, or their agents, or a political party committee and its agents 2 U.S.C. § 431(17); see 11 C.F.R. § 100.16(a) The Act generally prohibits any corporation from making an expenditure in connection with any election to any political office. 2 U.S.C. § 441b(a).

The Commission's regulations define express advocacy at 11 C.F.R. § 100.22. The first part of the regulation defines "expressly advocating" as a communication that uses phrases such as "vote for the President," or "support the Democratic nominee" , or individual word(s),

¹ For example, in the category of "Toxic Waste Cleanup," Ms Castor is praised for her support of the "polluter pays" principle to make corporate polluters, not U S taxpayers, pay to clean up abandoned toxic waste sites" Likewise, in the category of "Clean Air," she is praised for "pledg[ing] to address air pollution by placing caps" on various emissions For Mr Martinez, the mailer states that there is "no stance on record" relating to "Toxic Waste Cleanup" or "Clean Air" In the area of "Energy," Ms Castor purportedly "[s]upports a greater commitment to alternative energy," while Mr Martinez purportedly supports legislation "which gave millions in subsidies to the oil and coal industries, but made minimal investments in clean alternative energy technologies "

1 which in context can have no other reasonable meaning than to urge the election or defeat of one
2 or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc.
3 which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 C.F.R.
4 § 100.22(a). The second part of this regulation encompasses a communication that, when taken
5 as a whole or with limited reference to external events, "could only be interpreted by a reasonable
6 person as containing advocacy of the election or defeat of one or more clearly identified
7 candidate(s) because" it contains an "electoral portion" that is "unmistakable, unambiguous, and
8 suggestive of only one meaning," and one as to which "reasonable minds could not differ as to
9 whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or
10 encourages some other kind of action." 11 C.F.R. § 100 22(b).

11 The "Conscience" pamphlet contains express advocacy, as analyzed under both prongs of
12 the regulation. Turning first to 100.22(a), the pamphlet provides "in effect" an explicit directive
13 to vote for those candidates whose positions have been identified as in accord with those of the
14 sponsoring organization. In *FEC v Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986)
15 ("MCFL"), the Supreme Court held that a newsletter that set out the positions of the candidates,
16 highlighting and identifying those candidates whose pro-life views were consistent with those of
17 MCFL, and then urged voters to "VOTE PRO-LIFE!" provided "in effect an explicit directive" to
18 vote for the candidates favored by MCFL, and hence, contained express advocacy. The Court
19 reasoned that the newsletter could not "be regarded as a mere discussion of public issues that by
20 their nature raises the names of certain politicians." *Id* Rather, the newsletter went "beyond
21 issue discussion to express advocacy. The disclaimer of endorsement cannot negate this fact."

22 *Id*

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1 Similarly, in this matter, despite addressing environmental issues, the "Conscience"
2 pamphlet cannot "be regarded as a mere discussion of public issues that by their nature raises the
3 names of certain politicians." The pamphlet portrays protecting the environment as a matter of
4 conscience, with the words "LET YOUR CONSCIENCE BE YOUR GUIDE," accompanied by
5 scenic photographs of nature; it also highlights by means of checkmarks those candidates whose
6 pro-environment records meet the dictates of conscience and directs voters to "LET YOUR
7 VOTE BE YOUR VOICE." As in *MCFL*, the pamphlet's message is "marginally less direct
8 than vote for" Kerry and Castor, but that "does not change its essential nature." *MCFL* at 249.

9 The "Conscience" pamphlet is also similar to the mailing in *FEC v Christian Coalition*,
10 52 F. Supp. 2d 45, 62 (D D.C. 1999) ("*Christian Coalition*"). There, the district court
11 considered a mailing from the Christian Coalition that enclosed a "Scorecard" indicating whether
12 candidates in various Congressional races supported the Christian Coalition's positions on a
13 number of issues. The letter stated that the recipient of the mailing need not bring the Scorecard
14 to the voting booth for the congressional primary election (as the recipient should for other races
15 addressed in the scorecard), "because only one incumbent is being challenged, Newt Gingrich,
16 and he is a '100 percenter.'" See *Christian Coalition*, 52 F.Supp.2d. at 65. In concluding that
17 the letter was express advocacy, the court reasoned that "[w]hile marginally less direct than
18 saying 'Vote for Newt Gingrich,' the letter in effect is explicit that the reader should take with
19 him to the voting booth the knowledge that Speaker Gingrich was a 'Christian Coalition 100
20 percenter' and therefore the reader should vote for him." *Id.* Similarly, the mailer at issue here
21 shows Senator Kerry and Betty Castor as supporting the Sierra Club's positions for each and
22 every issue presented, while simultaneously exhorting the reader to "LET YOUR CONSCIENCE
23 BE YOUR GUIDE ... AND LET YOUR VOTE BE YOUR VOICE." It is equivalent to

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1 designating Kerry and Castor as the Sierra Club's "100 percenters" and, just as with the Christian
2 Coalition mailer, it in effect urges the reader to vote for them.

3 The "Conscience" pamphlet also contains express advocacy under section 100.22(b). It
4 was distributed before the November 2, 2004 General Election and identifies the two leading
5 candidates for President and U.S. Senate in Florida, respectively. With limited reference to these
6 factors, as well as to the Sierra Club's well-known stance supporting legislation aimed at
7 protecting the environment, the electoral portion of this communication—"LET YOUR
8 CONSCIENCE BE YOUR GUIDE and LET YOUR VOTE BE YOUR VOICE"—is
9 "unmistakable, unambiguous, and suggestive of only one meaning": vote for Senator Kerry and
10 Betty Castor. Moreover, reasonable minds could not differ as to whether the pamphlet
11 encourages readers to vote for Senator Kerry and Betty Castor or encourages some other kind of
12 action. Although the pamphlet concludes by directing the reader to "Find out more about the
13 candidates before you vote. Visit www.sierrclubvotes.org," this tag-line, viewed in the context
14 of the whole communication, does not convert the pamphlet into a mere starting point for further
15 information.³

16 We are mindful that one could argue that the "reasonable mind" of a voter opposing
17 proposed environmental legislation or favoring looser environmental regulation could regard the
18 words "LET YOUR CONSCIENCE BE YOUR GUIDE and LET YOUR VOTE BE YOUR
19 VOICE," with the accompanying voting records and checkmarks, as encouragement to vote for
20 President Bush and Mel Martinez. However, even in that case, the action encouraged is voting in
21 a particular way. The "reasonable mind" standard need not encompass every possible

³ When accessed, the "sierrclubvotes" website contains the same type of information as the pamphlet, with a focus on President Bush's "negative" environmental record and Senator Kerry's "favorable" environmental stance

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1 explanation that a creative individual might conjure. Courts routinely apply “reasonable person”
2 tests as objective tests that do not depend upon the preference of any one person or group,
3 including the specific people involved in the lawsuit at issue. *See, e.g., Wyatt v. Cole*, 504 U.S.
4 158, 166 (1992). We think the “reasonable mind” viewing the “Conscience” pamphlet “could
5 only [interpret]” this pamphlet “as containing advocacy of the election” of Senator Kerry and
6 Betty Castor. *See* 11 C.F.R. § 100.22(b).

7 In concluding that the “Conscience” pamphlet contains express advocacy, we also
8 considered MUR 5154 (“Sierra Club I”), a case concluded in 2003, and the accompanying
9 Statements of Reasons. In Sierra Club I, the Commission considered whether a mailer
10 distributed by the Sierra Club before the 2000 General Election contained express advocacy. The
11 top of the mailer carried the statement: “Before you vote on November 7 Know Their Record on
12 the Environment.” The mailer then pictured and identified Senator Robb as the incumbent, and
13 his opponent, George Allen, as a “candidate for Virginia Senate,” and underneath their pictures
14 described each candidate’s record on a number of environmental issues. Robb’s record received
15 three checkmarks, indicating that as to those issues, he “supports Sierra Club position,” and
16 Allen received one checkmark and two “thumbs down,” the latter indicating that as to those
17 issues, he “opposes Sierra Club position.” The mailer also provided a percentage rating (77% for
18 Robb, 13.5% for Allen) based on the candidate’s environmental voting records in Congress. At
19 the bottom of the page, the Sierra Club I voting guide stated “Sierra Club. Protect Virginia’s
20 environment, for our families, for the future.”

21 The Office of General Counsel concluded that this mailer contained express advocacy
22 pursuant to section 100.22(a), based largely on the reasoning found in *MCFL* and *Christian*
23 *Coalition*, and therefore recommended that the Commission find reason to believe that the Sierra

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1 Club violated the Act by making prohibited corporate expenditures. In Sierra Club I, after voting
2 3-3 on the substantive recommendations, the Commission voted 6-0 to dismiss the matter. Those
3 Commissioners voting to approve the substantive recommendations and those voting not to
4 approve them then issued separate Statements of Reason.

5 In analyzing the communication in Sierra Club I, those Commissioners who concluded
6 there was no express advocacy considered only section 100.22(a), noting that section 100.22(b)
7 had been declared unconstitutional by courts in the First and Fourth Circuits, and they also cited
8 cases defining "express advocacy" narrowly to include only communications with explicit words
9 of advocacy (*i.e.*, magic words). See Statement of Reasons by Commissioners Smith, Mason,
10 and Toner in MUR 5154 (Sierra Club), at 2. According to those Commissioners, "The better
11 view is to conclude that [the communication in Sierra Club I] does not fall within the narrow
12 confines of 'express advocacy' as articulated in cases and our regulations." *Id* at 3. Their
13 determination also rested in part on their concern that

14 [w]ere we to adopt the approach set forth in the General Counsel's report... then
15 any group's voter guide that announced an upcoming election, set forth the records
16 of candidates, and set forth the group's issue preferences would seem to become
17 "express advocacy." This approach would effectively make it impossible for any
18 group to publish a meaningful voter guide.

19
20 *Id*

21
22 Subsequent to the issuance of that Statement of Reasons, the Supreme Court decided
23 *McConnell v FEC*, 124 S.Ct. 619 (2003). In discussing express advocacy for another purpose,
24 the Court concluded that express advocacy is a statutory construction, not a constitutional

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boundary for the regulation of election-related speech.⁴ 124 S.Ct. at 688. The Court explained:

A plain reading of *Buckley*⁵ makes clear that the express advocacy limitation ... was the product of statutory interpretation rather than a constitutional command. [O]ur decisions in *Buckley* and *MCFL*⁶ were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.

Id. at 688.

The circuit courts cited in the Statement of Reasons as having found section 100.22(b) invalid appeared to proceed, at least in part, from an understanding that express advocacy is a constitutional imperative and that accordingly, under the First Amendment, "FEC restriction of election activities was not to be permitted to intrude *in any way* upon the public discussion of issues." *Maine Right to Life Comm., Inc. v FEC*, 914 F. Supp. 8, 12 (D. Maine 1996) (emphasis added), *aff'd*, 98 F.3d 1 (1st Cir. 1996); *see also Virginia Society for Human Life v. FEC*, 263 F 3d 379, 391-92 (4th Cir. 2001). To that extent, these prior decisions were wrongly

⁴ The *McConnell* Court discussed express advocacy principally to afford context in evaluating the constitutionality of an alternative standard for determining when communications are intended to influence voters' decisions and have that effect. *McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than did the Court in *Buckley v Valeo*, 424 U S 1 (1976). For example, the Court did not illuminate the permissible use of context and timing to discern what speech is or is not express advocacy. Such considerations are unavoidable. The phrase "Support President Bush," for example, had a vastly different meaning two days before Election Day than it did two days after Election Day. Importantly, *McConnell* also did not address the validity of section 100 22(a) or (b), nor cite the Commission's regulation for any purpose.

⁵ In *Buckley*, to avoid constitutional overbreadth or vagueness problems, the Supreme Court construed certain provisions of the Act "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U S at 80.

⁶ In *MCFL*, the Supreme Court held that to avoid constitutional overbreadth or vagueness problems, a corporate expenditure for a general public communication, if made independent of a candidate and/or his campaign committee, "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249.

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1 reasoned, which at the very least raises a question as to whether these courts would reach the
2 same conclusion today.⁷

3 Presumably, too, a court now addressing a constitutional challenge to section 100.22(b)
4 would have to account for the Supreme Court's decision upholding the "promote, support, attack,
5 or oppose" standard against a constitutional vagueness challenge, as the Court found that the
6 standard "give[s] [a] person of ordinary intelligence a reasonable opportunity to know what is
7 prohibited." 124 S.Ct. at 675, n. 64 (quoting *Grayned v City of Rockford*, 408 U.S. 104 108-109
8 (1972)). Likewise, a court now addressing a constitutional challenge to section 100.22(b) would
9 have to account for *McConnell's* decision upholding BCRA's electioneering communication
10 provision against a constitutional overbreadth challenge. In upholding that provision, *McConnell*
11 acknowledged that the definition of electioneering communication would cover some ads which
12 have no electioneering purpose, but noted that "whatever the precise percentage [of such ads]
13 may have been in the past, in the future, corporations and unions may finance genuine issue ads
14 during those time frames by simply avoiding any specific reference to federal candidates, or in
15 doubtful cases, by paying for the ad from a segregated fund." *Id.* at 696.

16 By its very terms, section 100.22 is a carefully tailored provision,⁸ and everything that the
17 Supreme Court said in *McConnell* about the nature of express advocacy applies to this regulation.

⁷ In any event, the "Conscience" pamphlet was distributed in the Eleventh Circuit, which has never addressed the question of the constitutionality of section 100.22(b). Absent a ruling in that circuit that the regulation is invalid, the Commission is bound to apply its regulations to matters before it. See *Chamber of Commerce v FEC*, 69 F 3d 600, 603 (D C Cir 1995), *Reuters Ltd v FCC*, 781 F 2d 946, 950 (D C Cir 1986), *US v Mendoza*, 464 U S 154 (1984) (holding that an adverse ruling against the federal government in one circuit does not prevent the government from litigating the same issue before another circuit court)

⁸ Express advocacy, in addition to being used as a narrowing construction applied by the Supreme Court in *Buckley* and *MCFL*, is also itself a statutory term. See 2 U S C §§ 431(17) (definition of "independent expenditure"); 441d (disclaimer requirements). Accordingly, the Commission possesses broad authority to interpret the term, to "formulate policy" on it, 2 U S C § 437c(b)(1), and "to make, amend, and repeal such rules .. as are necessary" regarding it, 2 U S C § 437d(a)(8). See also 2 U S C §§ 438(a)(8), 438(d).

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1 In particular, section 100 22 is consistent with *McConnell*'s emphasis on the language contained
2 in express advocacy communications. Section 100.22(a), for example, contains the specific
3 phrases from *Buckley* that *McConnell* noted are "examples of words of express advocacy ... that
4 eventually gave rise to what is now known as the 'magic words' requirement." *McConnell*, 124
5 S.Ct. at 687. Section 100.22(a) also covers words "which in context can have no other
6 reasonable meaning than to urge the election or defeat" of a candidate. Similarly, section
7 100.22(b) covers communications that contain an "electoral portion" that is "unmistakable,
8 unambiguous, and suggestive of only one meaning" and about which "reasonable minds could
9 not differ as to whether it encourages actions to elect or defeat" a candidate. These restricting
10 terms ensure that section 100 22(b) will encompass only a "tiny fraction of the political
11 communications made for the purpose of electing or defeating candidates during a campaign."⁹
12 124 S.Ct. at 702.

13 Finally, the concern expressed in the Statement of Reasons that the recommended
14 approach in *Sierra Club I* "would effectively make it impossible for any group to publish a
15 meaningful voter guide," has proven to be unfounded. The Commission found no reason to
16 believe that the Sierra Club violated 2 U.S.C. § 441b(a) in connection with its pamphlet entitled
17 "The Dirt," which the Sierra Club described in its response to the complaint as a voter guide.
18 Thus, corporations are in fact able to publish meaningful voter guides, even ones showing
19 preferences for particular candidates' records, without crossing the line into express advocacy.

⁹ The Court found that advertisers easily evade the express advocacy test, and in that respect it has become "functionally meaningless " 124 S Ct at 689. This observation was nothing new The limits of the express advocacy test were acknowledged in *Buckley* and have been noted by courts ever since See *id*

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Based on the foregoing factual and legal analysis, this Office is prepared to recommend that the Commission find that there is probable cause to believe that Sierra Club made a prohibited corporate expenditure, in violation of 2 U.S.C. § 441b(a).

III. GENERAL COUNSEL'S RECOMMENDATION

1. Find probable cause to believe Sierra Club, Inc. violated 2 U.S.C. § 441b(a) in connection with the publication and distribution of the pamphlet entitled "Let your Conscience be your Guide."

12/14/05
Date

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