CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

October 22, 2008

Via Facsimile
Mary W. Dove, Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
Facsimile No. (202) 208-3333

Re: Comments of the Center for Competitive Politics
Draft Advisory Opinion 2008-15 (Agenda Doc. No. 08-32)

Dear Ms. Dove:

On behalf of the Center for Competitive Politics, I respectfully submit the following comments with respect to the Draft Advisory Opinion 2008-15 (Agenda Document No. 08-32), which is scheduled to be on the Federal Election Commission's agenda for its public meeting of October 23, 2008. Pursuant to the Commission's requirements, I am also sending a duplicate copy of these comments via facsimile to the Office of General Counsel.

As the Commission is aware, the advisory opinion was requested by the National Right to Life Committee, Inc. (NRLC), "a non-stock, not-for-profit corporation, exempt from Federal taxes under 26 U.S.C. § 501(c)(4)," which is also "not a 'qualified non-profit corporation'" under the Commission's regulations. Specifically, NRLC requested the Commission's advice as to whether NRLC could "use general treasury funds to fund the broadcast of [two] ads" in the "weeks leading up to the November 2008 general election." AOR 2008-15, at 1. The ads are "nearly identical," DAO 2008-15 (Agenda Doc. No. 08-32), at 3, with both scripts referring to Barack Obama and questioning his position in being "responsible for killing a bill to provide care and protection for babies who were born alive after abortions" and "later misrepresent[ing] the bill's content," DAO at 2-3, see also AO 2008-15, at 2-3. Both ads also refrain from using any language that explicitly "urge[s] the election or defeat ... of [a] clearly identified candidate[ ]." 11 C.F.R. § 100.22(a). Indeed, as the Draft Advisory Opinion acknowledges, "[t]he only difference between" the two ads "is that [the second ad] features a concluding sentence that reads: 'Barack Obama: a candidate whose word you can't believe in.'" DAO 2008-

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15, at 3 (quoting script). The advice sought by the NRLC was (1) whether the broadcast of either ad would constitute "a prohibited 'electioneering communication," or (2) whether either ad would constitute a "prohibited corporate expenditure" because in either or both cases the ads "contain express advocacy as defined by 11 C.F.R. § 100.22(b). AOR 2008-15, at 4.

In answering these questions, the Draft Advisory Opinion concludes that the first advertisement (omitting the concluding line of the second ad) (1) "does not contain express advocacy and, therefore, the funding of its broadcast would not constitute an expenditure," and (2) "would be a permissible corporate-funded electioneering communication." DAO 2008-15, at 4. However, based solely on the inclusion of a last line stating "Barack Obama: a candidate whose word you can't believe in," the Draft Advisory Opinion concludes that the second advertisement "contains express advocacy and, therefore, the funds used to finance its broadcast would constitute an expenditure." *Id.* As a result, the Draft Advisory Opinion instructs that "the NRLC may not use general treasury funds to finance its broadcast because corporations are banned from expressly advocating the defeat of a clearly identified candidate in communications to the general public." *Id.* at 4-5. While the Center for Competitive Politics agrees with the analysis and conclusion of the Draft Advisory Opinion with respect to the first ad, the analysis and conclusion with respect to the second is extremely troubling.

The Draft Advisory Opinion rests its conclusion that the second ad constitutes "express advocacy" on a more than two decades old Ninth Circuit decision and a more than decade old regulation that both have been thoroughly discredited by multiple courts. Indeed, in setting forth the legal analysis to be applied, the Draft Advisory Opinion relies exclusively on the *Furgatch* decision and regulation Section 100.22(b) in stating that "a communication contains express advocacy if it has an 'electoral portion' that is 'unmistakable, unambiguous, and suggestive of only one meaning' and if '[r]easonable minds could not differ as to whether it encourages actions to elect of defeat [a candidate] or encourages some other kind of action.'" DAO 2008-15, at 6 (quoting 11 C.F.R. § 100.22(b), and citing *Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987)). The Draft Advisory Opinion then goes on to find that "the inclusion of the concluding sentence in [the NRLC's second ad] gives the advertisement an 'unmistakable, unambiguous' electoral portion[,] ... significantly alter[ing] the tone of the advertisement, focusing it as much on Senator Obama's bid for the presidency as his actions as a State legislator." DAO 2008-15, at 8. The Draft Advisory Opinion also interprets the second ad as "manipulat[ing] Senator Obama's campaign slogan — 'Change we can believe in' — to attack his character and call into question his trustworthiness as 'a candidate whose word you can't believe in.'" *Id.* It is because of "these factors" — for which only *Furgatch* and Section 100.22(b) are cited in support — that the Draft Advisory Opinion concludes the second "advertisement contains express advocacy." *Id.* at 9. But, quite simply, *Furgatch* has been discredited in many circuit courts of appeal and other courts of record, while some commentators believe that *Furgatch* marks the outer bounds of Section 100.22(a) express advocacy because it's

call to action leaves the listener with only one way to respond accordingly: to defeat then-President Carter. Whether or not *Furgatch* marks the outer bounds of Section 100.22(a) express advocacy, the Commission's rule at Section 100.22(b) is not faithful even to the Ninth Circuit's ruling in *Furgatch*, let alone express advocacy as understood by Supreme Court and the vast majority of federal circuit courts of appeal. Thus, the Draft Advisory Opinion's conclusion is mistaken not only because both *Furgatch* and Section 100.22(b) have been undermined and discredited, but also because the second ad in question here does not include an implicit call to action as required by *Furgatch* for express advocacy.

It is important for the Commission to understand the overwhelming and all but unanimous extent to which both *Furgatch* and 11 C.F.R. 100.22(b) have been discredited — which means that the Commission should not rely on them in issuing advice that core political speech is regulable. As noted by the Fourth Circuit now more than five years ago, "[t]his circuit, along with many of our sister circuits, has rejected the expanded view of express advocacy adopted by the Ninth Circuit" in *Furgatch*, and later by the Federal Election Commission in Section 100.22(b). *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 426 (4th Cir. 2003) (citing *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 194 (5th Cir. 2002); *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 391 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386-87 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *Faucher v. Fed. Election Comm'n*, 928 F.2d 468, 471 (1st Cir. 1991)). Indeed, it was only last week that the U.S. District Court for Southern District of West Virginia preliminarily enjoined the West Virginia statutory definition of "[e]xpressly advocating" — that was nearly identical to 11 C.F.R. 100.22(b), as well as the supporting language from *Furgatch* — because the challengers were "likely to prevail on their claim that [the express advocacy definition] [wa]s unconstitutionally vague on its face." *Center for Individual Freedom v. Ireland*, No. 1:08-cv-00190 & *West Virginians for Life, Inc. v. Ireland*, No. 1:08-cv-1133 (consolidated), Mem. Op. (dated Oct. 17, 2008), at 23, *see also generally id.* at 16-23 (explaining preliminary injunction of W. VA. CODE § 3-8-1a(13)(B)); Preliminary Injunction Order (dated Oct. 17, 2008), at 2 (enjoining W. VA. CODE § 3-8-1a(13)(B) as "unconstitutionally vague on its face")). This latest decision is just another drop in the already full bucket of decisions that have undermined both Section 100.22(b) and *Furgatch* to the point of being utterly irredeemable absent specific approval from Congress or the Supreme Court. *See, e.g., McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d. 176, 601 (Kollar-Kotelly, J) (noting that courts rejecting 11 C.F.R. § 100.22(b) "held that neither they nor the FEC had the authority to change the express advocacy test, concluding that to do so required further congressional or Supreme Court action").[1]

[1] Though the Draft Advisory opinion does not do so here, there have been suggestions by the Commission and commentators in the past that the Supreme Court's decision in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), somehow served as validation of the relaxed

Given this state of legal decisions, the Commission really must not only be cognizant of the contrary legal precedent, but also be careful not to issue opinions — such as the Draft Advisory Opinion here — advising that speech is regulable under Section 100.22(b), as supported by *Furgatch*, because neither that decision nor that regulation correctly states the express advocacy standard for vast swaths of the country. As even a quick Westlaw or Lexis search will demonstrate, the *Furgatch* decision has been explicitly criticized and rejected in both the Fourth and Fifth Circuits — not to mention by several state courts of record — and, more broadly, the context-based express advocacy approach endorsed by both *Furgatch* and Section 100.22(b) has been rejected in the First, Second, Fourth, Fifth, Eighth, and Tenth Circuits. *See supra.* This means that in a majority of these United States — 28 of the 50 states, plus Puerto Rico — cases decided by the applicable circuit court of appeals instruct that "express advocacy" is limited to those communications that explicitly urge the election or defeat of an identified candidate. Nevertheless, the Draft Advisory Opinion here persists in not only exclusively citing *Furgatch* and Section 100.22(b) to the exclusion of contrary precedent, but also in applying a relaxed and rejected standard across the entirety of the United States — a result that is extremely controversial at best and wholly unsupportable at worst. Indeed, the Commission should keep in mind that the Draft Advisory Opinion concludes that the NCRL's speech in the form of its second ad is not just regulable but prohibited since the ad is express advocacy, thereby constituting an expenditure, which a corporation cannot make.

While it is true that the Ninth Circuit has not yet overruled *Furgatch*, that decision is an isolated "sole departure ... among [the] circuits" from a "bright-line approach," which finds "express advocacy" in "only those communications containing explicit words advocating the election or defeat of a particular candidate." *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187, 193; *see also id.* at 193-96 (explaining "that the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment as interpreted" by the

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context-based definition of express advocacy in Section 100.22(b). But *McConnell* did no such thing. Rather, *McConnell* held only that Congress could regulate beyond the narrow bounds of express advocacy — as defined by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 43-44, n.52, 80 — to get at its "functional equivalent." And, thus far, Congress has only regulated the "functional equivalent" of express advocacy through the "electioneering communications" provisions, not by amending and expanding the definition of "expenditure" that was construed and narrowed by the Supreme Court in *Buckley*. As a result, neither Congress nor the Supreme Court has validated the approach to express advocacy taken in Section 100.22(b), which explains why lower courts continue to enjoin and/or strike down relaxed context-based tests for express advocacy or expenditures. *See, e.g., North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 280-86 (2008); *Center for Individual Freedom v. Ireland*, No. 1:08-cv-00190 & *West Virginians for Life, Inc. v. Ireland*, No. 1:08-cv-1133 (consolidated), Mem. Op. (dated Oct. 17, 2008), at 16-23.

Supreme Court). In other words, neither *Furgatch* nor Section 100.22(b) supports prohibition of the second NCRL ad in every jurisdiction across the country.

Moreover, even accepting *Furgatch* on its own terms, the second ad at issue here does not amount to express advocacy that would be regulable as an expenditure because it does not contain a required call to action. As the *Furgatch* specifically noted:

> "[S]peech may only be termed 'advocacy' if it presents a clear plea for action, and ... it must be clear what action is advocated. 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. We emphasize that if any reasonable alternative reading of the speech can be suggested, it cannot be express advocacy ..."

Furgatch, 807 F.2d at 864. The *Furgatch* Court went on to apply that standard to the anti-Carter advertisement at issue there by further explaining:

> "We have no doubt that the ad asks the public to vote against Carter. ... The bold print of the advertisement pleads: 'Don't let him do it.' ... The pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it. The words we focus on are 'don't let him.' They are simple and direct. 'Don't let him' is a command. The words 'expressly advocate' action of some kind. If the action that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the Campaign Act."

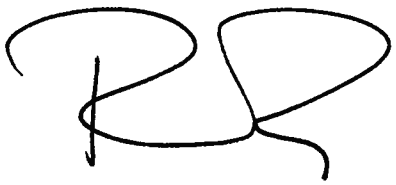
Id. at 864-65. The *Furgatch* Court then went on to hold that the ad at issue constituted express advocacy because the ad included "an express call to action," which "[r]easonable minds could not dispute ... is urging readers to vote against Jimmy Carter." *Id.* at 865. Indeed, the *Furgatch* Court emphasized that voting against Carter "was the only action open to those who would not 'let him do it.' ... [T]he only way to not let him do it was to give the election to someone else." *Id.* Of course, the same is not true of the second NRLC ad at issue that is at issue in this Advisory Opinion Request, and thus it cannot constitute express advocacy even under *Furgatch*'s own terms.

The NRLC's second ad is, as the Draft Advisory Opinion notes, "nearly identical" to the first ad, except that the second ad "features a concluding sentence that reads 'Barack Obama: a candidate whose word you can't believe in.'" DAO 2008-15, at 3. But this last additional sentence in the second ad does not insert any new call to action, nor does it even suggest that the only way for the listener to act is to vote against Obama. Indeed, viewed side-by-side, it is clear that the only possible call to action in both of the NRLC advertisements comes in the penultimate

section, in which "Female 1" asks: "Will Obama now apologize for calling us liars when we were the ones telling the truth?" DAO 2008-15, at 2, 3. Not only is this call to action not at all electorally related, but it is also not a call to action for the listener to act, it is a call for Obama to apologize. Nevertheless, the Draft Advisory Opinion concludes that "the advertisement contains express advocacy" because "reasonable minds could not differ about the [electoral] actions the advertisement is encouraging listeners to take." DAO 2008-15, at 8-9. Quite frankly, it is hard to understand how the Draft Advisory Opinion reaches that conclusion, especially under *Furgatch*, which held in — in the context of a "close call" — that an "express call to action" with a reasonably undisputable electoral component was necessary and required. *Furgatch*, 807 F.2d at 861, 865. Thus, we would suggest that the Commission reconsider this analysis.

In short, the Center for Competitive Politics finds it troubling that the Draft Advisory Opinion ignores a significant precedential conflict that is readily apparent, and that it misconstrues the primary case and regulation cited in support of its conclusion. These concerns should be troubling to everyone, but especially to the Commission, whose duty it is to implement the Federal Election Campaign Act as enacted by the elected branches and interpreted by the judicial branch. Therefore, the Center for Competitive Politics requests that the Commission seriously reconsider whether it is appropriate to issue the current Draft Advisory Opinion that relies on such a tenuous rationale.

Respectfully submitted,



Reid Alan Cox
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cc: Office of General Counsel
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