UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. _____

HARVEY FURGATCH,

Petitioner,

V.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA (Leland C. Nielsen, J.),

Respondent,

AND

FEDERAL ELECTION COMMISSION,

Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION TO THE COURT EN BANC FOR ISSUANCE OF A WRIT OF MANDAMUS TO THE HONORABLE LELAND C. NIELSEN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Richard Mayberry
RICHARD MAYBERRY & ASSOCIATES
1055 Thomas Jefferson St., N.W.
Suite 202
Washington, D.C. 20007
(202) 337-4172

Clinton L Blain
LANE, BLAIN & WOODS
111 Elm Street
Suite 450
San Diego, California 92101
(619) 236-9069

Of Counsel:

Robert B. Hummel
6213 Dahlonega Road
Bethesda, Maryland 20816

DATE: April 29, 1987

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STATEMENT OF ISSUES PRESENTED

1. Whether mandamus should issue because the Respondent District Judge has failed and refused to follow the command of 2 U.S.C. § 437h by certifying to this Court en banc questions regarding the constitutionality of the Federal Election Campaign Act ("the Campaign Act") that are properly raised and are neither "insubstantial" nor "frivolous" nor "settled," which failure and refusal impairs the jurisdiction of this Court to decide such

questions en banc, and the subsequent jurisdiction of the Supreme Court to review such decision upon appeal.

2. Whether 2 U.S.C. §§ 434(c) and 441d, on their face or as applied by the Federal Election Commission, are unconstitutionally vague and overbroad under the First and Fifth Amendments to the United States Constitution.

3. Whether the Act as amended, on its face or as applied by the Commission, violates the First Amendment and the due process clause of the Fifth Amendment in that individuals are subject to the reporting and disclaimer requirements of 2 U.S.C. §§ 434(c) and 441d while members of the institutional press are exempted from such requirements pursuant to 2 U.S.C. § 431(9)(B)(i).

STATEMENT OF THE CASE

A. Jurisdiction

This proceeding in mandamus is filed under the authority of 28 U.S.C. § 1651 and Rules 21 and 35 of the Federal Rules of Appellate Procedure to protect the jurisdiction of this Court to decide en banc constitutional questions that are raised in declaratory judgment proceedings filed under the authority of 2 U.S.C. § 437h. (Exhibit 4) Petitioner filed such an action on March 6, 1985, and moved to certify appropriate constitutional questions on March 7, 1985. (Exhibit 5) Petitioner's action was dismissed for lack of a case or controversy, but the dismissal was reversed by a panel of this Court on January 21, 1987, and the action was remanded for further consideration. (Exhibit 1)

Petitioner thereupon renewed his motion to certify constitutional issues (Exhibit 6) and the matter was heard before

succeeded in utilizing the pending § 437g proceeding to frustrate Petitioner's efforts to pursue his rights under § 437h.

In March, 1985 the FEC argued in a motion to dismiss the § 437h proceeding that under the doctrine of res judicata, Petitioner was not in jeopardy, and had no standing to sue under § 437h because Petitioner had prevailed in the enforcement proceeding under § 437g. Judge Nielsen granted that motion. Petitioner appealed that ruling, and sought to have the panel which was destined to hear the FEC's appeal consolidate the two appeals and refer the constitutional issues to the en banc Court for resolution. The FEC opposed consolidation -- steadfastly urging res judicata in the 437h proceeding while it sought to overrule the ruling that it relied upon as res judicata. The panel consolidated argument in the two appeals, but did not refer any part of the litigation to the en banc Court.

Instead, on January 9, 1987, the panel reversed Judge Thompson's decision in the enforcement case, and held that the ad did "expressly advocate" the defeat of Jimmy Carter. The panel concluded it need not say any more about the constitutional challenge of Petitioner than that Buckley v. Valeo, 424 U.S. 1 (1976), had held the statute to be sufficiently precise.[1/] (Exhibit 3, p. 19).

1/ Petitioner sought rehearing of the appeal in the enforcement case, which was denied on April 23, 1987. His suggestion for rehearing en banc was rejected at the same time.

On January 21, 1987, the panel reversed Judge Nielsen's ruling in the proceeding under § 437h, and referred it back to the District Court for "further consideration." No reference was made to Petitioner's request that the constitutional issues be referred to the en banc Court as required by § 437h, without referring the matter back to the District Court.[2/] (Exhibit 3, p. 18).

When the 437h action was remanded back to Judge Nielsen, Petitioner again moved to certify the constitutional questions. In opposing the motion the Commission argued res judicata and collateral estoppel (Exhibit 2). The panel had said: "we do not make a preliminary ruling here [in the declaratory judgment case]," but then went on to say that it had held the Act constitutional in the January 9 decision in the enforcement case (Exhibit 1, pp. 1-2). The District Court concluded that "my hands are bound" by the panel ruling that the Campaign Act was constitutional under Buckley, and declined to certify. (Exhibit 2, p. 13).

By the procedures described above, more than two years have elapsed since Petitioner sought to bring the constitutional questions to the en banc Court pursuant to 2 U.S.C. § 437h for

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[2/] Such a referral was made in Athens Lumber Co. v. FEC, 689 F.2d 1006 (11th Cir. 1982), 718 F.2d 363 (11th Cir. 1983) (en banc), appeal dismissed, cert. denied, 465 U.S. 1092 (1984). There the 11th Circuit held that a panel of the Court of Appeals in the interest of judicial economy and justice should refer constitutional questions directly to the en banc Court rather than follow the circuitous route of remanding to the District Court for certification.

full appellate review. The en banc Court has yet to rule on the constitutional issues.

ARGUMENT

SUMMARY OF ARGUMENT

1. Mandamus en banc is the appropriate vehicle for review here. Section 437h contemplates "immediate" certification of constitutional issues arising under the Campaign Act to the en banc Court of Appeals, and then provides for direct appeal to the Supreme Court. In Petitioner's § 437h proceeding, the District Judge has refused to certify the constitutional questions. An appeal to a panel of the Court of Appeals would leave the issue of certifiability to a panel, which would then possess the power to deny the jurisdiction of the full en banc Court. The only review of the decision of a panel would be by certiorari to the Supreme Court or by writ of mandamus to the Supreme Court -- both of which would provide only discretionary jurisdiction. This kind of discretionary review -- all of which would delay reaching the question of constitutionality -- is not an adequate substitute for the petition for mandamus to the en banc Court. (Of course, under Rule 35, F.R.A.P., the en banc Court could treat this petition as an interlocutory appeal to it if it concludes an appeal will lie.)

2. Taking the opinion of the panel in FEC v. Furgatch as the law of this Circuit with respect to the meaning of "expressly advocating" as that language appears in the Campaign Act, the Act is violative of Petitioner's rights under the First Amendment. Buckley v. Valeo, 424 U.S. 1 (1976). Its infirmity is that it is

unconstitutionally vague, and places the rights of speakers at the mercy of the understanding of the audience, in an effort to promote full disclosure of campaign funding to a position of primacy over the interest of free expression. FEC v. Furgatch reads "expressly advocating" as though it said "expressly or impliedly advocating". Such a rendering results in an unconstitutional statute.

3. The Act is violative of Petitioner's Fifth Amendment right to be subjected to no heavier burden than is placed upon the institutional press when he seeks to exercise his First Amendment right to free speech. The Act discriminates against individuals with no stated rational basis in the legislative history, and no rational basis that can be conceived. There is no reason why when Petitioner places a paid editorial in a newspaper he must reveal whether the editorial was authorized by a candidate, but that no such disclosure is required when a publisher prints his own editorial. If it is important for the public to know who might be prompting Petitioner, it is even more important for the public to know when an important voice like a newspaper is similarly a candidate's instrument.

INTRODUCTION

The Court may well be asking: Why the fuss? This case involves two identical ads published in 1980, and the FEC filed its enforcement action in 1983. No one will ever publish the same ad again. So what is being contested with such intensity?

This case is about principle.

The FEC will have its own explanation, of course, but Petitioner believes he is a pawn in an effort by the FEC to have the words of the statute, which are "expressly advocating," read as though they said "expressly or impliedly advocating." We develop this point below, at pages 20-22. The FEC no doubt seeks to make the statute more effective -- pushing against its language. Surely it is not continuing this case to recover the penalty money, and it cannot expect to see the same ad ever again. And it is absurd to think Petitioner's ads were deliberately designed to bring on a prosecution by the FEC.

In 1980 Petitioner was outraged by the campaign tactics of Jimmy Carter, and published two ads designed to make such tactics issues of public concern. A desire to see Jimmy Carter defeated is inferable from the ads. But the Campaign Act only regulates ads which "expressly advocate the election or defeat of a candidate." These ads under common language usage, rhetorical principles and grammatical principles do not so "expressly advocate."

The ads begin under a bold head: "Don't let him do it." They end, after a rolling rhetorical attack on Carter's campaign tactics:

> "It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies, ineptness, and illusion, as he leaves a legacy of low-level campaigning."
>
> "DON'T LET HIM DO IT."

"If he succeeds" clearly means: If he succeeds in doing what he is attempting to do: "hide his own record". And "Don't let him do it" means "Don't let him succeed in what he is trying to

do: hide his own record." And the direct way to deny success to an attempt to hide is to expose. That means talk to your friends, relatives, neighbors, co-workers, or put an ad in the paper telling the truth.

The FEC objects to this ad because one can infer an intent to have President Carter defeated. The Campaign Act isn't very effective if it doesn't cover implied advocacy. And if implied advocacy is covered, the FEC has a great deal more freedom to impose its regulation. This tempts the agency to push against that word "expressly."

The stumbling block for the FEC is that expressly advocating was a requirement originally decreed by the Supreme Court in 1976, and later put into the statute by Congress. The reason for the limit is the Constitution: Freedom of Speech requires specificity.

That explains Petitioner. He believes he is fighting for the Constitution, for the right to debate public issues during a political campaign without fear that he will inadvertently violate the law. Moreover, he believes that the language is a precious part of the heritage of freedom. He knows that dictatorships set great store by controlling language, giving their own definitions of "democracy," "peace," a "free press" and a "free election." He believes he has a right to rely upon the clear language of the Supreme Court that seeks to protect his right of Free Speech.

And so the FEC has tangled with a determined "tar baby". In this 200th year of our Constitution, Petitioner wants the courts

to take another small celebratory step, by reading Supreme Court decisions and statutory words with respect for the language and for the principles which underpin true freedom of speech. This is not just another lawsuit about a penalty sought to be imposed by a government agency. Both sides are fighting for a principle.

I. MANDAMUS IS NECESSARY AND APPROPRIATE TO PROTECT THE JURISDICTION OF THE EN BANC COURT OF APPEALS, AND ULTIMATELY THE JURISDICTION OF THE SUPREME COURT

In remanding the declaratory judgment action for further decision the Court of Appeals panel said:

> "Although we do not make a preliminary ruling here, we upheld the constitutionality of the Campaign Act as applied against Furgatch in Federal Election Commission v. Furgatch [the FEC's enforcement action]." (Exhibit 3, pp. 1-2)

When Petitioner's renewal of the motion to certify the constitutional issues came before Judge Nielsen again, it is understandable that he did not feel free to undertake an independent position:

> "Well, I sympathize greatly with Mr. Furgatch. I think the Court of Appeals' decision was wrong, but I think I'm bound by the Court of Appeals decision and I am not going to certify again [sic[3/]]. (Exhibit 2, p. 13)

Petitioner is now in a position where the only way to get prompt review of the constitutional issues, in accordance with

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3/ Actually the District Court erred on this point: he had not certified the first time the motion came before him, either.

2 U.S.C. § 437h, is to pursue a writ of mandamus to the en banc Court of Appeals.[4/]

Granting of this petition for mandamus is appropriate. The district court's order was clearly erroneous: As the Supreme Court and courts of appeal have recognized, the duty to certify is virtually ministerial. "Section 437h expressly requires a district court to 'immediately . . . certify all questions of the constitutionality of this Act' to the court of appeals." California Medical Assn. v. FEC, 453 U.S. 182, 191 (1981) (emphasis in original).

The Fifth Circuit has acknowledged that "Congress's obvious intent in enacting this section was to deprive district courts and panels of the circuit courts of appeals of jurisdiction to consider the constitutionality of the FECA. . . ." FEC v. Lance, 617 F.2d 365, 374 (5th Cir. 1980). The panel in Lance concluded that it had no choice but to submit the constituional question to the Court of Appeals en banc (ibid.).[5/]

[4/] Mandamus would be proper in this case under the precedent in this circuit. See, e.g., CBS v. U.S. District Court for the Central District of California, 729 F.2d 1174 (9th Cir. 1984); U.S. v. Harper, 729 F.2d 1216 (9th Cir. 1984); Baumann v. U.S. District Court, 557 F.2d 650 (9th Cir. 1977).

[5/] Apparently the only other Court of Appeals to consider the issue was the Eleventh Circuit, which concluded that a court has no discretion once it has been "determined that [a party] presents a justiciable claim and is qualified to invoke certification procedures. . . ." Athens Lumber Co. v. FEC, supra, 689 F.2d at 1015. Once this determination is made, the court "can either remand the case to the district court with directions to conduct additional fact finding and certify the issues directly to the court of appeals en banc, or [it] can certify the issues directly." (Ibid.)

Plaintiff has standing as a voter who is under actual prosecution by the FEC. Unless the issues are moot, or frivolous, or insubstantial, certification should occur. The decision of the panel in the enforcement action cannot make the question "insubstantial" or "settled," for that would shift the en banc Court's jurisdiction to the panel, contrary to the provisions of § 437h.[6/] Petitioner is of course now in a position to petition the Supreme Court for a writ of certiorari in the enforcement case, but it is well settled that the right of appeal is a substantive right, for which certiorari is not an adequate substitute.

6/ The district court and the panel apparently felt that the constitutional issue was "settled" when the panel ruled in the enforcement case. However, a constitutional issue is not "settled" under 437h until there is a decision by the Supreme Court on the constitutional issue involved. This is the standard adopted by the Supreme Court in cases under 28 U.S.C. § 2821 (the former three-judge court provision on which the language of 437h was apparently based). See, e.g., California Water Service v. City of Redding, 304 U.S. 252, 255 (1983); Bailey v. Patterson, 369 U.S. 31, 33 (1962); Utica Mutual Ins. Co. v. Vincent, 375 F.2d 129, 131 (2d Cir. 1967). In fact, it was precisely so that questions regarding the constitutionality of the Campaign Act could be "settled" as expeditiously as possible BY THE SUPREME COURT that the en banc and direct Supreme Court appeal procedure of 437h was adopted.

That the questions at issue here are not "settled" should be obvious from the disagreement among the courts involved. Four of the five judges involved have thought that the constitutional issues presented a close case. Both district court judges have reached conclusions different from those of the panel of this Court. To that extent, this case is similar to the California Medical Association case (435 U.S. at 193 n.14), where the Court noted: "as evidenced by the divided en banc court below, the issues here are neither insubstantial nor settled."

Accordingly, unless this petition for mandamus is granted, the jurisdiction of the en banc Court of Appeals specifically granted in § 437h will have been impaired, and Petitioner will have been denied a statutory right to review by the en banc Court. At the same time the jurisdiction of the Supreme Court to hear an appeal from the en banc Court of Appeals will have been impaired, and Petitioner will have been denied his right of appeal to the Supreme Court, contrary to § 437h.[7/]

Petitioner can understand the reluctance of the District Judge to certify here. A panel of the Court of Appeals had pointedly advised him that Petitioner was wrong on the constitutional issues, and he had been told that the en banc Court of Appeals was going to deny en banc rehearing in that case. (Exhibit 2, pp. 3 and 8) Nevertheless, the constitutional issues are substantial and the District Judge is therefore refusing to perform a clear statutory duty.

It should also be noted that appeal from a subsequent order dismissing the declaratory judgment action would not be an adequate means for Petitioner to secure his right to en banc

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7/ It should also be noted that Petitioner's ability to "suggest" a rehearing en banc in FEC v. Furgatch (the enforcement proceeding) is no adequate substitute for the statutory right of a decision by the en banc Court in this case. Under the Federal Rules of Appellate Procedure (Rule 40) the chance to secure rehearing is sharply limited, and does not extend ordinarily to errors of the panel. And, of course, the chance to secure a rehearing en banc is even more limited: the most Petitioner can do is "suggest" such a rehearing. Rule 35, F.R.A.P.

review.[8/] A panel could certify to the en banc Court, but if it did not, Petitioner would not be in a position to pursue the 437h appeal route, and more time would have elapsed, so the Petitioner's right to "immediate" certification would be lost.

We are aware of no provision for appeal to the en banc Court of Appeals from the District Court's refusal to certify. We would note, however, that if such an appeal were proper the en banc Court has authority to treat this Petition as such an appeal.

II. THE CAMPAIGN ACT DEPRIVES PETITIONER OF HIS RIGHT TO FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT

A. This litigation and the welter of views which it has called forth concerning the applicability of the Campaign Act demonstrate that the Act is unconstitutionally vague.

Petitioner has consistently maintained that the Campaign Act does not require that his ad must contain the disclaimers and that he need not make a report and disclosure to the FEC, as would be required if the ad "expressly advocated the election or defeat" of a candidate. As demonstrated below (pages 18-20), the Supreme Court coined that critical phrase to satisfy the Constitutional mandate for clarity and specificity. A panel of this Court has now authoritatively concluded that the Supreme Court has failed:

[8/] In the present posture of this case, Petitioner has no adequate remedy save mandamus. There is no final judgment from which an appeal can be taken. Nor is interlocutory appeal under 28 U.S.C. 1292(b) available.

> "As this litigation demonstrates, the 'express advocacy' language of Buckley and section 431(17) [of the Campaign Act] does not draw a bright and unambiguous line." (Exhibit 3, p. 9)

In reaching this conclusion -- which virtually acknowledges that the Act is fatally defective for vagueness -- the panel (1) rejects the conclusion of Chief Judge Thompson that the ad cannot be read as "expressly advocating the election or defeat" of a candidate (id. at 16-19); (2) rejects the construction of the Act advanced by the FEC (id. at 6-7); (3) rejects the construction of the statutory language advanced by the Petitioner (id. at 7); (4) finds that the "decisions of the First and Second Circuits are not especially helpful beyond the general interpretive principles we can find between the lines of those rulings" (id. at 8); (5) concludes that "[n]either these decisions nor counsel for the parties here have supplied us with an analysis of the standard to be used or even a thoughtful list of the factors which we might consider in evaluating an 'express advocacy' dispute" (id.); (6) goes on to create its own new and different "test" to apply to the ad (id. at 14-15); and (7) says that Judge Thompson was correct in saying that the ad presented a "close call" (id. at 7), but concludes that he was wrong in saying that the ad could not be read as subjecting Petitioner to the requirements of the Act (id. at 16-19). Perhaps as a post-script, District Judge Nielsen -- on remand in the declaratory judgment action -- now concludes that the panel was "wrong", although he does not specify in what respect, and opines that the statute is "ridiculous." (Exhibit 2, pp. 16-19)

This total confusion of the bench and bar demonstrates dramatically that the Campaign Act fails to comply wih the First Amendment's requirement that a regulation of political speech be drawn with narrow specificity.

We submit that speech regulation cannot meet the standards of the First Amendment when its meaning cannot be discerned clearly from a Supreme Court opinion, decisions of the First and Second Circuit, nor arguments of contesting counsel, and is further disputed by two learned District Judges and three members of this Court. We submit that the "chill" of such a situation upon the freedom of speech which the Constitution seeks to protect is clear beyond doubt.[9/] It is erroneous to dispose of the constitutional issue, as the panel does, with a mere observation that "the constitutionality of the provisions at issue was reviewed in Buckley, and the standard set forth by the Supreme Court in that case was incorporated in the Act in its present form."

9/ The pendency of these cases has already chilled Petitioner's exercise of his First Amendment rights for over 4 years, and threatens to do the same in 1987 and 1988. In fact, the order of the district court "might also lead the petitioner to forego his constitutional right . . . altogether. . . ." U.S. v. Harper, supra, 729 F.2d at 1223. These lost First Amendment freedoms constitute a harm that can never be remedied on appeal. In different circumstances, the Supreme Court has noted that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373-374 (1976).

The effort to dispose of the constitutional issue in such summary fashion is inconsistent with the panel's earlier conclusion that Buckley "does not draw a bright and unambiguous line."

The panel's concluding words are ironic -- perhaps deliberately so. "Treatment of those constitutional issues is implicit in our disposition of the statutory question." (Exhibit 3, p. 18) The panel failed to carry over to the statute this constitutionally required distinction between "express" and "implied" advocacy.

That the panel has construed the Act so that it flouts the Constitutionally-mandated tenets of Buckley is evident from a close examination of the panel's opinion.

B. Buckley v. Valeo does not foreclose the issue of constituionality of the present Act, but it does require that to pass muster under the Constitution, the Act must not extend to "implied" advocacy.

1. Buckley did not decide that the present Campaign Act is constitutional.

Buckley dealt with an earlier version of the Campaign Act which did not contain the words "expressly advocating." The statutory provisions were former 18 U.S.C. § 434(e)[10/] establishing disclosure and reporting requirements, and former 18 U.S.C. § 608(e)(1)[11/] limiting campaign contributions. In a detailed discussion, the Court first held that § 608(e)(1) could

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10/ 18 U.S.C. § 434(e) (1970 ed., Supp. IV)

11/ 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV).

survive a challenge based on vagueness only if its scope were limited to expenditures that in "express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 40-44. Proceeding to the disclosure and reporting requirements of § 434(e), the Supreme Court concluded:

> "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 candidtate. . . ." (424 U.S. at 80, footnote omitted.)

The Court stated that "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." (Ibid.) But the two concepts "expressly advocate" and "unambiguously related" are not interchangeable, and it is the phrase "expressly advocating" which Congress wrote into the statute, and upon which the Court insisted. Obviously a statement can be "unambiguous," but still not "express" -- the Court is saying that in order to be certain the spending is "unambiguously" related, the Act must be limited to advocacy that is "express." It is as if the Court were saying that in order to make sure a regulation applied to "tall" men, it would limit the regulation to those over six foot six inches in height. Such a ruling would foreclose efforts to include six foot five inch men on the theory that they are "tall."

Over and over, the Supreme Court repeated the need for express and explicit words if the Constitution's command for specificity is to be observed:

(1) "explicit words of advocacy of election or defeat" (Id. at 43);
(2) "expressly calling for" (Id. at 44);

(3) "in express terms advocate" (Ibid.);
(4) "in express terms advocate" (Id. at 45);
(5) "communications that expressly advocate[168/]" (Id. at 80);
(6) appended footnote 168, above, referred to footnote 52 of the opinion, limiting the statute's coverage to "communications containing express words of advocacy of election or defeat," followed by eight examples of such words (Id. at 44) (emphasis supplied).

None of the foregoing deliberate phraseology is reflected in the present Campaign Act, as construed by the panel in the enforcement action. The panel's basic premise is that it need not look for specific words advocating election or defeat:

> "We begin with the proposition that 'express advocacy' is not strictly limited to communications using certain key phrases. . . ." (Exhibit 3, p. 12)

Starting with the undisputed premise that the Supreme Court's list of eight examples does not "exhaust the capacity" of language to expressly advocate election or defeat, the panel rejects any test "requiring the magic words 'elect,' 'support,' etc. or their nearly perfect synonyms." (Ibid.) But Petitioner never contended for "magic words" or for "nearly perfect synonyms" -- the demand is for "express words." Without such words, Petitioner can be penalized for what a reader infers, which is what Buckley forbids.

We think it abundantly clear that this Campaign Act is not the Act passed upon in Buckley v. Valeo.

2. The FEC has been engaged in a determined effort to have the Campaign Act construed as if it read "expressly or impliedly advocating."

The record in the declaratory judgment action and in FEC v. Furgatch (the enforcement action) demonstrate that the FEC is engaged in an effort to construe the Campaign Act as if it

covered speech that "expressly or impliedly" advocated the election or defeat of the candidate. Two other FEC cases disclose the same purpose; and the Second Circuit has so concluded.

In its brief to the panel of this Court in the enforcement action (CA. No. 85-5524), the FEC continued to seek inferences drawn from the ad by a "fair reading" (page 7), reading it "as a whole" (pages 8) and by placing heavy emphasis on the fact that the ads were printed just days before the election (pages 2, 3, 7). This latter point was relied on heavily by the panel opinion (Exhibit 3, 17-18). We submit that such reliance is an acceptance of an implied meaning: surely the date of publication does not change the explicit words of the ad, or change its express terms. Moreover, the reading of the FEC and the panel adds to the vagueness of the statute's test, for it requires a speaker to estimate just when this type of ad, for example, could have been printed without running afoul of the Campaign Act.

The emphasis upon motive, intent, implication and inference is not a unique effort of the FEC limited to this one case. In Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 53 (2d Cir. 1980) (en banc), that en banc Court of Appeals said (emphasis in original):

> This history of §§ 437(e) and 441d thus clearly establish [sic] that, contrary to the position of the FEC, the words "expressly advocating" means exactly what they say. The FEC, to support its position, argues that "[t]he TRIM bulletins at issue here were not disseminated for such a limited purpose" as merely informing the public about the voting record of a government official. . . . Rather, the purpose was to unseat "big spenders." Thus, 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 statue ordered in Buckley v. Valeo and adopted by Congress in the 1976 amendments. The position is totally meritless.

A similar effort was rebuffed in Federal Election Commission v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315 (D.D.C. 1979). The FEC now argues that those cases are not in point, because its cases were even weaker there than here. But the FEC cannot so easily walk away from its own prosecutions: those cases demonstrate a deliberate campaign to get regulatory control over ads that contain only implied advocacy. This case is part of the same effort.

3. Contrary to the Constitution's command that in regulating speech Congress must avoid vagueness, this Campaign Act leaves a speaker at the mercy of the understanding of the audience and of inferences it may draw from his words.

When the Supreme Court picked the phrase "expressly advocating" it sought to foreclose speculation about "intent and effect," to avoid putting a speaker "at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." The panel has engaged freely in such speculation, while reciting the language of the statute. This demonstrates the futility of the statutory phrase "expressly advocating" as a means of keeping regulation of a speaker's right of free expression within narrowly specified limits: the vagueness now relates to the meaning of the word "expressly". What does that word mean now?

(a) As construed by the panel of this Court, the Act's purpose of facilitating full disclosure is given primacy over the Constitution's command that speakers be free of vague

regulations. The panel recoils at the danger of "eviscerating" the Act which might result if one were to be overly fastidious about preserving a speaker's right to Freedom of Speech. The panel totally ignores the Supreme Court's observation in Buckley:

> "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention . . ." (424 U.S. at 45.)

With these words, the Supreme Court unequivocally recognized that the First Amendment's protection of the speaker occupies a preferred position over the Act's purposes. The panel elevates the Act's purposes to the superior position and thus destroys the efficacy of the words "expressly advocating" as a means of avoiding unconstitutional vagueness. Let the panel speak for itself:

> "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 by a rigid construction of the terms of the Act." (Exhibit 3, p. 11)

The "exacting interpretation" required by the Supreme Court thus becomes "rigid construction", and the panel proceeds to "[fashion] a more comprehensive approach . . . [and reject] some of the overly constrictive rules of interpretation that the parties [the FEC and the Petitioner] urge for our adoption." (Ibid.)

(b) The panel's test, which focuses so heavily on avoiding clever circumvention, ends in a trap for the unwary. Under its Act, "[a] speaker may expressly advocate regardless of his

intention. . . ." (Id. at 13.) This is not an inadvertent loose observation of the panel. It earlier announces:

> "We must read [the relevant section of the Act] so as to prevent speech that is clearly intended to effect [sic] the outcome of a federal election from escaping, either fortuitously or by design, the coverage of the Act. . . ." (Id. at 11.)

This Act unmistakably chills the exercise of Free Speech at any time during an election campaign. If one's purpose can be discerned as intending to affect the outcome of an election, no lucky accident or careful employment of language will permit one to escape the regulations of the FEC. "Intended" advocacy thus replaces "express" advocacy in the statute. This conclusion is at odds with the Supreme Court's observation that:

> ". . . the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." (Buckley, supra, 424 U.S. at 42.)

In such a context it is surely unconstitutional to restrain speech regardless of the speaker's expressed intention.

(c) The panel's test leaves a speaker at the mercy of the understanding of his audience and the inferences it may draw from his speech. It is appropriate at this point to repeat in fuller detail the quotation from Thomas v. Collins, 323 U.S. 516, 535 (1945) which is relied upon in Buckley (424 U.S. at 43):

> [W]hether 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.

We note above (pp. 22-23) how the panel concludes that intent takes primacy over any complications caused by language which the speaker chooses. Next we note that the panel says that a speaker may violate the Act regardless of his intent (pp. 23-24). But the panel's opinion goes on to add even more confusion. After making references to intent, understanding, inference, clear impression, construing speech "as a whole", and in its "entirety", the panel observes that the "subjective" intent of the speaker cannot "alone" be determinative, and appears to turn Thomas v. Collins inside-out by noting that "[w]ords derive their meaning from what the speaker intends and what the reader understands." (Exhibit 3, p. 13) This observation is made even more confusing by the comparison which follows, between "interpreting" political speech and "interpreting" a contract, and the panel's declaration that the role of "intent" is of lesser importance than "effect," without defining the relevance of either. It is submitted that Buckley declares both to be fatally deficient as standards.

Next the panel concludes that "context" is relevant among "factors that the audience must consider in evaluating the words before it." (Id. at 14.) We submit that all of this leaves the speaker at the mercy of the audience, contrary to Buckley and Thomas v. Collins.

The test fashioned by the panel merely emphasizes what is recited above. First, the panel says it need not be the

"clearest, most explicit language"; it is enough if it is "unmistakable and unambiguous, suggestive of only one plausible meaning." (Id. at 15.) Thus "express" is synonymous with "clear," "unmistakable" and "unambiguous" -- without regard for whether clarity is the result of explicit words or of the inferences and understanding of the audience. Second, "advocacy" must present "a clear plea for action" (Ibid.) -- a point with which we agree. And third, "it must be clear what action is advocated." (Ibid.)

We repeat that this substitution of "clear" for "express" unconstitutionally subjects the speaker to unconstrained inferences prohibited by Buckley. It reveals why the panel labors to put a gloss on "expressly advocating" -- and to avoid "a search for fixed indicators of 'express advocacy'." The "problem" is, according to the panel:

> "In Furgatch's advertisement we are presented with an express call to action, but no express indication of what action is appropriate. . . ."
>
> * * *
>
> ". . . 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. . . ." (Id. at 17-18.)

The Court, adopting the FEC's argument, supplies the "blank" from "context": an election is impending, and is but a few days away.[12/] It says that in such a context "only one action is open

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12/ Election campaigns now run from one election to the next, in many cases. The panel's emphasis on timing does not make the advocacy of the ad "express"; it adds another vague question: how far from election time could this same ad have been safely published?

to those who would not 'let him do it'": vote against Jimmy Carter. The Court, having embarked on its search for inference, ignores the plain grammatical, rhetorical meaning of "it" in the phrase "Don't let him do it." "It" is a reference back to "hiding his record" -- what he is "attempting" to do. Even the FEC read the ad this way in its Brief to the panel in the enforcement case (Brief for FEC in FEC v. Furgatch, No 85-5524, at page 8):

> "[The ads] 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. . . .'"

And the way to stop a person from hiding his record is to expose his true record. Voting against a candidate may help defeat him, but it will not stop him from hiding his record. The Court does not explain what is wrong with this plain straightforward construction of what the ad advocates.

The FEC attacks Petitioner's "primary argument that the 'express advocacy' standard must be applied in a strictly grammatical manner," and that it is "impermissible . . . to recognize ideas that are communicated by unambiguous references rather than by explicit 'words'." (Opposition of the FEC to Petition for Rehearing and Suggestion for Rehearing In Banc, filed March 19, 1987, in FEC v. Furgatch, No. 85-5524, at page 5.) That is indeed Petitioner's arguement, on constitutional grounds elaborated in Buckley. On the same grounds, we also insist upon what the FEC now labels an "extreme argument" (Ibid.)

> "Unless the court can find a single sentence that advocates in so many words the election or defeat of a particular candidate, the Act is inapplicable." (Ibid.)

On the basis of Buckley we stand upon the requirement of "in so many words," although we have never argued for the requirement of a "single sentence."

FEC v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616, 623 (1986) (hereinafter referred to as "MCFL") does not construe Buckley any differently than we have, does not depart from Buckley and does not support the FEC's position here. The MCFL publication at issue there expressly advocated that readers "Vote Pro-Life." The sense in which the Supreme Court noted that the message was "marginally less direct" than that in Buckley was that the connection between "Vote Pro-Life" and "clearly identified" candidates had to be spelled out. (Id. at 623.) But that spelling out was unmistakable and clearly consistent with common language usage: the publication contained photos and voting records of those candidates whom it regarded as being "Pro-Life". Thus the publication "expressly advocated" voting for "Pro-Life" candidates who were "clearly identified". There was no vagueness, no problem of construction, no need to disregard grammatical or rhetorical rules. There was no question but that readers were urged to vote, and the only question was whether the beneficiaries of that vote were "clearly identified." Petitioner's ad, to be like the "Pro-Life" advocacy, would have had to read "Vote against Deceptive Campaigners," and it did not.

The two statutory requirements -- "express advocacy of election or defeat", and a "clearly identified" candidate -- are separate and distinct. "Expressly" and "clearly" are not the same thing. Here, Petitioner's ad urges the reader not to let Jimmy Carter hide his record. That is not "marginally less direct" than urging his defeat; it is very different. The reader can effectively stop Jimmy Carter from hiding his record only by exposing his true record: voting would not stop him from hiding his record.

III. THE CAMPAIGN ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT INSOFAR AS IT COMPELS DISCLOSURE AND DISCLAIMER BY INDIVIDUALS WHO DO NOT PUBLISH NEWSPAPERS AND PERIODICALS

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. Individuals who publish newspapers or periodicals are specifically exempted from these requirements pursuant to 2 U.S.C. § 431(9)(B)(i). It is Mr. Furgatch's position that such exemption denies him equal protection of the law, in violation of the Fifth Amendment. This claim should also have been certified to the en banc Court since it presents a substantial question of Constitutionality. The issue was not referred to in FEC v. Furgatch, the panel's opinion in the

enforcement case, and is not decided in Buckley v. Valeo or any other Supreme Court decision under the Campaign Act.[13/]

Petitioner considers the burden of compliance with the Campaign Act a serious one that chills his desire to debate important public issues. He has brought the present action not merely to secure vindication on the narrow issue of whether he has violated the Campaign Act, but to relieve his future conduct from the unequal burden which the Campaign Act places on him as contrasted to the news media. Petitioner 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. The FEC has demonstrated a continuing purpose to enforce the disclosure and filing requirements of the Campaign Act aginst private individuals. Cf. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 299 (1979) (case or controversy exists when plaintiff alleges an intention to engage in conduct statutorily prohibited and there exists a credible threat of prosecution); 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

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13/ The issue is an important one of first impression, thus meeting the fifth part of the Baumann test. See n. 4, supra, and 557 F.2d at 655. The fourth part of that test is not relevant to this case: As this Court has recognized, the final two parts of the Baumann test are in effect mutually exclusive, so "[w]here one of the two is present, the absence of the other is of little or no significance." U.S. v. Harper, supra, 729 F.2d at 1222.

of the unequal treatment which the Act accords to him in the exercise of his views on public issues.

In order to freely spend money to debate issues of public importance, the ordinary citizen is faced with a substantial burden. If an advertisement contains express advocacy of the election or defeat of a candidate, he must add his name and a disclaimer to the publication, and he must file an accounting with the FEC that becomes a public record. If he desire to be free of the obligation to report to the FEC, he must tailor his advertisement in a way that may reduce its effectiveness. If the ad is authorized by a candidate he must so state. The statute then goes on to exempt newspapers, broadcasters and other media from similar obligations with respect to editorials.

In Petitioner's view this 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 the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972). The Mosley case held that the Equal Protection clause was violated by a statute which prohibited picketing near a school, but exempted peaceful labor picketing. Id. at 94. It relies upon a long line of cases which hold that government may not discriminate between different ideas and groups in providing access to public forums without furthering "an appropriate governmental interest."

No appropriate governmental interst is furthered by exempting the professional press from the burden which falls on ordinary citizens. Certainly none comes readily to mind. The only

reference to the reason for the exemption in the legislative history is a vague statement in the House Committee Report that it was being established to: "make 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, 93rd Cong., 2d Sess. 4 (1974).

It cannot seriously be contended that the commercial press or the 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. City of Griffin, 303 U.S. 444, 452 (1938).

Petitioner Furgatch endures this litigation to assert the historic rights of the pamphleteer to the protection of the First Amendment. In today's society the independent pamphleteer faces enormous costs; to publish an advertisement in a widely-read newspaper is the most economically feasible way to be a pamphleteer. It is inconsistent with the First Amendment that a newspaper publisher who profits from an individual's advertisement should bear a lesser burden of disclosure than those who purchase space in the publication. It is respectfully submitted that in all the circumstances, Sections 434(c) and 441d taken in conjunction with the exemption provided for the news media in Section 431(9)(B)(i) violate the Due Process Clause of the Fifth Amendment.

CONCLUSION

It is respectfully submitted that the en banc Court should grant this Petition for Mandamus, order the constitutional questions certified and declare that the Campaign Act is violative of the First and Fifth Amendments to the Constitution. Because it has already been over two years since Petitioner sought to exercise his right to "immediate" certification and in order to expedite resolution, Petitioner requests that, should the Court grant the petition for mandamus to the extent of certifying the constitutional questions, the Court consider Parts II and III of this Petition to be Petitioner's Brief or Memorandum on the merits of those issues and proceed immediately to decide those issues upon receipt of a Response from Respondent FEC.

Respectfully submitted,

DATE: 4/29/87

H. Richard Mayberry, Jr.
RICHARD MAYBERRY & ASSOCIATES
Suite 202
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 337-4172

Clinton L. Blain
LANE, BLAIN & WOODS
Suite 450
111 Elm Street
San Diego, California 92101
(619) 236-9069

Counsel for Plaintiff

Of Counsel:

Robert B. Hummel

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARVEY FURGATCH, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (Leland C. Nielsen, J.), Respondent, AND FEDERAL ELECTION COMMISSION, Respondent.	)	No. _____

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of April, 1987, caused to be served, by first class mail, postage pre-paid, a copy of the foregoing Memorandum of Points and Authorities In Support of Petition for Writ of Mandamus on the following:

Honorable Leland C. Nielsen
United States District Court for the
Southern District of California
940 Front Street
San Diego, California 92189

Lawrence Noble
Acting General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Richard Maybery
Richard Maybery