UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 85-5963

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HARVEY FURGATCH,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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On Appeal From The United States District Court
For The Southern District of California

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# REPLY BRIEF FOR APPELLANT HARVEY FURGATCH

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April 30, 1986

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## ARGUMENT

## I. A JUSTICIABLE CASE OR CONTROVERSY EXISTS

Mr. Furgatch's attempt to seek an en banc ruling by this Court on his constitutional challenge of certain provisions of the Federal Election Campaign Act ("Act") should not fail because the District Court below erred in dismissing this case for failure to present a case or controversy.

### A. The Applicable De Novo Standard Of Review Obviates The Need To Consider The District Court's Contrary Determination

As the Commission concedes in its opposition brief ("Brief") at pp. 4-5, this appeal from the District Court's dismissal of the complaint for failure to present a case or controversy creates a legal issue to be reviewed de novo. Because of this de novo standard of review, the panel considering this issue at the same time that it considers the Commission's enforcement case

against Mr. Furgatch ("Furgatch I") need decide only whether there is a case or controversy before it, and need not consider the correctness of the District Court's decision that there was no case or controversy pending before that court.

**B. The Commission's Assertion That There Is No Case Or Controversy Because Of The District Court's Ruling Favorable To Furgatch In Furgatch I, And Its Concurrent Assertion That The Furgatch I Ruling Is Incorrect, Are Anomalous**

Mr. Furgatch filed this action within five weeks of the Commission's appeal of the enforcement action dismissal in Furgatch I. The Commission's continued prosecution of the enforcement action against Mr. Furgatch demonstrates its continuing unconstitutional interpretation and application of the Campaign Act. (Brief at 6-7). Because the Commission continues to this day to assert that Mr. Furgatch's conduct violates the Act, imposing continuing pressure on him to defend himself against charges of statutory violations, he is faced with continued prosecution and penalty not only for his past actions but also for any attempt he makes to speak out similarly on political issues of concern to him as a voting citizen, now or hereafter. The Commission's argument before this panel in Furgatch I that Harvey Furgatch has violated the Act, and its concurrent denial that a controversy exists between Mr. Furgatch and the Commission, are anomalous, and should be barred by the doctrine of judicial estoppel. Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th Cir. 1984), cert. denied, 105 S. Ct. 980 (1985).

### C. A Case Or Controversy Clearly Exists If This Panel Reverses The District Court's Decision In Furgatch I

The procedural issues raised by the Commission are irrelevant now that the cases have been consolidated for argument before the same panel. If this panel should reverse Mr. Furgatch's favorable decision in Furgatch I, then clearly Mr. Furgatch's First Amendment rights are at issue.[1/]

The Commission's argument that Mr. Furgatch failed to allege, in his complaint, a continuing intent to engage in the same or similar activities is not sound. The Supreme Court, however, recognizing "that the First Amendment needs breathing space," Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973), has altered the traditional rules of standing in the First Amendment area. This overbreadth doctrine does not require a litigant to prove that his speech is protected but may show instead that the statute is so vague or broad that it may be used to prosecute anyone whose speech is constitutionally protected. Broadrick, 413 U.S. at 611-12 (and cases cited therein); L. Tribe, American Constitutional Law § 12-29 (1978). Under this doctrine Mr. Furgatch would have standing to challenge the overbreadth of these statutory provisions and regulations even if this Court agrees with the Commission that the statute and regulations are not directly applicable to his conduct. A fortiori, if Furgatch

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1/ If this panel should affirm Furgatch I, then the issues in this case (Furgatch II) would become moot only after all avenues of appellate review have been foreclosed.

I is reversed, the sole constitutional question at issue on appeal from such reversal in Furgatch I would be the overbroad language and interpretation of the statutory provisions of which Mr. Furgatch would be convicted. He then would be entitled to make the overbreadth claim not only on his own behalf, but on behalf of anyone else who may be affected, even though his complaint does not seek relief on behalf of anyone else. Analogously, Mr. Furgatch's failure to allege his continuing intent to engage in similar conduct should not be fatal.

Additionally, the Commission was not disadvantaged by the absence of an explicit allegation that Mr. Furgatch might do whatever he should perceive he is lawfuly entitled to do. Implicit in Mr. Furgatch's complaint is his intention to exercise what he perceives as his lawful rights as a voter and a citizen. The cases cited by the Commission (Brief at 9-10), which review dismissals for failure to state a claim, lack of diversity jurisdiction and jurisdictional amount, do not buttress the Commission's argument.[2/]

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2/ The Commission argues that Mr. Furgatch never raised "his possible future conduct as a basis for standing at any time in the district court" and is thus "precluded from raising this argument for the first time on appeal." (Brief at 11 n.5). Yet the Supreme Court, in the very case cited by the Commission, stated that this rule is "not inflexible" and found that the issue reviewed, while not expressly pleaded, was "not foreign to the subject matter of the complaint" which was therefore a factor justifying its review of the issue. Youakim v. Miller, 425 U.S. 231, 234 (1976).

The Commission's argument that the consideration of the constitutional defenses necessarily involved in a section 437g evaluation of the Commission's interpretation of the statute precludes the section 437h case is fallacious, as it fails to consider that this determination need not be final. The Commission's argument is based on the presumption that after a consideration of the constitutional defenses a final mandate may result, thus failing to consider that the panel's determination that dismissal of the Furgatch I complaint should be reversed may be reviewed by the en banc court in an application for an en banc hearing. Such en banc rehearing would be clearly appropriate if the en banc court were considering the constitutional questions as provided in section 437h. Once the panel concludes that Furgatch I should be reversed, the constitutional questions obviously would not be moot. Therefore, the Commission's argument that such questions would be moot would turn the determination of this case into a circular procedural game with the outcome dependent on the order in which the panel considers discrete questions, ignoring the posture of this case and the interconnected nature of the whole.

## II. THIS PANEL HAS AUTHORITY TO CERTIFY THESE CONSTITUTIONAL ISSUES DIRECTLY TO THE EN BANC COURT

The Commission argues that this panel lacks the authority to certify these issues to the en banc court and that there is a need for the District Court to develop a factual record to determine whether the issues are, in fact, certifiable under the criteria discussed in California Medical Association v. FEC, 453

U.S. 182, 192 n.14 (1981). (Brief at 13 n.8). As discussed below, and in appellant's opening brief, these issues are not settled, insubstantial or hypothetical and are properly certifiable.

The Eleventh Circuit decided there is no need for remand when the issues raised by appellant are legislative and not adjudicative, observing:

> [C]ertification is improper when resolution of the issues requires a fully developed factual record, California Medical Association v. FEC, 453 U.S. 182, 194 n.14 . . . (1981), [yet] we are convinced that the facts necessary to resolve the issues raised by appellants are legislative as opposed to adjudicative. As such they are easily presented to the court of appeals en banc as to the district court. At this point, a remand to the district court would serve only to delay proceedings contrary to the Congressional mandate that we expedite certified matters "to the greatest possible extent . . . ." 2 U.S.C. § 437h(c). Submission to the en banc court, on the other hand, is consistent with the prompt review anticipated by Congress.

Athens Lumber Co. v. FEC, 689 F.2d 1006, 1015 vacated on other grounds per curiam, 718 F.2d 363 (11th Cir. 1983) (en banc) cert. denied and appeal dismissed, 465 U.S. 1092 (1984).

The adjudicative facts of this case, such as the language of the advertisements, are well established. What remains to be shown is the significance of these facts in terms of the values embodied in our Constitution. Now it is necessary to determine the legislative facts, i.e., to go beyond the record of adjudicative facts and determine the chilling effect of these statutory provisions and regulations on the free debate of public issues. Kenneth F. Ripple, Constitutional Litigation, §2-2 (1984).

## III. APPELLANT IS ENTITLED TO EN BANC REVIEW AND DIRECT APPEAL TO THE SUPREME COURT

The Commission states that "Mr. Furgatch is entitled to only one opportunity to present his claim" (Brief at 9), and argues that Mr. Furgatch lost his right to section 437h relief by his "choice" of a section 437g action. This ignores the fact that the Commission, not Mr. Furgatch, initiated the 437g action and Mr. Furgatch raised his constitutional arguments only as a defense to that prosecution. Mr. Furgatch did not choose his forum; he did not elect a 437g prosecution. In fact, there is no evidence that Mr. Furgatch believed there was any problem or knew that the Commission would contend that his conduct violated the law until the Commission's administrative proceeding undertaken prior to their filing of the 437g action.[3/] Under the Commission's suggested approach, it could deprive a citizen of his 437h rights simply by filing a 437g action before the citizen even knew that his conduct raised any problem under the Act.

The Commission makes much of Mr. Furgatch's filing of this action after its appeal of Furgatch I. In doing so, it misses the significance of this point. This does not establish, as is claimed by the Commission, that Mr. Furgatch seeks two opportunities to present his constitutional challenge. It does

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3/ The advertisements were published in 1980; the Commission did not question the disclosure failures until 1982, and filed Furgatch I nearly three years after the advertisements were published.

establish that only after the Commission refused to accept the determination of the forum of the Commission's choice, did Harvey Furgatch first exercise his right to have the constitutional issues decided by an en banc court of appeals.

The Commission incorrectly declares that "there is nothing in the . . . the Supreme Court's decision [in California Medical Association] which gives Mr. Furgatch the right to switch his strategies" and proceed with a 437h action (Brief at 8-9), even though the Court in California Medical noted that although "[t]he legislative history . . . is silent on the interaction of the two provisions. . . . [t]he brief discussion in Congress of § 437h indicates that it was intended to cover all serious constitutional challenges to the Act." 453 U.S. at 190 n.10 (emphasis added).

What Mr. Furgatch is entitled to is what Congress provided to "any individual under this bill . . . [,] a direct method to raise these [constitutional] questions and to have those considered as quickly as possible by the Supreme Court." 120 Cong. Rec. 35,110 (1974) (remarks of Representative Frenzel), quoted in California Medical, 453 U.S. at 188 n.7.

The Commission argues that Mr. Furgatch may, in the 437g action, petition this Court, under Rule 35 of the Federal Rules of Appellate Procedure, for an en banc hearing and also may seek Supreme Court review, but ignores an important distinction. (Brief at 8-9). Congress gave Mr. Furgatch the right, in a 437h

action, to an en banc court of appeals hearing,[4/] as well as the right of an appeal to the Supreme Court without the necessity of a petition for certiorari. Congress, in providing the 437h procedure, guaranteed Supreme Court review of a constitutional challenge to the Act's provisions without the competition from other meritorious cases for a place on an already overcrowded docket.

## IV. APPELLANT PRESENTS FOR CERTIFICATION UNRESOLVED CONSTITUTIONAL CHALLENGES TO THE CAMPAIGN ACT

The Commission argues that "[a]ffirmance of the district court's decision dismissing the complaint is proper even if this court were to find that this action presents a case or controversy[,]" as the constitutional questions presented are insubstantial, settled and hypothetical. (Brief at 12-13).

As shown below, and in Mr. Furgatch's brief in this case, as well as in his brief in Furgatch I (No. 85-5524), hereby incorporated by reference, the constitutional issues are not frivolous or insubstantial but go to the very heart of public speech and are properly certifiable under California Medical, 453 U.S. at 192 n.14. The ongoing enforcement of the Act against Mr. Furgatch removes all argument that this constitutional challenge involves a "purely hypothetical" application of the statute.

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4/ Even if this panel should disagree with the District Court in Furgatch I and hold that Mr. Furgatch's advertisement did expressly advocate a candidate's defeat, and even if this panel should conclude that the statute would stand constitutional scrutiny, Mr. Furgatch is entitled to have his constitutional challenge determined by the en banc court under section 437h.

The Commission argues that if this Court decides not to affirm the District Court's dismissal of Furgatch II, it should remand to permit the compilation of a factual record by the District Court relevant to the constitutional questions. (Brief at 13 n.8). We disagree. As discussed above, the necessary determinations can properly be made by the court of appeals en banc, and there is no need to further delay these proceedings.

### A. The Federal Election Campaign Act, As Applied And Interpreted By The Commission In Its Regulations And Prosecution Of Appellant, Is Unconstitutionally Vague In Violation Of The First Amendment

The Commission characterizes appellant's argument as a challenge only of Commission regulation 11 C.F.R. § 109.1 which, it asserts, could have been easily clarified through the advisory opinion process. (Brief at 13-17).[5/] This characterization misreads Mr. Furgatch's brief and oversimplifies his quarrel with the Commission.

The appellant challenges the unconstitutional interpretation given the Act by the Commission as evidenced by its explanatory regulation, as well as by its continuing prosecution of the Furgatch I enforcement action. Therefore, the Commission's

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5/ Appellant agrees with the principle cited in the cases raised by the Commission which holds that jurisdictional statutes, which provide for direct appeal to the Supreme Court, must be narrowly construed; however, a strict reading of section 437h does not require this panel to consider each issue in a vacuum, ignoring the interconnected nature of this case.

argument that no constitutional issue warranting section 437h review is present because its regulation can be properly challenged only if it allegedly conflicts with the Act, is circular. (Brief at 16 n.10). Mr. Furgatch is challenging the regulation as a reflection of the Commission's unconstitutional interpretation and enforcement of the Act.

The parties agree that unless Mr. Furgatch's advertisements "expressly advocate the . . . defeat of a candidate," he was not required under the statute to make the disclaimers or disclosures required by 2 U.S.C. §§ 434(c) and 441d. The parties disagree over what constitutes express advocacy.

The words "expressly advocate" were intended by Congress to have a narrow meaning, the Supreme Court having previously employed the words for the precise purpose of giving the predecessor campaign laws the narrow specificity required by the First Amendment. Buckley v. Valeo, 424 U.S. 1 (1976). The Commission's efforts to apply the Act by implication, inference, context, ambiguity, etc., are contrary to the statutory test of express advocacy of the election or defeat of a candidate. The Commission in its regulations[6/] and continued prosecution of Mr.

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6/ In its regulation, 11 C.F.R. § 109.1(b)(2), the FEC defines "expressly advocating" as follows:

> "Expressly advocating" means any communication containing a message advocating election or defeat, . . . of the candidate.

(emphasis added). The FEC's use of the term "message" intensifies the vagueness and overbreadth of its interpretive regulation in violation of the strictures set down in the Buckley case.

Furgatch has urged that the statute be read as though it said "expressly or impliedly advocating."[7/]

If the statutory standard were to be read so as to measure an advertisement by its implied meaning, as the FEC does, the Act would conflict with the First Amendment. Reference to the decision in Buckley v. Valeo, above, demonstrates that to save the provisions of sections 434(c) and 441d from fatal conflict with the First Amendment, the words "expressly advocating" must be strictly construed. As the Commission contends (Brief at 15), the "expressly advocating" language in the existing Campaign Act was meant to conform the statute to Buckley. To read the statute, however, as the Commission does, as though it said "expressly or impliedly advocating" would not only contravene the intention of Congress, but would result in an unconstitutional infringement of First Amendment rights under Buckley v. Valeo. As the Supreme Court held in Buckley, 424 U.S. at 41, where "legislation imposes criminal penalties in an area permeated by First Amendment interests," courts must afford "[c]lose examination" of the "specificity" or vagueness of the limitations. Thus, courts regularly apply a much stricter test to statutes restricting First Amendment rights when they are challenged for vagueness than they do to other statutes, Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967); Exxon

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7/ See Brief of Appellee Harvey Furgatch, in Furgatch I, No. 85-5524, p.9 nn.4, 5, incorporated by reference herein.

Corp. v. Georgia Association of Petroleum Retailers, 484 F. Supp. 1008, 1013-14 (N.D. Ga. 1979), aff'd, 644 F.2d 1030 (5th Cir. 1981), cert. denied, 454 U.S. 932 (1981); Thompson v. Southwest School District, 483 F. Supp. 1170, 1179 (W.D. Mo. 1980); Corporation of Haverford College v. Reeher, 329 F. Supp. 1196, 1201-02, (E.D. Pa. 1971); United States ex rel. Huguley v. Martin, 325 F. Supp. 489, 492 (N.D. Ga. 1971). The cases cited by the Commission (Brief at 16), concerning the narrow scope of vagueness review do not implicate First Amendment issues and are inapposite.

### B. The Campaign Act's Media Exemption Violates The Due Process Clause Of The Fifth Amendment

The Campaign Act requires an individual desiring to make "independent expenditures" in an election campaign to place a disclosure and disclaimer in any advertisement, and to file sworn statements with the FEC, 2 U.S.C. §§ 434(c) and 441d. Individuals who publish newspapers or periodicals are specifically exempted from these requirements pursuant to 2 U.S.C. § 431(9)(B)(i). Mr. Furgatch's position that this media exemption denies him equal protection of the law is a constitutional challenge to the Act which has not been determined by the courts.

Mr. Furgatch considers the burden of compliance with the Act a serious one that chills his ability to debate important public issues, a burden which the Act does not place on the news media.

Mr. Furgatch has demonstrated a clear interest in participating in public debate on issues which lie at the core of

the First Amendment -- clearly an important interest, and the Commission has demonstrated a continuing purpose to enforce the disclosure and filing requirements of the Campaign Act against private individuals. Cf. Steffel v. Thompson, 415 U.S. 452, 459 (1974); Doe v. Bolton, 410 U.S. 179, 188-189 (1973). Mr. Furgatch therefore has an important present right to be relieved of the unequal treatment which the Act accords to him in the exercise of his views on public issues.

In order to spend money freely to debate issues of public importance, the ordinary citizen is faced with a substantial and unequal burden. If an advertisement is campaign-oriented, he must add his name and a disclaimer to the publication; he must file an accounting with the Commission that becomes a public record; and he has to find his way through a 112-page statutory compilation and 194 pages of regulations to determine just what his obligations are.[8/] If he locates the regulation defining "expressly advocating" he may be intimidated or misled by the statement that it means "any communication containing a message advocating election or defeat."[9/]

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8/ The Commission's suggestion that the ordinary citizen continue this regulatory foray until ascertaining the procedures for obtaining an advisory opinion does not seem adequate to mitigate the chill on an individual's right to debate public issues freely. (Brief at 17). The cases cited by the Commission deal with sophisticated corporations, candidates and regulated entities and are not applicable. Surely, we have not reached the point where a private citizen is charged with the knowledge of the advisory opinion process.

9/ 11 C.F.R. § 109.1(b)(2).

The Commission argues that it would be far too burdensome to require "a newspaper to report the portion of its daily operating costs allocable to editorial comments on federal elections." (Brief at 21). The reporting requirements, however, could be less of a burden than the Commission asserts. If newspapers could not ascertain the pro rata share of their operating expenditures to allocate to an editorial, they could measure the expenditure by the market value of the space occupied by the editorial, not its cost to the newspaper. The administrative feasibility of this reporting requirement is demonstrated by the fact that newspapers owned, or controlled by, political parties, political committees and candidates are required to report editorials and commentaries as expenditures. 2 U.S.C. § 431(9)(B)(i) and 11 C.F.R. § 100.8(b)(2).

The Commission incorrectly asserts that Mr. Furgatch bears a greater burden in this constitutional attack because the challenged provision "only requires disclosure," thereby implicating substantially weaker First Amendment interests than a restriction on speech. (Brief at 19). The Supreme Court in Buckley, however, recognized the "potential for substantially infringing the exercise of First Amendment rights" inherent in compelled financial disclosure and the exacting scrutiny necessary to uphold such provisions. Buckley, 424 U.S. at 66.

Even if the Commission were to have construed the statute consistent with Buckley, it would place an unequal burden on Mr.

Furgatch. If he desires to be free of the obligation to report to the Commission, he must tailor his advertisement in a way that may reduce its effectiveness.

Indeed, as the Supreme Court had previously noted in its discussion of the prior Campaign Act:

> As narrowed, § 434(e), like § 608(e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.

Buckley, 424 U.S. at 80.

The Supreme Court also noted the ease in which the sophisticated could circumvent these provisions:

> It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.

424 U.S. at 45.

Accordingly, this Court is faced with a statute that requires only the ignorant, unwary or scrupulously law-abiding to disclose information to the Commission and the public, while exempting the professionals. The exemption for newspapers, broadcasters and other media creates a discriminatory classification between amateurs and professionals that can only be justified by identifying "an appropriate governmental interest suitably furthered by the differential treatment." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that the government may not discriminate between different ideas and

groups in providing access to public forums without furthering an appropriate governmental interest).

The Commission improperly equates the challenged media exemption with financial assistance to, and favorable economic regulation of, the media, evidencing an appropriate "congressional solicitousness for the independence and stability of the press," (Brief at 20). Exempting the media from financial disclosures and disclaimers however, serves no similar or appropriate governmental goal. A comparison between the Act's treatment of individuals and its treatment of the institutional press is not "inapt," as claimed by the Commission, for, as shown above, the distinction cannot be justified. It is the Commission's attempt to equate the Act's disparate treatment of individuals and the institutional press with the distinction made between all corporations and those publishing newspapers and magazines which is "inapt." (Brief at 22, citing Athens Lumber Company).[10/]

No appropriate governmental interest is furthered by exempting the professional press from the burden which falls on private citizens. The only reference to the reason for the

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10/ The court in Athens Lumber however, cited the Supreme Court's decision in FEC v. National Right to Work Committee, 459 U.S. 197 (1982), to find the Act's distinction between corporations publishing newspapers, and those which do not publish newspapers, constitutional. Athens Lumber, 718 F.2d at 363. The Commission fails to recognize, however, that the Supreme Court was not considering an equal protection challenge to this provision.

exemption in the legislative history is a vague statement in the House Committee Report that it was being established to:

> [m]ake it plain that it is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association.

H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974). It cannot seriously be contended that the commercial or professional press is entitled to greater protection in its exercise of free speech than individuals. As the Supreme Court has noted:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest.

Lovell v. Griffin, 303 U.S. 444, 452 (1938) (emphasis added).

In enduring this litigation, appellant Harvey Furgatch asserts the historic rights of the pamphleteer to the protection of the First Amendment. The media exemption creates a classification based on no apparent principle, and is therefore a denial of Mr. Furgatch's right to equal protection. This exemption, taken in conjunction with sections 434(c) and 441d violates the due process clause of the Fifth Amendment.

## CONCLUSION

It is respectfully submitted that this Court should reverse the ruling of the District Court dismissing the complaint in this

action and certify the constitutional issues to the en banc Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant was mailed first class mail, postage prepaid, this 30th day of April, 1986, to the following counsel:

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H. Richard Mayberry, Jr.

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# ADDENDUM OF STATUTORY AND REGULATORY PROVISIONS

penditure but shall be reported as a disbursement in accordance with 11 CFR 104.3 if made by a political committee.

(vi) If made by a political committee, such payments for voter registration and get-out-the-vote activities shall be reported by that committee as disbursements in accordance with 11 CFR 104.3, but such payments need not be allocated to specific candidates in committee reports except as provided in 11 CFR 100.7(b)(17)(iv).

(vii) Payments made from funds donated by a national committee of a political party to a State or local party committee for voter registration and get-out-the-vote activities shall not qualify under this exemption. Rather, such funds shall be subject to the limitations of 2 U.S.C. 441a(d) and 11 CFR 110.7.

(18) Payments made to any party committee by a candidate or the authorized committee of a candidate as a condition of ballot access are not contributions.

(19) The payment of any honorarium and related expenses within the meaning of 11 CFR 110.12 is not a contribution.

(20) A gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 CFR 110.4(a) and Part 114 apply.

(21) Funds provided to defray costs incurred in staging nonpartisan candidate debates in accordance with the provisions of 11 CFR 110.13 and 114.4(e).

(c) For purposes of 11 CFR 100.7 (a) and (b), any contributions or payments made by a married individual shall not be attributed to that individual's spouse, unless otherwise specified by that individual or by the individual's spouse.

[45 FR 15094, Mar.7, 1980, as amended at 45 FR 21209, Apr. 1, 1980; 45 FR 23642, Apr. 8, 1980; 48 FR 19020, Apr. 27, 1983; 50 FR 9994, Mar. 13, 1985]

## § 100.8 Expenditure (2 U.S.C. 431(9)).

(a) The term "expenditure" incudes the following payments, gifts or other things of value:

(1) A purchase, payment, distribution, loan (except for a loan made in accordance with 11 CFR 100.8(b)(12)), advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office is an expenditure.

(i) For purposes of 11 CFR 100.8(a)(1), the term "payment" includes payment of any interest on an obligation and any guarantee or endorsement of a loan by a candidate or a political committee.

(ii) For purposes of 11 CFR 100.8(a)(1), the term "payment" does not include the repayment by a political committee of the principal of an outstanding obligation which is owed by such committee, except that the repayment shall be reported as disbursements in accordance with 11 CFR 104.3(b).

(iii) For purposes of 11 CFR 100.8(a)(1), the term "money" includes currency of the United States or of any foreign nation, checks, money orders, or any other negotiable instrument payable on demand.

(iv)(A) For purposes of 11 CFR 100.8(a)(1), the term "anything of value" includes all in-kind contributions. Unless specifically exempted under 11 CFR 100.8(b), the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for the goods or services is an expenditure. Examples of such goods or services include, but are not limited to: securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists. If goods or services are provided at less than the usual and normal charge, the amount of the expenditure is the difference between the usual and normal charge for the goods or services at the time of the expenditure and the amount charged the candidate or political committee.

(B) For the purposes of 11 CFR 100.8(a)(1)(iv)(A), "usual and normal charge" for goods means the price of

those goods in the market from which they ordinarily would have been purchased at the time of the expenditure; and "usual and normal charge" for services, other than those provided by an unpaid volunteer, means the hourly or piecework charge for the services at a commerically reasonable rate prevailing at the time the services were rendered.

(2) A written contract, including a media contract, promise, or agreement to make an expenditure is an expenditure as of the date such contract, promise or obligation is made.

(3) An independent expenditure which meets the requirements of 11 CFR 104.4 or Part 109 is an expenditure, and such independent expenditure is to be reported by the person making the expenditure in accordance with 11 CFR 104.4 and Part 109.

(b) The term "expenditure" does not include the following payments, gifts, or other things of value:

(1) (i) Payments made solely for the purpose of determining whether an individual should become a candidate are not expenditures. Examples of activities permissible under this exemption if they are conducted to determine whether an indivdual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel. Only funds permissible under the Act may be used for such activities. The individual shall keep records of all such payments. See 11 CFR 101.3. If the individual subsequently becomes a candidate, the payments made are subject to the reporting requirements of the Act. Such expenditures must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the payments were made.

(ii) This exemption does not apply to payments made for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign. Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:

(A) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.

(B) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.

(C) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.

(D) The individual conducts activities in close proximity to the election or over a protracted period of time.

(E) The individual has taken action to quality for the ballot under State law.

(2) Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication is not an expenditure, unless the facility is owned or controlled by any political party, political committee or candidate, in which case the cost for a news story (i) which represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not an expenditure.

(3) Any cost incurred for nonpartisan activity designed to encourage individuals to register to vote or to vote is not an expenditure, except that corporations and labor organizations shall engage in such activity in accordance with 11 CFR 114.4(c) and (d). For purposes of 11 CFR 100.8(b)(3), "nonpartisan activity" means that no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote.

(4) Any cost incurred for any communication by a membership organization to its members, or by a corporation to its stockholders or executive or administrative personnel, is not an expenditure, so long as the membership organization or corporation is not organized primarily for the purpose of influencing the nomination for elec-