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## INTRODUCTION BY TREVOR POTTER

Political issue advocacy exploded into the public consciousness during the 1996 congressional and presidential elections. Organizations and interest groups saturated the local radio and television airwaves across the country with issue-oriented advertisements, with the stated purpose of shaping public opinion on selected policy matters. The Democratic National Committee initiated the air wars as early as 1995 with advertisements designed to bolster President Clinton's support by portraying him as saving the nation from the Republican Congress. The AFL-CIO followed up with an announcement of a \$35 million advertising campaign attacking the legislative records of potentially vulnerable Republican House incumbents (especially freshmen members). In the summer of 1996, a business coalition responded with advertising praising the congressional voting records of the incumbent Republicans in those districts.

Moreover, the Democratic and Republican national committees ran "issue ads" featuring their presidential nominees before the party conventions (see document 7.1). This was important for the Republicans, as the Dole campaign had nearly reached its primary spending limit in March 1996, five months before the party's August convention. After the conventions, many other issue groups—usually tax-exempt 501(c)(4) organizations (the Sierra Club, Americans for Tax Reform, and others)—took to the airwaves with significant expenditures for "issue ads" in targeted districts and states.

Because these "issue advocacy" advertisements were designed to avoid the narrow legal definition

of federal election spending, the sponsors were free to underwrite the campaigns with money that is prohibited or severely restricted when used in connection with federal elections—including corporate and labor treasury funds and unlimited individual contributions. Moreover, because the advertisements were not deemed to be "in connection with a federal election," the sponsoring organizations were not required to disclose the sources of their funding, or where and how it was spent.

To many observers, these issue advertisements were clearly designed to influence the outcome of selected congressional races and the presidential contest. Indeed, on occasion the sponsors proudly claimed that the advertisements had achieved this goal. In some congressional districts, unlimited and undisclosed funds spent on "issue" broadcasts and mailers exceeded that spent by the candidates themselves. There are now calls for disclosure of "issue advocacy," and regulation of its funding. But what exactly is issue advocacy, and where did it come from?

Simply stated, issue advocacy has come to mean political speech that may mention specific candidates or political parties *but* does not "expressly advocate" the election or defeat of a clearly identified federal candidate through the use of words such as "vote for," "oppose," "support," and the like. As a legal construct, issue advocacy was created by the U.S. Supreme Court when it narrowed the reach of the federal election laws in the *Buckley v. Valeo* decision, 424 U.S. 1 (1976); see document 7.3). Al-

though the definition is relatively simple to state, distinguishing between issue advocacy (exempt from federal campaign finance regulation) and express advocacy (subject to reporting requirements and limits on sources of payment) has proven exceedingly contentious in practice over the past twenty years.

This introduction traces the evolution of issue advocacy from the Supreme Court's seminal *Buckley* decision through the ensuing decisions of the lower federal courts. It also discusses the Federal Election Commission's (FEC) response to these major court rulings.

#### ISSUE ADVOCACY: WHAT IS IT, AND WHERE DID IT COME FROM?

As noted previously, issue advocacy is best understood by what it does *not* do—it is a communication that does not “expressly advocate” the election or defeat of a clearly identified federal candidate. Whether it must affirmatively do something else—such as present a clear view about a political, social, or economic issue—is less clear.

The Genesis: *Buckley v. Valeo*

*Buckley* was, on its face, a constitutional challenge to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. (For a discussion of the FECA, see chapter 2; for a complete account of the *Buckley* decision, see document 3.1.) This meant that the courts had no specific political spending before it but were judging the constitutional validity of the FECA as drafted by Congress. As a result, the courts were declaring general principles of constitutional law disconnected from any practical application in specific election contests.

The first decision in *Buckley* came from the Court of Appeals for the D.C. Circuit, which largely upheld the law as passed by Congress. However, the D.C. Circuit did strike down a broad “issue advocacy” provision that would have required disclo-

sure of all contributions of more than \$10 received by any organization that publicly referred to any candidate or the candidate's voting record or positions, or official acts of candidates who were federal officeholders; *Buckley v. Valeo*, 519 F.2d 821, 869—878 (D.C. Cir. 1975)—document 7.2.

The D.C. Circuit held that this language—which regulated even nonpartisan communications by groups that were not political committees, using a broad phrase, “for the purpose of influencing the outcome of an election”—was both unconstitutionally vague (providing no real guidance as to regulated or unregulated speech) and too inclusive (requiring disclosure by groups not overtly involved in political activity). This provision, intended by Congress to provide disclosure of all donors to Common Cause, the ACLU, and “many groups, including liberal, labor, environmental, business and conservative organizations,” was declared unconstitutional in its entirety by the D.C. Circuit, and that holding was the only part of the D.C. Circuit's decision not appealed to the Supreme Court.<sup>1</sup>

In *Buckley*, the Supreme Court confronted a wide array of congressionally enacted prohibitions and restrictions on contributions and expenditures in connection with federal elections. Congress had written the FECA broadly, regulating all spending “in connection with,” or “for the purpose of influencing” a federal election, or “relative to” a federal candidate. One of the questions the Court faced was whether these statutory phrases were so vague and overly broad that they provided an unconstitutional lack of notice to persons potentially affected by the FECA. The Court stressed that vagueness concerns are especially acute where, as here, “the legislation imposes criminal penalties in an area permeated by First Amendment interests. . . . The test is whether the language . . . affords the ‘[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.’” The Court noted that Congress had failed to define “in connection with” an election or “relative to a candidate.”

The D.C. Circuit Court of Appeals had sought

to avoid vagueness problems by narrowing “relative to a candidate” to communications “advocating the election or defeat of such candidate.” However, the Supreme Court held that greater precision and clarity were required to avoid unconstititutional vagueness. The Court held that “explicit words of advocacy of election or defeat” are required. The Court indicated that the following explicit advocacy terms satisfied the strict “express advocacy” test: “vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”<sup>2</sup> Such a strict line was required because “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.”

*Buckley* cautioned that a standard which turned on the speaker’s purpose or the listener’s understanding would have a chilling effect on political speech.

Similarly, the Court in *Buckley* narrowed a provision in the FECA requiring every person who makes contributions or expenditures over \$100 in connection with a federal election to file a disclosure statement with the FEC. The FECA defined “contributions” and “expenditures” as providing money or other valuable assets “for the purpose of . . . influencing’ . . . [an] election.” Again, to avoid vagueness, the Court narrowed the definition of “expenditure” to “reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.”

In narrowing the reach of the FECA to avoid declaring it unconstitutionally vague, the Court in *Buckley* significantly restricted the reach of the federal election laws. Instead of Congress’s intended

broad coverage of “all spending” to “influence” federal elections (phrases presumably to be defined with greater specificity over time by the courts and the Federal Election Commission), the law as interpreted by the Supreme Court now regulated only speech that constituted “express advocacy.” Though that new term was not yet defined in practice, it clearly meant that much political speech Congress had intended to be regulated and disclosed would instead be beyond the reach of the campaign finance laws.

#### The First Supreme Court Application of the Express Advocacy Test: *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*

Although the Supreme Court enunciated the express advocacy test in *Buckley* in 1976, it was not until ten years later, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), that the Supreme Court had occasion to apply the test to an actual communication (see document 7.4). *MCFL* was a nonprofit, nonstock corporation organized to advance anti-abortion goals. In 1973, *MCFL* began publishing a newsletter that typically contained information on the organization’s activities, including the status of various proposed bills and constitutional amendments. In September 1978—just weeks before the primary elections—*MCFL* published a special edition of the newsletter. Though earlier newsletters has been sent to 2,000 to 3,000 people, *MCFL* published more than 100,000 copies of the special edition. The front page of the publication was headlined “EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE,” and readers were reminded that “[n]o pro-life candidate can win in November without your vote in September.” “VOTE PRO-LIFE” appeared in large black letters on the back page, and a coupon was available to clip and take to the polls to remind voters of the names of the “pro-life” candidates. Next to this statement was the following disclaimer: “This special election edition does not represent an endorsement of any particu-

lar candidate.” An accompanying flyer placed a “y” next to the names of candidates who supported the MCFL view on a particular issue; an “n” indicated that a candidate opposed MCFL’s position.

Section 441b of the FECA prohibits any corporation from using treasury funds “in connection with” a federal election and requires that any expenditure for such purpose be financed by voluntary contributions into separate segregated funds, commonly known as political action committees (PACs). The FEC alleged that MCFL’s expenditures in financing the special election newsletter constituted an illegal corporate contribution to the candidates named in the newsletter. As in *Buckley*, the Court ruled “that an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition of § 441b.”

However, the Court went on to hold that the MCFL newsletter was express advocacy because it urged readers “to vote for ‘pro-life’ candidates” and provided the names and photographs of candidates meeting that descriptions. Said the Court: “The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than ‘Vote for Smith’ does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.”<sup>3</sup>

The Court’s application of the express advocacy test in *MCFL* is noteworthy in two respects. In determining whether the MCFL newsletter was express advocacy, the Court did not appear to consider any factual circumstances outside of the communication itself. These external circumstances could have included, for example, the proximity of the publication to the election, the number of copies published (which was well in excess of the normal newsletter distribution), and the intent of the speakers. In this regard, *MCFL* is fully consistent with *Buckley*—the express advocacy test turns on the

communication itself with no consideration of external events. In addition, the Court broadened (even if only slightly) the *Buckley* definition of express advocacy to include words that are “in effect” an explicit directive “marginally less direct” than the *Buckley* language.<sup>4</sup> As a result, *MCFL* has been used by the FEC in court pleadings to justify a definition of express advocacy based, at least in part, on implied electoral meanings.

#### Competing Approaches: *Federal Election Commission v. Furgatch* and *Faucher v. Federal Election Commission*

After *Buckley* and *MCFL*, the federal courts struggled to apply the express advocacy test, often with what appeared to be inconsistent results. Perhaps the most pro-regulatory decision is the Ninth Circuit’s ruling in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (1987), *cert. denied*, 484 U.S. 850 (1987) (see document 7.5). In *Furgatch*, an individual published a full-page advertisement in the *New York Times* one week before the 1980 presidential election. 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 [Jimmy] 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 incoherences, ineptness and illusion, as he leaves a legacy of low-level campaigning.

DON'T LET HIM DO IT. [*Furgatch*, 807 F.2d at 858 (emphasis in original)]

The Ninth Circuit ruled that the advertisement was “express advocacy” and therefore could be regulated under the FECA. The court began its analysis by contending that the *Buckley* express advocacy test “does not draw a bright and unambiguous line. . . . [W]here 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 [FECA]* . . .” (*Furgatch*, 807 F.2d at 861 [emphasis added]). Because of these important regulatory concerns, the court concluded in *Furgatch* that it must “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 . . . overly constrictive rules of interpretation.”

The Ninth Circuit in *Furgatch* rejected the notion that express advocacy is limited to the list of specific terms identified by the Supreme Court in *Buckley*. The court stated presciently that “[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 unmistak-

ably directed to the election or defeat of a named candidate” (*Furgatch*, 807 F.2d at 863). The Ninth Circuit ruled that when evaluating whether a communication constitutes express advocacy, a reviewing court must take into account the context in which the communication is made. The court established a standard that, to be express advocacy, speech “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.” The Ninth Circuit made it clear that implied meanings can form the basis for a finding 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” (emphasis added).

However, the Ninth Circuit was not willing to allow the government to use only subjective standards to identify express advocacy. Instead, it enunciated a murky standard requiring that speech *not* be susceptible to interpretation as “issue advocacy” and that it clearly advocate a specific electoral outcome. The *Furgatch* standard has three specific 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” (emphasis added). The third *Furgatch* component would appear to require advocacy of *electoral* action for or against a particular candidate, without more, as opposed to a communication that included a plea for some other kind of action, such as writing an officeholder or making a political contribution.

Applying the foregoing standard, the Ninth Circuit ruled that the *Furgatch* advertisement expressly advocated the defeat of President Jimmy Carter. In making this determination, the court focused on the words “‘don’t let him.’ They are simple and direct. ‘Don’t let him’ is a command. The words ‘expressly advocate’ action of some kind.” The court acknowledged that there was no express indication in the advertisement of what kind of action the reader should take. However, it ruled “that this failure to state with specificity the action required does not remove political speech from [the Act]. . . . *Reasonable minds* could not dispute that *Furgatch*’s advertisement urged readers to vote against Jimmy Carter” (emphasis added).

Opening an important debate which has engaged the FEC and commentators ever since, the Ninth Circuit stressed that its conclusion was reinforced by the timing of the advertisement, which was less than a week before the election. The court also sought to distinguish the advertisement from issue-oriented speech: “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 enacted to cover.”

The *Furgatch* decision is notable in many respects. The court was willing to find express advocacy based on implied electoral meanings. In addition, the Ninth Circuit held that in determining whether express advocacy exists, reviewing courts may go beyond the text of the communication itself and consider external, contextual factors—including the proximity of the commu-

nication to the election. And although *Furgatch* purportedly requires the communication to clearly advocate *electoral* action as opposed to some other kind of action, the court found express advocacy even without an explicit electoral plea in *Furgatch*’s advertisement, apparently because no nonelectoral issue message could plausibly be found in the ad. Finally, contrary to language in the Supreme Court’s *Buckley* ruling, the court in *Furgatch* suggested that it was possible to distinguish between attacks on candidates and incumbents involving personal issues but no “vote for, support/oppose” explicit language (which it said could be regulated) and what it termed “issue-oriented speech” (which it said could not be). *Furgatch* remains the most pro-regulatory, and increasingly isolated, decision in the issue advocacy area. The Supreme Court denied a petition to review the Ninth Circuit’s decision; *cert. denied*, 484 U.S. 850 (1987).

At the other end of the spectrum is the First Circuit’s ruling in *Faucher v. Federal Election Commission*, 928 F.2d 468 (1991), *cert. denied sub nom.*, 502 U.S. 820 (1991); see document 7.6. In that case, the Maine Right to Life Committee (MRLC) published a voting guide surveying the positions of federal and state candidates on pro-life issues, and distributed it widely immediately before election day. The MRLC financed the voting guide out of its general corporate monies. MRLC’s 1988 guide was entitled “November Election Issue 1988!” was subheaded “Federal & State Candidate Surveys Enclosed—Take-along Issue for Election Day!,” included candidate and party positions on pro-life issues, and contained the following statement: “PLEASE NOTE: A ‘yes’ response indicates agreement with the National Right to Life position on each question.” The guide carried the following disclaimer: “The publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC.”

The First Circuit, relying on *Buckley* and *MCFL*, hewed to a strict definition of express advocacy requiring explicit “vote for, support/oppose” type lan-

guage in the communication. The court stressed that “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.’ The FEC nevertheless has sought to restrain that very same activity which the [Supreme] Court in *Buckley* sought to protect. This we cannot allow.”

The First Circuit ruled that the MRLC voting guide was not express advocacy, concluding that “trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the [Supreme] Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.” The effect of the court’s ruling is that a voting guide that contains a discussion of public policy issues and does not include “elect” or “defeat” or any of the other “magic words” identified in *Buckley* is *per se* issue advocacy and cannot be regulated—even if candidates are also discussed in the guide and the manner in which the issues are discussed is favorable or unfavorable to particular candidates. At the very least, *Faucher* can be read as rejecting any consideration of implied meanings in determining whether a communication contains express advocacy.

#### Other Major Court Rulings

Several other circuit courts have adopted the strict approach to express advocacy exemplified by *Faucher*. For example, in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*CLITRIM*), the Second Circuit considered whether an issues bulletin published by a nonprofit association prior to a general election was express advocacy.

The bulletin detailed and attacked the voting record of a local congressional representative but did not refer to any federal election, did not mention the representative’s party affiliation, and did not identify the representative’s electoral opponent.

The FEC contended that the bulletin was express advocacy. The Second Circuit rejected the Commission’s contention, reaffirming that the federal election laws do not “reach all partisan discussion . . . [but only] those expenditures that expressly advocate a particular election result.’ This is consistent with the firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution.” The court stressed that “contrary to the position of the FEC, the words ‘expressly advocating’ mean exactly what they say. . . [T]he FEC would apparently have us read ‘expressly advocating the election or defeat’ to mean for the purpose, express or *implied*, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered in *Buckley v. Valeo* and adopted by Congress in the 1976 amendments [document 2.10]. The position is totally meritless (emphasis in original).

Similarly, in *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), the district court adopted a strict view of express advocacy, and the Fourth Circuit summarily affirmed; 92 F.3d 1178 (4th Cir. 1996)—see document 7.7A. The Christian Action Network is a grassroots organization that seeks to inform the public about “traditional Christian family values.” During the weeks immediately before the 1992 presidential election, the network aired television advertisements criticizing the alleged “militant homosexual agenda” of the Clinton/Gore ticket. As described by the court, the advertisement opened

with a full-color picture of candidate Bill Clinton’s face superimposed upon an American flag, which is blowing in the wind. Clinton is shown smiling and the ad appears to be complimentary. However, as the narrator begins to describe Clinton’s alleged support for ‘radical’ homosexual causes, Clinton’s image dissolves into a black and white photographic negative. The negative darkens Clinton’s eyes and mouth, giving the candidate a sinister and threatening appearance.

Simultaneously, the music accompanying the commercial changes from a single high pitched tone to a lower octave.

The commercial then presents a series of pictures depicting advocates of homosexual rights, apparently gay men and lesbians, demonstrating at a political march.

...

As the scenes from the march continue, the narrator asks in rhetorical fashion, "Is this your vision for a better America?" Thereafter, the image of the American flag reappears on the screen, but without the superimposed image of candidate Clinton. At the same time, the music changes back to the single high pitched tone. The narrator then states, "for more information on traditional family values, contact the Christian Action Network." (*Christian Action Network*, 894 F. Supp. at 948–49)

The FEC argued that any viewer would understand the advertisement to advocate Clinton's defeat. The Commission argued that the way the American flag was used in the commercial sent an explicit anti-Clinton message: "By graphically removing Clinton's superimposed image from the presidential setting of the American flag, the advertisement visually conveys the message that Clinton should not become president. [It] is a powerful visual image telling voters to defeat Clinton." The FEC also pointed to the following aspects of the commercial: "(1) the visual degrading of candidate Clinton's picture into a black and white negative; (2) the use of visual text and audio voice-overs; (3) ominous music; (4) unfavorable coloring; (5) codewords such as 'vision' and 'quota'; (6) issues raised that are relevant only if candidate Clinton became president; (7) the airing of the commercial in close proximity to the national election; and (8) abrupt editing linking Clinton to the images of the gay rights marchers."

The court ruled that the Christian Action Network's advertisement was constitutionally protected issue advocacy that could not be regulated:

Concededly, the advertisements "clearly identified" the 1992 Democratic presidential and vice presidential candidates. . . . Similarly, it is beyond dispute that the advertisements were openly hostile to the proposals believed to have been endorsed by the two candidates. Nevertheless, the advertisements were devoid of any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute "express advocacy" as that term is defined in *Buckley* and its progeny ("It is clear from the cases that expressions of hostility to the positions of an official, implying that [the] official should not be reelected—even when that implication is quite clear—do not constitute . . . express advocacy").

After summarily affirming the district court's ruling, the Fourth Circuit later awarded the Christian Action Network attorneys fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); see document 7.7B. In a blistering opinion highly critical of the FEC's legal arguments, the Fourth Circuit found that the Commission's legal position "if not assumed in bad faith, was at least not 'substantially justified.'" The court held that there was no legal basis for the FEC's contention that the Christian Action Network's advertisement was express advocacy:

In the face of the unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that "no words of advocacy are necessary to expressly advocate the election of a candidate," simply cannot be advanced in good faith much less with "substantial justification." It may be that "images and symbols without words can also convey unequivocal meaning synonymous with literal text." It may well be that "metaphorical and figurative speech can be more pointed and compelling, and can thus more successfully express advocacy, than a plain, literal recommendation to vote for a particular

person” and that “it would indeed be perverse to require FECA regulation to turn on the degree to which speech is literal or figurative, rather than on the clarity of its message,” “given that banal, literal language often carries less force.” It may even be, as the FEC contends in this particular case, that “the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film editing, photographic techniques, and music, involving highly charged rhetoric and provocative images . . . taken as a whole, sent an unmistakable message to oppose [Governor Clinton]. But the Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. “Explicit words of advocacy of election or defeat of a candidate,” “express words of advocacy,” the Court has held, are the constitutional minima. To allow the government’s power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect—as this case well confirms.

#### Consensus of the Circuit Courts

A clear pattern emerges from the foregoing rulings on issue and express advocacy. Other than the Ninth Circuit in *Furgatch*, every other federal appeals court that has considered the issue—including the First, Second, and Fourth Circuits—has ruled that the express advocacy test set out in *Buckley* can only be met by communications that contain *explicit* and unambiguous words that urge readers (or viewers) to elect or defeat a clearly identified candidate. These circuits have rejected the FEC’s repeated attempts to find express advocacy based on implied electoral meanings, even if the implicit electoral message is clear and arguably unmistakable. In several cases, they have done so while acknowledging that this standard will effectively exempt much candidate-related political speech intended to affect the outcome of federal elections from the law’s disclo-

sure requirements and restrictions on corporate and labor funding.

#### The FEC Responds

In the wake of these Supreme Court and lower federal court rulings, in 1995 the FEC promulgated new regulations on what kinds of communications constitute express advocacy (11 C.F.R. § 100.22; see document 7.8).

Two aspects of the FEC’s new express advocacy regulation bear comment. Part (a) of the regulation includes all of the express advocacy terms that the Supreme Court identified in *Buckley* and thereby incorporates the Court’s decision into the Commission’s regulations. More importantly, part (b) of the regulation is a clear attempt to incorporate the broader *Furgatch* express advocacy standard into the FEC’s regulations, which are in effect throughout the country. As a result, it is not surprising that the FEC’s new “express advocacy” regulations have already been successfully challenged in the First Circuit, which has taken a stricter view than the Ninth Circuit of the permissible scope of the FEC’s regulatory authority. In *Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F. Supp. 8 (D. Me. 1996), the court held that subpart (b) of the Commission’s new regulations are unconstitutional on their face, regardless of how they might be applied. The First Circuit summarily affirmed the district court’s decision on appeal; 98 F.3d 1 (1st Cir. 1996) *petition for cert. filed*, 65 U.S.L.W. 3783 (May 14, 1997) (No. 96.1818) (document 7.9).

In *Maine Right to Life*, the district court judge stressed that he believed his decision was compelled by binding Supreme Court precedent, even if the ruling served to restrict the scope of the federal election laws and leave much election-related speech unregulated:

If the Supreme Court had not decided *Buckley* and [MCFL] and if the First Circuit had not decided *Faucher*, I might well uphold the FEC’s subpart (b)

definition of what should be covered. After all, the Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question [of] what form that interference may take based on its history of complaints, investigations and enforcement actions.

...

But there is another policy at issue here and it is one that I believe the Supreme Court and the First Circuit have used to trump all the arguments suggested above. Specifically, the Supreme Court has been most concerned not to permit intrusion upon “issue” advocacy—discussion of the issues on the public’s mind from time to time or of the candidate’s positions on such issues—that the Supreme Court has considered a special concern of the First Amendment. . . . *FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues.* The Court seems to have been quite serious in limiting FEC enforcement to *express* advocacy. (*Maine Right to Life*, 914 F. Supp. at 11—12 [emphasis added]).

The court also highlighted the tensions between the purposes of the election laws (as upheld by the Supreme Court) and the Supreme Court’s strict express advocacy test: “The advantage of this [strict] approach, from [a] First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited. In the stressful context of public discussions with deadlines, bright lights and cameras, the speaker need not pause to debate the shades of meaning in language. The result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way, but it does recognize the First Amendment interest as the Court has defined it.”

## An Unresolved Issue: What Happens When Issue Advocacy Sponsors Coordinate Spending with Candidates?

The Supreme Court in *Buckley* distinguished between “independent” advocacy and advocacy coordinated with a candidate when it declared restrictions on independent spending by individuals unconstitutional:

Independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending [the law] contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate’s campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions, rather than expenditures under the Act. Section 608(b)’s contribution ceilings . . . prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions . . . The absence of prearrangement and coordination of an expenditure with the candidate or his agent 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. (*Buckley*, 424 U.S. at 46–47)

Thus, as previously noted, after *Buckley*, *National Conservative Political Action Committee*, and the *Colorado Republican* decisions, individuals, PACs, and political parties are permitted to make unlimited “independent expenditures” in connection with a federal election, including communications containing express advocacy, provided that the expenditures are made independently of candidates and their agents.<sup>5</sup> If, however, an entity’s expenditures

are “coordinated” with candidates, the expenditures are treated as in-kind contributions that are applicable to the entity’s contribution limits.<sup>6</sup>

The FEC’s regulations currently define coordination as any activity “made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate”; 11 C.F.R. § 109.1(b)(4) (1997).

The FEC General Counsel’s Office recently proposed that the Commission adopt a significantly broader definition of coordination, which would be met by any involvement in the spending by the candidate or any person who had been an agent of the candidate at another point in the election cycle.<sup>7</sup>

The question then becomes whether individuals and organizations who fund issue advocacy must also act independently of candidates to avoid regulation. A lower federal court recently shed some light on this issue. In *Clifton v. Federal Election Commission*, 927 F. Supp. 493 (D. Me. 1996), the court struck down the FEC’s latest voting guide regulations and held that a nonprofit corporate advocacy group could contact candidates orally to obtain information to be published in an issue-oriented voter guide without making an illegal in-kind contribution to the candidates. The Commission’s latest voter guide regulations prohibited *any* contact between voting guide corporate sponsors and candidates, with the sole exception that sponsors were allowed to direct questions to be included in the guide to the candidates in writing, and the candidates were allowed to respond in writing; 11 C.F.R. § 114.4(c)(4) & (5).

In *Clifton*, a nonprofit corporate sponsor contended that it had the constitutional right to engage in issue advocacy even while communicating with candidates beyond the minor exception permitted by the FEC’s regulation—such as by contacting candidates directly and orally discussing their positions on various issues. In striking down the Commission’s regulations, the court distinguished between mere “contact” between an issue-advocacy sponsor and a candidate, which the court

ruled cannot be regulated, and issue advocacy that is “coordinated” with or authorized by a candidate, which the court suggested could be. The court pointed out that “*Buckley* talked only about prohibiting expenditures ‘authorized or requested by the candidate,’ interpreted at its broadest as ‘all expenditures placed in cooperation with or with the consent of a candidate.’ The FEC has gone far beyond ‘cooperation’ or ‘consent’ in these prohibitions of all contact and consultation in the preparation of voter guides . . .”; *Clifton*, 927 F. Supp. at 499. In so ruling, the court emphasized that “as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate.”

The court in *Clifton* did not indicate what kind of communications (if any) between issue advocacy sponsors and candidates will result in spending “authorized or requested” or “in cooperation with or with the consent of” a candidate, and thus might be considered “coordinated” expenditures, with potential federal election law disclosure and limit implications. However, it did state in dictum that any issue advocacy “made ‘on behalf of’ a candidate” can be regulated consistent with the Constitution (quoting *MCFL*, 479 U.S. at 248).

Clearly, one of the next contentious areas of federal election law is whether the FEC can regulate issue advocacy which has been “coordinated” with a candidate. That is, what definition of “coordination” will prevail, and will the presence of coordination serve to convert some otherwise protected independent issue advocacy into spending authorized or requested by a federal candidate, and thus subject to regulation? For instance, Common Cause has filed a complaint with both the Justice Department and the FEC alleging that Democratic and Republican National Committee issue advertisements in 1996 should be considered contributions by those committees to their party’s presidential candidates (and thus subject to limits and restric-

tions on the use of soft money), because these ads were planned with the candidates or their agents. In the case of President Clinton, a wide range of published accounts by former White House officials have detailed the president's personal role in authorizing the issue advertising campaign, editing and approving the ads, selecting the locations for their broadcast, and raising the funds needed to pay for the advertisements.

#### THE LAW GOVERNING ISSUE ADVOCACY AND EXPRESS ADVOCACY: A SHORT SUMMATION

If a communication contains "*express advocacy*" of the election or defeat of a clearly identified candidate, the communication may be regulated under federal law.

In addition, if a communication does not contain "express advocacy" and is instead "*issue advocacy*" (an issue-oriented discussion of public policy matters), it is not deemed to be "in connection with" a federal election (unless it raises coordination issues noted here). The sponsor may therefore run an unlimited number of such "issue advocacy" communications and may pay for the communication however it chooses, including from sources and in amounts prohibited by the federal election laws. Corporations, unions, and political parties are permitted to engage in issue advocacy.

If a communication containing issue advocacy has been made in consultation with a candidate, it may be considered "*coordinated*." This *may* result in an in-kind contribution by the speaker to the candidate, depending upon the outcome of current and future legal battles over the definition of "coordination" and whether courts will allow coordinated issue advocacy to be regulated.

Finally, none of this involves "*independent expenditures*," which are communications "expressly advocating" the election or defeat of a clearly identified

federal candidate, are financed with federal "hard" dollars and are publicly disclosed. Independent expenditures may not be coordinated with any candidate or campaign committee.

#### CONCLUSION

The year 1996 was a watershed in American politics. Special interest groups, individuals, and political parties inundated the air waves with unregulated issue-oriented advertisements that undoubtedly had an impact on federal elections. In some U.S. House races, more money was spent on issue advocacy than was spent by the two major-party candidates combined. Election law reformers are concerned that the success of these issue spots will embolden political activists to use them even more aggressively in future campaigns. Clearer legal standards may emerge from litigation arising out of the 1996 issue advocacy campaigns. In the meantime, the law in this high-stakes area remains uncertain.

A variety of proposals to regulate issue advocacy now exist. They range from attempts to require disclosure of the sources of funding for public communications that mention a clearly identified candidate within ninety days of an election, to proposals to define such communications as "express advocacy," thereby limiting the funding sources to "hard money," and closing off labor and corporate funding. (See document 7.10 and the reform proposals formulated by Ornstein, Mann, Taylor, Malbin, and Corrado [document 9.9].) One of the strategies of reformers is to pass new legislation restricting issue advocacy (with a lengthy congressional factual record demonstrating the corrupting potential of such spending) and then challenge the Supreme Court to allow Congress to expand the definition of express advocacy, or otherwise allow regulation of issue advocacy if it can be shown to be a form of campaign spending.

## NOTES

1. The D.C. Circuit cited with approval another issue advocacy case decided in 1972 by the Second Circuit, *United States v. National Committee for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). The Department of Justice had prosecuted a group that took out newspaper advertisements urging the impeachment of President Nixon for failure to register as a political committee under the disclosure provisions of the 1971 act (document 2.8). The Second Circuit held that communications primarily directed toward advocacy of a position on a public issue, rather than urging a vote for or against a candidate, did not qualify as an election expenditure, and thus did not trigger political committee status. (Back.)

2. The Court did not state whether the foregoing list was exhaustive. Most commentators, however, do not regard the list as being so, and this reading is consistent with language in the Court's opinion. *Buckley*, 424 U.S. at 44 n.52 (describing the list of terms as "express words of advocacy of election or defeat, such as 'vote for,' 'elect' . . .") (emphasis added). (Back.)

3. Because the Court found the MCFL newsletter to be express advocacy, it ruled that MCFL's expenditures violated the FECA. The Court then ruled that the ban on federal election expenditures by incorporated entities was unconstitutional as applied to issue-oriented organizations such as MCFL, and other 501(c)(4)-type organizations that are not themselves funded by for-profit corporations. In reaching this conclusion, the Court first noted that the expenditures were made independently of any candidate ("independent expenditures 'produce speech at the core of the First Amendment'") (quoting *Federal Election*

*Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) ("*NCPAC*") (invalidating a \$1,000 cap on independent PAC expenditures); *Buckley*, 424 U.S. at 39 (invalidating \$1,000 limit on independent individual expenditures). Second, the Court relied on several institutional aspects of MCFL that differentiated the organization from most corporations. These aspects included that MCFL "was formed for the express purpose of promoting political ideas, and cannot engage in business activities," "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and "was not established by a business corporation or a labor union, and [has a] policy not to accept contributions from such entities"; *MCFL*, 479 U.S. at 264. For a fuller discussion of *MCFL*, see chapter 3. (Back.)

4. *MCFL*, 479 U.S. at 249 (concluding that the MCFL publication provides "*in effect* an explicit directive: vote for these (named) candidates") (emphasis added); (acknowledging that the electoral message in MCFL is "marginally less direct than 'Vote for Smith' [and the other terms identified in *Buckley*]"). (Back.)

5. See *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309 (1996) (holding that political parties have a constitutional right to make unlimited independent expenditures) (document 3.4). (Back.)

6. In *Colorado Republican*, the Supreme Court remanded to the lower courts the issue of whether political parties have a constitutional right to make unlimited coordinated expenditures. (Back.)

7. "Proposed Rules," *Federal Register*, vol. 62, no. 86 (May 5, 1997), p. 24372. (Back.)

Issue advocacy was a hot topic during the 1996 congressional elections. The AFL-CIO launched a widely publicized \$35 million advertising effort to highlight issues unfavorable to House Republicans. The U.S. Chamber of Commerce and other organizations friendly to Republicans sponsored an advertising blitz in response. This is a newspaper article describing how these issue advocacy air wars played out in several key congressional districts.

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PHILADELPHIA—The message in the TV ads is unmistakable: Don't re-elect this guy. He's tight with Newt Gingrich. He'll hurt you.

On television and radio last week, in 32 congressional districts across 26 states, the AFL-CIO has been hammering away at Republican incumbents. The ads in first-term Rep. Phil English's Erie, PA., district show a mother worrying aloud. "My husband and I both work," she says. "And next year, we'll have two kids in college."

To which the announcer adds: "Working families are struggling. But Congressman Phil English voted with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy."

About the only thing the ad doesn't tell viewers is to throw English out of office.

And there's a good reason for that.

By avoiding such explicit advocacy, the union steers around campaign law and the 1943 ban on unions spending money to influence a federal election [see chapter 2].

The AFL-CIO is in good company. Unaccounted millions are being spent this year on a new kind of political pitch: "issue ads." Ask Jon D. Fox in Montgomery County, PA., one of labor's targets. Or Robert G. Torricelli in New Jersey, under fire from the GOP. Or Bob Dole. Or Bill Clinton.

Such spending was supposed to be regulated by the post-Watergate campaign laws that limit giving and spending and require public disclosure of those activities.

But a series of federal court decisions has allowed unlimited sums from any source to be spent on so-called issue advocacy ads like the one aimed at English. These ads ostensibly promote or criticize public policy positions—without using explicit words like "vote for" or "defeat." That places them beyond the reach of election laws, courts have ruled.

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## Pushing Rules to the Edge

This year, issue ads have emerged as the weapon of choice on the political battlefield from groups ranging from the AFL-CIO to the U.S. Chamber of Commerce, the Sierra Club and the major parties.

The upshot, says Trevor Potter, former chairman of the Federal Election Commission, is that “this election is going to tell everyone that there really isn’t any barrier anymore to spending funds to influence an election.”

Donald Simon, executive vice president and counsel to Common Cause, the self-styled citizens’ lobby, describes issue ads more bluntly: “It provides an easy way to cheat.”

“It’s a scam,” said Simon. “What we’re seeing as issue ads are candidate campaign ads dressed up and called issue ads for the purpose of evading the law.”

Bruce Josten, an executive vice president of the U.S. Chamber of Commerce, which is spearheading its own issue ad campaign to counter the AFL-CIO barrage and to keep Congress Republican, said: “Modern political history is being made, because the magnitude of these ads is greater than any previous election. You’re seeing a gigantic leap in the number of these ads.”

The escalation has been fueled largely by two events.

Last fall, the AFL-CIO announced plans for a \$35 million political mobilization, including radio and TV ads aimed at Republicans in Congress, and paid for with \$1.80 out of each union member’s annual dues.

And in February, a federal judge in Maine tossed out an FEC proposal to regulate such ads. [*Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F. Supp. 8 (D. Me.), *aff’d* 98 F.3d 1 (1st Cir. 1996), excerpted in the introduction to chapter 7.]

“What you’re seeing is a lot more of these organizations pushing against the line, seeing how far they can go,” said Lawrence Noble, the FEC’s general counsel.

Earlier this year, Noble warned the House oversight Committee that the latest court rulings meant “labor unions and corporations can spend unlimited amounts of ‘soft’ money to mail the letters, publish the ads or broadcast the commercials day and night right up to the election. . . . And not only is there no limit on the source or amount of the money, but there is no requirement that either the expenditures or the source of the money be disclosed.”

Events have proven him right.

One campaign finance expert, Darrell West, a Brown University political scientist, calls the election rules “so loose now you can drive a Mack truck through them.”

Even the judge who threw out the FEC’s bid to regulate the ads acknowledged in his ruling that it did not “give much recognition to the policy of the election statute to keep corporate money from influencing elections.”

But judges worry that reining in such ads would trample on the First Amendment. Thus, the latest rulings have become a road map for getting around federal election laws.

Now, almost anything goes.

Last year, for example, a federal judge in Virginia ruled that a 30-second Christian Action Network TV spot attacking Bill Clinton just before the 1992 election wasn’t “express advocacy.” [*Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va.), *aff’d mem.* 92 F.3d 1178 (4th Cir. 1996), document 7.7A.]

This despite the fact that the ad told of Clinton’s support for “radical” homosexual causes, and de-

picted his face dissolving into a black-and-white negative that gave him, in the judge's view, "a sinister and threatening appearance."

But the judge noted: "Nowhere in the commercial were viewers asked to vote against" anyone.

Corporations have been banned since 1907 from direct spending to influence a federal election; unions, since 1943. But issue ads have effectively reopened the doors to union and company money. So, too, individuals, other special interests and the political parties.

### Hitting Vulnerable Races

Fox, the first-term Republican from Montgomery County, knows this only too well.

Two years ago, he won with less than 50 percent of the vote—a sign of vulnerability that the AFL-CIO is working hard to exploit. The union has run seven radio ad campaigns against Fox since July 1995—ads that Fox's people estimate have cost \$550,000. (Union officials say this year's anti-Fox ads have cost \$400,000.)

In one of the ads, the anti-Fox message—much like the ad aimed at English in Erie last week—was clear: "Last year," the announcer said, "Jon Fox voted with Newt Gingrich to cut Medicare, and give new tax breaks to the wealthy."

The U.S. Chamber of Commerce has responded to the labor blitz by bringing 29 industry groups under one umbrella known as The Coalition to mount its own issue ads. "What we're trying to do is create an informed dialogue," said the chamber's Josten.

The Clinton-Dole race is another case in point.

The law limits each party to spending no more than \$12 million on its presidential candidate.

But by offering ads that ostensibly discuss policy, the parties can use what critics claim is the biggest loophole of all: "soft money."

Each party can bankroll its ads with some of the tens of millions raised this year for so-called party-building.

There's no limit on raising such funds.

"Both parties are really pushing the envelope," said Lisa Rosenberg, who monitors issue ads for the nonpartisan Center for Responsive Politics, which tracks campaign money.

"The presidential campaigns are publicly funded, and when you start allowing private money to filter in, you defeat the purpose of public funding, which is to prevent the candidates from being beholden to large contributors."

The D.C. Circuit upheld almost all of the provisions of the 1974 Federal Election Campaign Act (document 2.9) in the face of a challenge from a broad coalition of conservatives (Senator James Buckley) and liberals (Senator Eugene McCarthy and the American Civil Liberties Union). However, the D.C. Circuit did strike down as unconstitutional a requirement to disclose the names of all donors who gave more than \$10 to groups engaging in issue advocacy. The court found the provision unconstitutionally overbroad. Below are excerpts from that decision.

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[In *Buckley*, the court of appeals invalidated then sec. 437a of FECA (2 U.S.C. §437a), which provided in part:

Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description, or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee.]

...

Section 437a is susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance. For while the reporting requirement plainly obtains when a group publishes or broadcasts to the public material "set[ting] forth a candidate's position on any public issue, his voting record, or other official acts" with a "design . . . to influence" voting at an election, it is not at all certain that the requirement is inoperative where those activities are unaccompanied by any such design.

Thus section 437a calls for disclosure, for example, by plaintiff Human Events, Inc., the publisher of a weekly newspaper devoted primarily to events of political importance and interest, and to discussion of public issues, public officials, political leaders and candidates.

...

[S]ection 437a may also demand disclosure by plaintiff New York Civil Liberties Union. The District Court found that this organization is forbidden by the constitution and policies of its parent body from endorsing or opposing any candidate for public office, but that it does engage publicly in nonpartisan activities which “frequently and necessarily refer to, praise, criticize, set forth, describe or rate the conduct or actions of clearly identified public officials who may also happen to be candidates for federal office.” The organization also publicizes in newsletters and other publications the civil liberties voting records, positions and actions of elected public officials, some of whom are candidates for federal office. Since the published material regularly gives “candidates’ positions on . . . public issues, [their] voting records, or other official acts,” the organization may be subject to section 437a.

...

As we have said, [Section 437a] may undertake to compel disclosure by groups that do no more than discuss issues of public interest on a wholly nonpartisan basis. To be sure, any discussion of important public questions can possibly exert some influence on the outcome of an election preceding which they were campaign issues. But unlike contributions and expenditures made solely with a view to influencing the nomination or election of a candidate, see 2 U.S.C. §§ 431 (e), 431 (f), issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.

The Supreme Court has indicated quite plainly that groups seeking only to advance discussion of public issues or to influence public opinion cannot be equated to groups whose relation to political processes is direct and intimate.

...

Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections. In this milieu, where do “purpose” and “design . . . to influence” draw the line? Do they connote subjectively a state of mind, or objectively only a propensity to influence? Do they require, irrespective of state of mind, a capability of influencing, and if so how substantial a capability? What do they demand with respect to materials which “advocate the election or defeat of [a] candidate,” or which “set . . . forth the candidate’s position on [a] public issue” or “his voting record,” beyond the inherent tendency of those materials to influence? What references to “other official acts” of the candidate, with what mental element, bring the section into play? To these questions, among a multitude of others, neither the text nor the legislative history of section 437a supplies any clear answer. And while we have continued our struggle for an interpretation of section 437a which might bypass its vagueness and overbreadth difficulties, we have been unable to do so.

...

Below are excerpts from the Supreme Court's landmark ruling in *Buckley v. Valeo*. *Buckley* (document 3.1) was a facial constitutional challenge to the Federal Election Campaign Act of 1971 as amended in 1974 (document 2.9). The plaintiffs included a presidential candidate and a sitting United States Senator. *Buckley* was the high Court's first pronouncement on the constitutional protections that exist for issue advocacy. The Court established the "express advocacy" test for distinguishing between those communications that contain explicit words of election or defeat of a candidate, and those communications, like issue advocacy, that do not. As these excerpts show, the Court ruled in *Buckley* that express advocacy can be regulated consistent with the Constitution, but that issue advocacy cannot be restricted.

---

...

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchanges of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York*, 333 U.S. 507, 510 (1948),

there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ[ing] discussions of candidates . . . .

*Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our "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 (1964).

...

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.<sup>1</sup> This is because virtually

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1. Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

...

Section 608(e)(1) provides that

[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000.

The plain effect of § 608(e)(1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views “relative to a clearly identified candidate” through means that entail aggregate expenditures of more than \$1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement “relative to a clearly identified candidate” in a major metropolitan newspaper.<sup>2</sup>

Before examining the interests advanced in support of § 608(e)(1)'s expenditure ceiling, consideration must be given to appellants' contention that the provision is unconstitutionally vague. Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. See *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287–288 (1961); *Smith v. California*, 361 U.S. 147, 151 (1959).<sup>3</sup> The test is whether the language of § 608(e)(1) affords the “[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.” *NAACP v. Button*, 371 U.S., at 438.

The key operative language of the provision limits “any expenditure . . . relative to a clearly identified candidate.” Although “expenditure,” “clearly identified,” and “candidate” are defined in the Act, there is no definition clarifying what expenditures are “relative to” a candidate. The use of so indefinite a phrase as “relative to” a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of § 608(e)(1) make sufficiently explicit the range of expenditures covered by the limitation. The section prohibits “any expenditure . . . relative to a clearly identified candidate

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2. [Ed. note: The record indicates that, as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost \$6,971.04—almost seven times the annual limit on expenditures “relative to” a particular candidate imposed on the vast majority of individual citizens and associations by § 608(e)(1).] (Back.)

3. In such circumstances, vague laws may not only “trap the innocent by not providing fair warning” or foster “arbitrary and discriminatory application” but also operate to inhibit protected expression by inducing “citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972), quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958). “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). (Back.)

during a calendar year which, *when added to all other expenditures . . . advocating the election or defeat of such candidate*, exceeds \$1,000.” (Emphasis added.) This context clearly permits, if indeed it does not require, the phrase “relative to” a candidate to be read to mean “advocat[ing] the election or defeat of” a candidate.

But while such a construction of 608(e)(1) refocuses the vagueness question, the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether. For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. In an analogous context, this Court in *Thomas v. Collins*, 323 U.S. 516 (1945), observed:

Whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

*Id.*, at 535.

...

The constitutional deficiencies described in *Thomas v. Collins* can be avoided only by reading § 608(3)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate, much as the definition of “clearly identified” in § 608(e)(2) requires that an explicit and unambiguous reference to the candidate appear as part of the communication. This is the reading of the provision suggested by the non-governmental appellees in arguing that “[f]unds spent to propagate one’s views on issues without expressly calling for a candidate’s election or defeat are thus not covered.” We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that, in express terms advocate the election or defeat of a clearly identified candidate for federal office.<sup>4</sup>

...

### C. SECTION 434(3)

Section 434(e) requires “[e]very person (other than a political committee or candidate) who makes contributions or expenditures” aggregating over \$100 in a calendar year “other than by contribution to a political committee or candidate” to file a statement with the Commission.

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4. This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.” (Back.)

...

## 2. Vagueness Problems

In its effort to be all-inclusive, however, [Section 434(e)] raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.

Section 434(e) applies to “[e]very person . . . who makes contributions or expenditures.” “Contributions” and “expenditures” are defined in parallel provisions in terms of the use of money or other valuable assets “for the purpose of . . . influencing” the nomination or election of candidates for federal office. It is the ambiguity of this phrase that poses constitutional problems.

Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *United States v. Harris*, 347 U.S. 612, 617 (1954). See also *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Where First Amendment rights are involved, an even “greater degree of specificity” is required. *Smith v. Goguen*, 415 U.S. at 573. See *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Kunz v. New York*, 340 U.S. 290 (1951).

There is no legislative history to guide us in determining the scope of the critical phrase “for the purpose of . . . influencing.” It appears to have been adopted without comment from earlier disclosure Acts.

...

When we attempt to define “expenditure” . . . we encounter line-drawing problems of the sort we faced in 18 U.S.C. § 608(e) (1). Although the phrase, “for the purpose of . . . influencing” an election or nomination, differs from the language used in § 608(e) (1), it shares the same potential for encompassing both issue discussion and advocacy of a political result. The general requirement that “political committees” and candidates disclose their expenditures could raise similar vagueness problems, for “political committee” is defined only in terms of amount of annual “contributions” and “expenditures,” and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words “political committee” more narrowly. To fulfill the purposes of the Act, they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of “political committees,” so construed, can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a “political committee”—the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of § 434(e) is not impermissibly broad, we construe “expenditure” for purposes of that section in the same way we construed the terms of § 608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate. . . .

*FEC v. Massachusetts Citizens for Life (MCFL)* was the Supreme Court's first occasion to apply the "express advocacy" test announced in *Buckley*. *MCFL* concerned whether the Federal Election Commission could regulate a purportedly nonpartisan voting guide published by a nonprofit, issue-oriented group. Many commentators contend that the "express advocacy" test leaves little room for regulation of election-related communications. However, the Court found the test to be satisfied in *MCFL* and ruled that the FEC could regulate the communication.

...

B.

In September 1978, MCFL prepared and distributed a "Special Edition" prior to the September 1978 primary elections. While the May 1978 newsletter had been mailed to 2,109 people and the October 1978 newsletter to 3,119 people, more than 100,000 copies of the "Special Edition" were printed for distribution. The front page of the publication was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the names of the "pro-life" candidates. Next to the exhortation to vote "pro-life" was a disclaimer: "This special election edition does not represent an endorsement of any particular candidate."

To aid the reader in selecting candidates, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues. A "y" indicated that a candidate supported the MCFL view on a particular issue and an "n" indicated that the candidate opposed it. An asterisk was placed next to the names of those incumbents who had made a "special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." While some 400 candidates were running for office in the primary, the "Special Edition" featured the photographs of only 13. These 13 had received a triple "y" rating, or were identified either as having a 100% favorable voting record or as having stated a position consistent with that of MCFL. No candidate whose photograph was featured had received even one "n" rating.

...

[MCFL] argues that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication “expressly advocate” the election of candidates, and that its “Special Edition” does not constitute express advocacy. The argument relies on the portion of *Buckley v. Valeo*, 424 U.S. 1 (1976) [documents 3.1 and 7.4], that upheld the disclosure requirement for expenditures by individuals other than candidates and by groups other than political committees. See 2 U.S.C. § 434(c). There, in order to avoid problems of overbreadth, the Court held that the term “expenditure” encompassed “only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” 424 U.S., at 80 (footnote omitted). The rationale for this holding was:

“The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.” *Id.*, at 42 (footnote omitted).

We agree with [MCFL] that this rationale requires a similar construction of the more intrusive provision that directly regulates independent spending. We therefore hold that an expenditure must constitute “express advocacy” in order to be subject to the prohibition of § 441b. We also hold, however, that the publication of the “Special Edition” constitutes “express advocacy.”

*Buckley* adopted the “express advocacy” requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of “express advocacy” depended upon the use of language such as “vote for,” “elect,” “support,” etc., *Buckley, supra*, at 44, n. 52. Just such an exhortation appears in the “Special Edition.” The publication not only urges voters to vote for “pro-life” candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than “Vote for Smith” does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact. The “Special Edition” thus falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public.

...

During the last ten years, the lower federal courts have struggled to apply the “express advocacy” test, often with what appears to be radically different results. One of the most pro-regulatory decisions was issued by the United States Court of Appeals for the Ninth Circuit in *Federal Election Commission v. Furgatch*. *Furgatch* is commonly cited by commentators who seek to aggressively regulate campaign-related communications. On the other end of the spectrum is the First Circuit’s ruling in *Faucher v. Federal Election Commission*, 928 F.2d 468 (1st Cir. 1991), cert. denied, 502 U.S. 820 (1991), in which court strictly applied the “express advocacy” test. The First Circuit has been a difficult forum for the FEC ever since. Excerpts from both *Furgatch* and *Faucher* (document 7.6) follow.

---

...

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, [Jimmy] 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 incoherences, ineptness and illusion, as he leaves a legacy of low-level campaigning.  
DON'T LET HIM DO IT.

...

### 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* [documents 3.1 and 7.3] 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. 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 advertisement 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 reelected if the public allows him to continue to use "low-level campaign tactics."

...

### 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 informed 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.

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. . . . 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 allowance of free expression loses considerable value if expression is only partial.

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. 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.

We begin with the proposition that "express advocacy" is not strictly limited to communications using 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.

...

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.

...

VI.

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.

...

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.

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.

...

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OPINION: TORRUELLA, Circuit Judge

...

[The Maine Right to Life Committee] publishes a bimonthly newsletter, containing educational articles and news of local chapter activities, which is mailed directly to all dues-paying members and is also made available to the general public through schools, churches, etc. Before elections, MRLC conducts candidate surveys to ascertain federal and state candidates' positions on pro-life issues. The survey responses are published in the newsletter. Publication costs for the newsletter are drawn from the corporation's general and educational funds rather than the separate segregated funds of its political action committee.

... The 1988 guide was entitled "November Election Issue 1988!", was subheaded "Federal & State Candidate Surveys Enclosed—Take-along Issue for Election Day!", featured candidate and party positions on pro-life issues, and contained the following statement: "PLEASE NOTE: A 'yes' response indicates agreement with the National Right to Life position on each question." The guide did, however, also carry a disclaimer which read: "The publication of the MRLC November Election Candidate Survey does not represent an endorsement of any candidate(s) by MRLC."

...

Section 441b(a) of the FECA [Federal Election Campaign Act] prohibits corporations from using general treasury funds to make "contribution[s] or expenditure[s] in connection with any [federal] election." The FEC, entrusted with regulatory power under the FECA, has interpreted this provision very broadly to include a ban on corporate financed activities involving express advocacy as well as issue advocacy. The regulation in question, 11 C.F.R. § 114.4(b)(5), states:

(5) *Voter guides.* (i) A corporation . . . may prepare and distribute to the general public nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. The following are factors that the Commission may consider in determining whether a voter guide is nonpartisan:

...

- (C) The wording of the questions presented does not suggest or favor any position on the *issues* covered;
- (D) The voter guide expresses no editorial opinion concerning the *issues* presented nor does it indicate any support for or opposition to any candidate or political party. (Emphasis added).

A.

First, we face the question of whether the FEC has the authority, under section 441b(a), to restrict issue advocacy or whether the FEC may only restrict express advocacy.

...

We begin by defining the scope of the statute. On its face, the statute appears to allow for a very broad application. Our inquiry, however, does not end there.

The Supreme Court, recognizing that such broad language as found in section 441b(a) creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to "express advocacy." *Buckley v. Valeo*, 424 U.S. 1, 42–43 (1976) [documents 3.1 and 7.3]. Express advocacy is language which "in express terms advocate[s] the election or defeat of a clearly identified candidate" through the use of such phrases as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Buckley*, 424 U.S. at 44 and n. 52. This express advocacy test was again embraced by the Supreme Court in the more recent case of *Massachusetts Citizens for Life*. See *Massachusetts Citizens for Life*, 479 U.S. at 249 [document 7.4]. The FEC, however, maintains that the language relied upon in *Massachusetts Citizens for Life* was mere dictum and therefore not binding on this court. We do not agree. All nine Justices assented to that portion of the opinion which states: "We therefore *hold* that an expenditure must constitute 'express advocacy' in order to subject to the prohibition of § 441b." *Id.* at 249. (emphasis added). We cannot accept that in resolving constitutional issues such as the one presented in *Massachusetts Citizens for Life*, the Supreme Court proclaims the law lightly. The Court's "basis for deciding [should] not [later be treated as] dictum [simply] because a critic would have decided on another basis." Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 385–86 (1964).

...

In limiting section 441b(a) to express advocacy, the Court in *Buckley* clearly had the protection of issue advocacy in mind. *Buckley* reads: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley*, 424 U.S. at 14–15. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14. The FEC nevertheless has sought to restrain that very same activity which the Court in *Buckley* sought to protect. This we cannot allow.

B.

In the alternative, the FEC argues that even if section 441b(a) is restricted to express advocacy, the speech sought to be regulated in this case was express advocacy and therefore falls within the scope of the FECA. To the extent that this argument asks us to treat the regulation, despite its multiple references to “issue advocacy,” as reaching only “express advocacy,” the Supreme Court has barred such word games. *See, e.g., Buckley*, 424 U.S. at 42–44 (expressing concern that the “distinction between discussion of issues and candidates may often dissolve in practical application” and adopting a bright-line test that expenditures must “in express terms advocate the election or defeat of a candidate” in order to be subject to limitation); *see also Massachusetts Citizens for Life*, 479 U.S. at 249. In *Buckley*, the Court quoted *Thomas v. Collins*, 323 U.S. 516 (1945), approvingly, on the difficulty of interpreting the meaning and effects of words:

Whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

*Buckley*, 424 U.S. at 43 (quoting *Collins*, 323 U.S. at 535).

In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*.

...

One of the most extended discussions of issue advocacy is in the *Federal Election Commission v. Christian Action Network* case, which originated in the Western District of Virginia (document 7.7A). Judge James C. Turk’s scholarly opinion highlights many of the practical, fact-intensive difficulties in applying the “express advocacy” test to different kinds of communications. The Fourth Circuit recently affirmed Judge Turk’s ruling and took the extraordinary step of awarding the Christian Action Network its attorneys’ fees and costs in litigating against the FEC (document 7.7B). Excerpts from both opinions follow.

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A.

*Federal Election Commission v. Christian Action Network*,  
894 F. Supp. 946 (W.D.Va. 1995), *aff’d mem.*, 92 F.3d 1178 (4th Cir. 1996)

...

The Christian Action Network is a nonprofit corporation created in 1990 under the laws of the Commonwealth of Virginia. CAN is a grass-roots organization that seeks to inform the public about issues which it believes affect “traditional Christian family values.” During the weeks leading up to the November 3, 1992 presidential election, CAN spent approximately sixty-three thousand dollars, (\$63,000.00), from its general treasury fund to produce television and print advertisements. These advertisements assailed what the Defendants believed to be the militant homosexual agenda of the Democratic candidates for president and vice-president, William Jefferson Clinton and Albert Gore, Jr. (hereinafter “Bill Clinton” and “Al Gore”).

The television advertisement consisted of a thirty second spot entitled “Clinton’s Vision for a Better America”.<sup>1</sup> It opens with a full-color picture of candidate Bill Clinton’s face superimposed upon an American flag, which is blowing in the wind. Clinton is shown smiling and the ad appears to be complimentary. However, as the narrator begins to describe Clinton’s alleged support for “radical” homosexual causes, Clinton’s image dissolves into a black and white photographic negative. The negative darkens

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1. Between September 26 and November 2, 1992, the television commercial was broadcast at least 250 times in twenty-four cities throughout the country. The commercial was broadcast up until November 2, 1992, the day before the presidential election took place. In addition to the regular broadcasting of the commercial, copies of the ad were also sent by CAN to group contributors.

Clinton's eyes and mouth, giving the candidate a sinister and threatening appearance. Simultaneously, the music accompanying the commercial changes from a single high pitched tone to a lower octave.

The commercial then presents a series of pictures depicting advocates of homosexual rights, apparently gay men and lesbians, demonstrating at a political march. While the narrator discusses the candidates' alleged agenda for homosexuals, short captions paraphrasing their positions are superimposed on the screen in front of the marchers. These images include: marchers carrying a banner saying "Libertarians for Gay and Lesbian Concerns" accompanied by the superimposed text "Job Quotas for Homosexuals"; the same banner accompanied by the superimposed text "Special Rights for Homosexuals"; two individuals with their arms around each other's shoulders and text saying "Homosexuals in the Armed Forces"; and a man wearing a shirt which reads "Gay Fathers" with the text "Homosexuals Adopting Children."

As the scenes from the march continue, the narrator asks in rhetorical fashion, "Is this your vision for a better America?" Thereafter, the image of the American flag reappears on the screen, but without the superimposed image of candidate Clinton. At the same time, the music changes back to the single high pitched tone. The narrator then states, "for more information on traditional family values, contact the Christian Action Network."

...

#### FECA Section 441b(a) and the Express Advocacy Standard

A literal reading of FECA section 441b(a) suggests that corporate entities are strictly prohibited from using general treasury funds to make independent expenditures in connection with federal elections. The provision states: "It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with [Federal elections] . . . or any officer or director of any corporation . . . to consent to any contribution or expenditure by the corporation prohibited by this section. 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.3(a) (1) (1995)."

However, a significant judicial gloss has been read into section 441b making the provision's ban less severe than it initially appears. Specifically, before an expenditure is subject to the prohibition of § 441b, it must be found to "expressly advocate" the election or defeat of a "clearly identified" federal candidate. *Federal Election [Commission] v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 249 (1986) [document 7.4].

...

Acknowledging that political expression, including discussion of public issues and debate on the qualifications of candidates, enjoys extensive First Amendment protection, the vast majority of these courts have adopted a strict interpretation of the "express advocacy" standard. *See Central Long Island Tax Reform*, 616 F.2d at 53 ("Contrary to the position of the FEC, the words 'expressly advocating' means exactly what they say. . . . The FEC would apparently have us read 'expressly advocating the election or defeat' to mean for the purpose, express or *implied*, of encouraging election or defeat. This would, by statutory interpretation, nullify the change in the statute ordered by *Buckley*. . . "). Thus, courts generally have been disinclined to entertain arguments made by the Commission that focus on

anything other than the actual language used in an advertisement. *Faucher*, 928 F.2d at 472 [document 7.6] (“In our view, trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional question the [Supreme] Court sought to avoid in adopting the bright-line express advocacy test in *Buckley*”); [*Colorado Republican Federal Campaign Committee*], 839 F.Supp. at 1456 (“Trying to determine whether the surrounding circumstances, coupled with the implications of the advertisement, constitute ‘express advocacy’ leads to the type of semantic dilemma which the [Supreme] Court sought to avoid by adopting a bright-line rule”).

The one notable exception, on which the FEC relies heavily in the instant case, is the Ninth Circuit’s decision in *FEC v. Furgatch* [document 7.5].

...

#### THE DEFENDANTS' ADVERTISEMENTS DID NOT EXPRESSLY ADVOCATE THE DEFEAT OF CANDIDATES CLINTON AND GORE

Having thoroughly reviewed the case law addressing the “express advocacy” standard, the court finds that the Defendants’ advertisements are not subject to regulation under FECA. This is true whether CAN’s television commercial is viewed individually or in conjunction with the two print advertisements. Concededly, the advertisements “clearly identified” the 1992 Democratic presidential and vice presidential candidates. Bill Clinton’s face was prominently displayed in the television commercial and both Clinton and Gore were mentioned by name in all three advertisements. Similarly, it is beyond dispute that the advertisements were openly hostile to the proposals believed to have been endorsed by the two candidates. Nevertheless, the advertisements were devoid of any language that directly exhorted the public to vote. Without a frank admonition to take electoral action, even admittedly negative advertisements such as these, do not constitute “express advocacy” as that term is defined in *Buckley* and its progeny. See *Colorado [Republican]*, 839 F.Supp. at 1455 (“Even assuming the advertisement indirectly discourages voters from supporting [the candidate], it does not contain a direct plea for specific action required from *Buckley* and *Furgatch*”); *SEFI*, 1994 U.S. Dist. LEXIS 210, at \*6, 1994 WL 9658 at \*3 (“It is clear from the cases that expressions of hostility to the positions of an official, implying that [the] official should not be reelected—even when that implication is quite clear—do not constitute the express advocacy which runs afoul of [FECA]”), *American Federation*, 471 F.Supp. at 317 (“Although the poster includes a clearly identified candidate and may have tended to influence voting, it contains communication on a public issue widely debated during the campaign. . . . As such, it is the type of political speech which is protected from regulation”).

CAN’s television commercial addressed political issues. It informed the public on what the organization believed to be the “gay agenda” of the Democratic candidates. Specifically, the commercial questioned whether homosexuals should be afforded protection under federal civil rights laws. It also questioned the propriety of integrating homosexuals into the armed services and permitting their adoption of children. Moreover, through the use of the narrator’s rhetorical question at the end of the commercial—“Is this your vision of a better America?”—the Defendants made it clear that they were adamantly opposed to such action.

At the same time, despite the *implication* that the Democratic candidates favored such changes, nowhere in the commercial were viewers asked to vote against them. As the Defendants correctly note, the November general election, the political party of the candidates, and their potential opponents were never even mentioned during the commercial. Instead, viewers were presented with the candidates' views on homosexual rights and told that they sharply contrasted with those held by the Defendants. The only immediate action called for by the commercial was for viewers to contact CAN if they agree with the Defendants' opposition to a "gay rights agenda." As the final statement in the commercial instructed, "for more information on traditional family values contact the Christian Action Network." See *NOW*, 713 F. Supp. at 435 (defendant did not go beyond issue discussion to express advocacy; it merely attempted to make its views known and gain new members). . . .<sup>2</sup>

...

#### THE FEC'S PROPOSED APPROACH TO THE EXPRESS ADVOCACY STANDARD IS LEGALLY AND LOGISTICALLY UNTENABLE

The FEC seeks to avoid the weight of authority calling for a strict interpretation of the "express advocacy" test by arguing that the instant case is unique. Unlike previous decisions which dealt exclusively with print and radio advertisements, the FEC argues that a different analysis is appropriate when, as here, a television commercial is at issue. According to the FEC, a different standard is justified because imagery and other more subtle forms of non-verbal communication used in the television medium are sufficient to meet the *Buckley* express advocacy standard. The FEC finds support for this contention from the *Buckley* decision itself, and from several First Amendment decisions in which non-verbal communication has been recognized as protected political speech.

Especially significant, the FEC argues, is the strong message conveyed by the use of the American flag in the CAN television commercial. According to the FEC, the television advertisement "makes its anti-Clinton message explicit by concluding with the same full-color image of the rippling flag as opened the commercial—but without the superimposed image of Clinton." "By graphically removing Clinton's superimposed image from the presidential setting of the American flag, the advertisement visually conveys the message that Clinton should not become president." "[It] is a powerful visual image telling voters to defeat Clinton."

In addition to the symbolic use of the American flag, the FEC notes several other aspects of CAN's television commercial which it believes are relevant to the court's express advocacy analysis. These include: (1) the visual degrading of candidate Clinton's picture into a black and white negative; (2) the use of visual text and audio voice-overs; (3) ominous music; (4) unfavorable coloring; (5) codewords such

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2. The FEC also points to contemporaneous press statements made by spokesmen for CAN, including Defendant Mawyer as president of the organization, in which they stated that the purpose of the television commercial was to educate the "voting" public about the Clinton/Gore position on homosexual rights. Even if the court were to consider these random statements in conjunction with the advertisements, they do not suggest that the Defendants did anything other than inform the public about their views on an election issue. See *Furgatch*, 807 F.2d at 863 (stating that a speaker's intent is less important than the message conveyed by the speech itself because the speaker may expressly advocate regardless of his intention); [*Federal Election Commission v. Colorado Republican Federal Campaign Committee*], 839 F. Supp. 1448, 1456 (D.Colo. 1993) (rejecting the FEC's argument that contemporaneous press statements made by officers for the Defendant's organization were relevant to the court's analysis.) (Back.)

as “vision” and “quota;” (6) issues raised that are relevant only if candidate Clinton became president; (7) the airing of the commercial in close proximity to the national election; and (8) abrupt editing linking Clinton to the images of the gay rights marchers.

...

While the approach to the “express advocacy” standard proposed by the Commission is resourceful, the court cannot accept it. Under the Commission’s approach, courts would be asked to consider not only the words used in a television advertisement, but also more nebulous characteristics such as the ad’s use of color, music, tone, and editing. The Supreme Court’s decision in *Buckley* simply does not permit this type of judicial inquiry. In *Buckley*, the Court recognized that, depending on the audience, the language used in a political communication can be interpreted to have a variety of meanings. What one person sees as an exhortation to vote, the Court reasoned, another might view as a frank discussion of political issues.

...

Therefore, in order to avoid the possibility that a speaker’s intent or meaning would be misinterpreted, the Court in *Buckley* limited FECA’s restrictions to communications containing express words of advocacy. By creating a bright-line rule, the Court ensured, to the degree possible, that individuals would know at what point their political speech would become subject to governmental regulation.

It takes little reflection to realize that messages conveyed by imagery are susceptible to even greater misinterpretation than those that are conveyed by the written or spoken word.<sup>3</sup> Consequently, if courts were to begin considering the images created by a communication to determine if a call to electoral action was present, the likelihood that protected speech would be chilled would be far greater. Given this inevitable result, the court cannot accept the FEC’s invitation to delve into the meaning behind an image. To expand the express advocacy standard enunciated in *Buckley* in this manner would be to render the standard meaningless. Such an expansion of the judicial inquiry would open the very Pandora’s Box which the Supreme Court consciously sought to keep closed.

...

The FEC . . . distorts the holding in *Furgatch* by attaching undue significance to the timing of the Defendants’ advertisements. Repeatedly, the Commission insists that because the Defendants’ advertisements appeared just prior to the general election they conveyed a singular message—vote against candidates Clinton and Gore. Such a “magic timing” approach is no better than one which insists upon the presence of the “magic words” found in *Buckley* and it would lead to anomalous results.<sup>4</sup> As the court explained to the parties during oral argument, the First Amendment does not include a proviso stating

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3. If the adage “a picture is worth a thousand words” is accurate, then the difficulty in interpreting a message conveyed by a picture is undoubtedly far greater than one conveyed by mere words. (Back.)

4. For example, under such analysis, the same political communication could be regulated by FECA if it appeared on November 2 of an election year, and yet be fully protected under the First Amendment if it were aired a week later.

“except in elections” and the court refuses to accept an approach to the express advocacy standard that would effectuate such a result.

...

*[Following this decision, the Fourth Circuit not only upheld the District Court’s decision, but awarded attorney’s fees to the Christian Action Network, a very rare outcome in an enforcement case brought by a government agency. The Fourth Circuit found that the FEC’s claim that the speech was “express advocacy” was “foreclosed by clear well-established Supreme Court case law.”]*

B.

*Federal Election Commission v. Christian Action Network,*  
110 F.3d. 1049 (4th Cir. 1997)

LUTTIG, Circuit Judge

...

B.

Against [the] overwhelming weight of (and, in the case of the Supreme Court decisions, dispositive) authority, the FEC argued before the district court [document 7.7a] and before us the concededly “novel” position, that, even though the Christian Action Network’s advertisements did not include any explicit words or language advocating Governor Clinton’s defeat, the expenditure of corporate funds for these advertisements nonetheless violated section 441b because, considered as a whole with the imagery, music, film footage, and voice intonations, the advertisements’ nonprescriptive language unmistakably conveyed a message expressly advocating the defeat of Governor Clinton. That is, the FEC argued the position that “no words of advocacy are necessary to expressly advocate the election of a candidate,” that an advertisement which does not include *any* “express words of advocacy” may nevertheless constitute “express words of advocacy” may nevertheless constitute “express advocacy” as defined by the Supreme Court in *Buckley* [documents 3.1 and 7.3] and *MCFL* [document 7.4], provided it unmistakably conveys a message urging action with respect to a particular candidate for public office.

...

Stripped of its circumlocution, the FEC’s argument was (and is) that the determination of whether a given communication constitutes “express advocacy” depends upon all of the circumstances, internal and external to the communication, that could reasonably be considered to bear upon the recipient’s interpretation of the message.

...

The FEC thus argues that “when included as part of the message, the speaker’s identity becomes part of the communication itself, and what matters is not what the viewer or the courts will infer about the

speaker's intent, but what a reasonable person, informed about the speaker's identity (and thus potential biases and passions), understands the communication to mean."

...

To quote the following passage, in which the FEC articulates some of the multitude of factors that would be considered under its interpretation in determining whether a given communication was prohibited, is to appreciate the breadth of power that the FEC would appropriate to itself under its definition of "express advocacy".

Express electoral advocacy [can] consist . . . not of words alone, but of the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film editing, photographic techniques, and music, involving highly charged rhetoric and provocative images which, taken as a whole, send an unmistakable message to oppose [a specific candidate].

This is little more than an argument that the FEC will know "express advocacy" when it sees it.

...

Indeed, the commercial and advertisements that the FEC here contend fall squarely within its regulatory purview are precisely the kinds of issue advocacy that the Supreme Court sought to protect in *Buckley* and *MCFL*; and the FEC's interpretation of these advertisements is exactly that contemplated by the Court when it warned of the constitutional pitfalls in subjecting a speaker's message to the unpredictability of audience interpretation, see *Buckley*, 424 U.S. at 43.

In sum, unlike even the advertisement in *Furgatch*, which was "bold in calling for action, but fail[ed] to state expressly the precise action called for," *Furgatch*, 807 F.2d. at 865; see also *FEC Opposition to Certiorari in Furgatch* at 8 (noting that Furgatch's advertisement included "explicit exhortation"), in neither the video nor in the print advertisements at issue in this case is there any action urged with respect to any candidate. There are no words expressly advocating the defeat of Governor Clinton in the 1992 presidential election, or, for that matter, any words urging voters to take any action whatsoever as to the Governor. As the district court found, these advertisements are simply "devoid of any language that directly exhorted the public to vote" for or against any particular candidate.

...

Even absent binding Supreme Court precedent, we would bridle at the power over political speech that would reside in the FEC under such an interpretation. The American Civil Liberties Union observes in its amicus brief in support of the Christian Action Network that if the FEC's interpretation were to prevail, "ads attacking an identified candidate's political positions during a campaign would virtually always, if not *per se*, amount to 'express advocacy' of that candidate's defeat at the polls." And, from the Commission's argument that advertisements which "make it absolutely clear that [the group sponsoring the ads] considers homosexual behavior and the support of additional rights for gay men and lesbians to be abhorrent" can "only reasonably" be interpreted as "asking others to join its fight to defeat Clinton

and thereby foreclose his asserted homosexual rights agenda,” this would appear to be precisely the consequence of the agency’s interpretation.

D.

Whether we would agree with the FEC’s interpretation of its authority under the Federal Election Campaign Act, or find its interpretation reasonable, were this a matter of first impression, however, is not ultimately the question. The question for us is only whether the FEC was “substantially justified” in taking the position it did, in light of the Supreme Court’s unambiguous pronouncements in *Buckley* and *MCFL* that explicit words of advocacy are required if the Commission is to have standing to pursue an enforcement action. The simple answer to this question must be that it was not so justified. As we stated in adopting the district court’s opinion, the FEC’s position was based not only “on a misreading of the Ninth Circuit’s decision in *Furgatch*,” but also on a “profound misreading” of the Supreme Court’s decisions in both *Buckley* and *MCFL*. *Christian Action Network*, 894 F. Supp. at 958–59.

...

The FEC is fully aware that the Supreme Court has required explicit words of advocacy as a condition to the Commission’s exercise of power, as evidenced by its own dissembling before this court.

...

II.

In the face of the unequivocal Supreme Court and other authority discussed, an argument such as that made by the FEC in this case, that “no words of advocacy are necessary to expressly advocate the election of a candidate,” simply cannot be advanced in good faith (as the disingenuousness in the FEC’s submissions attests), much less with “substantial justification.” It may even be, as the FEC contends in this particular case, that “the combined message of words and dramatic moving images, sounds, and other non-verbal cues such as film editing, photographic techniques, and music, involving highly charged rhetoric and provocative images . . . taken as a whole . . . sent an unmistakable message to oppose [Governor Clinton].” But the Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. “Explicit words of advocacy of election or defeat of a candidate,” “express words of advocacy,” the Court has held, are the constitutional minima. To allow the government’s power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect—as this case well confirms.

For the reasons stated, the case is remanded to the district court for a determination of the amount of fees and costs properly awardable to the Christian Action Network under the authority of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). . . .

After the Supreme Court's ruling in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (document 7.4), the FEC promulgated new regulations on what kinds of communications constitute express advocacy. Below are the new regulations, which remain in effect today (except in the First Circuit, where part (b) has been held to be unconstitutional).

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*Expressly advocating* means any communication that— (a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in '94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon's the One,” “Carter '76,” “Reagan/Bush” or “Mondale!”; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

- (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
- (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

In *Maine Right to Life v. FEC*, the United States District Court for the District of Maine ruled that the FEC's new express advocacy regulations are unconstitutional. After the First Circuit summarily affirmed, the FEC sought rehearing en banc. The FEC's request is currently pending. Regardless of what happens in the First Circuit, the losing party is likely to seek Supreme Court review. Below are excerpts from the FEC's petition for rehearing. They are perhaps the agency's most forceful articulation of its argument that it has the authority and needs the power to regulate issue advocacy.

...

The Supreme Court has consistently recognized that § 434c and § 441b of the Act serve compelling governmental interests in protecting the integrity of federal elections from the specter of corruption and in ensuring an informed electorate. The district court gave these compelling interests no weight in its evaluation of the validity of the Commission's regulation, but the Supreme Court has cautioned that "in construing [a statute] narrowly to avoid constitutional doubts, we must . . . avoid a construction that would seriously impair the effectiveness of the [statute] in coping with the problem it was designed to alleviate." *United States v. Harris*, 347 U.S. 612, 623 (1954). See also *Austin [v. Michigan State Chamber of Commerce]*, 494 U.S. at 658, 660 (statute burdening expressive activity is constitutional if it is "justified by a compelling state interest" and "sufficiently narrowly tailored to achieve its goal") [document 3.3]; *Buckley*, 424 U.S. at 25 [documents 3.1 and 7.3] (statute burdening First Amendment activity "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms"). Thus, the proper approach to such a question, which contrasts starkly with that of the district court here, was stated in *Furgatch* [document 7.5]:

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.

807 F.2d at 862.

As noted above, the district court agreed that its conclusion gave short shrift to the implementation of the compelling purposes of the statute, but felt that it was bound by precedent to ensure that the Act's "restriction of election activities . . . not be permitted to intrude in any way upon the public discussion of issues." 914 F. Supp. at 12. We have already shown . . . that this Court's decision in *Faucher* did not

reach this question. The Supreme Court’s discussion of “express advocacy” in *Buckley* and *MCFL* [document 7.4] also do not mandate the rigidly narrow construction adopted by the district court. Although the Supreme Court held in *MCFL* that “an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition of § 441b,” 479 U.S. at 249, the Court demonstrated in that case that this did not mean protecting issue advocacy at all costs, as the district court believed. The newsletter in that case contained both issue advocacy and electoral advocacy, but the Court did not find that the inclusion of issue advocacy immunized the newsletter from regulation. Rather, the court concluded that, even though its language was not as direct as the examples of express advocacy listed in *Buckley*, the newsletter was not a “mere discussion of public issues” because its “essential nature” went “beyond issue discussion to express electoral advocacy,” and therefore fell within the prohibition of § 441b even though it also addressed issues. 479 U.S. at 249. The Court thus made clear in *MCFL*—the only case in which it has applied the “express advocacy” standard to specific facts—that when these two types of advocacy are combined in a single communication, the Act can still be applied even though it also affects the issue advocacy.<sup>1</sup>

Subpart (b) of the Commission’s regulation is, as the district court acknowledged, an extremely narrow regulation that is highly protective of First Amendment interests. It precludes application of the Act unless a communication has an “electoral portion” in which advocacy of election or defeat of a candidate is “unmistakable, unambiguous, *and* suggestive of only one meaning” (emphasis added). On its face, this requirement by itself rules out the possibility that the regulation would be applicable to communications containing only issue advocacy: if a communication has “only one meaning” and that meaning is unmistakably and unambiguously about election advocacy, its message cannot be a mere discussion of issues. The regulation also requires that reasonable people “could not differ” on whether the electoral message encourages action “to elect or defeat” a candidate rather than some other kind of action. The regulation explicitly implements the Court’s requirement in *Buckley* that regulation of independent expenditures be “directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate,” 424 U.S. at 80, and incorporates the distinction at the heart of *Buckley* “between discussion of issues and candidates and advocacy of election or defeat of candidates.” 424 U.S. at 42. This is enough to warrant upholding the Commission’s regulation under the established standard of review on a facial challenge, which will “not foreclose challenges to its actual operation” in particular factual situations. *Kines v. Day*, 754 F.2d 28, 30 (1st Cir. 1985). *Accord, Massachusetts v. United States*, 856 F.2d 378, 384 (1st Cir. 1988).

The panel’s rejection of this narrow regulation, explicitly limited to “unambiguous” communications, can only mean that the Act cannot be applied even to expenditures for communications that are “unambiguously related to the campaign of a particular federal candidate,” 424 U.S. at 80, if the communication does not use the terms, or their synonyms, from the short list of examples set out in *Buckley*, 424 U.S. at 44 n.52.<sup>2</sup> As the Ninth Circuit has explained, such a ruling opens the door to just the sort of

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1. The *MCFL* Court also demonstrated that form should not be elevated over substance. The newsletter’s call for action regarding particular candidates was merely implied, since its literal exhortation was only to “Vote Pro-Life.” Moreover, the newsletter contained a disclaimer that it did not endorse any candidates, yet the Court refused to allow the disclaimer to negate the express advocacy. 479 U.S. at 249. (Back.)

2. Unambiguous figurative speech such as “Smith is running for re-election—send him to the unemployment line!” is an example of a communication that avoids magic words but still sends an unambiguous electoral message under subpart (b), as is the exhortation found to be express advocacy in *Furgatch*. (Back.)

unreported spending by corporations and unions that the Supreme Court has found to be a threat to the integrity of federal elections.

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.

*Furgatch*, 807 F.2d at 863.

The *Furgatch* court noted that since *Buckley* the practices at which the statute was aimed had "apparently become more widespread in federal elections, and the need for controls more urgent." 807 F.2d at 862. As the *amicus curiae* in the instant case has shown, evasively written but unambiguously clear election advocacy has since then become even more pervasive. See Brief of *Amicus Curiae* Common Cause at 15–24. Indeed the 1996 election campaign was rife with allegations about millions of dollars being spent by corporations, unions and others to influence federal elections by unambiguously attacking clearly identified candidates, while carefully avoiding the terms listed in *Buckley*. The panel's decision would not only open the floodgates for such election spending in this Circuit, but would also permit independent spending of this type to go entirely undisclosed to the electorate, since "express advocacy" is also the touchstone for requiring disclosure of independent expenditures. Nothing in *Buckley*, *MCFL*, or *Faucher* requires this perverse result, and the district court candidly acknowledged that its "rigid" interpretation "does not give much recognition to the policy of the election statute to keep corporate money from influencing elections," 914 F. Supp. at 12—13.

In sum, if the express advocacy requirement is read too narrowly, the prohibitions of § 441b will require little more than careful diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections. To hold that unlimited corporate and union spending on unambiguous election advocacy cannot be restricted so long as it manages to shy away from a finite set of proscribed words, ignores the long-standing judgment of Congress, the teachings of the Supreme Court, and common sense. Because this Court's summary decision provides little guidance and creates a split in the circuits on an issue of exceptional national importance, the Commission respectfully requests rehearing and suggests that rehearing in banc is appropriate.

...

A number of proposals to regulate issue advocacy have been advanced in the aftermath of the 1996 elections. The constitutionality of many of the proposals is questionable. One of the more interesting proposals was offered by Representative Bill Thomas (R-Calif.). Mr. Thomas is chairman of the House Oversight Committee, which has exclusive jurisdiction in the House over campaign finance issues. He proposes regulating issue advocacy based on the proximity of the advocacy to election day. This is a recent article by Mr. Thomas outlining his proposal.

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The 1996 election represents a fundamental shift in the way campaigns for federal office are conducted in America, and the way in which we approach campaign reform. In no election since the passage of the Federal Election Campaign Act [document 2.7] more than 20 years ago has a new campaign strategy had a more dramatic impact.

The 1996 elections will be remembered for the explosion of undisclosed, unregulated campaign spending by special interests from all parts of the political spectrum, and perhaps even from foreign sources. Among the most far-reaching reforms Congress could consider would be to require disclosure and perhaps regulate the sources of funds for this campaign-related spending.

I am referring, particularly, to the money spent on so-called "issue attack ads" and various other "educational" campaigns that identified specific candidates and were clearly intended to influence voters' opinions and their Election Day choices. These communications were exempt from regulation or even disclosure under current federal election law as long as they did not expressly advocate the election or defeat of a candidate.

An example of such an ad paid for by the AFL-CIO includes this: "Our Congressman voted to block a minimum wage increase, after he voted to cut Medicare and cut college loans—all to give a big tax break to the rich. Let's tell Congressman [Jon] Christensen [R-Neb]—raise the minimum wage. And start voting for America's working families."

The amount spent on advertisements like these is nearly impossible to calculate and is not disclosed. The AFL-CIO indicated that it would spend at least \$35 million in non-campaign funds to influence the election, but the total may have been far higher. The Republican National Committee estimates that unions spent at least \$53 million for such ads. And other groups from across the political spectrum made similar expenditures in the tens of millions of dollars that were also exempt from the require-

ments of the law. For example, The Coalition, an alliance of business groups, announced its intention to raise as much as \$10 million in funds for such advertising in 1996.

While the exact sources of these funds is unknown, in the case of unions, a large portion came from mandatory dues money. These dues were paid by union members as a condition of their right to vote in union elections. Union elections select the representatives who bargain for pay and working conditions of all union workers.

Surveys show that more than one-third of union members voted for Republican Congressional candidates, yet unions made virtually all of their political expenditures, which came from the dues of these members, against Republicans.

These campaign practices and others emphasize the need for reform of our election laws. The overall goal of campaign reform in the 105th Congress, as in previous Congresses, should be to ensure that information is available to voters to encourage informed decision making. We should ensure that elections are fair and honest so that voters have a real choice. And we should ensure that ordinary citizens remain at the center of the campaign finance process.

At the same time, remember that at the core of our democracy is the freedom of political speech guaranteed by the First Amendment. In the long run, no government is immune from a temptation to use the law and its accompanying police power to silence critics. We must be extremely skeptical about giving those in power the ability to punish or put at a disadvantage those they decry who spend too much campaigning against incumbents. When an individual or group can be fined or even go to jail for spending too much to challenge someone in power, we are all at risk.

The Supreme Court, while fiercely protective of the First Amendment, does not, however, take the position that First Amendment rights are absolute. As Oliver Wendell Holmes said a century ago, the right to free speech does not include the right to cry “fire” in a crowded theater.

In the case of *Buckley v. Valeo* [424 U.S. 1 (1976)] the Court upheld limits on the amount that could be contributed from a single source to federal candidates or committees to prevent “corruption or the appearance of corruption” [documents 3.1 and 7.3]. However, the Court refused to allow limits on the total amount that could be spent by a candidate, or by an independent expenditure in support or opposition to a candidate. Contribution limits could be justified, but not mandatory spending limits that strike at the heart of free speech.

As the Court opinion declared, “By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.”

The Court reasoned, “The overall effect of the Act’s contribution ceilings is 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, rather than to reduce the total amount of money potentially available to promote political expression.”

The Court struck down a \$1,000 limit on independent expenditures, which it concluded were essential to the right of free expression.

In *Buckley*, the Court also affirmed the constitutionality of a requirement that federal committees and candidates disclose their spending and major contributors. The value of this information to the public and its value in deterring and detecting corruption outweighed any burden on candidates, committees, or contributors.

This year, in the Supreme Court's most recent major election law case, *Colorado Republican Federal Campaign Committee v. FEC* [116 S. Ct. 2309 (1996)] [document 3.4], the Court again emphasized the central role of free speech in the interpretation of campaign finance law. The Court affirmed the right of a political party to make unlimited "independent" expenditures as long as the expenditures are truly independent. Such expenditures could certainly be considered independent at a time when the party making the expenditures had not yet selected a candidate, and might be considered independent under other circumstances as well.

It is important to note, however, that the independent expenditures in Colorado met three vital criteria. First, they were fully disclosed and reported in a timely fashion to the public. Second, the sources of these funds were reported according to law, and federal committees that contributed to the Colorado GOP account also were required to report their contributors. Third, the expenditures were made with funds legally permitted to influence federal elections.

No corporate or union funds were allowed, so only funds voluntarily contributed by individuals directly or through federal committees were used. No individual contributions greater than the annual limit of \$20,000 to a national party or \$5,000 to a state party were used. And no foreign nationals could contribute to this federal committee.

The funds spent by the Colorado Republican party for independent expenditures, as permitted by the Supreme Court, are in sharp contrast to the funds spent by unions and other groups on "attack ads" and "voter education" in close proximity to the 1996 election.

The law requires no disclosure of the funds used by the unions and other groups for non-express advocacy communications. Such expenditures could come, not just from voluntary contributions, but from treasuries of union corporations, from individuals in excess of federal limits, or from foreign nationals.

There is nothing in today's law that prohibits a foreign source, or any source, from secretly contributing an unlimited amount of money to influence the outcome of a U.S. election. Such cash flow is unlimited with funds spent in the "gray zone" of unreported, unregulated attack advertising, or biased "voter education" that praises or condemns federal candidates without using express words of support or opposition.

Without reform in this area, remaining campaign laws are virtually meaningless. What use is disclosure for PACs, parties, and candidates when secret, unlimited funds are available that special interests fear to disclose?

And why prohibit contributions from foreign nationals at all, if these same sources are free to secretly contribute unlimited amounts for campaign spending that is unaccountable?

It is precisely the threat of corruption, and the clear appearance of corruption, that may constitutionally justify, not a limit on the total amount of election-related spending by any one group, but disclosure and perhaps limits on the size and source of election-related contributions to such a group.

For any such regulations to be constitutional under the Supreme Court's *Buckley* reasoning, the definition of funds spent for an "election-related purpose" must be clear and unambiguous, but not so broad that it unduly restricts the rights of individuals and groups to free expression and uninhibited discussion of issues.

The House of Representatives rules offer a way to make a "bright-line" distinction. House Rules now prohibit mass mailings of taxpayer-financed material by incumbents within 90 days of a primary or general election. These rules were adopted because during the time period, the taxpayer-funded material's potential election-related impact is judged to outweigh its purely informative value.

In the same fashion, contributions and expenditures for all mass communications that refer to a clearly identified federal candidate within 90 days of an election in which that candidate is on the ballot or qualified to be a write-in candidate, could be subject to regulation under federal law.

Seeking to create a vague and imprecise distinction between voter-education programs that favor one candidate over another and those programs that are purely “educational” is precisely the sort of doomed enterprise that the Supreme Court warned against in *Buckley*. Because no such rule or distinction could be clear in every case, no speaker could know in advance when they were engaging in regulated speech, and every speaker’s right of speech could be chilled. The alternative of limiting regulation to the 90-day period immediately prior to an election makes the definition clear to everyone.

The term “mass communications” should cover all paid communications, including radio and broadcast advertising, mailings, and other forms of information dissemination. Exempted from coverage would be news programming, public candidate debates, and direct access to media, or other forms of communication provided on an equal basis to all candidates in a particular race.

The regulation, under federal campaign law, of mass communications that mention a federal candidate within 90 days of an election offers a rule that the Court could sustain to serve a compelling government interest. The Court has clearly recognized that interest: fighting corruption or the appearance of corruption.

Perhaps such covered contributions and expenditures should be subject to the same limits as all federal contributions and expenditures for the purpose of influencing a federal election. In other words, they could be paid for only with reported contributions as allowed under federal law.

Under these rules, candidates, parties, and PACs would continue to have exactly the same rights to make contributions and independent expenditures that they do today. Membership organizations would retain the same rights to freely communicate with their members as they do under current law. Candidates, parties, and other political committees, funded ultimately by voluntary contributions from individuals, would remain at the center of our electoral system.

Some will argue that any restrictions, however narrowly tailored and for whatever compelling justifications, are too great. But at the very least, contributions and expenditures for such mass communications mentioning a clearly identified candidate or candidates could be subject to all of the disclosure requirements. Disclosure would ensure that the public knows how much groups and individuals are spending, and the sources of the money.

The public’s right to this information on who is seeking to influence the outcome of an election is a key part of the ability of an electorate to make informed choices that lead to a healthy democracy.

Many who expressed reservations about other campaign reform proposals in the past have declared their support for full disclosure as the most desirable method of campaign reform. Perhaps a first step in reforming our campaign laws could be a consensus, bipartisan measure to apply disclosure to this most critical area of our election process.