

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)		
CITIZENS FOR RESPONSIBILITY AND)		
ETHICS IN WASHINGTON, <i>et al.</i> ,)		
)	
Plaintiffs,)		Case No. 1:18-00076
)	
v.)		
)	
FEDERAL ELECTION COMMISSION,)		
)	
Defendant.)		
_____)		

**DECLARATION OF STUART C. MCPHAIL
IN SUPPORT OF PLAINTIFFS’ REPLY BRIEF IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT’S
CROSS-MOTOIN FOR SUMMARY JUDGMENT**

I, STUART C. MCPHAIL, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am an attorney licensed to practice law in the District of Columbia, California, and New York. I am admitted to practice before this Court. I am counsel of record for Plaintiffs Citizens for Responsibility and Ethics in Washington and Noah Bookbinder. I am personally familiar with the facts set forth herein, unless the context indicates otherwise.

2. Attached hereto as Exhibit 1 is a true and correct copy of an excerpt from the Brief of the FEC, filed in *FEC v. National Rifle Association of America*, No. 00-5163 (D.C. Cir. Nov. 21, 2000).

3. Attached hereto as Exhibit 2 is a table summarizing matters under review made available on the FEC website that I or my assistant could locate where the OGC recommended finding reason to believe that one or more respondents failed to register and report as a political

committee, and that were closed after Commissioner Hunter joined the Commission. The chart is provided as a helpful summary, but all original materials may be located on the FEC's website at <http://eqs.fec.gov/eqs/searcheqs>.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 2018 at Washington, D.C.

/s/ Stuart McPhail _____
Stuart C. McPhail

Exhibit 1

PERMANENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NOV 21 2000
RECEIVED

ORAL ARGUMENT SCHEDULED FOR FEB. 2, 2001

No. 00-5163

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED NOV 21 2000
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL ELECTION COMMISSION,

Plaintiff-Appellee,

v.

NATIONAL RIFLE ASSOCIATION OF AMERICA,
NATIONAL RIFLE ASSOCIATION INSTITUTE
FOR LEGISLATIVE ACTION, and NATIONAL RIFLE
ASSOCIATION POLITICAL VICTORY FUND,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE
FEDERAL ELECTION COMMISSION

Lawrence M. Noble
General Counsel

Richard B. Bader
Associate General Counsel

Vivien Clair
Attorney

November 20, 2000

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C.
(202) 694-1650

particularly since the court relied upon the deterrent effect of the penalties in declining to issue injunctive relief.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANTS VIOLATED 2 U.S.C. 441b(a)

A. Standard of Review

This Court reviews a grant of summary judgment de novo, applying the same standard of review as the district court. See, e.g., United States ex rel. Siewick v. Jamieson Science and Engineering, Inc., 214 F.3d 1372, 1375 (D.C. Cir. 2000); Nikoi v. Attorney General, 939 F.2d 1065, 1068 (D.C. Cir. 1991). The Court gives substantial deference, however, to the Commission's interpretation of the Act. FEC v. Democratic Senatorial Campaign Committee ("DSCC"), 454 U.S. 27, 37 (1981); Common Cause v. FEC, 842 F.2d 436, 439-40 (D.C. Cir. 1988); Orloski v. FEC, 795 F.2d 156, 164 (D.C. Cir. 1986).

Furthermore, "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." Udall v. Tallman, 380 U.S. 1, 16 (1965). An agency's construction of its own regulations is subject to an "exceedingly deferential standard of review" under which the court "is not to decide which among several competing interpretations best serves the regulatory purpose," Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618,

625 (D.C. Cir. 2000) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). Rather, the court ““must defer to the [agency’s] interpretation unless an alternative reading is compelled by the regulation’s plain language or by other indications of the [agency’s] intent at the time of the regulation’s promulgation.”” Id. (quoting Thomas Jefferson, 512 U.S. at 512) (emphasis added, brackets in original). Courts ““look to the administrative construction of the regulation if the meaning of the words used is in doubt.’ That construction is given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” FEC v. National Republican Senatorial Committee, 966 F.2d 1471, 1475-1476 (D.C. Cir. 1992) (citations omitted).⁹

B. NRA and ILA Made “Contributions” and “Expenditures” by Using Corporate Treasury Funds to Expressly Advocate the Election or Defeat of Candidates for Federal Office

Section 441b(a) prohibits “any corporation whatever” from making “a contribution or expenditure in connection with” any election for federal office. It also makes it unlawful for “any . . . political committee, or other person knowingly to accept or receive” any such corporate contribution. Section 441b(b)(2) provides

⁹ Accord, e.g., In re Sealed Case, 223 F.3d 775, 779-80 (D.C. Cir. 2000); Fulani v. FEC, 147 F.3d 924, 928 (D.C. Cir. 1998) (“But the FEC is, of course, entitled to substantial deference when it interprets its own regulations”); Puerto Rico Marine Shipping Authority v. FMC, 678 F.2d 327, 345 (D.C. Cir.) (“We will accept the [agency’s] interpretation so long as it does not do violence to the language of the regulation itself”), cert. denied, 459 U.S. 906 (1982).

Exhibit 2

Table 2. Commission Certification votes in MUR cases where the Office of the General Counsel recommends a finding of “reason to believe” that respondent violated the law by failing to register as a political committee.

Note: These cases were identified using the Federal Election Commission’s (FEC) Enforcement Query System. CREW researchers reviewed MUR cases from June 24, 2008 through the present that referenced “433” and “30103” to capture references to 52 U.S.C. § 30103 and its previous codification at 2 U.S.C. § 433. Additional cases were identified using text searches for “failing to register” and “failing to organize,” phrases which appear frequently in cases relevant to our inquiry.

RTB Vote date	MUR #	Respondent	Election-Related Purpose Disputed?	Vote tally	Dissenting commissioners	Certification url	Further Action Taken on § 30103 violation
6/7/2018	6969	New Day Independent Media Committee	No. See Response http://eqs.fec.gov/eqsdocsMUR/18044445750.pdf .	2-2	Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/18044445844.pdf	Dismissed.
11/14/2017	6872	New Models	Yes. See Response at 2, http://eqs.fec.gov/eqsdocsMUR/17044432590.pdf	2-2	Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/17044432619.pdf	Dismissed.
4/27/2017	6803	Thomas Brown for Congress	No. See Response, http://eqs.fec.gov/eqsdocsMUR/17044414556.pdf	1-4	Goodman; Hunter; Petersen; Walther	http://eqs.fec.gov/eqsdocsMUR/17044414601.pdf	Dismissed.
11/15/2016	6957	Isadore Hall	No. See First General Counsel’s Report 3-4, http://eqs.fec.gov/eqsdocsMUR/17044406070.pdf	3-3	Goodman; Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/17044406106.pdf	Dismissed.
10/18/2016	6589R	American Action Network	Yes. See Response at 2, http://eqs.fec.gov/eqsdocsMUR/14044361818.pdf .	3-3	Goodman, Hunter, Petersen	http://eqs.fec.gov/eqsdocsMUR/16044401006.pdf	Dismissed.
10/25/2015	6999	David Larsen for Congress	No. See Response http://eqs.fec.gov/eqsdocsMUR/16044403135.pdf	3-3	Goodman; Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/16044403173.pdf	Dismissed.
11/18/2014	6402	American Future Fund	Yes. See Response at 1, http://eqs.fec.gov/eqsdocsMUR/14044364767.pdf .	3-2	Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/14044364829.pdf	Dismissed.
9/16/2014	6391/6471	Commission on Hope, Growth and Opportunity	Yes. See Response at 5, http://eqs.fec.gov/eqsdocsMUR/15044380009.pdf .	3-3	Goodman; Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/15044380114.pdf	Dismissed.
6/24/2014	6538	Americans for Job Security	Yes. See Response at 2, http://eqs.fec.gov/eqsdocsMUR/14044360360.pdf .	3-3	Goodman; Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/14044361730.pdf	Dismissed.
6/24/2014	6589	American Action Network	Yes. See Response at 2, http://eqs.fec.gov/eqsdocsMUR/14044361818.pdf .	3-3	Goodman; Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/14044361924.pdf	Dismissed.
12/3/2013	6396	Crossroads Grassroots Political Strategies	Yes. See Response at 1, http://eqs.fec.gov/eqsdocsMUR/14044350759.pdf	3-3	Goodman; Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/14044350869.pdf	Dismissed.
1/8/2013	6560	Victory Ohio SuperPAC	N/A. No response from respondent.	3-2	McGahn II; Petersen	http://eqs.fec.gov/eqsdocsMUR/14044362075.pdf	Dismissed. http://eqs.fec.gov/eqsdocsMUR/14044362087.pdf
4/5/2011	6317	Utah Defenders of Constitutional Integrity	No. See Response at 2, http://eqs.fec.gov/eqsdocsMUR/12044312632.pdf .	5-0	none	http://eqs.fec.gov/eqsdocsMUR/12044312662.pdf	Conciliation reached. See http://eqs.fec.gov/eqsdocsMUR/12044312684.pdf
2/16/2011	6315	Alvin M. Greene for Senate	No. See First General Counsel’s Report at 4, http://eqs.fec.gov/eqsdocsMUR/12044322956.pdf .	6-0	none	http://eqs.fec.gov/eqsdocsMUR/12044322967.pdf	Dismissed. See http://eqs.fec.gov/eqsdocsMUR/12044322988.pdf
5/12/2009	6094	American Leadership Project	Yes. See Response at 2, http://eqs.fec.gov/eqsdocsMUR/29044243212.pdf .	2-3	Hunter; McGahn II Petersen	http://eqs.fec.gov/eqsdocsMUR/29044243219.pdf	Dismissed.
4/15/2009	6082	Majority Action	Yes. See Response at 3, http://eqs.fec.gov/eqsdocsMUR/29044242773.pdf .	2-2	Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/29044243016.pdf	Dismissed.
4/14/2009	5842	Economic Freedom Fund	Yes. See Response at 2-3, http://eqs.fec.gov/eqsdocsMUR/29044240822.pdf .	3-2	Hunter; Petersen	http://eqs.fec.gov/eqsdocsMUR/29044240853.pdf	Dismissed.
2/25/2009	5694/5910	Americans for Job Security	Yes. See Response at 10, http://eqs.fec.gov/eqsdocsMUR/29044232159.pdf .	3-3	Hunter; McGahn II; Petersen	http://eqs.fec.gov/eqsdocsMUR/29044232232.pdf	Dismissed.
2/25/2009	5977/6005	American Leadership Project	Yes. See First General Counsel’s Report at 3, http://eqs.fec.gov/eqsdocsMUR/10044264601.pdf .	2-3	Hunter; McGahn II; Petersen	http://eqs.fec.gov/eqsdocsMUR/29044231595.pdf	Dismissed.
2/11/2009	5831	Softer Voices	No. See Second General Counsel’s Report at 1-2, http://eqs.fec.gov/eqsdocsMUR/10044282457.pdf .	6-0	none	http://eqs.fec.gov/eqsdocsMUR/10044282424.pdf	Dismissed. See http://eqs.fec.gov/eqsdocsMUR/10044282476.pdf
10/21/2008	6106	MN Corn PAC	No. See First General Counsel’s Report at 3, http://eqs.fec.gov/eqsdocsMUR/10044272639.pdf .	6-0	none	http://eqs.fec.gov/eqsdocsMUR/29044224629.pdf	Conciliation reached. See http://eqs.fec.gov/eqsdocsMUR/29044224651.pdf