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Campaign Finance [Folder 2][2]

The Bipartisan Clean Congress Act of 1995
H.R. 2566

Summary

- Eliminates PAC contributions in federal elections. If such a ban is ruled unconstitutional, it would limit individual PAC contributions to $1,000 per election (the same as an individual contribution) and aggregate PAC contributions to any candidate to 25 percent of the spending limit.

- Sets voluntary spending limits of $600,000 in House races with benefits of TV, radio and postage rate discounts for political advertising. Candidates who agree to this system must also limit personal funds to their campaign, large contributions and out-of-district donations. If their opponents do not adhere to these limits, then complying candidates would receive more generous contribution and spending limits.

- Requires candidates to raise 60 percent of contributions from within their home state

- Caps individual contributions exceeding $250 to an aggregate limit of no more than 25 percent of the spending limit

- Limits contributions from registered lobbyists to $100 per election (current limit is $1,000 per election)

- Bans franked (taxpayer-financed) mass mailings in election years

- Eliminates the use of soft money (party contributions) in federal elections and ends the practice of bundling (grouped donations from individuals from the same organization)

- Tightens reporting requirements on independent expenditures

SECTION-BY-SECTION SUMMARY OF H.R. 2566 THE BIPARTISAN CLEAN CONGRESS ACT OF 1995

Section 1 Short Title

Provides that the name of the Act will be the "Bipartisan Clean Congress Act of 1995."

Section 2 Table of Contents

TITLE I -- HOUSE OF REPRESENTATIVES ELECTION SPENDING LIMITS AND BENEFITS

Section 101 House of Representatives Election Spending Limits and Benefits

Provides for spending limits and benefits to complying House candidates by adding a new Title V to the Federal Election Campaign Act of 1971 (FECA). The new Title contains the following sections:

Section 501 Candidates Eligible to Receive Benefits

Defines an "eligible" House candidate, as one who meets both the election filing requirements and the threshold contribution requirements of the Act.

Election Filing Requirements. The election filing requirements are met if, at the time a candidate files for the primary election, the candidate also files with the Federal Election Commission (FEC) a declaration that the candidate (1) will not exceed the expenditure limits set forth in Section 502; (2) will not raise contributions in excess of the expenditure limits; and (3) will use the campaign benefits provided by the Act.

Threshold Contribution Requirements. The threshold contribution requirements are met if the candidate has raised an amount equal to 10 percent of the election cycle expenditure limit, or $60,000. Of this threshold amount, (1) no more than $200 shall be taken into account from any individual contribution; (2) at least 60 percent, or $36,000, shall come from individuals residing in the candidate's home state; and (3) at least 50 percent of the home state amount, or $18,000, shall come from individuals residing in the candidate's congressional district.

Section 502 Limitation on Expenditures

Limit on Personal Funds. The limit for spending personal funds in any election cycle is 10 percent of the election cycle limit, or $60,000. Personal funds are defined as (1) any funds coming directly from the candidate and members of the candidate's immediate family or (2) any personal loans incurred by the candidate and members of the candidate's immediate family.

Expenditure Limit. The overall election cycle expenditure limit is $600,000, to be indexed each year after 1996. This expenditure limit shall not apply to any amounts paid for Federal, State, or local taxes on contributions raised.

Runoff Expenditure Limit. The expenditure limit is increased by 20 percent, or $120,000, for any candidate who is in a runoff election.

Contested Primary Limit. The expenditure limit is increased by 30 percent, or $180,000, for any candidate who is in a contested primary, defined as a primary won by a margin of 10 percent or less.

Complying Candidates Running Against Noncomplying Candidates. The election cycle spending limit is increased in steps for an eligible candidate who is running against a non-complying candidate.

First adjustment to expenditure limit. If the eligible candidate is -- in either the primary or the general election -- running against a non-complying candidate <u>and</u> that non-complying candidate has either spent in personal funds more than 10 percent of the election cycle limit, or $60,000, or has raised a total (including expended personal funds) exceeding 70 percent of the cycle limit, or $420,000, then the complying candidate may raise additional funds equal to 50 percent of the cycle limit, or $300,000, and may spend these additional funds if the non-complying opponent spends an amount equal to 105 percent of the cycle limit, or $630,000. In this event, the complying candidate would have a cycle spending limit of $900,000.

Second adjustment to expenditure limit. If the non-complying candidate raises (including expended personal funds) a total of 120 percent of the cycle spending limit, or $720,000, the complying candidate may raise further additional funds equal to another 50 percent of the cycle limit, or another $300,000, and may spend these additional funds if the non-complying candidate spends an amount equal to 155 percent of the cycle limit, or $930,000. In this event, the complying candidate would have a cycle spending limit of $1.2 million.

State media

Response to Independent Expenditures. If independent expenditures are made against a complying candidate or in support of an opponent, and such expenditures exceed $25,000, an eligible candidate may raise and spend additional funds in the amount of such independent expenditures, without such additional spending counting against the candidate's spending ceiling.

<u>Section 503 Benefits Eligible Candidates Entitled to Receive</u>

Provides that an eligible candidate who has at least one opponent and has raised contributions or expended personal funds an amount which, in the aggregate, equals 10 percent of the election cycle spending limit, or $60,000, is entitled to receive discounted broadcast media rates and reduced postage rates set forth in the Act.

Section 504 Certification by Commission

The FEC, based on the declarations and certifications filed by the candidates, shall make a determination to certify candidates as eligible to receive benefits.

Section 505 Repayments; Additional Civil Penalties

If an eligible candidate who has received discounted broadcast time or discounted postage rates is found to have violated the expenditure limits or otherwise had his/her eligibility revoked by the FEC, the candidate must repay the value of the benefits he/she received to the provider of the benefits. In addition, an eligible candidate who spends in excess of any expenditure limit is required to pay a civil penalty to the FEC. The size of the penalty increases as the amount of the excess spending increases.

Section 102 Broadcast Rates and Preemption

Provides that eligible candidates purchasing television or radio time in the 30 days prior to a primary election or the 60 days prior to a general election shall be charged 50 percent below the lowest charge of the station for the same amount of time for the same period on the same date. The time purchased by an eligible candidate should not be preempted by the broadcaster, unless preemption is for reasons beyond the broadcaster's control. The requirement on broadcasters to provide this discounted time is made an express condition of existing and new broadcast licenses. Broadcasters will be exempted from these requirements if their signal is broadcast nationwide or if the requirement would impose a significant economic hardship on the licensee. The United States Court of Federal Claims has exclusive jurisdiction over any challenge to the constitutionality of the broadcast discount provisions.

Section 103 Reduced Postage Rates

Provides eligible candidates with discounted postage rates for three mailings to the voting age population of the congressional district. The discounted rate is the third-class, special bulk rate currently available to non-profit organizations.

Section 104 Increased Contribution Limit for Eligible House of Representatives Candidates

If an eligible candidate is running against a non-complying candidate who has either spent personal funds in excess of 25 percent of the cycle limit, or $150,000, or who has received contributions or spent personal funds which, in the aggregate, exceed 50 percent of the expenditure limit, or $300,000, then the individual contribution limit for the eligible candidate is raised from $1,000 to $2,000.

Section 105 Reporting Requirements

Any House candidate must report to the FEC when he/she spends more in personal funds than the limit on personal funds ($60,000), and when he/she spends personal funds aggregating 25 percent of the election cycle limit ($150,000).

Any non-complying candidate must report to the FEC when he has received contributions and spent personal funds which aggregate 50 percent ($300,000), 70 percent ($420,000), 105 percent ($630,000), 120 percent ($720,000) and 155 percent ($930,000) of the election cycle expenditure limit. Reports must be filed with the FEC within 48 hours after such contributions have been received or such expenditures have been made.

For any reports filed on or before the 20th day preceding an election, the FEC shall notify each eligible House candidate in the election about such reports within 48 hours after the reports have been filed. For any reports filed after the 20th day but more than 24 hours preceding an election, the FEC shall notify the appropriate eligible House candidate about such reports within 24 hours after the reports have been filed.

TITLE II -- REDUCTION OF SPECIAL INTEREST INFLUENCE

SUBTITLE A -- ELIMINATION OF POLITICAL ACTION COMMITTEES FROM FEDERAL ELECTION ACTIVITIES

Section 201 Ban on Activities of Political Action Committees in Federal Elections

Bans contributions from PACs. Leadership committees are also prohibited, in that federal candidates and federal officeholders are prohibited from maintaining any political committee other than a principal campaign committee, authorized committee or party committee.

Fall-back provision. If the ban on PAC contributions is ruled unconstitutional, then the contribution limit for PACs is reduced to the same limit that applies to contributions from individuals, $1,000. Further, no candidate may receive PAC contributions which, in the aggregate, exceed 25 percent of the election cycle limit, or $150,000, whether or not the candidate is an eligible candidate.

Section 202 Aggregate Limit on Large Contributions

No candidate may receive large contributions -- defined as contributions over $250 -- which, in the aggregate, exceed 25 percent of the election cycle limit, or $150,000, whether or not the candidate is an eligible candidate.

If this provision is ruled unconstitutional, the large contribution restriction becomes a condition of being an eligible candidate. This restriction is lifted, however, if such candidate is entitled to the increased individual contribution limit of $2,000 provided in section 104.

Section 203 Contributions by Lobbyists

Sets the limit for a contribution from a registered lobbyist to $100 per election.

SUBTITLE B -- PROVISIONS RELATING TO SOFT MONEY OF POLITICAL PARTIES

Section 211 Soft Money of Political Parties

States that no national political party committee may solicit, receive, or spend any funds which are not subject to the limitations, prohibitions and reporting requirements under federal law. This would prohibit national committees from raising unlimited funds for "non-federal" accounts, which have been used to influence federal elections.

Further, state or local political party committees which engage in any activity in a federal election year which might affect the outcome of a federal election, including voter registration, and get-out-the-vote activity, any generic campaign activity and any communication that identifies a federal candidate, can spend only funds subject to the limitations, prohibitions and reporting requirements of the Act for such activities. Certain listed state campaign activities are expressly exempted from this requirement. Funds spent by state or local party committees to raise funds to be used for any activity which might affect the outcome of a federal election are also subject to the requirements of federal election law. No political party committee can solicit funds or make any donations to an 501(c) tax exempt organization.

No candidate for federal office or federal officeholder can solicit or receive any funds in connection with a federal election unless such funds are subject to the limitations, prohibitions and reporting requirements of the Act, or can they solicit or receive any funds in connection with a non-federal election unless such funds comply with federal contribution limits and are not from federally prohibited sources.

No candidate for federal office or federal officeholder can establish or control a 501(c) tax exempt organization if the organization raised money from the public, nor may such individual raise funds for any 501(c) organization if its activities include voter registration and get-out-the-vote campaigns.

Section 212 Reporting Requirements

Strengthens certain reporting requirements and provides that any state or local political party committee which spends money for any activity which might affect the outcome of a federal election shall report all receipts and disbursements, and that any political committee other than political party committees shall report any receipts and disbursements in connection with a federal election.

Section 213 Deletion of Building Fund Exception to the Definition of the Term "Contribution."

Includes contributions to party building funds in the definition of "contribution."

SUBTITLE C -- SOFT MONEY OF PERSONS OTHER THAN POLITICAL PARTIES

Section 221 Soft Money of Persons Other Than Political Parties

Requires greater disclosure for internal communications by corporations and unions that spend in excess of $2,000 for any activity which might affect the outcome of a federal election, including any voter registration and get-out-the-vote activity and any generic campaign activity. A report of

such disbursements must be filed with the FEC within 48 hours after the disbursements are made (or within 24 hours for such disbursements made within 20 days of the election).

SUBTITLE D -- CONTRIBUTIONS

Section 231 Contributions Through Intermediaries and Conduits

Provides that all "bundled" contributions shall be counted in the form of an individual contribution from the "bundler" or intermediary. Therefore, an intermediary cannot channel bundled contributions in excess of the applicable individual contribution limits. A person or entity is treated as an intermediary if either the contributions are in the form of a check payable to the intermediary, or the intermediary is a political committee, a corporation, a labor union, a partnership, a registered lobbyist, or an officer, employee or agent acting on behalf of the aforementioned.

Fundraising efforts conducted by another candidate or federal officeholder, or by an individual who uses his or her own resources and acts on his or her own behalf are not considered bundled contributions.

SUBTITLE E -- ADDITIONAL PROHIBITIONS ON CONTRIBUTIONS

Section 241 Allowable Contributions For Candidates

Requires candidates, by the end of the election cycle, to raise 60 percent of all individual contributions from individuals residing in the candidate's home state. If this provision is held unconstitutional, the in-state requirement becomes a condition of eligibility for complying candidates.

SUBTITLE F -- INDEPENDENT EXPENDITURES

Section 251 Clarification of Definitions Relating to Independent Expenditures

Provides that an independent expenditure is one that contains express advocacy and is made without the participation or cooperation of a candidate. An expenditure is not independent if it has been made by a person who, in the same election cycle, has raised or spent money on behalf of the candidate, or is in an executive or policy making position for the candidate's authorized committee, or has advised or counseled the candidate, or if the person making the expenditure retains the professional services of a vendor common with the candidate.

"Express advocacy" is defined as a communication which, taken as a whole, expresses support or opposition to a candidate or group of candidates.

Section 252 Reporting Requirements for Certain Independent Expenditures

Provides additional reporting requirements for independent expenditures. It also provides that the FEC is to notify any eligible candidate when an aggregate of $25,000 in independent expenditures

has been made against that candidate or in favor of another candidate in the same election.

The section also provides that when an individual reserves broadcast time to be paid for by an independent expenditure, the individual must provide the broadcast licensee with the names of all candidates for the office to which the expenditure relates, and the licensee must notify each such candidate of the proposed independent expenditure and allow each such candidate to purchase broadcast time immediately after the broadcast time paid for by the independent expenditure.

TITLE III -- MISCELLANEOUS PROVISIONS

Section 301 Restrictions on Use of Campaign Funds for Personal Purposes

Codifies recent FEC regulations on personal use of campaign funds. Candidates may not use campaign funds for an inherently personal purpose, including a home mortgage rent, clothing, noncampaign automobile expense, country club membership, vacation or trip of noncampaign nature, household food items, tuition payment, admission to a sporting event, concert, or theater not associated with a campaign, and dues, fees or contributions to a health club or recreational facility.

Section 302 Campaign Advertising Amendments

Strengthens the disclaimer requirements for political advertising. It requires that broadcast or cablecast communications include an audio statement that identifies the candidate and states that the candidate is responsible for the content of the advertisement.

Section 303 Filing of Reports Using Computers and Facsimile Machines

Authorizes the FEC to permit the electronic and facsimile filing of campaign disclosure reports.

Section 304 Random Audits

Permits the FEC to conduct random audits and investigations to ensure voluntary compliance with the Act.

Section 305 Change in Certain Reporting From a Calendar Year Basis to an Election Cycle Basis

Provides for reporting by election cycle rather than calendar year for reports filed by candidate committees.

Section 306 Disclosure of Personal and Consulting Services

Strengthens reporting requirements by requiring persons providing consulting services to candidates to disclose their expenditures made to other persons who provide goods or services to the candidate.

Section 307 Use of Candidate Names

Requires the name of each authorized committee to include the name of its candidate, and prohibits a committee which is not an authorized committee from including the name of any candidate in its name.

Section 308 Reporting Requirements

Strengthens reporting requirements by permitting principal campaign committees and certain other political committee to file monthly reports instead of quarterly reports. It further strengthens the requirements for political committees to obtain and report the identification of their contributors, and it provides the FEC with the authority to grant a waiver from the reporting requirements.

Section 309 Simultaneous Registration of Candidate and Candidate's Principal Campaign Committee

Requires an authorized campaign committee to file a statement of organization on the day it is so designated by the candidate.

Section 310 Independent Litigation Authority

Provides the FEC with independent litigation authority to appear in court, including in the Supreme Court, on its own behalf.

Section 311 Insolvent Political Committees

Provides that proceedings for the winding up of political committees take precedence over proceedings under the bankruptcy statutes.

Section 312 Regulations Relating to Use of Non-Federal Money

Provides the FEC with the authority to issue regulations to prohibit devices which have the effect of undermining or evading provisions of this Act restricting the use of non-federal money to affect federal elections.

Section 313 Term Limits for Federal Election Commission

Imposes a limit of one term on the service of members of the FEC.

Section 314 Authority to Seek Injunction

Provides the FEC with the authority to seek an injunction to either prevent or restrain a violation of the Act.

Section 315 Expedited Procedures

Provides the FEC with the authority to act on complaints in an expedited fashion if necessary to allow the matter to be resolved before an election in order to avoid harm to a party.

Section 316 Official Mass Mailing Allowance

Prohibits Members from sending a mass mailing during an election year, with certain limited exceptions. A "mass mailing" is defined as any mailing of 250 pieces or more with substantially identical content.

Section 317 Provisions Relating to Members' Official Mail Allowance

Cuts funding for franked mail by 50 percent of the FY ~~1995~~ 1994 levels. Also, separates funding of mass mailings from constituent response mail, similar to the separate accounts in the Senate.

Section 318 Intent of Congress

Provides the intent of Congress that savings realized by limitations on mass mailings shall be designated to pay for the reduced postage rate benefits provided by the Act.

Section 319 Severability

If any provisions in the Act are ruled unconstitutional, the other provisions of the bill will remain intact.

Section 320 Expedited Review of Constitutional Issues

Allows any constitutional challenge to the Act to be taken directly to the Supreme Court. The Supreme Court shall accept jurisdiction over, advance on the docket and expedite the appeal to the greatest extent possible.

Section 321 Effective Date

The Act will take effect on January 1, 1997

Section 322 Regulations

Requires the FEC to promulgate regulations to carry out the Act no later than 9 months after the effective date.

Not Common Cause

I. Add definition of "coordination" to definition of "contribution"

Section 301(8)(A)[2 U.S.C. 431 (8)(A) is amended by adding new paragraphs (iii) and (iv) as follows:

(8)(A) The term "contribution" includes--

***

(iii) any payment made for a communication or anything of value that is made in coordination with a candidate. Payments made in coordination with a candidate include:

(1) payments made by any person in cooperation, consultation, or concert with, at the request or suggestion of, or pursuant to any general or particular understanding with, a candidate, his authorized political committees, or their agents;

(2) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his authorized political committees, or their agents; or

(3) payments made based on information about the candidate's plans, projects or needs provided to the expending person by the candidate or the candidate's agents;

(iv) [see S.1219, sec. 241(b)]

II. Conforming Amendments Needed for "coordination" language

a) Section 315(a)(7)[2 U.S.C. 441a(a)(7) is amended by revising paragraph (B) as follows:

(B) Expenditures made in coordination with a candidate, as described in section 301(8)(A)(iii), shall be considered to be contribution to such candidate and, in the case of limitations on expenditures, shall be treated as expenditures for purposes of this section.

b) Section 316(b)[2 U.S.C. 441b(b) is amended by revising paragraph (2) as follows:

(2) For purposes of this section and section 79/(h) of title 15, the terms

"contribution" and "expenditure" shall include the definitions of those terms at section 301(8)(A) and 301(9)(A) and shall also include any direct or indirect payment...[continue with current statute]

III. Changes to S. 1219 Voting record language to incorporate "coordination"

Section 241(a) of S. 1219

(18)***

(C) Voting Records. The term "express advocacy" does not include the publication and distribution of a communication that is limited to providing information about votes by elected officials on legislative matters, that does not expressly advocate the election or defeat of a clearly identified candidate, and that is not prepared or distributed in coordination with, or pursuant to any general or particular understanding with, a candidate as described in section 301(8)(A)(iii).

Section 315 is amended as follows:

(a)(1) No person shall make contributions--

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $5,000, except that if the national political committee certifies that it will not make independent expenditures in that calendar year pursuant to paragraph (d)(4) of this section, then contributions to that committee shall not exceed $20,000 in that calendar year; or

(C) ***

(2) No multicandidate political committee shall make contributions--

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $5,000, except that if the national political committee certifies that it will not make independent expenditures in that calendar year pursuant to paragraph (d)(4) of this section, then contributions to that committee shall not exceed $15,000 in that calendar year; or

(d) (1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committe of a political party and a state committee of a political party, including any subordinate committee of a state committee, may make coordinated expenditures in connection with the general election campaign of candidates for federal office, subject to the limitations contained in paragraphs (2), (3) and (4) of this subsection.

(2) ***

(3) ***

(4) Before a party committee may make coordinated expenditures in connection with a general election campaign for federal office in excess of $5000 pursuant to this subsection, it shall file with the Federal Election Commission a certification, signed by the treasurer, that it has not and will not make any independent expenditures in connection with that campaign for federal office [or: in that election cycle]. A party committee that determines to make coordinated expenditures pursuant to this subsection shall not make any transfers of funds in the same election cycle to, or receive any transfers of funds in the same election cycle from, any other party committee that determines to make independent expenditures in connection with the same campaign for federal office.

NB: This language should be combined with legislative history noting that a party committee, like any other person, that wishes to make independent expenditures must have no coordination, consultation or cooperation with a candidate. If a party committee engages in coordinated expenditure activity under section 441a(d), it has had the kind of contact with a candidate that will negate the independence of future expenditures. If the alternative language is selected, the history should state that a party may only take advantage of the additional coordinated expenditure limits if it agrees not to make any independent expenditures in that election.

Timing and Express Advocacy

Add to S. 1219 definition of Express advocacy (see sec. 241(a))

(D) If a communication is made within 30 (?) days preceding a general election, and it discusses or comments on the character, qualifications, or accomplishments of a clearly identitifed candidate, a clearly identified group of candidates, or the candidates of a clearly identified political party, the communication will constitute an exhortation to support or oppose the clearly identified candidate(s) [or: express advocacy], unless it is solely devoted to urging action on a legislative issue pending before an open legislative session.

TO: DOUG SOSNIK
FROM: NORM ORNSTEIN

Ornstein

REFORMING CAMPAIGN FINANCE

The campaign finance system in America has been a problem for some time. But in 1996, it went from the political equivalent of a low-grade fever to Code Blue-- from a chronic problem needing attention sooner or later to a crisis, with a system clearly out of control. The system needs both an immediate fix in a few important areas, and some sustained attention to the broader problems. We need an approach that breaks us out of the unproductive framework-- Democrats insisting on a bottom line of tough spending limits and public financing, Republicans insisting on a bottom line of no spending limits and no public financing-- that has doomed any constructive change for decades. It must instead use constructive ideas to help reduce existing problems without creating large unanticipated new ones.

And any proposal must accommodate the Supreme Court's rulings, from Buckley v. Valeo to this year's Colorado decision, that give wide leeway to individuals and groups independently to raise and spend resources in public and political debate under the First Amendment. If a Constitutional Amendment to alter the impact of the Court's decisions were desirable (and it is not clear that amending the First Amendment is the appropriate course of action,) it is not practical in the near term. So other ways must be found to reform the system within the existing constitutional context-- ways that will achieve the objectives of placing huge donations to candidates or parties off limits; leveling the playing field for outside groups and candidates in political communications in campaigns; enhancing political discourse and dialogue in the campaign; strengthening enforcement and disclosure; and encouraging small individual contributions.

We propose changes in five key areas:

1. "Soft" Money. The idea of "soft" money, spending by parties outside federal regulation, emerged in the reforms of the 1970s, as a way to enhance the role and status of party organizations. Unlike the hard money that goes to campaigns, soft money can come directly from corporate coffers and unions, and in unlimited amounts from wealthy individuals. It is harder to trace, less systematically disclosed, and less accountable.

Over time, soft money contributions for "party-building and grass rots volunteer activities" (the language of the law) came to be used for broader purposes, and evolved into a complex system of parties setting up many separate accounts, sometimes funneling money from the national party to the states or vice versa, or back and forth in dizzying trails. But soft money was a comparatively minor problem in campaign funding until 1992. Parties sharply increased their soft money fundraising and spending for a wide range of political activities, including broadcast ads, both in and out of election season. The escalation increased alarmingly in 1996. Both parties sought and received large sums of money, often in staggering amounts from individuals, companies and other entities, and

poured unprecedented sums of soft money into the equivalent of party-financed campaign ads. There is now evidence that some of this money came illegally from foreign sources.

The original limited role of soft money, as a way to enable funds to be used to enhance the role and capability of the parties, especially the state parties, has been mangled beyond recognition. Still, any change in law must recognize that state parties are governed by state laws; that traditional party-building activities, from voter registration and get-out-the-vote drives to sample ballots, have an inevitable overlap between campaigns for state and local offices and campaigns for federal office, and that the goal of enhancing the role of parties is a laudable and necessary one.

What to do? We propose the following:

1. *Eliminate national party committee soft money by eliminating the distinction in law between non-federal and federal party money. In other words, create one pot of national party money, that has similar fund-raising qualifications to the money raised for candidates, namely, no corporate and union funds and limits on sums from individuals. Money may only come from individuals and registered political committees, which are given specific limitations. (See appendix for specific language.)*

2. *Give parties freedom to allocate the hard resources they are able to raise among their candidates for office as they chose and not subject to existing restrictions, in order to provide a robust role for political parties even as they lose the soft money resources,; this in turn will move the parties away from the subterfuge, encouraged by the* Colorado *decision, that they are independent of their own candidates.*

3. Expand *the existing limits on individual contributions to parties. Currently, individuals can give a total of $25,000 per year in hard money to federal candidates and/or parties, with a sub-limit of $20,000 to a party (and with no limits on soft money donations.) Change the limits so that individuals can give the current limit of $25,000 per year to candidates, but create a separate limit of $25,000 per year to political parties. Index both figures to inflation.*

4. *Stiffen party disclosure requirements. Currently, parties can transfer unlimited sums to state parties or related entities for use as they wish, without any federal disclosure of the state party expenditure. We propose that any monies transferred from a federal party to a state party or state and local entity be covered by federal disclosure laws, including the source and the nature of any expenditure of the funds, and that any transfers from state parties to federal committees come only from federal accounts.. We also encourage states to continue their own trend of strong state-based disclosure requirements.*

2. **Issue Advocacy.** 1996 saw an explosion of political ads both by outside groups, such as the AFL-CIO and business entities, and by both political parties, that were essentially unlimited in funding and outlays because they were classified not as campaign-related independent expenditures but as "issue advocacy" ads. The Court in Buckley v. Valeo defined political ads as those that explicitly advocate the election or defeat of a candidate. This very narrow definition has allowed groups to employ television and radio ads that were political ads in every sense except that they avoided any explicit candidate advocacy. Thus, huge numbers of campaign ads aired that were thinly disguised-- at best-

- as issue ads. They praised or-- more frequently attacked-- specific candidates but ended with the tag line "Call Congressman _____ and tell him to.... (stop "raising taxes," stop "cutting Medicare", etc.)

The Supreme Court has appropriately stated that issue advocacy is protected under the First Amendment, as are independent expenditure campaigns. However, funding for independent expenditure campaigns can be regulated as are candidate and party funding for elections. We believe that there is room for Congress to define with more clarity what is meant by issue advocacy and political campaigning without running afoul of the Court's real intent. Thus we propose:

Any paid communication with the general public that uses a federal candidate's name or likeness within sixty days of a primary or of a general election-- the same times used by Congress to limit lawmakers' postal patron mass mailing communications-- be considered a campaign ad, not an issue advocacy message, and be covered by the same rules that govern independent expenditure campaigns, meaning among other things that they cannot be financed by corporate or union funds, but can use publicly disclosed voluntary contributions in a fashion similar to funds raised by political action committees. (An exemption would apply, as it does in current law, for candidate debates and press coverage.)

This change would not limit in any way groups' ability to communicate in a direct targeted fashion with their own members or constituents. Nor would it limit advertising campaigns or the freedom of parties or independent groups to get their issue-oriented messages out. What it would do is change the funding basis of campaigns that include actual federal candidates to conform to other comparable election-related efforts. The AFL-CIO or the Chamber of Commerce, the Christian Coalition or the Sierra Club, for example, could run whatever ads it wanted, funded as it wished, whenever it wanted that mentioned or referred to no specific candidate for office. It could run ads that mentioned candidates or lawmakers in a similar fashion except during the sixty days before a primary or general election. During the two sixty-day periods, ads could run that mentioned a candidate or used the candidate's likeness-- but *those* ads would have to be funded in the same fashion as other independent expenditure campaigns-- in other words, by publicly disclosed money raised on a voluntary basis by a political committee.

3. **Enforcement.** The lack of strong enforcement of campaign laws has been a serious problem in the past, but escalated sharply in 1996. The Federal Election Commission is poorly and erratically funded, hampering its ability to gather information, disseminate it in a timely fashion, and use it to investigate or act on complaints of violations of the laws or regulations. The Commission's structure, with six commissioners, three of each major party, makes inevitable frequent deadlock along partisan lines. Little if any penalty results from blatant violations of the campaign laws. Elections are not overturned, and if there are subsequent financial penalties, they are rarely commensurate with the severity of the violations and in any case are of little importance if the violations made the difference between winning and losing. Candidates and parties, knowingly take advantage-- and never more openly than in 1996.

It would be desirable to change the structure of the FEC, including changing the selection of its membership. Given the Buckley decision and the attitudes of lawmakers

from both parties, major structural changes are probably not practical. But there are other ways to create a more viable disclosure and enforcement regimen. We recommend:

1. Move from the current practice of voluntary electronic filing to a mandatory one, with a de minimus threshold.

2. Move from annual appropriations for the FEC to two-year or even longer-term funding, with a bipartisan mechanism in Congress to maintain adequate funding for the commission. Congress should also consider an independent funding source for the FEC, such as a modest filing fee for campaigns and related committees.

3. Allow for the possibility of private legal action against campaigns for failure to disclose appropriate information, with the FEC as administrative agent. Streamline the process for allegations of criminal violations, by creating more shared jurisdiction between the FEC and the Justice Department, and fast-tracking the investigation from the FEC to Justice if any significant evidence of fraud exists.

4. Put into legislation a requirement that until a campaign has provided all the requisite contributor information to the FEC, it cannot put a contribution into any account other than an escrow account where the money cannot be spent. In turn, the current ten-day maximum holding period on checks would have to be waived.

5. Adopt a single eight-year term for Commissioners, with no holding over upon expiration. Commissioners' terms should be staggered, so than no two terms expire in the same year. Congress should explore ways to strengthen the office of chairman, including considering creating a new position of non-voting chairman and presiding officer, as the Commission's Chief Administrator.

4. **Broadcast Bank.** No campaign finance reform will be effective unless it ensures adequate resources for candidates and parties to get their messages across. A positive and constructive campaign finance reform proposal will channel the resources in the most beneficial ways, empowering parties and candidates (including challengers) and encouraging small individual contributions, while removing as much as possible the unfair advantages and subsidies available to independently wealthy, self-financed candidates. At the same time, a constructive reform will try to encourage better debate and deliberation in campaigns by encouraging more candidate-on-screen discourse. In that spirit we propose:

1. Creation of a "broadcast bank" consisting of minutes of television and radio time on all broadcast outlets. Some time will be given to political parties, allocated in the same proportion as the public funding available for presidential campaigns. Other time will be available to individual candidates, as described below. Each party will decide how to allocate the time among its candidates. Such time can be used for ads, provided that no message is less than sixty seconds, and the candidate must appear on screen on television messages, and the candidate's voice and identification used on radio communications.

2. Additional time will be available to candidates who raise above a threshold of $25,000 in individual, in-state contributions of $100 or less; for each subsequent such contribution, candidates will receive a voucher for an equivalent amount of broadcast time.

3. The broadcast bank can be financed in several ways. The first step is to make a tradeoff: the "lowest unit rate" provision, which requires that broadcasters give discounts that average thirty percent on the advertising time they sell political candidates, will be repealed. In return, each broadcaster will be assessed a fee of 30 percent on all the political advertising the broadcaster sells, with the revenues going to the broadcast bank. The second step is to provide additional revenues or broadcast minutes from one or more of a variety of options. One approach would be to auction off whatever space the FCC determines is available in the portion of the spectrum, currently reserved for public safety, channels 60 through 69, which is soon to be broadened by technological advances. A second is to take advantage of a provision of the 1996 Telecommunications Act that requires broadcasters to pay a fee for employment of any ancillary or supplementary portions of the digital spectrum, with the fee set by the FCC and the funds to be placed in the U.S. Treasury; Congress could direct or the FCC could require that the fee be paid in whole or part in broadcast minutes for public purposes, or that the funds be set aside for the bank.

4. Candidates who want to purchase time outside of the broadcast bank system may do so, but must do so at market rates (lowest unit rates would no longer be mandated for such time.)

5. **Small Individual Contributions.** Over the past several years, campaigns for Congress have seen sharp changes in the nature of contributions. A shrinking share of campaign resources have come from small donations from individuals, while steadily increasing shares have come from both larger contributions ($500 to $1,000) and political action committees. Of all the sources of private monies that go into our political campaigns, the most desirable and least controversial is that contributed by in-state individuals in small amounts. The more citizens involved in the campaign process, the more stake they have in the political system; a small contribution is a positive way, with no direct link to a legislative product, to enhance the political process.

One of the most significant goals of campaign finance reform, then, is to find ways to encourage small individual contributions, especially in-state, and to encourage candidates to raise more of their funds in this fashion. The key to doing so is:

1. *Create a 100% tax credit for in-state contributions to federal candidates of $100 or less. The credit would apply to the first $100 an individual gave to candidates--in other words, $25. given to each of four candidates would result in a $100. credit. It would not apply to large contributions; it would be phased out if an individual gave more than $200 to the candidate.*

2. As in #4 above, add a large incentive to candidates to raise more of their resources from small individual in-state contributions by creating a matching voucher system for broadcast time.

3. Consider funding the tax credit for small contributions by assessing campaigns a ten percent fee for large contributions ($500. or more.) Consider further the tradeoff of raising the individual contribution limit of $1,000. to $2,500. to take into account inflation in the two decades since it was instituted while simultaneously assessing the fee for large contributions.

The reforms above are not top-to-bottom comprehensive changes in the federal campaign financing system. Comprehensive proposals do exist-- although they include radically different approaches. But no comprehensive proposal is practical at the moment, or could in fact "cure" the problems in the system once and for all. Nor would any two of us agree on all or even most of the elements that might be included in a comprehensive package. The changes we propose are doable and sensible, and if enacted, would make a very big positive difference in American campaigns.

FOREIGN CONTRIBUTIONS BAN

___. Section 319(b) of FECA (2 USC § 441e(b)) is amended to read as follows:

"(b) As used in this section, the term 'foreign national' means--

(1) any individual who is not a citizen of the United States;

(2) any person other than an individual which is a foreign principal as such term is defined by section 611(b) of title 22;

(3) any corporation which is a foreign subsidiary;

(4) any partnership of which the rights to governance, or in which the majority of the ultimate beneficial ownership or interests, are held or controlled, directly or indirectly, by individuals who are not citizens of the United States; and

(5) any person other than an individual, a corporation or a partnership, whose activities are directly or indirectly supervised, directed, controlled, financed or subsidized in whole or major part by a foreign principal as such term is defined by

section 611(b) of title 22.

For purposes of this subsection (b), the term 'foreign subsidiary' shall mean any corporation (i) the ultimate beneficial ownership of which is held or controlled, directly or indirectly, by individuals who are not citizens of the United States or (ii) a majority of the total combined voting power of all classes of stock of which is ultimately held or controlled, directly or indirectly, by individuals who are not citizens of the United States."

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DATE 12/3 TIME 4:07 PAGES TO FOLLOW _____

FAX TO Jim Weber
ORGANIZATION The White House
PHONE _____ FAX 456-7964

FROM Don Simon
PHONE _____

PLEASE NOTIFY RECIPIENT PROMPTLY.

MESSAGE Jim - This is the soft money language we discussed - from last year's Smith-Shays-Meehan bill. Call if you have questions.
Don

1 **Subtitle B—Provisions Relating to**
2 **Soft Money of Political Parties**

3 SEC. 211. SOFT MONEY OF POLITICAL PARTIES.

4 Title III of the Federal Election Campaign Act of
5 1971 (2 U.S.C. 431 et seq.) is amended by adding at the
6 end the following new section:

7 "SOFT MONEY OF POLITICAL PARTIES

8 "SEC. 325. (a) A national committee of a political
9 party, including the national congressional campaign com-
10 mittees of a political party, and any officers or agents of
11 such party committees, shall not solicit or receive any con-
12 tributions, donations, or transfers of funds, or spend any
13 funds, not subject to the limitations, prohibitions, and re-
14 porting requirements of this Act. This subsection shall
15 apply to any entity that is established, financed, main-
16 tained, or controlled by a national committee of a political
17 party, including the national congressional campaign com-
18 mittees of a political party, and any officers or agents of
19 such party committees.

20 "(b)(1) Any amount expended or disbursed by a
21 State, district, or local committee of a political party, dur-
22 ing a calendar year in which a Federal election is held,
23 for any activity which might affect the outcome of a Fed-
24 eral election, including but not limited to any voter reg-
25 istration and get-out-the-vote activity, any generic cam-

1 paign activity, and any communication that identifies a
2 Federal candidate (regardless of whether a State or local
3 candidate is also mentioned or identified) shall be made
4 from funds subject to the limitations, prohibitions and re-
5 porting requirements of this Act.
6 "(2) Paragraph (1) shall not apply to expenditures
7 or disbursements made by a State, district or local com-
8 mittee of a political party for—
9 "(A) a contribution to a candidate other than
10 for Federal office, provided that such contribution is
11 not designated or otherwise earmarked to pay for ac-
12 tivities described in paragraph (1);
13 "(B) the costs of a State or district/local politi-
14 cal convention;
15 "(C) the non-Federal share of a State, district
16 or local party committee's administrative and over-
17 head expenses (but not including the compensation
18 in any month of any individual who spends more
19 than 20 percent of his or her time on activity during
20 such month which may affect the outcome of a Fed-
21 eral election). For purposes of this provision, the
22 non-Federal share of a party committee's admini-
23 trative and overhead expenses shall be determined by
24 applying the ratio of the non-Federal disbursements
25 to the total Federal expenditures and non-Federal

1 disbursements made by the committee during the
2 previous presidential election year to the committee's
3 administrative and overhead expenses in the election
4 year in question;
5 "(D) the costs of grassroots campaign mate-
6 rials, including buttons, bumper stickers, and yard
7 signs, which materials solely name or depict a State
8 or local candidate; or
9 "(E) the cost of any campaign activity con-
10 ducted solely on behalf of a clearly identified State
11 or local candidate, provided that such activity is not
12 a get out the vote activity or any other activity cov-
13 ered by paragraph (1).
14 "(3) Any amount spent by a national, State, district
15 or local committee or entity of a political party to raise
16 funds that are used, in whole or in part, to pay the costs
17 of any activity covered by paragraph (1) shall be made
18 from funds subject to the limitations, prohibitions, and re-
19 porting requirements of this Act. This paragraph shall
20 apply to any entity that is established, financed, main-
21 tained, or controlled by a State, district or local committee
22 of a political party or any agent or officer of such party
23 committee in the same manner as it applies to that com-
24 mittee.

1 "(c) No national, State, district or local committee
2 of a political party shall solicit any funds for or make any
3 donations to any organization that is exempt from Federal
4 taxation under section 501(c) of the Internal Revenue
5 Code of 1986.

6 "(d)(1) No candidate for Federal office, individual
7 holding Federal office, or any agent of such candidate or
8 officeholder, may solicit or receive (A) any funds in con-
9 nection with any Federal election unless such funds are
10 subject to the limitations, prohibitions and reporting re-
11 quirements of this Act; (B) any funds that are to be ex-
12 pended in connection with any election for other than a
13 Federal election unless such funds are not in excess of
14 the amounts permitted with respect to contributions to
15 Federal candidates and political committees under section
16 315(a)(1) and (2), and are not from sources prohibited
17 from making contributions by this Act with respect to elec-
18 tion for Federal office. This paragraph shall not apply to
19 the solicitation or receipt of funds by an individual who
20 is a candidate for a non-Federal office if such activity is
21 permitted under State law for such individual's non-Fed-
22 eral campaign committee.

23 "(2)(A) No candidate for Federal office or individual
24 holding Federal office may directly or indirectly establish,
25 maintain, finance or control any organization described in

1 section 501(c) of the Internal Revenue Code of 1986 if
2 such organization raises funds from the public.
3 "(B) No candidate for Federal office or individual
4 holding Federal office may raise funds for any organiza-
5 tion described in section 501(c) of the Internal Revenue
6 Code of 1986 if the activities of the organization include
7 voter registration or get-out-the-vote campaigns.
8 "(C) For purposes of this paragraph, an individual
9 shall be treated as holding Federal office if such individ-
10 ual—
11 "(i) holds a Federal office; or
12 "(ii) holds a position described in level I of the
13 Executive Schedule under 5312 of title 5, United
14 States Code.".
15 SEC. 212. REPORTING REQUIREMENTS.
16 (a) REPORTING REQUIREMENTS.—Section 304 of the
17 Federal Election Campaign Act of 1971 (2 U.S.C. 434)
18 is amended by adding at the end the following new sub-
19 section:
20 "(d) POLITICAL COMMITTEES.—(1) A political com-
21 mittee other than a national committee of a political party,
22 any congressional campaign committee of a political party,
23 and any subordinate committee of either, to which section
24 325(b)(1) applies shall report all receipts and disburse-
25 ments.

1 "(2) Any political committee other than the commit-
2 tees of a political party shall report any receipts or dis-
3 bursements that are used in connection with a Federal
4 election.

5 "(3) If a political committee has receipts or disburse-
6 ments to which this subsection applies from any person
7 aggregating in excess of $200 for any calendar year, the
8 political committee shall separately itemize its reporting
9 for such person in the same manner as required in sub-
10 section (b)(3)(A), (5), or (6).

11 "(4) Reports required to be filed under this sub-
12 section shall be filed for the same time periods required
13 for political committees under subsection (a).".

14 (b) REPORTS BY STATE COMMITTEES.—Section 304
15 of the Federal Election Campaign Act of 1971 (2 U.S.C.
16 434), as amended by subsection (a), is further amended
17 by adding at the end the following new subsection:

18 "(e) FILING OF STATE REPORTS.—In lieu of any re-
19 port required to be filed by this Act, the Commission may
20 allow a State committee of a political party to file with
21 the Commission a report required to be filed under State
22 law if the Commission determines such reports contain
23 substantially the same information.".

24 (c) OTHER REPORTING REQUIREMENTS.—

1 (1) AUTHORIZED COMMITTEES.—Section
2 304(b)(4) of the Federal Election Campaign Act of
3 1971 (2 U.S.C. 434(b)(4)) is amended—
4 (A) by striking "and" at the end of sub-
5 paragraph (H);
6 (B) by inserting "and" at the end of sub-
7 paragraph (I); and
8 (C) by adding at the end the following new
9 subparagraph:
10 "(J) in the case of an authorized commit-
11 tee, disbursements for the primary election, the
12 general election, and any other election in which
13 the candidate participates;".
14 (2) NAMES AND ADDRESSES.—Section
15 304(b)(5)(A) of the Federal Election Campaign Act
16 of 1971 (2 U.S.C. 434(b)(5)(A)) is amended—
17 (A) by striking "within the calendar year";
18 and
19 (B) by inserting ", and the election to
20 which the operating expenditure relates" after
21 "operating expenditure".
22 SEC. 213. BUILDING FUND EXCEPTION TO THE DEFINITION
23 OF THE TERM "CONTRIBUTION".
24 Section 301(8)(B) of the Federal Election Campaign
25 Act of 1971 (2 U.S.C. 431(8)(B)) is amended—

1 (1) by striking out clause (viii); and
2 (2) by redesignating clauses (ix) through (xiv)
3 as clauses (viii) through (xiii), respectively.

4 Subtitle C—Soft Money of Persons
5 Other Than Political Parties

6 SEC. 221. SOFT MONEY OF PERSONS OTHER THAN POLITI-
7 CAL PARTIES.

8 Section 304 of the Federal Election Campaign Act
9 of 1971 (2 U.S.C. 434), as amended by section 212(a)
10 and (c), is further amended by adding at the end the fol-
11 lowing new subsection:

12 "(f) ELECTION ACTIVITY OF PERSONS OTHER THAN
13 POLITICAL PARTIES.—(1)(A)(i) If any person to which
14 section 325 does not apply makes (or obligates to make)
15 disbursements for activities described in section 325(b)(1)
16 in excess of $2,000, such person shall file a statement—
17 "(I) within 48 hours after the disbursements
18 (or obligations) are made; or
19 "(II) in the case of disbursements (or obliga-
20 tions) that are required to be made within 20 days
21 of the election, within 24 hours after such disburse-
22 ment (or obligations) are made.
23 "(ii) An additional statement shall be filed each time
24 additional disbursements aggregating $2,000 are made (or
25 obligated to be made) by a person described in clause (i).

1ST CASE of Level 1 printed in FULL format.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE AND DOUGLAS JONES, TREASURER, PETITIONERS v. FEDERAL ELECTION COMMISSION

No. 95-489

SUPREME COURT OF THE UNITED STATES

116 S. Ct. 2309; 1996 U.S. LEXIS 4258; 135 L. Ed. 2d 795; 135 L. Ed. 2d 795; 64 U.S.L.W. 4663

April 15, 1996, Argued

June 26, 1996, Decided

NOTICE: [*1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

DISPOSITION: 59 F.3d 1015, vacated and remanded.

SYLLABUS:
Before the Colorado Republican Party selected its 1986 senatorial candidate, its Federal Campaign Committee (Colorado Party), the petitioner here, bought radio advertisements attacking the Democratic Party's likely candidate. The Federal Election Commission (FEC) brought suit charging that the Colorado Party had violated the "Party Expenditure Provision" of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. @ 441a(d)(3), which imposes dollar limits upon political party "expenditures in connection with the general election campaign of a [congressional] candidate." The Colorado Party defended in part by claiming that the expenditure limitations violated the First Amendment as applied to its [*2] advertisements, and filed a counterclaim seeking to raise a facial challenge to the Provision as a whole. The District Court interpreted the "in connection with" language narrowly and held that the Provision did not cover the expenditure at issue. It therefore entered summary judgment for the Colorado Party, dismissing the counterclaim as moot. In ordering judgment for the FEC, the Court of Appeals adopted a somewhat broader interpretation of the Provision, which, it said, both covered this expenditure and satisfied the Constitution.

Held: The judgment is vacated, and the case is remanded.

59 F.3d 1015, vacated and remanded.

JUSTICE BREYER, joined by JUSTICE O'CONNOR and JUSTICE SOUTER, concluded that the First Amendment prohibits application of the Party Expenditure Provision to the kind of expenditure at issue here--an expenditure that the political party has made independently, without coordination with any candidate. Pp. 6-17.

(a) The outcome is controlled by this Court's FECA case law. After weighing the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views, against a "compelling" governmental [*3] interest in protecting the electoral system from the appearance and reality of corruption, see, e.g., Buckley v. Valeo, 424 U.S. 1, 14-23, 46 L. Ed. 2d 659, 96 S. Ct. 612 (per curiam), the Court has ruled unconstitutional FECA provisions that, inter alia, limited the right of individuals, id., at 39-51, and political committees, Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 497, 84 L. Ed. 2d 455, 105 S. Ct. 1459, to make "independent" expenditures not coordinated with a candidate or a candidate's campaign, but has permitted other FECA provisions that imposed contribution limits both when an individual or political committee contributed money directly to a candidate, and when they contributed indirectly by making expenditures that they coordinated with the candidate, see Buckley, supra, at 23-36, 46-48. The summary judgment record indicates that the expenditure here at issue must be treated, for constitutional purposes, as an "independent" expenditure entitled to First Amendment protection, not as an indirect campaign contribution subject to regulation. There is uncontroverted direct evidence that the Colorado Party developed its advertising campaign independently and not [*4] pursuant to any understanding with a candidate. Since the Government does not point to evidence or legislative findings suggesting any special corruption problem in respect to political parties' independent expenditures, the Court's prior cases forbid regulation of such expenditures. Pp. 6-12.

(b) The Government's argument that this expenditure is not "independent," but is rather a "coordinated expenditure" which this Court has treated as a "contribution" that Congress may constitutionally regulate, is rejected. The summary judgment record shows no actual coordination with candidates as a matter of fact. The Government's claim for deference to FEC interpretations rendering all party expenditures "coordinated" is unpersuasive. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 28-29, n. 1, 70 L. Ed. 2d 23, 102 S. Ct. 38, distinguished. These regulations and advisory opinions do not represent an empirical judgment by the FEC that all party expenditures are coordinated with candidates or that party independent and coordinated expenditures cannot be distinguished in practice. Also unconvincing are the Government's contentions that the Colorado Party has conceded that the expenditure [*5] here is "coordinated," and that such coordination exists because a party and its candidate are, in some sense, identical. Pp. 12-17.

(c) Because this expenditure is "independent," the Court need not reach the broader question argued by the Colorado Party: whether, in the special case of political parties, the First Amendment also forbids congressional efforts to limit coordinated expenditures. While the Court is not deprived of jurisdiction to consider this facial challenge by the failure of the parties and the lower courts to focus specifically on the complex issues involved in determining the constitutionality of political parties' coordinated expenditures, that lack of focus provides a prudential reason for the Court not to decide the broader question. This is the first case to raise the question, and the Court should defer action until the lower courts have considered it in light of this decision. Pp. 17-20.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concluded that, on its face, FECA violates the First Amendment when it restricts as a

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read narrowly + can limit coordinated — but not indep

"contribution" a political party's spending "in cooperation, consultation, or concert, with . . . a candidate." 2 [*6] U.S.C. @ 441a(a)(7)(B)(i). The Court in Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (per curiam), had no occasion to consider limitations on political parties' expenditures, id., at 58, n. 66, and its reasoning upholding ordinary contribution limitations should not be extended to a case that does. Buckley's central holding is that spending money on one's own speech must be permitted, id., at 44-58, and that is what political parties do when they make the expenditures that @ 441a(a)(7)(B)(i) restricts as "contributions." Party spending "in cooperation, consultation, or concert with" a candidate is indistinguishable in substance from expenditures by the candidate or his campaign committee. The First Amendment does not permit regulation of the latter, see id., at 54-59, and it should not permit this regulation of the former. Pp. 1-5.

but if v.s. limits on cand contribs, pre rum could do this too?

JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concluded in Parts I and III that 2 U.S.C. @ 441a(d)(3) is unconstitutional not only as applied to petitioners, but also on its face. Pp. 1-5, 16-19.

(a) The Court should decide the Party's facial challenge to @ 441a(d)(3), addressing the constitutionality of limits [*7] on coordinated expenditures by political parties. That question is squarely before the Court, and the principal opinion's reasons for not reaching it are unpersuasive. In addition, concerns for the chilling of First Amendment expression counsel in favor of resolving the question. Reaching the facial challenge will make clear the circumstances under which political parties may engage in political speech without running afoul of @ 441a(d)(3). Pp. 1-5.

(b) Section 441a(d)(3) cannot withstand a facial challenge under the framework established by Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (per curiam). The anticorruption rationale that the Court has relied on is inapplicable in the specific context of campaign funding by political parties, since there is only a minimal threat of corruption when a party spends to support its candidate or to oppose his competitor, whether or not that expenditure is made in concert with the candidate. Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic. To the contrary, the danger to lies in Government suppression of such activity. Pp. 16-19.

JUSTICE [*8] THOMAS also concluded in Part II that, in resolving the facial challenge, the Buckley framework should be rejected because there is no constitutionally significant difference between campaign contributions and expenditures: both involve core expression and basic associational rights that are central to the First Amendment. Curbs on such speech must be strictly scrutinized. See, e.g., Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 501, 84 L. Ed. 2d 455, 105 S. Ct. 1459. Section 441a(d)(3)'s limits on independent and coordinated expenditures fail strict scrutiny because the statute is not narrowly tailored to serve the compelling governmental interest in preventing the fact or appearance of "corruption," which this Court has narrowly defined as a "financial quid pro quo: dollars for political favors," id., at 497. Contrary to the Court's ruling in Buckley, supra, at 28, bribery laws and disclosure requirements present less restrictive means of preventing corruption than does @ 441a(d)(3), which indiscriminately covers many conceivable instances in which a party committee could exceed spending limits without any intent to extract an unlawful

commitment from [*9] a candidate. Pp. 11-15.

JUDGES: BREYER, J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined. THOMAS, J., filed an opinion concurring in the judgment and dissenting in part, in which REHNQUIST, C. J., and SCALIA, J., joined as to Parts I and III. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined.

OPINIONBY: BREYER

OPINION: JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which JUSTICE O'CONNOR and JUSTICE SOUTER join.

In April 1986, before the Colorado Republican Party had selected its senatorial candidate for the fall's election, that Party's Federal Campaign Committee bought radio advertisements attacking Timothy Wirth, the Democratic Party's likely candidate. The Federal Election Commission (FEC) charged that this "expenditure" exceeded the dollar limits that a provision of the Federal Election Campaign Act of 1971 (FECA) imposes upon political party "expenditures in connection with" a "general election campaign" for congressional office. 90 Stat. 486, [*10] as amended, 2 U.S.C. @ 441a(d)(3). This case focuses upon the constitutionality of those limits as applied to this case. We conclude that the First Amendment prohibits the application of this provision to the kind of expenditure at issue here--an expenditure that the political party has made independently, without coordination with any candidate.

I

To understand the issues and our holding, one must begin with FECA as it emerged from Congress in 1974. That Act sought both to remedy the appearance of a "corrupt" political process (one in which large contributions seem to buy legislative votes) and to level the electoral playing field by reducing campaign costs. See Buckley v. Valeo, 424 U.S. 1, 25-27, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam). It consequently imposed limits upon the amounts that individuals, corporations, "political committees" (such as political action committees, or PAC's), and political parties could contribute to candidates for federal office, and it also imposed limits upon the amounts that candidates, corporations, labor unions, political committees, and political parties could spend, even on their own, to help a candidate win election. See 18 U.S.C. [*11] @@ 608, 610 (1970 ed., Supp. IV).

This Court subsequently examined several of the Act's provisions in light of the First Amendment's free speech and association protections. See Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 93 L. Ed. 2d 539, 107 S. Ct. 616 (1986); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985) (NCPAC); California Medical Assn. v. Federal Election Comm'n, 453 U.S. 182, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981); Buckley, supra. In these cases, the Court essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views, against a "compelling" governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of

corruption. See Massachusetts Citizens for Life, supra, at 256-263; NCPAC, supra, at 493-501; California Medical Assn., supra, at 193-199; Buckley, supra, at 14-23. After doing so, the Court found that the First Amendment prohibited some of FECA's provisions, but permitted others.

Most of the provisions this Court found unconstitutional imposed expenditure [*12] limits. Those provisions limited candidates' rights to spend their own money, Buckley, supra, at 51-54, limited a candidate's campaign expenditures, 424 U.S. at 54-58, limited the right of individuals to make "independent" expenditures (not coordinated with the candidate or candidate's campaign), id., at 39-51, and similarly limited the right of political committees to make "independent" expenditures, NCPAC, supra, at 497. The provisions that the Court found constitutional mostly imposed contribution limits--limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate, @ 441a(a)(7)(B)(i). See Buckley, supra, at 23-36. See also 424 U.S. at 46-48; California Medical Assn., supra, at 193-199 (limits on contributions to political committees). Consequently, for present purposes, the Act now prohibits individuals and political committees from making direct, or indirect, contributions that exceed the following limits:

coord. expends = contribs.

(a) For any "person": $ 1,000 to a candidate "with respect to any election"; $ [*13] 5,000 to any political committee in any year; $ 20,000 to the national committees of a political party in any year; but all within an overall limit (for any individual in any year) of $ 25,000. 2 U.S.C. @@ 441a(a)(1), (3).

(b) For any "multicandidate political committee": $ 5,000 to a candidate "with respect to any election"; $ 5,000 to any political committee in any year; and $ 15,000 to the national committees of a political party in any year. @ 441a(a)(2).

FECA also has a special provision, directly at issue in this case, that governs contributions and expenditures by political parties. @ 441a(d). This special provision creates, in part, an exception to the above contribution limits. That is, without special treatment, political parties ordinarily would be subject to the general limitation on contributions by a "multicandidate political committee" just described. See @ 441a(a)(4). That provision, as we said in (b) above, limits annual contributions by a "multicandidate political committee" to no more than $ 5,000 to any candidate. And as also mentioned above, this contribution limit governs not only direct contributions but also indirect contributions that take the form [*14] of coordinated expenditures, defined as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." @ 441a(a)(7)(B)(i). Thus, ordinarily, a party's coordinated expenditures would be subject to the $ 5,000 limitation.

However, FECA's special provision, which we shall call the "Party Expenditure Provision," creates a general exception from this contribution limitation, and from any other limitation on expenditures. It says:

"Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, . . . political party [committees] . . . may make expenditures in connection with the general election campaign of candidates for Federal office . . . ." @ 441a(d)(1) (emphasis added).

After exempting political parties from the general contribution and expenditure limitations of the statute, the Party Expenditure Provision then imposes a substitute limitation upon party "expenditures" in a senatorial campaign equal to the greater of $ 20,000 or "2 cents multiplied by the voting age population of the [*15] State," @ 441a(d)(3)(A)(i), adjusted for inflation since 1974, @ 441a(c). The Provision permitted a political party in Colorado in 1986 to spend about $ 103,000 in connection with the general election campaign of a candidate for the United States Senate. See FEC Record, vol. 12, no. 4, p. 1 (Apr. 1986). (A different provision, not at issue in this case, @ 441a(d)(2), limits party expenditures in connection with presidential campaigns. Since this case involves only the provision concerning congressional races, we do not address issues that might grow out of the public funding of Presidential campaigns).

In January 1986, Timothy Wirth, then a Democratic Congressman, announced that he would run for an open Senate seat in November. In April, before either the Democratic primary or the Republican convention, the Colorado Republican Federal Campaign Committee (Colorado Party), the petitioner here, bought radio advertisements attacking Congressman Wirth. The State Democratic Party complained to the Federal Election Commission. It pointed out that the Colorado Party had previously assigned its $ 103,000 general election allotment to the National Republican Senatorial Committee, leaving [*16] it without any permissible spending balance. See Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 70 L. Ed. 2d 23, 102 S. Ct. 38 (1981) (state party may appoint national senatorial campaign committee as agent to spend its Party Expenditure Provision allotment). It argued that the purchase of radio time was an "expenditure in connection with the general election campaign of a candidate for Federal office," @ 441a(d)(3), which, consequently, exceeded the Party Expenditure Provision limits.

The FEC agreed with the Democratic Party. It brought a complaint against the Colorado Republican Party, charging a violation. The Colorado Party defended in part by claiming that the Party Expenditure Provision's expenditure limitations violated the First Amendment--a charge that it repeated in a counterclaim that said the Colorado Party intended to make other "expenditures directly in connection with" senatorial elections, App. 68, P48, and attacked the constitutionality of the entire Party Expenditure Provision. The Federal District Court interpreted the Provision's words " 'in connection with' the general election campaign of a candidate" narrowly, as meaning only expenditures for advertising [*17] using " 'express words of advocacy of election or defeat.' " 839 F. Supp. 1448, 1455 (Colo. 1993) (quoting Buckley, 424 U.S. at 46, n. 52). See also Massachusetts Citizens for Life, 479 U.S. at 249. As so interpreted, the court held, the provision did not cover the expenditures here. The court entered summary judgment for the Colorado Party and dismissed its counterclaim as moot.

D.C. striking ruling - expend doesn't fall w/in limit

Both sides appealed. The Government, for the FEC, argued for a somewhat broader interpretation of the statute--applying the limits to advertisements containing an "electioneering message" about a "clearly identified candidate," FEC Advisory Op. 1985-14, 2 CCH Fed. Election Camp. Fin. Guide P5819, p. 11,185 (May 30, 1985) (AO 1985-14)--which, it said, both covered the expenditure and satisfied the Constitution. The Court of Appeals agreed. It found the Party Expenditure Provision applicable, held it constitutional, and ordered judgment in the FEC's favor. 59 F.3d 1015, 1023-1024 (CA10 1995).

We granted certiorari primarily to consider the Colorado Party's argument that the Party Expenditure Provision violates the First Amendment "either facially or as applied." Pet. for Cert. i. For reasons we [*18] shall discuss in Part IV below, we consider only the latter question--whether the Party Expenditure Provision as applied here violates the First Amendment. We conclude that it does.

II

The summary judgment record indicates that the expenditure in question is what this Court in Buckley called an "independent" expenditure, not a "coordinated" expenditure that other provisions of FECA treat as a kind of campaign "contribution." See Buckley, supra, at 36-37, 46-47, 78; NCPAC, 470 U.S. at 498. The record describes how the expenditure was made. In a deposition, the Colorado Party's Chairman, Howard Callaway, pointed out that, at the time of the expenditure, the Party had not yet selected a senatorial nominee from among the three individuals vying for the nomination. App. 195-196. He added that he arranged for the development of the script at his own initiative, id., at 200, that he, and no one else, approved it, id., at 199, that the only other politically relevant individuals who might have read it were the party's executive director and political director, ibid., and that all relevant discussions took place at meetings attended only by party staff, id., [*19] at 204.

Notwithstanding the above testimony, the Government argued in District Court--and reiterates in passing in its brief to this Court, Brief for Respondent 27, n. 20--that the deposition showed that the Party had coordinated the advertisement with its candidates. It pointed to Callaway's statement that it was the practice of the party to "coordinate with the candidate" "campaign strategy," App. 195, and for Callaway to be "as involved as [he] could be" with the individuals seeking the Republican nomination, ibid., by making available to them "all of the assets of the party," id., at 195-196. These latter statements, however, are general descriptions of party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate. We can find no "genuine" issue of fact in this respect. Fed. Rule Civ. Proc. 56(e); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 [*20] (1986). And we therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.

So treated, the expenditure falls within the scope of the Court's precedents that extend First Amendment protection to independent expenditures. Beginning with Buckley, the Court's cases have found a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." NCPAC, supra, at 497. This difference has been grounded in the observation that restrictions on contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication," Buckley, supra, at 20-21, because the symbolic communicative value of a contribution bears little relation to its size, 424 U.S. at 21, and because such limits leave "persons free to engage in independent political expression, to

associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." Id., [*21] at 28. At the same time, reasonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors. Id., at 26-27.

In contrast, the Court has said that restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and "represent substantial . . . restraints on the quantity and diversity of political speech." Id., at 19. And at the same time, the Court has concluded that limitations on independent expenditures are less directly related to preventing corruption, since "the absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." Id., at 47.

Given these established principles, we do not see how a provision that limits a political party's independent expenditures can escape their controlling effect. A political party's independent expression not only reflects its members' views about [*22] the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees. See, e.g., Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989).

We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction. When this Court considered, and held unconstitutional, limits that FECA had set on certain independent expenditures by political action committees, it reiterated Buckley's observation that "the absence of prearrangement and coordination" does not eliminate, but it does help to "alleviate," any "danger" that a candidate will understand the expenditure as an effort to obtain a "quid pro quo." See NCPAC, 470 U.S. at 498. The same is true of independent party expenditures. [*23]

We recognize that FECA permits individuals to contribute more money ($ 20,000) to a party than to a candidate ($ 1,000) or to other political committees ($ 5,000). 2 U.S.C. @ 441a(a). We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see @ 431(8)(A)(i), or for voter registration and "get out the vote" drives, see @ 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated. Unregulated "soft money" contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute. See @ 431(8)(B). Any contribution to a party that is earmarked for a particular campaign, is considered a contribution to the candidate and is subject to the contribution limitations. @ 441a(a)(8). A party may not simply channel unlimited amounts of even undesignated contributions to a candidate, since such direct

transfers are also considered contributions and are subject to the contribution limits on a "multicandidate political committee." @ 441a(a)(2). [*24] The greatest danger of corruption, therefore, appears to be from the ability of donors to give sums up to $ 20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate. We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties. Cf. California Medical Assn., 453 U.S. at 197-199 (plurality opinion) (danger of evasion of limits on contribution to candidates justified prophylactic limitation on contributions to PAC's). But we do not believe that the risk of corruption present here could justify the "markedly greater burden on basic freedoms caused by" the statute's limitations on expenditures. Buckley, supra, at 44. See also 424 U.S. at 46-47, 51; NCPAC, supra, at 498. Contributors seeking to avoid the effect of the $ 1,000 contribution limit indirectly by donations to the national party could spend that same amount of money (or more) themselves more directly by making their own independent expenditures promoting the candidate. See [*25] Buckley, supra, at 44-48 (risk of corruption by individuals' independent expenditures is insufficient to justify limits on such spending). If anything, an independent expenditure made possible by a $ 20,000 donation, but controlled and directed by a party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor. In any case, the constitutionally significant fact, present equally in both instances, is the lack of coordination between the candidate and the source of the expenditure. See Buckley, supra, at 45-46; NCPAC, supra, at 498. This fact prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.

The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures. See Turner Broadcasting System, Inc. v. FCC, 512 U.S. , (1994) (slip. op., at 40-41) ("When the Government defends a regulation on speech as a means [*26] to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured") (citation and internal quotation marks omitted); NCPAC, supra, at 498. To the contrary, this Court's opinions suggest that Congress wrote the Party Expenditure Provision not so much because of a special concern about the potentially "corrupting" effect of party expenditures, but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending. See Buckley, supra, at 57. In fact, rather than indicating a special fear of the corruptive influence of political parties, the legislative history demonstrates Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections. See Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. at 41 (Party Expenditure Provision was intended to "assure that political parties will continue to have an important role in federal elections"); S. Rep. No. 93-689, p. 7 (1974) ("[A] vigorous party system is vital to American politics . . . . Pooling resources from many small contributors [*27] is a legitimate function and an integral part of party politics"); id., at 7-8, 15.

We therefore believe that this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent

expenditures could deny the same right to political parties. Having concluded this, we need not consider the Party's further claim that the statute's "in connection with" language, and the FEC's interpretation of that language, are unconstitutionally vague. Cf. Buckley, supra, at 40-44.

III

The Government does not deny the force of the precedent we have discussed. Rather, it argued below, and the lower courts accepted, that the expenditure in this case should be treated under those precedents, not as an "independent expenditure," but rather as a "coordinated expenditure," which those cases have treated as "contributions," and which those cases have held Congress may constitutionally regulate. See, e.g., Buckley, supra, at 23-38.

While the District Court found that the expenditure in this case was "coordinated," 839 F. Supp. at 1453, it did not do [*28] so based on any factual finding that the Party had consulted with any candidate in the making or planing of the advertising campaign in question. Instead, the District Court accepted the Government's argument that all party expenditures should be treated as if they had been coordinated as a matter of law, "based on Supreme Court precedent and the Commission's interpretation of the statute," ibid. The Court of Appeals agreed with this legal conclusion. 59 F.3d at 1024. Thus, the lower courts' "finding" of coordination does not conflict with our conclusion, infra, at 6-8, that the summary judgment record shows no actual coordination as a matter of fact. The question, instead, is whether the Court of Appeals erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are "coordinated." We believe it did.

In support of its argument, the Government points to a set of legal materials, based on FEC interpretations, that seem to say or imply that all party expenditures are "coordinated." These include: (1) an FEC regulation that forbids political parties to make any "independent expenditures . . . in connection with" a "general [*29] election campaign," 11 CFR @ 110.7(b)(4) (1995); (2) Commission Advisory Opinions that use the word "coordinated" to describe the Party Expenditure Provisions' limitations, see, e.g., FEC Advisory Op. 1984-15, 1 CCH Fed. Election Camp. Fin. Guide P5766, p. 11,069 (May 31, 1984) (AO 1984-15); FEC Advisory Op. 1988-22, 2 CCH Fed. Election Camp. Fin. Guide P5932, p. 11,471 n. 4 (July 5, 1988) (AO 1988-22); (3) one Commission Advisory Opinion that says explicitly in a footnote that "coordination with candidates is presumed and 'independence' precluded," ibid.; and (4) a statement by this Court that "party committees are considered incapable of making 'independent' expenditures," FEC v. Democratic Senatorial Campaign Comm., supra, at 28-29, n. 1.

The Government argues, on the basis of these materials, that the FEC has made an "empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election." Brief for Respondent 27. The FEC materials, however, do not make this empirical judgment. For the most part those materials use the word "coordinated" as [*30] a description that does not necessarily deny the possibility that a party could also make independent expenditures. See, e.g., AO 1984-15 P5766, p. 11,069. We concede that one Advisory Opinion says, in a footnote, that "coordination with candidates is presumed." AO 1988-22 P5932, p. 11,471 n. 4. But this statement, like the others, appears without any

internal or external evidence that the FEC means it to embody an empirical judgment (say, that parties, in fact, hardly ever spend money independently) or to represent the outcome of an empirical investigation. Indeed, the statute does not require any such investigation, for it applies both to coordinated and to independent expenditures alike. See @ 441a(d)(3) (a "political party . . . may not make any expenditure" in excess of the limits) (emphasis added). In any event, language in other FEC Advisory Opinions suggests the opposite, namely that sometimes, in fact, parties do make independent expenditures. See, e.g., AO 1984-15, P5766, p. 11,069 ("Although consultation or coordination with the candidate is permissible, it is not required"). In these circumstances, we cannot take the cited materials as an empirical, [*31] or experience-based, determination that, as an factual matter, all party expenditures are coordinated with a candidate. That being so, we need not hold, on the basis of these materials, that the expenditures here were "coordinated." The Government does not advance any other legal reason that would require us to accept the Commission's characterization. The Commission has not claimed, for example, that, administratively speaking, it is more difficult to separate a political party's "independent," from its "coordinated," expenditures than, say, those of a PAC. Cf. 11 CFR @ 109.1 (1995) (distinguishing between independent and coordinated expenditures by other political groups). Nor can the Commission draw significant legal support from the footnote in Democratic Senatorial Campaign Comm., 454 U.S. at 28-29, n. 1, given that this statement was dicta that purported to describe the regulatory regime as the FEC had described it in a brief.

here's an avenue

Nor does the fact that the Party Expenditure Provision fails to distinguish between coordinated and independent expenditures indicate a congressional judgment that such a distinction is impossible or untenable in the context of political party spending. [*32] Instead, the use of the unmodified term "expenditure" is explained by Congress' desire to limit all party expenditures when it passed the 1974 amendments, just as it had limited all expenditures by individuals, corporations, and other political groups. See 18 U.S.C. @@ 608(e), 610 (1970 ed., Supp. IV); Buckley, 424 U.S. at 39.

Finally, we recognize that the FEC may have characterized the expenditures as "coordinated" in light of this Court's constitutional decisions prohibiting regulation of most independent expenditures. But, if so, the characterization cannot help the Government prove its case. An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one. See, e.g., NAACP v. Button, 371 U.S. 415, 429, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963) (the government "cannot foreclose the exercise of constitutional rights by mere labels"); Edwards v. South Carolina, 372 U.S. 229, 235-238, 9 L. Ed. 2d 697, 83 S. Ct. 680 (1963) (State may not avoid First Amendment's strictures by applying the label "breach of the peace" to peaceful demonstrations).

Key - Pre definitional & in party constitutional

The Government also argues that the Colorado Party has conceded that the expenditures are "coordinated." But [*33] there is no such concession in respect to the underlying facts. To the contrary, the Party's "Questions Presented" in its petition for certiorari describes the expenditure as one "the party has not coordinated with its candidate." See Pet. for Cert. i. In the lower courts the Party did accept the FEC's terminology, but it did so in the context of legal arguments that did not focus upon the constitutional distinction that we now consider. See Reply Brief for Petitioners 9-10, n. 8

(denying that the FEC's labels can control constitutional analysis). The Government has not referred us to any place where the Party conceded away or abandoned its legal claim that Congress may not limit the uncoordinated expenditure at issue here. And, in any event, we are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts. Cf. United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 447, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993); Massachusetts v. United States, 333 U.S. 611, 623-628, 92 L. Ed. 968, 68 S. Ct. 747 (1948); Young v. United States, 315 U.S. 257, 259, 86 L. Ed. 832, 62 S. Ct. 510 (1942) (recognizing that "our judgments [*34] are precedents" and that the proper understanding of matters of law "cannot be left merely to the stipulation of parties").

Finally, the Government and supporting amici argue that the expenditure is "coordinated" because a party and its candidate are identical, i.e., the party, in a sense, "is" its candidates. We cannot assume, however, that this is so. See, e.g., W. Keefe, Parties, Politics, and Public Policy in America 59-74 (5th ed. 1988) (describing parties as "coalitions" of differing interests). Congress chose to treat candidates and their parties quite differently under the Act, for example, by regulating contributions from one to the other. See @ 441a(a)(2)(B). See also 11 CFR @@ 110.2, 110.3(b) (1995). And we are not certain whether a metaphysical identity would help the Government, for in that case one might argue that the absolute identity of views and interests eliminates any potential for corruption, as would seem to be the case in the relationship between candidates and their campaign committees. Cf. Buckley, 424 U.S. at 54-59 (Congress may not limit expenditures by candidate/campaign committee); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 790, 55 L. Ed. 2d 707, 98 S. Ct. 1407 [*35] (1978) (where there is no risk of "corruption" of a candidate, the Government may not limit even contributions).

IV

The Colorado Party and supporting amici have argued a broader question than we have decided, for they have claimed that, in the special case of political parties, the First Amendment forbids congressional efforts to limit coordinated expenditures as well as independent expenditures. Because the expenditure before us is an independent expenditure we have not reached this broader question in deciding the Party's "as applied" challenge.

We recognize that the Party filed a counterclaim in which it sought to raise a facial challenge to the Party Expenditure Provision as a whole. But that counterclaim did not focus specifically upon coordinated expenditures. See App. 68-69. Nor did its summary judgment affidavits specifically allege that the Party intended to make coordinated expenditures exceeding the statute's limits. See App. 159, P4. While this lack of focus does not deprive this Court of jurisdiction to consider a facial challenge to the Party Expenditure Provision as overbroad or as unconstitutional in all applications, it does provide a prudential [*36] reason for this Court not to decide the broader question, especially since it may not be necessary to resolve the entire current dispute. If, in fact, the Party wants to make only independent expenditures like those before us, its counterclaim is mooted by our resolution of its "as applied" challenge. Cf. Renne v. Geary, 501 U.S. 312, 323-324, 115 L. Ed. 2d 288, 111 S. Ct. 2331 (1991) (facial challenge should generally not be entertained when an

"as-applied" challenge could resolve the case); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-504, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985).

More importantly, the opinions of the lower courts, and the parties' briefs in this case, did not squarely isolate, and address, party expenditures that in fact are coordinated, nor did they examine, in that context, relevant similarities or differences with similar expenditures made by individuals or other political groups. Indeed, to our knowledge, this is the first case in the 20-year history of the Party Expenditure Provision to suggest that in-fact coordinated expenditures by political parties are protected from congressional regulation by the First Amendment, even though this Court's prior cases have permitted regulation of similarly coordinated [*37] expenditures by individuals and other political groups. See Buckley, supra, at 46-47. This issue is complex. As JUSTICE KENNEDY points out, post, at 4-5, party coordinated expenditures do share some of the constitutionally relevant features of independent expenditures. But many such expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills, see Buckley, supra, at 46). Moreover, political parties also share relevant features with many PAC's, both having an interest in, and devoting resources to, the goal of electing candidates who will "work to further" a particular "political agenda," which activity would benefit from coordination with those candidates. Post, at 4. See, e.g., NCPAC, 470 U.S. at 490 (describing the purpose and activities of the National Conservative PAC); id., at 492 (coordinated expenditures by PAC's are subject to FECA contribution limitations). Thus, a holding on in-fact coordinated party expenditures necessarily implicates a broader range of issues than may first appear, including the constitutionality of party contribution [*38] limits.

But the focus of this litigation, and the lower court opinions, has not been on such issues, but rather on whether the Government may conclusively deem independent party expenditures to be coordinated. This lack of focus may reflect, in part, the litigation strategy of the parties. The Government has denied that any distinction can be made between a party's independent and its coordinated expenditures. The Colorado Party, for its part, did not challenge a different provision of the statute--a provision that imposes a $ 5,000 limit on any contribution by a "multicandidate political committee" (including a coordinated expenditure) and which would apply to party coordinated expenditures if the entire Party Expenditure Provision were struck from the statute as unconstitutional. See @@ 441a(a)(2), (4), (7)(B)(i). Rather than challenging the constitutionality of this provision as well, thereby making clear that it was challenging Congress' authority to regulate in-fact coordinated party expenditures, the Party has made an obscure severability argument that would leave party coordinated expenditures exempt from that provision. See Reply Brief for Petitioners 11, n. 9. While these [*39] strategies do not deprive the parties of a right to adjudicate the counterclaim, they do provide a reason for this Court to defer consideration of the broader issues until the lower courts have reconsidered the question in light of our current opinion.

Finally, we note that neither the parties nor the lower courts have considered whether or not Congress would have wanted the Party Expenditure Provisions limitations to stand were they to apply only to coordinated, and not to independent, expenditures. See Buckley, 424 U.S. at 108; NCPAC, supra, at 498. This non-constitutional ground for exempting party coordinated

expenditures from FECA limitations should be briefed and considered before addressing the constitutionality of such regulation. See United States v. Locke, 471 U.S. 84, 92, 85 L. Ed. 2d 64, 105 S. Ct. 1785, and n. 9 (1985).

JUSTICE THOMAS disagrees and would reach the broader constitutional question notwithstanding the above prudential considerations. In fact, he would reach a great number of issues neither addressed below, nor presented by the facts of this case, nor raised by the parties, for he believes it appropriate here to overrule sua sponte this Court's entire campaign [*40] finance jurisprudence, developed in numerous cases over the last 20 years. See post, at 5-15. Doing so seems inconsistent with this Court's view that it is ordinarily "inappropriate for us to reexamine" prior precedent "without the benefit of the parties' briefing," since the "principles that animate our policy of stare decisis caution against overruling a longstanding precedent on a theory not argued by the parties." United States v. International Business Machines Corp., 517 U.S. , , 1996 U.S. LEXIS 3716 (1996) (slip. op., at 12, 13). In our view, given the important competing interests involved in campaign finance issues, we should proceed cautiously, consistent with this precedent, and remand for further proceedings.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings.

It is so ordered.

CONCURBY: KENNEDY (In Part); THOMAS (In Part)

DISSENTBY: STEVENS; KENNEDY (In Part); THOMAS (In Part)

DISSENT: JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

In my opinion, all money spent by a political party to secure the election of its candidate for the office of United States Senator should be considered a "contribution" [*41] to his or her campaign. I therefore disagree with the conclusion reached in Part III of the Court's opinion.

I am persuaded that three interests provide a constitutionally sufficient predicate for federal limits on spending by political parties. First, such limits serve the interest in avoiding both the appearance and the reality of a corrupt political process. A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked. That interdependency creates a special danger that the party--or the persons who control the party--will abuse the influence it has over the candidate by virtue of its power to spend. The provisions at issue are appropriately aimed at reducing that threat. The fact that the party in this case had not yet chosen its nominee at the time it broadcast the challenged advertisements is immaterial to the analysis. Although the Democratic and Republican nominees for the 1996 Presidential race will not be selected until this summer, current advertising expenditures by the two national parties are no less contributions to the campaigns of the respective frontrunners than those that will be made in the fall.

Second, [*42] these restrictions supplement other spending limitations embodied in the Act, which are likewise designed to prevent corruption.

Individuals and certain organizations are permitted to contribute up to $ 1,000 to a candidate. 2 U.S.C. @ 441a(a)(1)(A). Since the same donors can give up to $ 5,000 to party committees, @ 441a(a)(1)(C), if there were no limits on party spending, their contributions could be spent to benefit the candidate and thereby circumvent the $ 1,000 cap. We have recognized the legitimate interest in blocking similar attempts to undermine the policies of the Act. See California Medical Assn. v. Federal Election Comm'n, 453 U.S. 182, 197-199, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981) (plurality opinion) (approving ceiling on contributions to political action committees to prevent circumvention of limitations on individual contributions to candidates); id., at 203 (Blackmun, J., concurring in part and concurring in judgment); Buckley v. Valeo, 424 U.S. 1, 38, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam) (approving limitation on total contributions by an individual in connection with an election on same rationale).

Finally, I believe the Government has an important interest in leveling the electoral [*43] playing field by constraining the cost of federal campaigns. As Justice White pointed out in his opinion in Buckley, "money is not always equivalent to or used for speech, even in the context of political campaigns." 424 U.S. at 263 (opinion concurring in part and dissenting in part). It is quite wrong to assume that the net effect of limits on contributions and expenditures--which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials--will be adverse to the interest in informed debate protected by the First Amendment. See id., at 262-266.

Congress surely has both wisdom and experience in these matters that is far superior to ours. I would therefore accord special deference to its judgment on questions related to the extent and nature of limits on campaign spending. * Accordingly, I would affirm the judgment of the Court of Appeals.

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* One irony of the case is that both the Democratic National Party and the Republican National Party have sided with petitioners in challenging a law that Congress has the obvious power to change. See Brief for Democratic National Committee as Amicus Curiae; Brief for Republican National Committee as Amicus Curiae.

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[*44]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring in the judgment and dissenting in part.

In agreement with JUSTICE THOMAS, post, at 1-5, I would hold that the Colorado Republican Party, in its pleadings in the District Court and throughout this litigation, has preserved its claim that the constraints imposed by the Federal Election Campaign Act of 1971 (FECA), both on its face and as interpreted by the Federal Elections Commission (FEC), violate the First Amendment.

In the plurality's view, the FEC's conclusive presumption that all political party spending relating to identified candidates is "coordinated" cannot be squared with the First Amendment. Ante, at 12-17. The plurality finds the presumption invalid, and I agree with much of the reasoning behind that conclusion. The quarrel over the FEC's presumption is beside the point, however, for under the statute it is both burdensome and quite unrealistic for a political party to attempt the expenditure of funds on a candidate's behalf (or against other candidates) without running afoul of FECA's spending limitations.

Indeed, the plurality's reasoning with respect to the presumption illuminates [*45] the deficiencies in the statutory provision as a whole as it constrains the speech and political activities of political parties. The presumption is a logical, though invalid, implementation of the statute, which restricts as a "contribution" a political party's spending "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. @ 441a(a)(7)(B)(i). While the statutory provision applies to any "person," its obvious purpose and effect when applied to political parties, as the FEC's presumption reflects, is to restrict any party's spending in a specific campaign for or against a candidate and so to burden a party in expending its own money for its own speech.

The central holding in Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam), is that spending money on one's own speech must be permitted, id., at 44-58, and this is what political parties do when they make the expenditures FECA restricts. FECA calls spending of this nature a "contribution," @ 441a(a)(7)(B)(i), and it is true that contributions can be restricted consistent with Buckley, supra, at 23-38. As [*46] the plurality acknowledges, however, and as our cases hold, we cannot allow the Government's suggested labels to control our First Amendment analysis. Ante, at 15. See also, e. g., Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). In Buckley, we concluded that contribution limitations imposed only "marginal restrictions" on the contributor's First Amendment rights, 424 U.S. at 20, because certain attributes of contributions make them less like "speech" for First Amendment purposes:

"A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or [*47] campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." Id., at 21 (footnote omitted).

We had no occasion in Buckley to consider possible First Amendment objections to limitations on spending by parties. Id., at 58, n. 66. While our cases uphold contribution limitations on individuals and associations, see id., at 23-38; California Medical Assn. v. Federal Election Comm'n, 453 U.S. 182, 193-199, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981) (plurality opinion), political party spending "in cooperation, consultation, or concert with" a candidate does not fit within our description of "contributions" in Buckley. In my view, we should not transplant the reasoning of cases upholding ordinary contribution limitations to a case involving FECA's restrictions [*48] on political party spending.

The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs. See, e. g., Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989); Sweezy v. New Hampshire, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957). Cf. Morse v. Republican Party of Va., 517 U.S. , , 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996) (slip op., at 3-4) (KENNEDY, J., dissenting). A party performs this function, in part, by "identifying the people who constitute the association, and . . . limiting the association to those people only." Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122, 67 L. Ed. 2d 82, 101 S. Ct. 1010 (1981). Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates. A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, [*49] candidates are necessary to make the party's message known and effective, and vice versa.

It makes no sense, therefore, to ask, as FECA does, whether a party's spending is made "in cooperation, consultation, or concert with" its candidate. The answer in most cases will be yes, but that provides more, not less, justification for holding unconstitutional the statute's attempt to control this type of party spending, which bears little resemblance to the contributions discussed in Buckley. Supra, at 2-3. Party spending "in cooperation, consultation, or concert with" its candidates of necessity "communicates the underlying basis for the support," 424 U.S. at 21, i. e., the hope that he or she will be elected and will work to further the party's political agenda.

The problem is not just the absence of a basis in our First Amendment cases for treating the party's spending as contributions. The greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do. It is fanciful to suppose that limiting party spending of the type at issue here "does not in any way infringe the contributor's freedom to discuss candidates and issues," [*50] ibid., since it would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consultation." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here. See Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480,

494-495, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985).

We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election. Party spending "in cooperation, consultation, or concert with" a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in Buckley that the First Amendment does not permit regulation of the latter, see 424 U.S. at 54-59, [*51] and it should not permit this regulation of the former. Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in Buckley, but that type of regulation is not at issue here.

I would resolve the Party's First Amendment claim in accord with these principles rather than remit the Party to further protracted proceedings. Because the plurality would do otherwise, I concur only in the judgment.

JUSTICE THOMAS, concurring in the judgment and dissenting in part, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join in Parts I and III.

I agree that petitioners' rights under the First Amendment have been violated, but I think we should reach the facial challenge in this case in order to make clear the circumstances under which political parties may engage in political speech without running afoul of 2 U.S.C. @ 441a(d)(3). In resolving that challenge, I would reject the framework established by Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam), for analyzing the constitutionality of campaign finance laws and hold that @ 441a(d)(3)'s limits on independent [*52] and coordinated expenditures fail strict scrutiny. But even under Buckley, @ 441a(d)(3) cannot stand, because the anti-corruption rationale that we have relied upon in sustaining other campaign finance laws is inapplicable where political parties are the subject of such regulation.

I

As an initial matter, I write to make clear that we should decide the Party's facial challenge to @ 441a(d)(3) and thus address the constitutionality of limits on coordinated expenditures by political parties. JUSTICE BREYER's reasons for not reaching the facial constitutionality of the statute are unpersuasive. In addition, concerns for the chilling of First Amendment expression counsel in favor of resolving that question.

After the Federal Election Commission (FEC) brought this action against the Party, the Party counterclaimed that "the limits on its expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U.S.C. @ 441a(d) are unconstitutional, both facially and as applied." App. 68. Though JUSTICE BREYER faults the Party for not "focusing specifically upon coordinated expenditures," ante, at 17, the [*53] term "expenditures" certainly includes both coordinated as well as independent expenditures. n1 See 2 U.S.C. @ 431(9)(A) ("The term 'expenditure' includes . . . any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office")

(emphasis added). Moreover, at the time the Party filed its counterclaim, all party expenditures were treated by law as coordinated, see Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 28-29, 70 L. Ed. 2d 23, 102 S. Ct. 38, n. 1 (1981), so a reference to expenditures by a party was tantamount to a reference to coordinated expenditures.

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n1 JUSTICE BREYER acknowledges as much when he asserts earlier in his opinion that "the unmodified term 'expenditure'" reflects a Congressional intent "to limit all party expenditures." Ante, at 15 (emphasis in original).

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Given the liberal nature of the rules governing civil pleading, see Fed. Rule Civ. Proc. 8, the [*54] Party's straightforward allegation of the unconstitutionality of @ 441a(d)(3)'s expenditure limits clearly suffices to raise the claim that neither independent nor coordinated expenditures may be regulated consistently with the First Amendment. Indeed, that is precisely how the Court of Appeals appears to have read the counterclaim. The court expressly said that it was "analyzing the constitutionality of limits on coordinated expenditures by political committees," 59 F.3d 1015, 1024 (CA10 1995), under @ 441a(d)(3).

For the same reasons, the fact that the Party's summary judgment affidavits did not "specifically allege," ante, at 17, that the Party intended to make coordinated expenditures is also immaterial. The affidavits made clear that, but for @ 441a(d)(3), the Party would spend in excess of the limits imposed by that statute, see App. 159 ("The State Party intends to pay for communications within the spending limits of [@ 441]. . . . However, the State Party would also like to pay for communications which costs [sic] exceed the spending limits of [@ 441a(d)], but will not do so due to the deterrent and chilling effect of the statute"), as did the Party's [*55] brief in this Court, see Brief for Petitioners 23-24 ("The Colorado Party is ready, willing and able to make expenditures expressly advocating the election or defeat of candidates for federal office that would exceed the limits imposed by @ 441a(d), but it has been deterred from doing so by the obvious and credible threat of FEC enforcement action").

Finally, though JUSTICE BREYER notes that this is the first Federal Election Campaign Act of 1971 (FECA) case to raise the constitutional validity of limits on coordinated expenditures, see ante, at 18, that is, at best, an argument against granting certiorari. It is too late for arguments like that now. The case is here, and we needlessly protract this litigation by remanding this important issue to the Court of Appeals. Nor is the fact that the "issue is complex," ante, at 18, a good reason for avoiding it. We do not sit to decide only easy cases. And while it may be true that no court has ever asked whether expenditures that are "in fact" coordinated may be regulated under the First Amendment, see ante, at 18, I do not see how the existence of an "in fact" coordinated expenditure would change our analysis of the facial [*56] constitutionality of @ 441a(d)(3), since courts in facial challenges under the First Amendment routinely consider applications of the relevant statute other than the application before the court. See Broadrick v. Oklahoma, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). Whether or not there are facts

in the record to support the finding that this particular expenditure was actually coordinated with a candidate, we are not, contrary to the suggestion of JUSTICE BREYER, incapable of considering the Government's interest in regulating such expenditures and testing the fit between that end and the means used to achieve it. n2

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n2 JUSTICE BREYER's remaining arguments for avoiding the facial challenge are straw men. See ante, at 19 (if @ 441a(d)(3) were invalidated in its entirety, other FECA provisions that the Party has not challenged might apply to coordinated party expenditures); ante, at 19 (if @ 441a(d)(3) were upheld as to coordinated expenditures but invalidated as to independent expenditures, issues of severability would be raised). That resolution of the primary question in this case (the constitutionality of @ 441a(d)(3) with respect to all expenditures) might generate issues not previously considered (such as severability) is no reason for not deciding the question itself. Without suggesting that remand is the only appropriate way to deal with possible corollary matters in this case or that these arguments have merit, I point out that we can, of course, decide the central question without ruling on the issues that concern JUSTICE BREYER.

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[*57]

The validity of @ 441a(d)(3)'s controls on coordinated expenditures is an open question that, if left unanswered, will inhibit the exercise of legitimate First Amendment activity nationwide. All JUSTICE BREYER resolves is that when a political party spends money in support of a candidate (or against his opponent) and the Government cannot thereafter prove any coordination between the Party and the candidate, the Party cannot be punished by the Government for that spending. This settles little, if anything. Parties are left to wonder whether their speech is protected by the First Amendment when the Government can show--presumably with circumstantial evidence--a link between the Party and the candidate with respect to the speech in question. And of course, one of the main purposes of a political party is to support its candidates in elections.

The constitutionality of limits on coordinated expenditures by political parties is squarely before us. We should address this important question now, instead of leaving political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage.

II

A

Critical to JUSTICE BREYER's reasoning is [*58] the distinction between contributions n3 and independent expenditures that we first drew in Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam). Though we said in Buckley that controls on spending and giving "operate in an area of the most fundamental First Amendment activities," id., at 14, we invalidated the expenditure limits of FECA and upheld the Act's contribution limits. The justification we gave for the differing results was this: "The expenditure limitations . . . represent substantial rather than merely theoretical

restraints on the quantity and diversity of political speech," id., at 19, whereas "limitations upon the amount that any one person or group may contribute to a candidate or political committee entail only a marginal restriction upon the contributor's ability to engage in free communication," id., at 20-21. This conclusion was supported mainly by two assertions about the nature of contributions: first, though contributions may result in speech, that speech is by the candidate and not by the contributor; and second, contributions express only general support for the candidate but do not communicate the reasons for that support. Id., [*59] at 21. Since Buckley, our campaign finance jurisprudence has been based in large part on this distinction between contributions and expenditures. See, e.g., Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. (MCFL), 479 U.S. 238, 259-260, 261-262, 93 L. Ed. 2d 539, 107 S. Ct. 616 (1986); Federal Election Comm'n v. National Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 497, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985); California Medical Assn. v. Federal Election Comm'n, 453 U.S. 182, 196, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981) (plurality opinion).

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n3 Coordinated expenditures are by statute categorized as contributions. See 2 U.S.C. @ 441a(a)(7)(B)(i) ("Expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate").

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In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: "Contributions and expenditures are two [*60] sides of the same First Amendment coin." Buckley v. Valeo, supra, 424 U.S. at 241 (concurring in part and dissenting in part). n4 Contributions and expenditures both involve core First Amendment expression because they further the "discussion of public issues and debate on the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." 424 U.S. at 14. When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. Indeed, the individual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual. The contribution of funds to a candidate or to a political group thus fosters the "free discussion of governmental affairs," Mills v. Alabama, 384 U.S. 214, 218, 16 L. Ed. 2d 484, 86 S. Ct. 1434 (1966), just as an expenditure does. n5 Giving and spending in the electoral process also involve basic associational rights under the First Amendment. See BeVier, Money and Politics: [*61] A Perspective on the First Amendment and Campaign Finance Reform, 73 Calif. L. Rev. 1045, 1064 (1985) (hereinafter BeVier). As we acknowledged in Buckley, "'effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" 424 U.S. at 15 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958)). Political associations allow citizens to pool their resources and make their advocacy more effective, and such efforts are fully protected by the First Amendment. Federal Election

Comm'n v. NCPAC, supra, at 494. If an individual is limited in the amount of resources he can contribute to the pool, he is most certainly limited in his ability to associate for purposes of effective advocacy. See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 296, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981) ("To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association"). And if an individual cannot be subject to such limits, neither can political associations be limited in their ability to give as a means of [*62] furthering their members' viewpoints. As we have said, "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." Sweezy v. New Hampshire, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (plurality opinion). n6

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n4 Three Members of the Buckley Court thought the distinction untenable at the time, see 424 U.S. at 241 (Burger, C. J., concurring in part and dissenting in part); id., at 261 (White, J., concurring in part and dissenting in part); id., at 290 (Blackmun, J., concurring in part and dissenting in part), and another Member disavowed it subsequently, see Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 518-521, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985) (Marshall, J., dissenting). Cf. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 678, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990) (STEVENS, J., concurring) (stating that distinction "should have little, if any, weight in reviewing corporate participation in candidate elections").

n5 See H. Alexander, Money in Politics 234 (1972): "The constitutional arguments against limiting campaign spending also apply against limiting contributions; specifically, it is the right of an individual to spend his money to support a congenial viewpoint . . . . Some views are heard only if interested individuals are willing to support financially the candidate or committee voicing the position. To be widely heard, mass communications may be necessary, and they are costly. By extension, then, the contribution of money is a contribution to freedom of political debate." [*63]

n6 To illustrate the point that giving and spending in the political process implicate the same First Amendment values, I note that virtually everything JUSTICE BREYER says about the importance of free independent expenditures applies with equal force to coordinated expenditures and contributions. For instance, JUSTICE BREYER states that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure." Ante, at 9. "Coordinated" expression by political parties, of course, shares those precise attributes. The fact that an expenditure is prearranged with the candidate--presumably to make it more effective in the election--does not take away from its fundamental democratic purposes.

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Turning from similarities to differences, I can discern only one potentially meaningful distinction between contributions [*64] and expenditures. In the

former case, the funds pass through an intermediary--some individual or entity responsible for organizing and facilitating the dissemination of the message--whereas in the latter case they may not necessarily do so. But the practical judgment by a citizen that another person or an organization can more effectively deploy funds for the good of a common cause than he can ought not deprive that citizen of his First Amendment rights. Whether an individual donates money to a candidate or group who will use it to promote the candidate or whether the individual spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with likeminded persons. A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance. As one commentator cautioned, "let us not lose sight of the speech." Powe, Mass Speech and the Newer First Amendment, 1982 S. Ct. Rev. 243, 258.

Echoing the suggestion in Buckley that contributions have less First Amendment value than expenditures because they do not involve speech by the donor, see 424 U.S. at 21, [*65] the Court has sometimes rationalized limitations on contributions by referring to contributions as "speech by proxy." See, e.g., California Medical Assn. v. Federal Election Comm'n, 453 U.S. at 196 (Marshall, J.) (plurality opinion). The "speech by proxy" label is, however, an ineffective tool for distinguishing contributions from expenditures. Even in the case of a direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message--for instance, an advertising agency or a television station. See Powe, supra, at 258-259. To call a contribution "speech by proxy" thus does little to differentiate it from an expenditure. See Buckley v. Valeo, supra, at 243- 244, and n. 7 (Burger, C. J., concurring in part and dissenting in part). The only possible difference is that contributions involve an extra step in the proxy chain. But again, that is a difference in form, not substance.

Moreover, we have recently recognized that where the "proxy" speech is endorsed by those who give, that speech is a fully-protected exercise of the donors' associational rights. In Federal Election Comm'n v. NCPAC, we explained that

"the [*66] 'proxy speech' approach is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organization and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." 470 U.S. at 495.

The other justification in Buckley for the proposition that contribution caps only marginally restrict speech-- that is, that a contribution signals only general support for the candidate but indicates nothing about the reasons for that support--is similarly unsatisfying. Assuming the assertion is descriptively accurate (which is certainly questionable), it still cannot mean that giving is less important than spending in terms of the First Amendment. A campaign poster that reads simply "We support candidate Smith" does not seem to me any less deserving of constitutional protection than one that reads "We support candidate Smith because [*67] we like his position on agriculture subsidies." Both express a political opinion. Even a pure message of support, unadorned with

reasons, is valuable to the democratic process.

In sum, unlike the Buckley Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits. The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy. I think that the Buckley framework for analyzing the constitutionality of campaign finance laws is deeply flawed. Accordingly, I would not employ it, as JUSTICE BREYER and JUSTICE KENNEDY do.

B

Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: both [*68] forms of speech are central to the First Amendment. Curbs on protected speech, we have repeatedly said, must be strictly scrutinized. See Federal Election Comm'n v. NCPAC, supra, at 501; Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. at 294; First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 786, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). n7 I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process, like @ 441a(d)(3), are unconstitutional.

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n7 In Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976), the Court purported to scrutinize strictly the contribution provisions as well the expenditures rules. See id., at 23 (FECA's contribution and expenditures limits "both implicate fundamental First Amendment interests"); id., at 25 (contributions limits, like expenditure limits, are "'subject to the closest scrutiny'") (citation omitted). It has not gone unnoticed, however, that we seemed more forgiving in our review of the contribution provisions than of the expenditure rules. See, e.g., California Medical Assn. v. Federal Election Comm'n, 453 U.S. 182, 196, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981) (plurality opinion) (contributions are "not the sort of political advocacy that this Court in Buckley found entitled to full First Amendment protection"). But see id., at 201-202 (Blackmun, J., concurring in part and concurring in judgment) (under Buckley, there is no lesser standard of review for contributions as opposed to expenditures).

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[*69]

The formula for strict scrutiny is, of course, well-established. It requires both a compelling governmental interest and legislative means narrowly tailored to serve that interest. In the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption, see Federal Election Comm'n v. NCPAC, 470 U.S. at 496-497, and we have narrowly defined "corruption" as a

"financial quid pro quo: dollars for political favors," id., at 497. n8 As for the means-ends fit under strict scrutiny, we have specified that "where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." Federal Election Comm'n v. MCFL, 479 U.S. at 265.

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n8 As I explain in Part III, infra, the interest in preventing corruption is inapplicable when the subject of the regulation is a political party. My analysis here is more general, however, and applies to all individuals and entities subject to campaign finance limits.

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[*70]

In Buckley, we expressly stated that the means adopted must be "closely drawn to avoid unnecessary abridgment" of First Amendment rights. 424 U.S. at 25. But the Buckley Court summarily rejected the argument that, because less restrictive means of preventing corruption existed--for instance, bribery laws and disclosure requirements-FECA's contribution provisions were invalid. Bribery laws, the Court said, "deal with only the most blatant and specific attempts of those with money to influence governmental action," id., at 28, suggesting that those means were inadequate to serve the governmental interest. With respect to disclosure rules, the Court admitted that they serve "many salutary purposes" but said that Congress was "entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant." Ibid. Finally, the Court noted that contribution caps leave people free to engage in independent political speech, to volunteer their services, and to contribute money to a "limited but nonetheless substantial extent." Ibid.

In my opinion, FECA's monetary caps fail the narrow tailoring test. Addressing [*71] the constitutionality of FECA's contribution caps, the Buckley appellants argued: "If a small minority of political contributions are given to secure appointments for the donors or some other quid pro quo, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." Brief for Appellants in Buckley v. Valeo, O. T. 1975, Nos. 75-436 and 75-437, pp. 117-118.

The Buckley appellants were, to my mind, correct. Broad prophylactic bans on campaign expenditures and contributions are not designed with the precision required by the First Amendment because they sweep protected speech within their prohibitions.

Section 441a(d)(3), in particular, suffers from this infirmity. It flatly bans all expenditures by all national and state party committees in excess of certain dollar [*72] limits, see @ 441a(d)(3), without any evidence that covered committees who exceed those limits are in fact engaging, or likely to

engage, in bribery or anything resembling it. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 689, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990) (SCALIA, J., dissenting) (where statute "extends to speech that has the mere potential for producing social harm" it should not be held to satisfy the narrow tailoring requirement) (emphasis in original). Thus, the statute indiscriminately covers the many conceivable instances in which a party committee could exceed the spending limits without any intent to extract an unlawful commitment from a candidate. Cf. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980) (state may not, in effort to stop fraud in charitable solicitations, "lump" truly charitable organizations "with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other"). As one commentator has observed, "it must not be forgotten that a large number of contributions are made without any hope of specific gain: for the promotion of a program, [*73] because of enthusiasm for a candidate, or to promote what the giver vaguely conceives to be the national interest." L. Overacker, Money in Elections 192 (1974).

In contrast, federal bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under FECA, and disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage. Cf. Schaumburg v. Citizens for a Better Environment, supra, at 637-638 (explaining that "less intrusive" means of preventing fraud in charitable solicitation are "the penal laws [that can be] used to punish such conduct directly" and "disclosure of the finances of charitable organizations"). In light of these alternatives, wholesale limitations that cover contributions having nothing to do with bribery--but with speech central to the First Amendment--are not narrowly tailored.

Buckley's rationale for the contrary conclusion, see supra, at 14, is faulty. That bribery laws are not completely effective in stamping out corruption is no justification for the conclusion that prophylactic controls on funding activity are narrowly tailored. The [*74] First Amendment limits Congress to legislative measures that do not abridge the Amendment's guaranteed freedoms, thereby constraining Congress' ability to accomplish certain goals. Similarly, that other modes of expression remain open to regulated individuals or groups does not mean that a statute is the least restrictive means of addressing a particular social problem. A statute could, of course, be more restrictive than necessary while still leaving open some avenues for speech. n9

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n9 JUSTICE STEVENS submits that we should "accord special deference to [Congress'] judgment on questions related to the extent and nature of limits on campaign spending," post, at 3, a stance that the Court of Appeals also adopted, see 59 F.3d 1015, 1024 (CA10 1995). This position poses great risk to the First Amendment, in that it amounts to letting the fox stand watch over the henhouse. There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment. See generally BeVier 1074-1081. What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it. See id., at 1075 ("'Courts must police inhibitions on . . . political activity because we cannot trust elected officials to do so'") (emphasis omitted) (quoting J. Ely,

Democracy and Distrust 106 (1980)). See also R. Winter, Political Financing and the Constitution, 486 Annals Am. Acad. Pol. & Soc. Sci. 34, 40, 48 (1986). Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups. See BeVier 1078-1080. When Congress seeks to ration political expression in the electoral process, we ought not simply acquiesce in its judgment.

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III

Were I convinced that the Buckley framework rested on a principled distinction between contributions and expenditures, which I am not, I would nevertheless conclude that @ 441a(d)(3)'s limits on political parties violate the First Amendment. Under Buckley and its progeny, a substantial threat of corruption must exist before a law purportedly aimed at the prevention of corruption will be sustained against First Amendment attack. n10 Just as some of the monetary limits in the Buckley line of cases were held to be invalid because the government interest in stemming corruption was inadequate under the circumstances to justify the restrictions on speech, so too is @ 441a(d)(3) invalid. n11

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n10 See Buckley v. Valeo, 424 U.S. at 45-47 (striking down limits on independent expenditures because the "advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption"); Federal Election Comm'n v. MCFL, 479 U.S. 238, 263, 93 L. Ed. 2d 539, 107 S. Ct. 616 (1986) (invalidating caps on campaign expenditures by incorporated political associations because spending by such groups "does not pose . . . [any] threat" of corruption); Federal Election Comm'n v. NCPAC, 470 U.S. at 498 (striking down limits on independent expenditures by political action committees because "a quid pro quo for improper commitments" in that context was a "hypothetical possibility"); Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 297, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981) (stating that "Buckley does not support limitations on contributions to committees formed to favor or oppose ballot measures" because anti-corruption rationale is inapplicable); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 790, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978) (concluding that limits on referendum speech by corporations violate First Amendment because "the risk of corruption . . . simply is not present"). [*76]

n11 While JUSTICE BREYER chides me for taking the positition that I would not adhere to Buckley, see ante, at 19-20, and suggests that my approach to this case is thus insufficiently "cautious," ante, at 20, he ignores this Part of my opinion, in which I explain why limits on coordinated expenditures are unconstitutional even under the Buckley line of precedent.

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The Government asserts that the purpose of @ 441a(d)(3) is to prevent the corruption of candidates and elected representatives by party officials. The

Government does not explain precisely what it means by "corruption," however; n12 the closest thing to an explanation the Government offers is that "corruption" is "'the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.'" Brief for Respondent 35 (quoting Buckley v. Valeo, 424 U.S. at 25). We so defined corruption in Buckley for purposes of reviewing ceilings on giving or spending by individuals, groups, political committees (PACs), and candidates. See id., at 23, [*77] 35, 39. But we did not in that case consider the First Amendment status of FECA's provisions dealing with political parties. See id., at 58, n. 66, 59, n. 67.

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n12 Nor, for that matter, does JUSTICE BREYER explain what sorts of quid pro quos a party could extract from a candidate. Cf. ante, at 9.

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As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. See Nahra, Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities, 56 Ford. L. Rev. 53, 105-106 (1987). What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process." Federal Election Comm'n v. NCPAC, 470 U.S. at 497. For instance, [*78] if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system. To borrow a phrase from Federal Election Comm'n v. NCPAC, "the fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [political groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." Id., at 498. Cf. Federal Election Comm'n v. MCFL, 479 U.S. at 263 (suggesting that "voluntary political associations do not . . . present the specter of corruption").

The structure of political parties is such that the theoretical danger of those groups actually engaging in quid pro quos with candidates is significantly less than the threat of individuals or other groups doing so. See Nahra, supra, at 97-98 (citing F. Sorauf, Party Politics in America 15-18 (5th ed. 1984)). American political parties, generally [*79] speaking, have numerous members with a wide variety of interests, Nahra, supra, at 98, features necessary for success in majoritarian elections. Consequently, the influence of any one person or the importance of any single issue within a political party is significantly diffused. For this reason, as the Party's amici argue, see Brief for Committee for Party Renewal et al. as Amicus Curiae 16, campaign funds donated by parties are considered to be some of "the cleanest money in politics." J. Bibby, Campaign Finance Reform, 6 Commonsense 1, 10 (Dec. 1983). And, as long as the Court continues to permit Congress to subject individuals to limits on the amount they can give to parties, and those limits are uniform as to all donors, see 2 U.S.C. @ 441a(a)(1), there is little risk that an individual donor could

use a party as a conduit for bribing candidates.

In any event, the Government, which bears the burden of "demonstrating that the recited harms are real, not merely conjectural," Turner Broadcasting System, Inc. v. FCC, 512 U.S. (1994) (slip op., at 41), has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent [*80] expenditures. Cf. ante, at 11 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"). And insofar as it appears that Congress did not actually enact @ 441a(d)(3) in order to stop corruption by political parties "but rather for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending," ante, at 11 (citing Buckley v. Valeo, supra, at 57), the statute's ceilings on coordinated expenditures are as unwarranted as the caps on independent expenditures.

In sum, there is only a minimal threat of "corruption," as we have understood that term, when a political party spends to support its candidate or to oppose his competitor, whether or not that expenditure is made in concert with the candidate. Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic. To the contrary, the danger to the Republic lies in Government suppression of such activity. Under Buckley and our subsequent cases, @ 441a(d)(3)'s heavy burden on [*81] First Amendment rights is not justified by the threat of corruption at which it is assertedly aimed.

* * *

To conclude, I would find @ 441a(d)(3) unconstitutional not just as applied to petitioners, but also on its face. Accordingly, I concur only in the Court's judgment.

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III.

CONCLUSION

We reverse the district court's suppression order as to both Grandstaff and Brown.

FEDERAL ELECTION COMMISSION,
Plaintiff-Appellant,

v.

Harvey FURGATCH,
Defendant-Appellee.

No. 85-5524.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 4, 1986.

Decided Jan. 9, 1987.

Federal Election Commission brought suit against citizen who had placed newspaper advertisement at cost of several thousand dollars that was critical of President Carter immediately before 1980 election. The United States District Court for the Southern District of California, Gordon Thompson, Jr., Chief Judge, granted citizen's motion for dismissal, and FEC appealed. The Court of Appeals, Farris, Circuit Judge, held that "Don't let him do it," was exhortation to vote against Carter, and advertisement expressly advocated Carter's defeat, even though it did not use any words listed in *Buckley v. Valeo*, and had to be reported to FEC as independent expenditure.

Reversed.

1. Elections ⇐317.4

For purposes of Federal Election Campaign Act requirement that independent expenditure of more than $250 on advertisement which expressly advocates election or defeat of particular candidate be reported to FEC, "express advocacy" is not strictly limited to communications using certain key phrases and speech must be considered as whole, speaker's subjective intent cannot be determinative and is less important than speech's effect, and context of advertisement, though relevant to determination, cannot supply meaning that is incompatible with or unrelated to words' clear import. Federal Election Campaign Act of 1971, §§ 301(17), 304(c), as amended, 2 U.S.C.A. §§ 431(17), 434(c).

2. Elections ⇐317.4

Speech need not include any of words listed in *Buckley v. Valeo* to be express advocacy under Federal Election Campaign Act reporting requirements, but must, when read as whole and with limited reference to external events, be susceptible of no other reasonable interpretation than as exhortation to vote for or against specific candidate; speech is "express" for that purpose if its message is unmistakable, unambiguous, and suggestive of only one plausible meaning even if not presented in clearest, most explicit language, speech is "advocacy" if it presents clear plea for action rather than being merely informative, and speech must clearly encourage vote for or against candidate rather than some other kind of action. Federal Election Campaign Act of 1971, §§ 301(17), 304(c), as amended, 2 U.S.C.A. §§ 431(17), 434(c).

3. Elections ⇐317.1

Failure to state with specificity what action is required of voters does not remove political speech from coverage of Federal Election Campaign Act when that speech is clearly the kind of advocacy of defeat of identified candidate that Congress intended to regulate. Federal Election Campaign Act of 1971, § 301(17), as amended, 2 U.S.C.A. § 431(17).

4. Elections ⇐317.4

Exhortation "Don't let him do it," published three days prior to 1980 presidential election as part of full-page advertisement that was critical of President Carter, was exhortation to vote against Carter, and advertisement expressly advocated Carter's defeat and had to be reported to FEC as independent expenditure; voting was only action open to readers even though never referred to in advertisement. Federal Election Campaign Act of 1971 §§ 301(17), 304(c), as amended, 2 U.S.C.A. §§ 431(17), 434(c).

Richard Bader, Asst. Gen. Counsel, Charles N. Steele, Gen. Counsel, Carol A. Latham, Atty., Federal Election Com'n, Washington, D.C., for plaintiff-appellant.

H. Richard Mayberry, Jr., Jonathan I. Epstein, Stephen M. Griffin, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the Southern District of California.

Before GOODWIN and FARRIS, Circuit Judges and SOLOMON,* District Judge.

FARRIS, Circuit Judge:

Under the Federal Election Campaign Act, a political advertisement which "expressly advocates" either the election or defeat of a candidate must be reported to the Federal Election Commission. We must decide whether in this case reporting was required and if so whether the Act meets constitutional demands.

No right of expression is more important to our participatory democracy than political speech. One of the most delicate tasks of First Amendment jurisprudence is to determine the scope of political speech and its permissible regulation. This appeal requires us to resolve the conflict between a citizen's right to speak without burden and society's interest in ensuring a fair and representative forum of debate by identifying the financial sources of particular kinds of speech.

I.

On October 28, 1980, one week prior to the 1980 presidential election, the *New York Times* published a full page advertisement captioned "Don't let him do it," placed and paid for by Harvey Furgatch. The advertisement read:

DON'T LET HIM DO IT.

The President of the United States continues degrading the electoral process and lessening the prestige of the office.

It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic. The President remained silent.

And we let him.

It continued when the President himself accused Ronald Reagan of being unpatriotic.

And we let him do it again.

In recent weeks, Carter has tried to buy entire cities, the steel industry, the auto industry, and others with public funds.

We are letting him do it.

He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between "peace and war," "black or white," "north or south," and "Jew vs. Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why Not the Best?"

It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT.

On November 1, 1980, three days before the election, Furgatch placed the same advertisement in *The Boston Globe*. Unlike the first advertisement, which stated that it was paid for by Furgatch and was "[n]ot

* The Honorable Gus Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

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authorized by any candidate," the second advertisement omitted the disclaimer. The two advertisements cost Furgatch approximately $25,000.

On March 25, 1983, the Federal Election Commission brought suit against Furgatch under the Federal Election Campaign Act, 2 U.S.C. § 437g(a)(6)(A).[1] The FEC sought a civil penalty and an injunction against further violation of the Act. It alleged that Furgatch violated 2 U.S.C. § 434(c)[2] by failing to report his expenditures and 2 U.S.C. § 441d[3] by failing to include a disclaimer in *The Boston Globe* advertisement. Furgatch moved for dismissal under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. The district court orally granted the motion to dismiss and on December 10, 1984 entered its final order. It concluded that the advertisement was not an "independent expenditure" within the meaning of the statute because it did not "expressly advocate" the defeat of Jimmy Carter. The court did not rule on the constitutional issues raised by Furgatch.

The FEC timely appealed. This court has jurisdiction under 28 U.S.C. § 1291 and 2 U.S.C. § 437g(a)(9). We review *de novo* a dismissal under rule 12(b)(6). *Gibson v. United States,* 781 F.2d 1334, 1337 (9th Cir.1986).

II.

Individuals who make independent expenditures totalling more than $250 must file a statement with the FEC. 2 U.S.C. § 434(c). The Federal Election Campaign Act defines an "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate...." 2 U.S.C. § 431(17). The Supreme Court has previously passed upon the constitutionality of the Act's disclosure requirements in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

1. Section 437g(a)(6)(A) provides:

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

2. Section 434(c)(1) requires that any person making an "independent expenditure" greater than $250 file a statement with the FEC. The contents of the statement are specified in 434(c)(2), which provides:

Statements ... shall include:

(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

The term "independent expenditure" is defined as follows in § 431(17):

(17) The term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

3. Section 441d provides:

(a) Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication—

* * * * * *

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

The disclosure provisions for independent expenditures were originally written more broadly, to cover any expenditures made "for the purpose of ... influencing" the nomination or election of candidates for federal office. Reviewing section 434(e) (the forerunner to the provisions before us) in *Buckley*, the Supreme Court held that any restriction on political speech—even restrictions that are far from absolute—can have a chilling effect on speech. "In its effort to be all-inclusive, ... the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring those sanctions may deter those who seek to exercise protected First Amendment rights." 424 U.S. at 76–77, 96 S.Ct. at 662.

The Court reasoned that Congress may place restrictions on the freedom of expression for legitimate reasons, but that those restrictions must be minimal, and closely tailored to avoid overreaching or vagueness. *Id.* at 78–82, 96 S.Ct. at 663–64. Consequently, the Court was obliged to construe the words of section 434(e) no more broadly than was absolutely necessary to serve the purposes of the Act, to avoid stifling speech that does not fit neatly in the category of election advertising. *Id.* at 78, 96 S.Ct. at 663. The Court was particularly insistent that a clear distinction be made between "issue discussion," which strongly implicates the First Amendment, and the candidate-oriented speech that is the focus of the Campaign Act. *Id.* at 79, 96 S.Ct. at 663.

The Court concluded that the only expenditures covered by the disclosure provisions were funds used for communications that "expressly advocate the election or defeat of a clearly identified candidate." *Id.* It gave examples, in a footnote, of words of express advocacy, including "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *See id.* at 80, n. 108, 96 S.Ct. at 664 n. 108 (incorporating by reference *id.* at 44, n. 52, 96 S.Ct. at 647 n. 52). Congress' later revision of the Act, now before us, directly adopted the "express advocacy" standard of *Buckley* into sections 431(17) and 441d. *See* H.R.Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976), U.S.Code Cong. & Admin.News 1976, p. 929, reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1976, 1032 (GPO 1977). That standard is designed to limit the coverage of the disclosure provision "precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80, 96 S.Ct. at 663.

We must apply sections 434(c) and 441d consistently with the constitutional requirements set out in *Buckley*.

III.

The FEC argues that Furgatch's advertisement expressly advocates the defeat of Jimmy Carter and therefore is an independent expenditure which must be reported to the FEC. The examples of express advocacy contained in the *Buckley* opinion (i.e., "vote for," "support," etc.), the FEC argues, merely provide guidelines for determining what constitutes "express advocacy." Whether those words are contained in the advertisement is not determinative. The test is whether or not the advertisement contains a message advocating the defeat of a political candidate. Furgatch's advertisement, the FEC contends, contains an unequivocal message that Carter must not "succeed" in "burden[ing]" the country with "four more years" of his allegedly harmful leadership.

The FEC further argues that the advertisement is, in the words of the Supreme Court, "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80, 96 S.Ct. at 663. Nothing more, it contends, is required to place this advertisement under coverage of the Act. The FEC grounds this argument on the Court's effort in *Buckley* to distinguish between speech that pertains only to candidates and their campaigns and speech revolving around political issues in general. The FEC argues that because the adver-

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Furgatch responds that the mere raising of any question on this issue demonstrates that it is not express advocacy. We would not be debating the meaning of the advertisement, he contends, if it were express. He argues that the words "don't let him do it" do not expressly call for Carter's defeat at the polls but an end to his "attempt to hide his own record, or lack of it." The advertisement, according to Furgatch, is merely a warning that Carter will be re-elected if the public allows him to continue to use "low-level campaign tactics."

As the district court noted, whether the advertisement expressly advocates the defeat of Jimmy Carter is a very close call. We have not had occasion to consider the scope of the Act before now. Few other courts of appeals have dealt with the issue.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 769 F.2d 13 (1st Cir.1985), the First Circuit considered an advertisement in which an anti-abortion group published a "Special Election Edition" of its newsletter which contained photographs of candidates identified as "pro-life." The publication included at least two exhortations to "vote pro-life" and the statement: "Your vote in the primary will make the critical difference in electing pro-life candidates." The court ruled that the "Special Election Edition ... explicitly advocated the election of particular candidates in the primary elections and presented photographs of those candidates only," and thus fell within the FEC's regulatory sphere.

In *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir.1980), the Second Circuit addressed the applicability of the statute to a leaflet which expounded the economic views of a tax reform group and criticized the voting record of a local member of Congress, whose picture was included. The leaflet, however, did not refer to any federal election or to the member's political affiliation or opponent. The court held that because the leaflet did not expressly advocate the defeat or election of the congressman, the Act did not apply to the pamphlet. The leaflet "contains nothing which could rationally be termed express advocacy ... there is no reference anywhere in the Bulletin to the congressman's party, to whether he is running for re-election, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambra." *Id.* at 53.

Because of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis*, offering limited guidance for subsequent decisions. The decisions of the First and Second Circuits are not especially helpful beyond the general interpretive principles we can find between the lines of those rulings. Neither these decisions nor counsel for the parties here have supplied us with an analysis of the standard to be used or even a thoughtful list of the factors which we might consider in evaluating an "express advocacy" dispute. Without such a framework, the federal courts risk an inconsistent analysis of each case involving the meaning of "express advocacy."

IV.

As this litigation demonstrates, the "express advocacy" language of *Buckley* and section 431(17) does not draw a bright and unambiguous line. We are called upon to interpret and refine that standard here. Mindful of the Supreme Court's directive that, where First amendment concerns are present, we must construe the words of the regulatory statute precisely and narrowly, only as far as is necessary to further the purposes of the Act, we first examine those purposes in some detail for guidance.

In *Buckley*, the Court described the function of section 434(e) as follows:

> Section 434(e) is part of Congress' effort to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully in-

> formed and to achieve through publicity the maximum deterrence to corruption and undue influence possible. The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.

424 U.S. at 76, 96 S.Ct. at 662.

Thus there are two important goals behind these disclosure provisions. The first, that of keeping the electorate fully informed of the sources of campaign-directed speech and the possible connections between the speaker and individual candidates, derives directly from the primary concern of the First Amendment. The vision of a free and open marketplace of ideas is based on the assumption that the people should be exposed to speech on all sides, so that they may freely evaluate and choose from among competing points of view. One goal of the First Amendment, then, is to ensure that the individual citizen has available all the information necessary to allow him to properly evaluate speech.

Information about the composition of a candidate's constituency, the sources of a candidate's support, and the impact that such financial support may have on the candidate's stand on the issues or future performance may be crucial to the individual's choice from among the several competitors for his vote. The allowance of free expression loses considerable value if expression is only partial. Therefore, disclosure requirements, which may at times inhibit the free speech that is so dearly protected by the First Amendment, are indispensible to the proper and effective exercise of First Amendment rights.

The other major purpose of the disclosure provision is to deter or expose corruption, and therefore to minimize the influence that unaccountable interest groups and individuals can have on elected federal officials. The disclosure requirement is particularly directed at attempts by candidates to circumvent the statutory limits on their own expenditures through close and secretive relationships with apparently "independent" campaign spenders. The Supreme Court noted that efforts had been made in the past to avoid disclosure requirements by the routing of campaign contributions through unregulated independent advertising. Since *Buckley* was decided, such practices have apparently become more widespread in federal elections, and the need for controls more urgent. *See, e.g.*, "The $676,000 Cleanup", *The New Republic*, Vol. 195, No. 22 (December 1, 1986) at 7.

We conclude that the Act's disclosure provisions serve an important Congressional policy and a very strong First Amendment interest. Properly applied, they will have only a "reasonable and minimally restrictive" effect on the exercise of First Amendment rights. *Buckley*, 424 U.S. at 82, 96 S.Ct. at 664. Although we may not place burdens on the freedom of speech beyond what is strictly necessary to further the purposes of the Act, we must be just as careful to ensure that those purposes are fully carried out, that they are not cleverly circumvented, or thwarted by a rigid construction of the terms of the Act. We must read section 434(c) so as to prevent speech that is clearly intended to affect the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act. This concern leads us to fashion a more comprehensive approach to the delimitation of "express advocacy," and to reject some of the overly constrictive rules of interpretation that the parties urge for our adoption.

V.

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The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.

B

A proper understanding of the speaker's message can best be obtained by considering speech as a whole. Comprehension often requires inferences from the relation of one part of speech to another. The entirety may give a clear impression that is never succinctly stated in a single phrase or sentence. Similarly, a stray comment viewed in isolation may suggest an idea that is only peripheral to the primary purpose of speech as a whole. Furgatch would have us reject intra-textual interpretation and construe each part of speech independently, requiring express advocacy from specific phrases rather than from speech in its entirety.

We reject the suggestion that we isolate each sentence and act as if it bears no relation to its neighbors. This is not to say that we will not examine each sentence in an effort to understand the whole. We only recognize that the whole consists of its parts in relation to each other.

C

The subjective intent of the speaker cannot alone be determinative. Words derive their meaning from what the speaker intends and what the reader understands. A speaker may expressly advocate regardless of his intention, and our attempts to fathom his mental state would distract us unnecessarily from the speech itself. Interpreting political speech in this context is not the same as interpreting a contract, where subjective intent underlies the formation and construction of the contract and would be the explicit focus of interpretation were it not for the greater reliability of the objective terms. The intent behind political speech is less important than its effect for the purposes of this inquiry. *But see Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 325, 89 L.Ed. 430 (1945), quoted in *Buckley*, 424 U.S. at 43, 96 S.Ct. at 646.

D

More problematic than use of "magic words" or inquiry into subjective intent are questions of context. The FEC argues, for example, that this advertisement cannot be construed outside its temporal context, the 1980 presidential election. Furgatch, on the other hand, maintains that the court must find express advocacy in the speech itself, without reference to external circumstances.

The problem of the context of speech goes to the heart of some of the most difficult First Amendment questions. The doctrines of subversive speech, "fighting words," libel, and speech in the workplace and in public fora illustrate that when and where speech takes place can determine its legal significance. In these instances, context is one of the crucial factors making these kinds of speech regulable. First Amendment doctrine has long recognized that words take part of their meaning and effect from the environment in which they are spoken. When the constitutional and statutory standard is "express advocacy," however, the weight that we give to the context of speech declines considerably. Our concern here is with the clarity of the communication rather than its harmful effects. Context remains a consideration, but an ancillary one, peripheral to the words themselves.

Context important

We conclude that context is relevant to a determination of express advocacy. A consideration of the context in which speech is

uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers. We should not ignore external factors that contribute to a complete understanding of speech, especially when they are factors that the audience must consider in evaluating the words before it. However, context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words.

VI.

[2] With these principles in mind, we propose a standard for "express advocacy" that will preserve the efficacy of the Act without treading upon the freedom of political expression. We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is ummistakable and unambiguous, suggestive of only one plausible meaning. Second, 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 the Act. Finally, 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 speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act. At the same time, however, the court is not forced under this standard to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of "express advocacy."

VII.

Applying this standard to Furgatch's advertisement, we reject the district court's ruling that it does not expressly advocate the defeat of Jimmy Carter. We have no doubt that the ad asks the public to vote against Carter. It cannot be read in the way that Furgatch suggests.

The bold print of the advertisement pleads: "Don't let him do it." The district court determined that the focus of the inquiry, and the message of the ad, is the meaning of the word "it." Under the district court's analysis, only if "it" is a clear reference to Carter's re-election, supported by the text of the ad, could one find express advocacy. The district court accepted the arguments of Furgatch that "it" may plausibly be read to refer to Carter's degradation of his office, and his manipulation of the campaign process. The ad deplores Carter's "attempt to hide his own record," his "legacy of low-level campaigning," his divisiveness and "meanness of spirit," and his "incoherencies, ineptness, and illusion." As the district court viewed it, although the advertisement criticizes Carter's campaign tactics, it never refers to the election or to voting against Carter. The words "don't let him do it" urge readers to stop Carter from doing those things now and in the future.

We disagree with the district court that the word "it" is the proper focus of the inquiry. There is no question what "it" is—"it" is all the things that the ad accuses Jimmy Carter of doing, the litany of abuses and indiscretions that constitutes the body of the statement. 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

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that Furgatch is urging the public to take is a rejection of Carter at the polls, this advertisement is covered by the Campaign Act.

[3] In Furgatch's advertisement we are presented with an express call to action, but no express indication of what action is appropriate. We hold, however, that this failure to state with specificity the action required does not remove political speech from the coverage of the Campaign Act when it is clearly the kind of advocacy of the defeat of an identified candidate that Congress intended to regulate.

[4] Reasonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not "let him do it." The reader could not sue President Carter for his indelicate remarks, or arrest him for his transgressions. If Furgatch had been seeking impeachment, or some form of judicial or administrative action against Carter, his plea would have been to a different audience, in a different forum. If Jimmy Carter was degrading his office, as Furgatch claimed, the audience to whom the ad was directed must vote him out of that office. If Jimmy Carter was attempting to buy the election, or to win it by "hid[ing] his own record, or lack of it," as Furgatch suggested, the only way to not let him do it was to give the election to someone else. Although the ad may be evasively written, its meaning is clear.

Our conclusion is reinforced by consideration of the timing of the ad. The ad is bold in calling for action, but fails to state expressly the precise action called for, leaving an obvious blank that the reader is compelled to fill in. It refers repeatedly to the election campaign and Carter's campaign tactics. Timing the appearance of the advertisement less than a week before the election left no doubt of the action proposed.

Finally, this advertisement was not issue-oriented speech of the sort that the Supreme Court was careful to distinguish in *Buckley*, and the Second Circuit found to be excluded from the coverage of the Act in *Central Long Island Tax Reform*. The ad directly attacks a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign. It is the type of advertising that the Act was intended to cover.

There is vagueness in Furgatch's message, but no ambiguity. Furgatch was obligated to file the statement and make the disclosures required for any "independent expenditure" under the Federal Election Campaign Act. He is liable for the omission.

We do not address Furgatch's constitutional claims except to note that the constitutionality of the provisions at issue was reviewed in *Buckley*, and the standard set forth by the Supreme Court in that case was incorporated in the Act in its present form. Treatment of those constitutional issues is implicit in our disposition of the statutory question.

REVERSED.

Luis Mariano PLATERO-REYMUNDO, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 85-7457.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 13, 1986.

Decided Jan. 9, 1987.

Alien sought review of order of the Board of Immigration Appeals denying his motion to reopen deportation proceeding