UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-5524

FEDERAL ELECTION COMMISSION,

Appellant,

v.

HARVEY FURGATCH,

Appellee.

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

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

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UNITED STATES COURT OF APPEALS
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FEDERAL ELECTION COMMISSION,	)	
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Appellant,	)	
	)	
v.	)	No. 85-5524
	)	
HARVEY FURGATCH,	)	
	)	
Appellee.	)	
	)	

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

STATEMENT OF ISSUES PRESENTED

1. Whether Harvey Furgatch violated 2 U.S.C. §434(c) by failing to report to the Commission expenditures expressly advocating the defeat of Jimmy Carter in the 1980 general presidential election.

2. Whether Harvey Furgatch violated 2 U.S.C. §441d by failing to state, in an advertisement which expressly advocated the defeat of Jimmy Carter in the 1980 general presidential election, that the advertisement was not authorized by any candidate or candidate's committee.

STATEMENT OF THE CASE

A. Jurisdiction

This case is before this court on appeal from a decision of the United States District Court for the Southern District of California to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court had

jurisdiction pursuant to 28 U.S.C. § 1345 because the Commission is an agency of the United States expressly authorized by 2 U.S.C. § 437g(a)(6) to bring actions such as this one to enforce the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. ("the Act"). This court has jurisdiction of this appeal under 28 U.S.C. § 1291 and 2 U.S.C. § 437g(a)(9). The district court entered its final judgment disposing of all claims, by granting a motion to dismiss the case, on December 10, 1984 (Excerpt, "Exc." 152). The Commission filed a timely notice of appeal on January 24, 1985 pursuant to Rule 4 of the Federal Rules of Appellate Procedure (Exc. 156).[1/]

B. Background

On October 28, 1980, one week prior to the November 4, 1980 general presidential election, a full page advertisement, paid for by Harvey Furgatch, was published in the New York Times. Captioned "Don't let him do it," the advertisement accused Jimmy Carter of "degrading the electoral process and lessening the prestige of the office," and warned that "[i]f he succeeds the country will be burdened with four more years of incoherencies, ineptness, and illusion as he leaves a legacy of low-level campaigning." (Exc. 11). The advertisement concluded with the exhortation in bold face print: "Don't let him do it."

1/ The Commission moved to consolidate this appeal with its appeal in the virtually identical case of FEC v. Dominelli, (No. 85-5525). This motion was denied, however, in part because counsel for Mr. Dominelli, who also represents Mr. Furgatch, sought to withdraw his representation of Mr. Dominelli. Counsel's motion was granted.

On November 1, 1980, three days before the general election, Harvey Furgatch placed the same advertisement in The Boston Globe (Exc. 12). Unlike the first ad, which stated that it was paid for by Harvey Furgatch and was "[n]ot authorized by any candidate" the second ad omitted the disclaimer that it was "not authorized by any candidate." The two advertisements cost Mr. Furgatch a total of approximately $25,008 (Exc. 7).

Upon the foregoing facts, the Commission found probable cause to believe that Mr. Furgatch had violated 2 U.S.C. § 434(c) by failing to report his expenditures made in connection with these advertisements, and violated 2 U.S.C. § 441d by failing to include the disclaimer in the Boston Globe advertisement. When conciliation efforts proved unsuccessful, the Commission authorized the filing of this action against Mr. Furgatch pursuant to 2 U.S.C. § 437g(a)(6)(A).

C. The District Court Proceedings

On March 25, 1983, the Commission filed its complaint in this case pursuant to 2 U.S.C. § 437g(a)(6)(A), seeking a civil penalty and an injunction against further violation of the Act by Mr. Furgatch (Exc. 1). The defendant responded by filing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Exc. 18), which the Commission opposed (Exc. 63). A hearing was held on November 21, 1983 at which Judge Thompson orally ruled that the motion to dismiss would be granted. On December 10, 1984 the district court entered its final order granting the defendant's motion to dismiss (Exc. 152).

The court found that "although it is a very close call, the political advertisements placed by defendant Furgatch do not as required by 2 U.S.C. §§ 434(c) and 441d(a), constitute 'communications expressly advocating the election or defeat of a clearly identified candidate'" (Exc. 152). For this reason, the court concluded that Mr. Furgatch's expenditures were not covered by the Act. The court then noted that since the case was decided on statutory grounds, none of the constitutional issues raised in the motion to dismiss need be reached (Exc. 154).

ARGUMENT

I. MR. FURGATCH VIOLATED 2 U.S.C. §§ 434(c) AND 441d BY FAILING TO COMPLY WITH THE REQUIREMENTS FOR REPORTING AND DISCLOSURE OF INDEPENDENT EXPENDITURES FOR A COMMUNICATION EXPRESSLY ADVOCATING THE DEFEAT OF JIMMY CARTER IN THE 1980 PRESIDENTIAL ELECTION

A. The Standard Of Review

This is an appeal from a district court decision granting a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. It is well settled that appellate review in such cases is de novo.

> A decision to dismiss a complaint for failure to state a claim upon which relief can be granted is reviewable de novo. Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984). In conducting this review, [the court] must accept all material allegations in the complaint as true. Berner v. Lazzaro, 730 F.2d 1319, 1320 (9th Cir. 1984). All doubts are resolved in favor of the plaintiff. Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 834-35 (9th Cir. 1980). A dismissal cannot be upheld "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 834

(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)); accord Halet v. Wend Investment Co., 672 F.2d 1305, 1309 (9th Cir. 1982).

Preferred Communications, Inc. v. Los Angeles, 754 F.2d 1396, 1399 (9th Cir. 1985). See also Jones v. Community Redevelopement Agency of Los Angeles, 733 F.2d 646, 649 (9th Cir. 1984); Compton v. Ide, 732 F.2d 1429, 1432 (9th Cir. 1984); St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1372 (9th Cir. 1981).

B. The Act Requires Independent Expenditures Advocating A Particular Election Result To Be Reported To The Commission For Public Disclosure

Section 304(c) of the Act, codified at 2 U.S.C. § 434(c), requires individuals who make independent expenditures totalling more than $250 during a calendar year to file a statement with the Commission containing certain specified information about those expenditures. See also 11 C.F.R. § 109.2(a). The Act defines an "independent expenditure" as an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is made without coordination with, or authorization of, any candidate's campaign. 2 U.S.C. § 431(17). See also 11 C.F.R. §§ 100.16 and 109.1(a).

Section 318 of the Act, codified at 2 U.S.C. § 441d, requires any person who makes an expenditure to finance communications expressly advocating the election or defeat of a clearly identified candidate, to include in the communication a disclaimer stating the name of the person financing it, and

stating whether or not the communication is authorized by any candidate or candidate's committee. See also 11 C.F.R. § 109.3.

The district court found that Mr. Furgatch's advertisements were not covered by these provisions because the ads did not "expressly advocate" the election or defeat of any candidate (Exc. 152). Congress included the "express advocacy" requirement in these provisions in response to the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1, 76-82 (1976). See H.R. Rep. No. 1057, 94th Cong., 2d Sess. 38 (1976), reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1976, 1032 (GPO 1977) (hereinafter "1976 Leg. Hist."). See also H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976), 1976 Leg. Hist. at 805; S. Rep. No. 677, 94th Cong., 2d Sess. 6 (1976), 1976 Leg. Hist. at 282; FEC v. Central Long Island Tax Reform Immediately Committee ("CLITRIM"), 616 F.2d 45, 52-53 (2d Cir. 1980) (en banc).

In Buckley, the Court upheld, against First Amendment challenge, a statutory provision requiring the filing of reports with the Commission disclosing expenditures made "for the purpose of influencing" a Federal election. The Court found that this requirement serves an important governmental interest in expanding voter information about the sources of support for candidates (see p. 11, infra). The Court was, however, concerned that the statute could be construed to extend beyond this purpose to cover communications that only discussed public issues which were also campaign issues.

The Court first concluded that candidates and political committees could permissibly be required to report all expenditures because "[t]hey are, by definition, campaign related." 424 U.S. at 79. With respect to others, the Court construed the provision "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. The Court listed several catch phrases as examples of express advocacy,[2/] but noted that the rationale for its construction was to limit the statute's reach "to that spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. The Court explained that the provision, as construed, would go "beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported...." 424 U.S. at 81. See also FEC v. CLITRIM, 616 F.2d at 53 (finding leaflet criticizing a Congressman's voting record did not contain "express advocacy" because there was no "unambiguous statement in favor of or against the election of Congressman Ambro.")

C. Mr. Furgatch's Advertisement Expressly Advocated The Defeat Of President Carter in the 1980 Presidential Election.

Any fair reading of Mr. Furgatch's two advertisments (Exc. 11, 12) can leave no doubt that they advocate Jimmy Carter's defeat in the election which was only a few days away. Indeed,

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2/ "'vote for,' 'elect', 'support' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 44 n. 52, incorporated by reference, 424 U.S. at 80 n. 81.

the advertisements discuss nothing other than Jimmy Carter's campaign for reelection. They criticize Carter for remaining silent when his "running mate" accused Ted Kennedy, Carter's opponent for the Democratic nomination, of being unpatriotic. They accuse Carter himself of labelling his opponent in the general election as unpatriotic; of attempting to use federal funds to buy special interest votes; and of campaigning in a manner that "cultivate[s] the fears, not the hopes, of the voting public...." These campaign tactics, the advertisements assert, are "degrading the electoral process and lessening the prestige of the office."

If Mr. Furgatch had only attacked Jimmy Carter's campaign style, there would be a reasonable argument that this did not amount to advocacy of a particular election result, although, even then, the advertisements would clearly satisfy the Supreme Court's criterion that the communication be "unambiguously campaign related" (see p. 7, supra). However, Mr. Furgatch's advertisements did not stop with a mere attack on Jimmy Carter's reelection campaign. Instead, they went on to assert that Carter's campaign was "an attempt to hide his own record, or lack of it," and warned that if Carter "succeeds" in this objective "the country will be burdened with four more years of incoherencies, ineptness and illusion...." This warning was followed by the explicit plea, in bold print three lines high, **"Don't let him do it."** Thus, when read as a whole, it is clear that the ads explicitly exhort the reader to stop Carter from

"succeed[ing] in "burden[ing]" the country with "four more years" of his assertedly harmful leadership.[3/]

The district court's failure to find express advocacy in Mr. Furgatch's advertisements was due to its view that "the inquiry can be immediately narrowed to an analysis of the phrase 'Don't let him do it.'" (Exc. 112.)[4/] Only by thus deciding to ignore the advertisements' explicit warning not to let Carter "succeed[]" in "burden[ing]" the country for "four more years," could the court conclude that "the range of actions expressly recommended by the ad obviously did not include voting the President out of office" (Exc. 154). As we have shown, a fair

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3/ This explicit call to stop Carter from succeeding in the election, which was to be held only a few days later, materially distinguishes this case from the cases relied upon by the district court. In FEC v. CLITRIM, 616 F.2d at 53, the court found no express advocacy in a leaflet that advocated lower taxes and listed a local congressman's votes on certain tax bills in the House of Representatives. In contrast to Mr. Furgatch's advertisements, the leaflet in CLITRIM contained "no reference anywhere ... to the congressman's party, to whether he was running for reelection, to the existence of an election or the act of voting in any election; nor is there anything approaching an unambiguous statement in favor of or against the election of Congressman Ambro." FEC v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979) involved a poster of "Gerald Ford, wearing a button reading 'Pardon Me' and embracing former President Nixon" along with a quotation from a 1974 Ford speech defending Nixon's innocence. 471 F. Supp. at 316. Unlike Mr. Furgatch's advertisements, the AFSCME poster did not refer to the ongoing election campaign in any way and contained no words of exhortation at all. In addition, that case involved a different provision of the Act, which does not require reporting of expenditures containing express advocacy if they are "primarily devoted to subjects other than" express advocacy.

4/ The court suggested that the Commission "recognized" that the rest of the ad was unimportant to a determination of express advocacy. However, this is contrary to the position taken by the FEC throughout these proceedings. (Exc. 93-99).

reading of the advertisements as a whole can leave no ambiguity about their express call for Jimmy Carter's defeat.[5/] Indeed, Mr. Furgatch's decision to include in his first advertisement the disclaimer of candidate authorization required by 2 U.S.C. § 441d for communications "expressly advocating the election or defeat of a clearly identified candidate" indicates that even he recognized, at the time he placed that advertisement, that it expressly called for Jimmy Carter's defeat. Accordingly, the district court clearly erred in concluding that Mr. Furgatch's expenditure for these advertisements was not covered by the Act.

II. 2 U.S.C. §§ 434(c) AND 441d DO NOT VIOLATE THE FIRST AMENDMENT

Although the court had no occasion to reach the question, Mr. Furgatch contended in the district court that 2 U.S.C. §§ 434(c) and 441d are unconstitutional if applied to an advertisement like his. However, the constitutionality of those provisions has already been settled by the Supreme Court. As

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5/ The district court buttressed its conclusion by reasoning that

> whatever "it" was that the reader of the ad was supposed to do, it was something that could have been done "'months"' or "weeks"' before the date the ad was published. But months or weeks before the ad was published there had not been a presidential election.

This statement is inexplicable. Jimmy Carter's reelection campaign had been carried on with great success for many months. The electorate had voted for him in a number of primary elections "months" before the ads were published, and even after he won the Democratic nomination the public opinion polls continued to indicate, until the eve of the election, that a large percentage of the electorate intended to vote for him in November despite the campaign tactics the advertisement criticized. Thus the advertisements' complaint that "We let him do it" and "We are letting him do it" cannot negate the explicit call to stop Carter from succeeding in obtaining "four more years."

discussed supra, p. 6, in Buckley v. Valeo, 424 U.S. at 80-82, the Court held that it was not unconstitutional for Congress to require reporting and disclosure of independent expenditures, so long as the requirement was limited to express advocacy of a particular election result. Sections 434(c) and 441d do not impose any limit upon the financing of advertisements like Mr. Furgatch's, nor do they interfere with the ability to make direct contributions to any candidate or political committee. These provisions merely require the public disclosure of certain information about such expenditures to help educate the voting public. In Buckley, the Supreme Court found this purpose compelling, concluding that the requirement

> increases the fund of information concerning those who support the candidates. It goes beyond the general disclosure requirements to shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors. By the same token, it is not fatal that [the provision] encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

424 U.S. at 81. Since it serves a compelling purpose and does not interfere with the freedom to publish political statements, the court upheld the statute.

> The burden imposed by [this requirement] is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our Federal election system to public view.

424 U.S. at 82. Cf. Lowe v. SEC, 53 U.S.L.W. 4705, 4717 (June 10, 1985, No. 83-1911) (White, J., concurring) ("[R]eporting requirements would not inhibit [investment] advisors from speaking, and it is well settled that '[t]he [First] Amendment does not forbid ... regulation which ends in no restraint upon expression ....'").6/

In sum, the sole issue before the court is whether Mr. Furgatch's two advertisements contained express advocacy of Jimmy Carter's defeat in the 1980 election. As we have shown, the ads did contain express advocacy and therefore were subject to the disclosure requirements of the Act. Since the Supreme Court has already upheld the constitutionality of those statutory provisions, no further issue is presented.

CONCLUSION

For the reasons set forth above, the Commission submits that this court should reverse the district court's judgment, and hold that Mr. Furgatch did violate 2 U.S.C. §§ 434(c) and 441d, as alleged by the Commission.

Respectfully submitted,

Charles N. Steele
General Counsel

6/ Since section 441d also merely requires disclosure of the source of independent expenditures containing express advocacy, the same result would follow. See FEC v. CLITRIM, 616 F.2d at 52 n. 8.

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STATEMENT OF RELATED CASES

1. FEC v. Furgatch (No. 85-5524) and FEC v. Dominelli (No. 85-5525) are related cases in that these two actions involve virtually identical issues of law and fact.

2. FEC v. Furgatch (No. 85-5524) and Furgatch v. FEC (No. 85-) are also related cases in that they involve the same parties and arise out of related facts.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL ELECTION COMMISSION, Defendant,	)	
v.	)	Civil Action No. 85-5524
HARVEY FURGATCH, Plaintiff.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served, by first class mail, postage prepaid, a copy of the Brief for Appellant Federal Election Commission as well as a copy of the Excerpts of Record on this 1st day of July, 1985, on the following counsel:

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ADDENDUM
OF STATUTORY AND REGULATORY PROVISIONS

TITLE 2. THE CONGRESS

Chapter 14—Federal Election Campaigns

Subchaper 1—Disclosure of Federal Campaign Funds

§ 431. Definitions

When used in this Act:

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

§ 434. Reporting requirements

(c) *Statements by other than political committees; filing; contents; indices of expenditures.*

(1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person.

(2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include—

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

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

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

Any independent expenditure (including those described in subsection (b)(6)(B)(iii) of ths section) aggregating $1,000 or more made after the 20th day, but more than 24 hours, before any election shall be reported within 24 hours after such independent expenditure is made. Such statement shall be filed with the Clerk, the Secretary, or the Commission and the Secretary of State and shall contain the information required by subsection (b)(6)(B)(iii) of this section indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved.

(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all independent expenditures separately, including those reported under subsection (b)(6)(B)(iii) of this section, made by or for each candidate, as reported under this subsection, and for periodically publishing such indices on a timely pre-election basis.

§ 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about

to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount

equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

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

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the

judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60

days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of this title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

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

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

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

(b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

SUBCHAPTER A—GENERAL

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

Sec.

100.1 Scope.
100.2 Election (2 U.S.C. 431(1)).
100.3 Candidate (2 U.S.C. 431(2)).
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100.6 Connected organization (2 U.S.C. 431(7)).
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100.18 Act (2 U.S.C. 431(19)).
100.19 File, filed or filing (2 U.S.C. 434(a)).
100.20 Occupation (2 U.S.C. 431(13)).
100.21 Employer (2 U.S.C. 431(13)).

AUTHORITY: 2 U.S.C. 431, 438(a)(8).

SOURCE: 45 FR 15094, Mar. 7, 1980, unless otherwise noted.

§ 100.16 Independent expenditure (2 U.S.C. 431(17)).

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

(2) This paragraph does not affect the right of a State or subordinate party committee to engage in such dissemination, distribution, or republication as agents designated by the national committee pursuant to § 110.7(a)(4).

(e) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

§ 109.2 Reporting of independent expenditures by persons other than a political committee (2 U.S.C. 434(c)).

(a) Every person other than a political committee, who makes independent expenditures aggregating in excess of $250 during a calendar year shall file a signed statement or report on FEC Form 5 with the Commission, the Clerk of the House or Secretary of the Senate in accordance with 11 CFR 104.4(c).

(1) If a signed statement is submitted, the statement shall include:

(i) The reporting person's name mailing address, occupation and the name of his or her employer, if any;

(ii) The identification (name and mailing address) of the person to whom the expenditure was made;

(iii) The amount, date and purpose of each expenditure;

(iv) A statement which indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;

(v) A notarized certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation or concert with, or at the request or suggestion of any candidate or any authorized committee or agen thereof: and

(vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

(2) Reports or statements filed under this section shall be filed at the end of the reporting period (quarterly pre-election post-election semi-annual annual) (See 11 CFR 104.5)) during which any independent expenditure which aggregrates in excess of $250 is made and in any reporting period thereafter in which additional independent expenditures are made.

(b) Independent expenditures aggregating $1,000 or more made by any person after the twentieth day, but more than 24 hours before 12:01 A.M of the day of an election shall be reported within 24 hours after such independent expenditure is made. Such report or statement shall contain the information required by 11 CFR 109.2(a) indicating whether the independent expenditure is made in support of, or in opposition to, a particular candidate and shall be filed with the appropriate officers in accordance with 11 CFR 104.4(c).

§ 109.3 Non-authorization notice (2 U.S.C. 441d).

Whenever any person makes an independent expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such person shall comply with the requirements of 11 CFR 110.11.

PART 109—INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c))

Sec.
109.1 Definitions (2 U.S.C. 431(17)).
109.2 Reporting of independent expenditures by persons other than a political committee (2 U.S.C. 434(c)).
109.3 Non-authorization notice (2 U.S.C. 441d).

AUTHORITY: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441d.

SOURCE: 45 FR 15118, Mar. 7, 1980, unless otherwise noted.

§ 109.1 Definitions (2 U.S.C. 431(17)).

(a) "Independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not 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 such candidate.

(b) For purposes of this definition—

(1) "Person" means an individual, partnership, committee, association, or any organization or group of persons, including a separate segregated fund established by a labor organization, corporation, or national bank (see Part 114) but does not mean a labor organization, corporation, or national bank.

(2) "Expressly advocating" means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Congress," or "vote against," "defeat," or "reject."

(3) "Clearly identified candidate" means that the name of the candidate appears, a photograph or drawing of the candidate appears, or the identity of the candidate is otherwise apparent by unambiguous reference.

(4) "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" means—

(i) Any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is—

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made;

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent;

(ii) But does not include providing to the expending person upon request Commission guidelines on independent expenditures.

(5) "Agent" means any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate, or means any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

(c) An expenditure not qualifying under this section as an independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted.

(d)(1) The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered a contribution for the purpose of contribution limitations and reporting responsibilities by the person making the expenditure but shall not be considered an expenditure by the candidate or his authorized committees unless 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 authorized agent or committee thereof.