

NLWJC - Kagan

Counsel - Box 035 - Folder 003

Campaign Finance Current [3]

when the search of the car itself was without a warrant.

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.

*The Honorable Gus Solomon, Senior United States District Judge for the District of Oregon,

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

sitting by designation.

authorized by any ca advertisement omitted two advertisements cost approximately \$25,000.

On March 25, 1983, Commission brought suit under the Federal Election Campaign Act, 2 U.S.C. § 437g(a)(6)(F) for a civil penalty and a further violation of 18 U.S.C. § 441d³ that Furgatch violated by failing to report his independent expenditure in U.S.C. § 441d³ by failing to report his independent expenditure in *The Boston Globe*. Furgatch moved for summary judgment under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. The district court granted summary judgment to dismiss his motion to dismiss and on March 25, 1984 entered its final judgment that the advertisement violated the independent expenditure provision of the statute because it "advocated" the defeat

1. Section 437g(a)(6)(A) 18 U.S.C. § 437g(a)(6)(A) If the Commission may, upon the request of any member, in its discretion, including a preliminary injunction, restraining order (including a civil penalty which does not exceed \$5,000 or an amount equal to the amount of the independent expenditure in violation) in the district court for the district in which the person in whom such action is taken, or transacts business.
2. Section 434(c)(1) requires any person making an independent expenditure in excess of \$250 to file a statement of the contents of the statement with the Commission, which provide:
 - (A) the information required by section 434(c)(2)(B)(iii) of this section if the independent expenditure is made in opposition to, or in support of, a candidate, or if it is made in cooperation with, or at the request of, any candidate or any agent of such candidate;
 - (B) under penalty of perjury, whether or not such expenditure is made in cooperation with, or at the request of, any candidate or any agent of such candidate;
 - (C) the identification of the person filing such statement.

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. § 441d³ 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.

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

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).

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 "ex-

press 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(e) 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-

tisement discusses (rather than the politician) the issue, the advertiser must report the expenditure.

Furgatch responds to any question on that it is not expressing an opinion. He contends that it is not expressing an opinion, he contends. He argues that the advertisement "do not expressly call for the election of Carter at the polls but an editorial which hides his own record, advertisement, accordingly a warning that he should be elected if the public is to use "low-level cam-

As the district court's advertisement expressly advocates the defeat of Jimmy Carter. We have not had occasion to consider the scope of the Act before the courts of appeals have.

In *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), 13 F.2d 13 (1st Cir.198) considered an advertisement by an anti-abortion group in the "Election Edition" of the magazine. The advertisement contained a photograph of a fetus, captioned as "pro-life." The advertisement at least two exhortations and the statement: "If you vote for Jimmy Carter, you will make the election of a pro-life candidate. We have ruled that the 'Special Edition' explicitly advocated the election of particular candidates in the advertisement only," and thus fell within the statutory sphere.

In *Federal Election Commission v. Central Long Island Chapter of the National Abortion Federation*, 616 F.2d 100 (2d Cir.1979), the Second Circuit adverted to the statute to support its holding that the advertisement of the economic reform group and criticism of a local member of the group was included. The advertisement did not refer to any particular member's political

tisement discusses Carter, the candidate, rather than the political issues, Furgatch must report the expenditure.

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 oppo-

nent. 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-

standard of *Buckley* into and 441d. See H.R.Rep. Jong., 2d Sess. 38 (1976), & Admin.News 1976, p. Legislative History of the Campaign Act Amend-1032 (GPO 1977). That ned to limit the coverage provision "precisely to t is unambiguously relat- gn of a particular federal kley, 424 U.S. at 80, 96

sections 434(c) and 441d he constitutional require- Buckley.

III.

3 that Furgatch's adver- advocates the defeat of therefore is an indepen- hich must be reported to mples of express advoca- e *Buckley* opinion (i.e., ort," etc.), the FEC ar- ide guidelines for deter- itutes "express advoca- e words are contained in is not determinative. r or not the advertise- message advocating the l candidate. Furgatch's FEC contends, contains ssage that Carter must urden[ing]" the country ears" of his allegedly

argues that the adver- words of the Supreme isly related to the cam- lar federal candidate." at 80, 96 S.Ct. at 663. ntends, is required to ent under coverage of grounds this argument t in *Buckley* to distin- h that pertains only to campaigns and speech itical issues in general. at because the adver-

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 indispensable 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.

A

[1] We begin with the proposition that "express advocacy" is not strictly limited to communications using certain key phrases.

The short list of words the Supreme Court's opinion does not exhaust the capacious language to express support or defeat of a candidate; the magic words "election" and "defeat" are their nearly perfect synonyms. The First Amendment's protection of express advocacy is not limited to the First Amendment's protection of speech only at the time of the Federal Election Commission's "Independent" campaign on behalf of candidates beyond the reach of certain key words which suggest that is unmistakable election or defeat of

A proper understanding of a message can best be achieved by viewing the speech as a whole. The First Amendment requires inference from one part of speech to another. The First Amendment may give a clear inference from a succinctly stated sentence. Similarly, a sentence viewed in isolation rather than in its peripheral context is only peripheral to the purpose of speech as a whole. We would have us reject the First Amendment's protection and construe it independently, requiring inference from specific phrases to the speech in its entirety.

We reject the suggestion that each sentence and a sentence's relation to its neighbors are to be examined that we will not examine an effort to understand only recognize that its parts in relation to

The subjective intent of a speaker is not alone to be determined; it must be determined from their meaning from the context, the speaker's intent and what the speaker may express of his intention, and from his mental state

Cite as 807 F.2d 857 (9th Cir. 1987)

ted at attempts by candi-
ent the statutory limits on
ditures through close and
ships with apparently "in-
paign spenders. The Su-
ed that efforts had been
it to avoid disclosure re-
he routing of campaign
ugh unregulated indepen-

Since *Buckley* was de-
ices have apparently be-
pread in federal elections,
r controls more urgent.
6,000 Cleanup", *The New*
5, No. 22 (December 1,

hat the Act's disclosure
n important Congression-
ery strong First Amend-
roperly applied, they will
onable and minimally re-
on the exercise of First
s. *Buckley*, 424 U.S. at
4. Although we may not
the freedom of speech
strictly necessary to fur-
of the Act, we must be
ensure that those pur-
rried out, that they are
vented, or thwarted by a
of the terms of the Act.
tion 434(c) so as to pre-
s clearly intended to af-
f a federal election from
rtuitously or by design,
the Act. This concern
n a more comprehensive
elimitation of "express
reject some of the overly
f interpretation that the
r adoption.

V.

A

ith the proposition that
is not strictly limited to
ng certain key phrases.

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 un-

necessarily 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.

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 unmistakable 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

that Furgatch is urging is a rejection of Carter's advertisement is covered by the Act.

[3] In Furgatch's presentation with an effect but no express indication appropriate. We hold failure to state with required does not result from the coverage when it is clearly the defeat of an idea Congress intended to

[4] Reasonable readers that Furgatch's readers to vote against. This was the only action would not "let him could not sue President's remarks, or aggressions. If Furgatch's impeachment, or some administrative action would have been, in a different manner was degrading to the claimed, the audience directed must vote against. If Jimmy Carter was election, or to win in record, or lack of it, the only way to give the election to though the ad may have meaning is clear.

Our conclusion is that the timing of the bold in calling for a expressly the preciseing an obvious blam compelled to fill in. the election campaign tactics. Tim the advertisement to the election left no proposed.

Finally, this advertisement oriented speech of the Supreme Court was

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

Issues Re: Independent Expenditures and Issues Advocacy Spending

Background:

In Buckley v. Valeo (424 U.S. 1), the U.S. Supreme Court defined its balancing test for determining whether statutory limits on campaign spending are constitutional. In Buckley the Court 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 protecting the electoral system from the appearance and reality of corruption.

Under this test, the Buckley Court found that spending limits could not be placed on independent expenditures as long as they were truly independent, i.e., uncoordinated with the political candidate’s spending. The Court noted 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.” Moreover, the Court held that the absence of coordination of an expenditure with a candidate “alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”

Additionally, the Buckley Court specifically examined disclosure provisions for independent expenditures under its balancing test and concluded that the only independent expenditures that could be required to be disclosed were those used for communications that “expressly advocate the election or defeat of a clearly identified candidate.” (This definition has since been codified in the Federal Election Campaign Act) In a footnote in its decision the Court gave examples of words of express advocacy, including “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat” and “reject.” The Court created this narrow definition to draw a clear distinction between “issue discussion,” which has strong First Amendment protections, and the candidate-oriented speech which is the focus of campaign finance laws.

More recent Supreme Court decisions have consistently applied the Buckley balancing test and ultimately expanded its reach. Most notably, earlier this year in Colorado Republican Campaign Committee v. FEC, the Court found that spending limits on independent expenditures by political parties are unconstitutional. The Court noted that the independent expression of a political party’s views is a “core” First Amendment activity and there is no sufficiently compelling government interest that requires that activity to be restricted.

Issues:

Whether express advocacy may be defined broadly enough to cover all speech that is clearly intended to affect the outcome of federal elections. This would allow greater disclosure of independent expenditures but would not allow spending limits on those expenditures.

- In the 1987 case, Federal Election Commission v. Furgatch, the Ninth Circuit said that speech need not include any of the words listed in Buckley to be express advocacy. Rather, if the speech is susceptible to no other reasonable interpretation than as exhortation to vote for or against a

specific candidate then it could be considered express advocacy and be subject to the disclosure requirements of independent expenditures.

- However, earlier this year the 1st Circuit affirmed a Maine District Court decision in Maine Right to Life Committee v. FEC striking down an FEC regulation based on the Furgatch decision as overly broad and unconstitutional.

Can restrictions other than limits, but greater than disclosure, be placed on independent expenditures, e.g. no independent expenditures allowed within 30 days prior to an election?

Can benefits for complying candidates be crafted to allow such candidates to effectively respond to independent expenditures made on behalf of their opponent. For example, would the McCain-Feingold provisions that allow complying candidates additional resources to respond to independent expenditures made against them be considered an unconstitutional restraint on the political speech by their opponents.

] |

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 and 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.

State made | *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.

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.

Section 503 Benefits Eligible Candidates Entitled to Receive

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.

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.

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *2;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

(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.

Try to show
this but
what is this?

(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

still more
of the
partic
read however I can
limit coordinated
but not indep

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *5;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

"contribution" a political party's spending "in cooperation, consultation, or concert, with . . . a candidate." 2 [*6] U.S.C. @ 441a(a)(7)(B)(1). 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 vof
limits or
can't curb
pre run 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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *8;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *11;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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. expend.
contributes.

(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).

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *14;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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.
statutory 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).

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *17;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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.

have to be
partic
advert?

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.

Handings

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).

Handings

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

!

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *23;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *27;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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 + if God done?

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.

how about
-> just that
could occur
often +
imposs to
pick apart
(more so than
in case of PAC)

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.

+ if so?

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 - Re
definitional
2. 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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *33;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

(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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *36;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

"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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *39;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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.

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *42;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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.

- - - - -Footnotes- - - - -

* 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.

- - - - -End Footnotes- - - - -

[*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.

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *44;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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).

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *47;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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,

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *50;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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")

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *53;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

(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.

-Footnotes-

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).

-End Footnotes-

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

-Footnotes-

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.

-End Footnotes-

[*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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *58;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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).

-Footnotes-

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").

-End Footnotes-

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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *61;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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

-Footnotes-

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.

-End Footnotes-

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

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

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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *67;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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.

- - - - -Footnotes- - - - -

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).

- - - - -End Footnotes- - - - -

[*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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *69;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

"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. MCFE, 479 U.S. at 265.

-Footnotes-

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.

-End Footnotes-

[*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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *72;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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

- - - - -Footnotes- - - - -

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,

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *74;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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.

- - - - -End Footnotes- - - - -
[*75]

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

- - - - -Footnotes- - - - -

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 position 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.

- - - - -End Footnotes- - - - -

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

116 S. Ct. 2309; 1996 U.S. LEXIS 4258, *76;
135 L. Ed. 2d 795; 135 L. Ed. 2d 795

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.

-Footnotes-

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.

-End Footnotes-

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.



FEDERAL ELECTION COMMISSION

Washington, DC 20463

August 1, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

SUBJECT: Draft AO 1996-30

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 8, 1996.

Attachment

DRAFT

1
2 **ADVISORY OPINION 1996-30**

3
4 **Robert F. Bauer**
5 **Perkins Coie**
6 **607 Fourteenth Street, NW**
7 **Washington, D.C. 20005-2011**

8
9 **Dear Mr. Bauer:**

10
11 **This responds to your letter dated July 11, 1996, requesting an advisory opinion**
12 **on behalf of the Democratic Senatorial Campaign Committee and the Democratic**
13 **Congressional Campaign Committee ("the Committees") concerning application of the**
14 **Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission**
15 **regulations to proposed independent expenditures by the Committees on behalf of their**
16 **1996 candidates for the United States Senate and the United States House of**
17 **Representatives.**

18 **Your request indicates that it is submitted because of the recent United States**
19 **Supreme Court decision in *Colorado Republican Federal Campaign Committee v.***
20 ***Federal Election Commission* ("*Colorado*"), 116 S. Ct. 2309 (1996). The request also**
21 **relates the factual background regarding the proposed expenditures by the Committees**
22 **and states, in pertinent part, as follows:**

23 **The Committees have made plans for the selection of a number of**
24 **House and Senate candidates who the Committees might support with**
25 **independent expenditures advocating their election or the defeat of their**
26 **opponents in the general election. To date, neither of the Committees**
27 **have discussed, or otherwise communicated this proposal to any of the**
28 **candidates in question. Moreover, the Committees have selected the**

1 candidates on the basis of a number of factors which will not be disclosed
2 to these or any other candidates.

3 * * * *

4 In the case of each candidate under consideration by the
5 Committees for these independent expenditures, the Committees would
6 assert the following about the history of relationship and contacts with the
7 candidates. The Committees have maintained continuous contact with
8 these candidates' campaigns and key fundraising and other consulting
9 agents. For example, the Committees have communicated with these
10 candidates' polling firms about polling information and its strategic
11 implication for message, allocation of campaign resources, and advertising
12 strategy. The Committees have also communicated with these candidates'
13 media advisors about the proposed strategic direction of its advertising.
14 On a virtually daily basis, the Committees' senior management have
15 communicated with senior management of the campaigns and the
16 candidate about advertising, fundraising and other related issues.

17 These contacts have included face-to-face meetings, telephone
18 conversations, and exchanges of written and electronic mail
19 communications. The candidates have visited party committee
20 headquarters for meetings and party committee representatives from time-
21 to-time have visited candidates in their home states. The Committee staffs
22 have had numerous telephone conversations with various members of the
23 campaign staff, consultants, and other agents of the campaigns on any

1 number of questions affecting campaign operations, staffing, tactics and
2 strategy.

3 In some but not all instances, the Committees use the same
4 consultants as the candidates in developing strategy or improving
5 committee operations for the benefit of its candidates, including the
6 candidates under consideration for this "independent expenditure" effort.

7 In some instances, the Committees communicate with the consultants
8 about the candidates; in other cases, the Committees utilize those same
9 consultants for their own purposes and do not communicate directly with
10 those consultants about any matters directly bearing on their separate
11 representation of those candidates.

12 • • • •

13 Under the circumstances and the facts as set forth in their request, the Committees
14 ask if they "may properly establish and maintain independence for purposes of making
15 independent expenditures within the meaning of the recently decided Colorado
16 Republican case?" The request poses several questions that are set forth with the same
17 text used in the request, except where designated by brackets. The Commission's
18 responses follow each question or cluster of questions.

19 (1) Are the requirements of 11 CFR Part 109 which apply to all
20 other "independent expenditure" activity by political committees
21 applicable to the party committees?

22 (2) If not, what regulations govern "independent expenditure"
23 activities by political parties?

1 **Responding to questions (1) and (2), the Commission concludes that the**
2 **Committees' purported independent expenditures are subject to the same conditions and**
3 **requirements as those made by any other person, such as individuals and non-party**
4 **political committees. This result follows from the plurality Supreme Court opinion**
5 **delivered by Justice Breyer (joined by Justices O'Connor and Souter) holding that:**

6 **The independent expression of a political party's views is 'core' First**
7 **Amendment activity no less than is the independent expression of**
8 **individuals, candidates, or other political committees. [Citation**
9 **omitted.] *Colorado* at 2316.**

10 *** * * ***

11 **We therefore believe that this Court's prior case law controls**
12 **the outcome here. We do not see how a Constitution that grants to**
13 **individuals, candidates, and ordinary political committees the right to**
14 **make unlimited independent expenditures could deny the same right to**
15 **political parties. *Colorado* at 2317.**

16
17 **Accordingly, the Committees would be subject to all the conditions and**
18 **requirements that govern whether an independent expenditure so qualifies, or is instead a**
19 **contribution (in kind) subject to the limits of §441a. See 2 U.S.C. §441a(a)(7)(B) and 11**
20 **CFR Part 109. The independent expenditure reporting rules also apply to the**
21 **Committees. This includes the requirement that written and signed certifications (under**
22 **penalty of perjury) must be submitted in the Committees' reports to indicate whether any**
23 **reported "independent expenditure is made in cooperation, consultation, or concert with,**

1 or at the request or suggestion of, any candidate or any authorized committee or agent of
2 such committee... ." 2 U.S.C. §434(b)(6)(B)(iii). See the relevant statutory definitions in
3 2 U.S.C. §431(17) and §431(18); also, see the 24 hour pre-election reporting provisions
4 of 2 U.S.C. §434(c)(2) and the disclaimer provisions of 2 U.S.C. §441d(a)(3). Several
5 Commission regulations implement the cited sections of the Act and govern the making
6 and reporting of independent expenditures by the Committees. The regulations would
7 apply in the same manner and to the same extent as applicable to other political
8 committees that are not authorized campaign committees of any Federal candidate. 11
9 CFR 100.8(a)(3), 100.16, 100.17, 104.3(b)(3)(vii)(A), (B) & (C), 104.4, 104.5(g),
10 106.1(a), Part 109, and 110.11(a)(1)(iii).

11 (3) May a party [each of the Committees] undertake "independent
12 expenditures" on behalf of a candidate while it continues with day-to-day contacts
13 with the same candidate campaign? Or are the Committees required to suspend
14 all other communications of strategic significance with candidates if the
15 Committees are preparing or considering "independent expenditure" activities for
16 those candidates?

17 Responding to this question, the Commission concludes that, given all of the facts
18 and circumstances related in the request and with regard to the candidates involved in the
19 relationships described above, the Committees could not satisfy the requisite conditions
20 for conducting independent expenditure activity in support of their candidates in the 1996
21 election cycle, including expenditures to advocate the defeat of candidates who are the
22 1996 election cycle opponents of the Committees' favored candidates. The basis for this
23 conclusion is the Committees' description of their coordinated and cooperative campaign;

1 activities with their candidates that have already occurred in the 1996 election cycle and }
2 before the Supreme Court's decision on June 26, 1996.

3 Specifically, although the request states that the Committees have not discussed or
4 otherwise communicated the particular independent expenditure proposals with or to any
5 of the candidates who may be supported, the Committees have been involved in general }
6 coordination with the candidates, including maintaining continuous contact with the
7 candidates' campaigns and with their key fundraising and other consulting agents. For
8 example, Committee personnel have communicated with their candidates' polling firms
9 about polling information and the strategic implications of that information for message, ✓✓
10 allocation of campaign resources and campaign advertising strategy. Also,
11 communications by the Committees have been made to media advisors of their ✓✓
12 candidates about the proposed strategic direction of the Committees' advertising. In
13 addition, on virtually a daily basis, senior management of the Committees have
14 communicated with senior management personnel of their candidates' campaigns and the ✓✓
15 candidates themselves about advertising, fundraising and other related issues.¹ Visits
16 either at the Committees' offices by candidates or by the Committees' personnel with
17 candidates in their home states have also occurred. Further, Committee staffs have had
18 numerous telephone conversations with their candidates' campaign staffs, consultants and
19 other agents on many questions affecting campaign operations, staffing, tactics and
20 strategy. Moreover, in some (but not all) instances, the Committees use the same
21 consultants as their candidates to develop strategy or improve the Committees' operations

¹ These contacts have been in face-to-face meetings, telephone conversations, and via exchanges of written and electronic mail communications.

1 for the benefit of its candidates, including those candidates who are under consideration
2 for the "independent expenditure" effort.²

3 Considered in their totality, the extensive consultation, cooperation and
4 coordination activities by the Committees with their candidates (as described above) that
5 have already occurred in the 1996 election cycle would preclude the Committees from
6 demonstrating that the proposed expenditures in support of those candidates could qualify
7 as independent expenditures under the Act and Commission regulations. 2 U.S.C.
8 §441a(a)(7)(B), 11 CFR 109.1. In these circumstances it would make no difference if the
9 Committees now suspend all further communications of strategic significance with
10 candidates who may be the subject of independent expenditures by the Committees.³

11 Thus, the Committees' situation is very different and distinguishable from that
12 before the Court in *Colorado*. Noting the testimony in the case, the Court cited general
13 descriptions of the State party's practice to coordinate campaign strategy with its
14 candidates, and then concluded that such a practice does not "conflict with, or cast doubt
15 upon, the uncontroverted direct evidence that this advertising campaign was developed by
16 the Colorado Party independently and not pursuant to any general or particular

² In some instances, the Committees communicate with these consultants about the candidates, while in others the Committees use the same consultants for the Committees' own purposes and do not communicate directly with them about any matters directly bearing on the consultants' separate representation of those candidates. See *Federal Election Commission v. National Conservative Political Action Committee*, 647 F. Supp. 987, 995 (S.D.N.Y. 1986) where court indicated that coordination was established when multicandidate committee and candidate developed and implemented nearly identical campaigns through use of a common political consultant, regardless of whether those campaigns took place during the primary or general election season.

³ See Advisory Opinion 1996-1 wherein the Commission concluded that contacts made between candidates' campaigns and agents of a trade association, with respect to its membership endorsements of those candidates and when the association PAC might consider independent expenditures in their campaigns, would be disqualifying coordination if such contacts "became the means by which information is passed regarding the candidate's plans, projects or needs with a view toward having an expenditure made."

1 understanding with a candidate.” *Colorado* at 2315 (emphasis added). In the situation
2 presented in the Committees’ request, the campaign advertising program will be
3 developed with at least a “general . . . understanding” with the candidates or their
4 campaign personnel.

5 (4) Does it matter whether in a particular case the Committees’
6 communication with a candidate or his or her campaign on strategic matters
7 took place within days if not hours of the “independent expenditure”
8 campaign or was suspended around the time that the “independent
9 expenditure” advertising was (a) conceived, or (b) prepared, or (c)
10 conducted--that is paid for and distributed to the voting public through the
11 chosen medium?

12 Responding to this question, the Commission concludes that, while in some
13 circumstances the timing of the Committees’ communications with a candidate or the
14 campaign’s other personnel could be a factor to consider, the time intervals would not be
15 relevant here given the facts presented and discussed above in the answer to question (3).
16 It is significant here that, in Advisory Opinion 1984-30, the Commission considered the
17 effect of cooperation and coordination, occurring in the context of a committee’s
18 contributions (in kind) to candidates in their primary election campaigns, on the
19 committee’s ability to support those same candidates with independent expenditures in
20 their general election campaigns. The Commission concluded that the primary election
21 contacts would raise the (rebuttable) presumption that committee expenditures supporting
22 those candidates in the general election would be based on information about the

1 candidate's plans, projects, or needs. Advisory Opinion 1984-30, citing Advisory
2 Opinion 1979-80.

3 (5) If restrictions do apply to the communications between the
4 Committees and candidates who will be the focus of "independent
5 expenditures," do the Committees have an obligation to advise all of their
6 staff in writing, and the candidates to advise their staff also in writing, that
7 communications between the parties and campaigns should be suspended
8 or held in abeyance to preserve for the Committees the opportunity to
9 make independent expenditures if they so choose?

10 In response to question (5), the Commission concludes that, if the Committees are
11 considering independent expenditures in factual situations (other than those discussed in
12 question 3 above) where they have not had disqualifying consultation and coordination
13 contacts with their candidates, the Committees' written instructions to their staffs to cease
14 and desist from all communications with the target campaigns would be a relevant factor
15 in determining whether Committee expenditures will, in fact, be considered independent.
16 Likewise, it would be a relevant factor if the Committees provide written instructions to
17 their candidates saying that they should convey the same directions to their own
18 campaign personnel. See *Democratic Senatorial Campaign Committee v. Federal*
19 *Election Commission ("DSCC")*, 745 F. Supp. 742 (D.D.C. 1990) [In reviewing the
20 Commission's dismissal of an administrative complaint presenting independent
21 expenditure activity, the court noted the significant fact that the PAC chairman had
22 directed its consultants "not to say anything at all" about a Senate election in Florida to
23 other PAC personnel, since those consultants had advised the Florida candidate who was

1 also subject of same PAC's independent expenditure program, although conducted with
2 the advice of different consultants.]

3 (6) May the Committees erect a "Chinese Wall" to permit certain staff,
4 segregated from other staff of the Committees, to work on "independent expend-
5 iture" campaigns--to design the expenditures, to request all checks needed for
6 that purpose and to take all of their steps to produce and distribute the advertise-
7 ment to the public--while other staff remain free to communicate with the
8 campaign on any and all issues through the completion of the "independent
9 expenditure" advertising?

10 In response to question (6), the Commission may not express an opinion because
11 the request does not present a specific and fully described situation wherein the nature
12 and scope of the asserted segregation (erecting a "Chinese Wall") of some of the
13 Committees' personnel from other personnel has been presented. Furthermore, the
14 circumstances related in the request appear to negate the possibility that such a barrier is
15 currently in place or could be erected at this point in the 1996 election cycle. Therefore,
16 as to this question, the request in its present form only presents a general question of
17 interpretation in a hypothetical factual context. The advisory opinion process may not be
18 used to address such questions. 11 CFR 112.1(b), 112.1(c).

19 (7) May the Committees make Section 441a(d) coordinated expenditures
20 on behalf of a candidate at the same time that it is making "independent expend-
21 itures" on the same candidate's behalf? If they are conducted simultaneously,
22 must a "Chinese Wall" be established to separate those staffs involved in the

1 coordinated expenditures from those staffs involved in the independent
2 expenditures?

3 The Commission notes its responses to the other questions above. Beyond that,
4 this question presents a very general inquiry without a specific and fully described factual
5 context. See 11 CFR 112.1(b), 112.1(c). For the same reasons cited in response to
6 question (6), the Commission may not issue an advisory opinion addressing question (7).

7 This response constitutes an advisory opinion concerning the application of the
8 Act, or regulations prescribed by the Commission, to the specific transactions or activities
9 set forth in your request. See 2 U.S.C. §437f.

10 Sincerely,

11 Lee Ann Elliott
12 Chairman
13

14 Enclosures (AOs 1996-1, 1984-30 and 1979-80)

Memorandum



Subject S.1219, McCain-Feingold Campaign Finance Reform Bill	Date June 12, 1996
--	-----------------------

To
 Andrew Foiss
 Assistant Attorney General

From
 Randolph Moss *RM*
 Deputy Assistant
 Attorney General

The following are the comments of the Office of Legal Counsel on S. 1219, the Senate Campaign Finance Reform Act of 1995, and the statement of administration policy on that bill. The bill would establish a voluntary system that would grant benefits to candidates who choose to participate in return for their commitment to adhere to a variety of restrictions on their fund-raising and expenditures. The bill would also enact a variety of generally applicable regulations.

I. Generally Applicable Provisions

1. Independent Expenditures by Associations: The bill would ban contributions and independent expenditures¹ by anyone other than an individual or a political committee. A political committee is defined as a political party or a committee of a political party. See S. 1219, § 201. The effect of this provision, then, is to ban independent expenditures and contributions by all political associations other than political parties. Id. Under current Supreme Court jurisprudence, the ban on independent expenditures is unconstitutional.²

¹ An independent expenditure is defined as an expenditure that is made without the participation or cooperation of or without consultation with a candidate and that contains express advocacy. Express advocacy, in turn, is defined as an expression of support for or opposition to a specific candidate or group of candidates or to the candidates of a specific political party. S. 12319, § 251.

² The ban on contributions by associations also raises a constitutional question, but we believe that this ban can be justified as an ancillary measure that enforces the limit on contributions by individuals that the Court upheld in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). Individuals remain able to make contributions up to the statutory limit. The ban on contributions by associations merely prevents an individual from exceeding the legal limit by making unarmarked contributions to

In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held unconstitutional a provision of the Federal Election Campaign Act that prohibited any independent expenditures in excess of \$1,000, unless made by a candidate, a party, or the institutional media. Id. at 19. The Court concluded that this provision precluded individuals and associations from availing themselves of the most effective means of communicating regarding elections. In so doing, the Act seriously infringed upon speech at the core of the First Amendment and, therefore, was subject to strict scrutiny. To satisfy this exacting level of scrutiny, a statute must be narrowly tailored to the advancement of a compelling governmental interest. The proffered governmental interest in Buckley was the avoidance of actual corruption or the appearance of corruption. The Buckley Court upheld the FECA's \$1,000 limit on contributions by an individual to a particular candidate on the basis of this interest. Id. at 23-38. In the context of independent expenditures, however, the Court held that the anti-corruption interest was not sufficiently compelling to justify the limitation. The Court reasoned that the potential for corruption through independent expenditures is substantially diminished as compared to direct contributions because independent expenditures by definition are not coordinated with the candidate's campaign and therefore could possibly prove counterproductive. Thus, according to the Court, independent expenditures made on behalf of a particular candidate or in opposition to that candidate's opponent are unlikely to be an effective means of currying favor with the candidate. Under this holding of Buckley, the proposed ban on independent expenditures is unconstitutional. See id. at 19, 39-51.

Even if the Court were to accept that the anti-corruption interest is fully compelling in the context of independent expenditures,³ the specific proposal in the McCain-Feingold bill would be unconstitutional. The bill would continue to allow unlimited independent expenditures by individuals with the means to make them. It would only deny individuals of more modest means the ability to band together to engage in effective advocacy. The bill, therefore, significantly infringes the right of individuals to associate in order to express their political views. Because the right to associate for the purposes of political expression is a fundamental right, the bill's distinction is valid only if there is a compelling interest in differentiating between independent

associations that the contributor regards as likely to make a contribution to the contributor's favored candidate. See id. at 38; see also Gard v. Wisconsin, 456 N.W.2d 809, 820 (Wis. 1990).

³ The Supreme Court "ha[s] consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 259-60 (1986).

expenditures by associations, on the one hand, and by individuals, on the other. See generally Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). We are aware of no reason to believe that independent expenditures by associations present a greater potential for actual or apparent corruption than independent expenditures by individuals. See Buckley, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

This was the Court's ruling when it addressed a more limited form of the proposed prohibition. See FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) ("NCPAC"). There, the Court assessed a statute that prohibited all PACs from making independent expenditures to further the election of a presidential candidate who accepted public funding. Id. at 482. The Court ruled that "[t]o 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." Id. at 495. Therefore, the Court applied strict scrutiny, which the statute did not pass because the potential for corruption from independent expenditures is diminished as set forth in Buckley. Id. at 487-98.

2. Contributions Made through Intermediaries: The bill would provide that, if a contribution is made through or is arranged by an intermediary or conduit, directly or indirectly, the contribution would be attributed to the intermediary or conduit if, inter alia, the intermediary or conduit is (1) a political committee or party; (2) a lobbyist or foreign agent; (3) a bank, corporation, union, or partnership; (4) or an officer, agent, or employee of (2) or (3) when acting on behalf of such person or entity. S. 1219, § 231.⁴ This provision raises serious constitutional concerns. *bundling*

Constitutional concerns would be raised if "arranging" for a contribution were construed to include communications or other actions that resulted in encouraging others to make contributions, because this would impose a significant burden on the right of

⁴ This provision would operate by attributing contributions made or arranged through an intermediary or conduit to the intermediary or conduit, who is subject to the general individual contribution limit of \$1,000. Thus, one of the listed conduits could not "bundle" contributions from other individuals to the extent the sum of those contributions and the intermediary or conduit's personal contributions exceeds \$1,000.

association. The right of association is designed to allow "individuals of modest means [to] join together in organizations which serve to 'amplify the voice of their adherents'" and to engage in effective advocacy. NCPAC, 470 U.S. at 494 (quoting Buckley, 424 U.S. at 22). Associations that are formed to advocate the political beliefs of their members often also perform an educational function. That is, they inform their members regarding which candidates have supported the association's positions and prioritize those whose election will most benefit the association's positions. This process can be conducted and will be aided by a person who is a lobbyist or an agent or employee of a lobbyist. If this were to constitute "arranging" a contribution, it would strike at associational activity that is at the core of the First Amendment and as a result would be subject to strict scrutiny.

It might be contended that this provision could be satisfied by an association by segregating lobbyists from fundraisers and any other persons who communicate information to members of the association. If that were the statutory requirement, however, it would not pass constitutional muster. In a given association, it is possible, perhaps likely, that the association's lobbyists will be uniquely situated to advise the membership as to where their contributions will do the most good from the association's point of view. Even if an association could hire a separate staff to perform this function, the Constitution requires strict scrutiny where such a burden is placed on the right to associate. Again, we are aware of no governmental interest sufficient to justify this burden. See FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); cf. FAIR Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (holding unconstitutional a ban on any lobbyist serving as a conduit for a contribution as part of a comprehensive ban on all contributions made by lobbyists).

To avoid these constitutional infirmities, the bill should be clarified to make it explicit that the regulation of contributions made through intermediaries or conduits applies only where the intermediary or conduit retains ultimate authority over whether or not the contribution is in fact made.

3. Contributions by advisers and employees: The bill would exclude from the definition of "independent expenditures" any expenditures made by a person who has counseled the candidate or the candidate's agents on any aspect of the candidacy, including whether to run, as well as expenditures by employees in a fundraising, fund-spending, executive or policy-making position. S. 1219, § 251(a). As a result, expenditures by advisers and employees would count as contributions and are subject to the \$1,000 limit. Although some covered advisers and employees may be sufficiently familiar with a candidate's strategy to be able to make independent expenditures that are in essence in-kind contributions to the candidate, if read literally, the bill's broad

limitation on expenditures by all covered advisers and employees raises substantial concerns. To the extent the bill would sweep in expenditures by individuals who offer passing advice and who do not have distinguishably greater knowledge of a candidate's strategy than the general public, the bill would limit expenditures that are truly independent. The validity of any measure with such an effect is subject to serious doubt. See, e.g., Buckley, 424 U.S. at 39-51.⁵

Current law addresses the issue of expenditures that are coordinated with a candidate in a straightforward manner: any such coordinated expenditure is treated as a contribution rather than an independent expenditure. See 2 U.S.C. § 441a(7). Although one might fairly presume such coordination where the person making the expenditure is or has played a significant role in the candidate's campaign, this presumption is difficult to justify -- and would probably fail to satisfy strict scrutiny -- where the individual had only a passing relationship with the candidate or his campaign. Unless a court were to find that the broader presumption was necessary to enforce the coordinated expenditure limitation or were to adopt a narrowing construction of this provision, it would likely be held unconstitutional. To avoid the risk that a court would not so read the bill, it should be amended to require a showing of actual coordination.

4. Soft money other than from political parties: Persons (broadly defined) who are not political party committees would be required to file a report for disbursements aggregating to \$2,000 and an additional report for every additional aggregation of \$2,000. This requirement covers disbursements that "might affect the outcome of a federal election" but does not cover "independent expenditures" (express advocacy regarding a specific candidate). In Buckley, the Court applied strict scrutiny to a disclosure requirement because it recognized that requiring individuals and groups to identify themselves could chill protected speech and association. Nevertheless, the Court upheld a requirement that individuals and groups file reports disclosing their independent expenditures. See 424 U.S. at 76-82. In doing so, however, the Court indicated that the governmental interest in disclosure would not be sufficient where the expenditure was not made expressly to advocate a specific result in an election. Id. at 80-82. The expenditures covered by this provision of the bill, by definition,

⁵ Absent a saving construction, the bill would also have a chilling effect on political speech. Individuals who might wish to make independent expenditures would be required to forgo offering advice that they otherwise would have tendered in order to maintain their ability to speak out publicly. The Supreme Court has held that legislation that imposes such a choice is subject to strict scrutiny. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

do not include express advocacy regarding the result of a specific election.

We note, however, that the bill would not require that individuals or groups identify themselves in making the report. Rather, only the fact of the expenditure need be reported. We believe that if the bill is construed so that those making "soft money" expenditures are not required to identify themselves, the concern that the Court identified in Buckley -- chilling effect on speech and association -- would not arise.

5. Compelled advertisement identification: Existing law requires that every "general public political advertis[ement]" that includes either express advocacy of the election or defeat of a candidate or solicitation of a contribution must also identify the candidate or other person or entity who paid for the advertisement and, if the advertisement is authorized by a candidate, must disclose the authorization. 2 U.S.C. § 441d(a). The bill would further define the form of this self-identification. S. 1219, § 302. Specifically, the bill would require that printed communications make the identification in "clearly readable" type size in a box set off from the remainder of the text with a "reasonable of color contrast between the background" and the identification. The bill would also require that any television broadcast or cablecast include the written self-identification to "appear[] at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds." Id.

As applied to solicitations, we believe that the self-identification requirement is constitutionally permissible. See FEC v. Survival Education Fund, 65 F.3d 285, 295-98 (2d Cir. 1995). As applied to express advocacy, we recognize, as did the court in Survival Education Fund, that substantial arguments might be made that the existing law does not survive McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).⁶ In that case, an individual distributed handbills expressing opposition to a local referendum to increase the school tax. The handbills did not disclose the identity of their author as required by Ohio law. The Supreme Court held that the Ohio law placed a substantial burden on speech that lies at the core of the First Amendment's protection and that the state's interest in avoiding fraud and libel was not sufficient to sustain the self-identification requirement. The Court, however, noted that the case involved only the distribution of handbills in a local issue-based election and expressly declined to reach the question of whether, and to what extent, its holding

⁶ The validity or invalidity of the amendments proposed in S. 1219 that further define the form of the identification follows a fortiori from the validity or invalidity of the existing statute.

would apply in the context of advocacy expressed through mass media regarding a federal, candidate election. See id. at 1514-15 n.3; id. at 1524 (Ginsburg, J., concurring).

In addition to S. 1219's amendments to the form of the self-identification requirement, S. 1219 would enact additional substantive requirements. The bill would require that (1) printed communications financed by independent expenditures include the permanent street address of the person or organization that paid for the communication, (2) broadcast or cablecast communications that are paid for or authorized by a candidate include an audio self-identification that is read by the candidate, and (3) any televised broadcast or cablecast that is paid for by a candidate include, next to the written self-identification, "a clearly identifiable photographic or similar image of the candidate." S. 1219, § 302.

Assuming the validity of the existing statutory self-identification requirement and the amendments to their form proposed in S. 1219 discussed previously, the additional substantive requirements raise serious constitutional concerns. By requiring those making independent expenditures to publicize their permanent street address and forcing candidates literally to speak⁷ or to make an appearance, each of these requirements places a burden on speech at the core of the First Amendment's protection. See, e.g., Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Wooley v. Maynard, 430 U.S. 705 (1977). We are unaware of how these additional measures would advance the government's anti-corruption interest beyond the pre-existing self-identification requirement and thus believe there is a substantial risk of a court ruling that the regulations fail to advance a sufficient governmental interest.⁸ If these requirements place a substantial

⁷ We do not doubt that, if self-identification requirements are valid, a requirement that the self-identification on a televised ad be read as well as written on the screen is also permissible. Such a requirement would serve the purpose of conveying the identification to someone who does not happen to be looking at the television screen during the four seconds that the identification is required to appear. The distinct constitutional issue arises where a specific individual, here the candidate, is required personally to read the identification.

⁸ In addition, a court might, given this failure to advance a sufficient interest, be inclined to credit the argument that inevitably would be made by those who will challenge the amendment that the bill is an attempt to prevent candidates from broadcasting "negative" ads. Congress may not enact regulations that are aimed at the suppression of ideas that Congress deems dangerous. See, e.g., Rosenberger v. Rector & Visitors of the University of Virginia, 115 S. Ct. 2510, 2519 (1995); Speiser v. Randall, 357

burden on protected speech and do not materially advance a governmental interest, the provision would fail to pass constitutional scrutiny. See McIntyre, 115 S. Ct. at 1522-24; Buckley, 424 U.S. at 39-59.

II. Provisions of the Voluntary System

Out-of-state contributions: The Senate bill applies a limit on out-of-state contributions to candidates who elect to participate in the public funding system. The bill defines allowable contributions as not including "contributions from individuals residing outside the candidate's State to the extent such contributions exceed 40 percent of the aggregate allowable contributions" received during the approximately two years preceding the Senate election. S. 1219, § 501.

The bill would discriminate against out-of-state contributors. While Buckley held that there is little speech content in the size of a contribution, the Court did hold that inherent in every contribution is a statement of support that is protected by the First Amendment. In discriminating against out-of-state contributions, the bill would place burdens on the speech of citizens who do not reside in the same state as the candidate. As such, the bill would trigger some level of scrutiny under the First Amendment, for "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." Rosenberger, 115 S. Ct. at 2516; see also, e.g., Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1986) ("A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.").

Speaker-based restrictions do not inevitably demand strict scrutiny; they do so only where the speaker-based discrimination is based on "the communicative impact of the regulated speech," Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2467 (1994); that is, where the regulation "arises in some measure because the communication . . . is itself thought to be harmful." Buckley v. Valeo, 424 U.S. 1, 17 (1976) (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)) (quoted with approval in Turner Broadcasting, 114 S. Ct. at 2467). Thus, strict scrutiny is required where the prohibition or limitation on speech is based "on the identity of interests that spokesmen may represent in public debate over controversial issues." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). Accord Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 15 (1986) (plurality opinion); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990); cf. FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984) (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-40 (1980) and id., at 546 (Stevens, J., concurring)).

U.S. 513 (1958).

On the other hand, strict scrutiny is not required where a regulation that discriminates among speakers does not do so because of the communicative impact of the disadvantaged speech. For example, a speaker-based restriction might be imposed based on a speaker's unique ability to transmit communications using particular physical means; see Turner Broadcasting, 114 S. Ct. at 2460-61, 2467, or based on things the speaker has done in the past unrelated to their speech; see, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548-51 (1983).

We are not aware of the purpose this provision is meant to serve. We believe, however, that there are valid reasons unrelated to the communicative impact of out-of-state contributions that would sustain the provision. In particular, we believe that the government has a legitimate interest in seeking to foster strong ties between a Senator and the constituency he or she is constitutionally committed to represent. In upholding the individual contribution limit in Buckley, the Court noted its effect was merely "to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 22. We believe that the out-of-state contribution limit would have essentially the same effect. It would merely require candidates to build stronger ties with the constituents whom they are elected to represent. We also note that because candidates may return to each out-of-state contributor a pro rata share of the excess of the 40% limitation, the law does not necessarily require that a candidate ever refuse to receive, which is to say associate with, a given out-of-state contributor.