79-3014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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FEDERAL ELECTION COMMISSION,

Plaintiff,

-against-

CENTRAL LONG ISLAND TAX REFORM IMMEDIATELY COMMITTEE, et al.,

Defendants.

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REPLY BRIEF SUBMITTED BY
DEFENDANTS
EDWARD COZZETTE AND CLITRIM

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## INTRODUCTION

The defendants Edward Cozzette and the Central Long Island Tax Reform Immediately Committee submit this brief, replying to certain assertions made by the Federal Election Commission in its opening brief. More particularly, we will show: (1) that this Court has the power, indeed the responsibility, to decide whether the defendants' First Amendment activity fell within the reach of the Act, and to consider the constitutional validity of the challenged sections, on their face and as applied to these defendants; (2) that the statutory interpretations advanced by the FEC in its brief do not rectify the constitutional flaws in the challenged provisions, but, indeed, magnify those defects; and (3) that the application of those provisions to these defendants is, at once, beyond the scope of the statute and invalid under the First Amendment.

## ARGUMENT

### I. THE COURT HAS AUTHORITY TO CONSIDER AND RESOLVE THE CLAIMS THAT THE FECA PROVISIONS AT ISSUE IN THIS CASE DO NOT REACH THE DEFENDANTS' ACTIVITIES, OR THAT, IF THEY DO, SUCH APPLICATION IS UNCONSTITUTIONAL.

The FEC contends that, in this proceeding, this Court is empowered solely to consider the "facial constitutionality of FECA." Such a contention is novel and unsupported by either the text of the statute, its legislative history or by policy considerations involving constitutional adjudication. In this respect, the FEC position constructs an artificial distinction between "facial" and "as applied constitutional inquiry. In so doing, it would have this Court adjudicate the broadest and most theoretical constitutional issues in advance of all other issues in this case. The FEC thus advances a specie of the scholasticism that stands traditional Article III prudential considerations on their head. This portion of defendant's reply brief will be devoted to these matters.

#### A. The Asserted "Facial"-"As Applied" Distinction

As noted above, the FEC asserts that, under 2 U.S.C. 437h, this Court can inquire only into the "facial" validity of the statute. The FEC position is, however, unsupported by the text of §437h. The first sentence of the operative provision of §437h confers standing upon certain groups and individuals to institute "actions...to construe the constitutionality of any provision of this Act." 2 U.S.C. 437h(a). The next sentence then provides: "The district court immediately shall certify all questions of constitutionality of this Act to the United States Court of Appeals for the circuit involved

which shall hear the matter sitting en banc." 2 U.S.C. 437h(a). The statute does not explicitly indicate whether the certification requirement operates in all cases raising "questions of constitutionality of this Act" or only in those brought pursuant to the first sentence of the provision.

In any event, it is clear that the two phrases, "construe the constitutionality" and "questions of constitutionality" make no distinction between "facial" and "as applied" challenges or issues, and Congress had no such fine distinctions in mind. Nor, similarly, does this §437h language preclude a Circuit Court from considering the scope and reach of "any provision of this Act" as part of a §437h action to "construe" the constitutionality of any such provision. Indeed, the term "construe" is one more frequently associated with interpretation and construction of statutory provisions rather than with passing upon their constitutionality.

It is thus evident that there is nothing in the language of §437h to suggest much less compel the artificial distinction advanced by the FEC between "facial" and "as applied" adjudication. Moreover, the precedent of constitutional adjudication indicates that no such firm distinction between "facial" and "as applied" inquiries has been or can be fashioned. Indeed in Buckley v. Valeo 424 U.S. 1 (1976), the first and paradigm use of the §437h procedure, the Court twice observed that the general political committee disclosure requirements were being challenged "as overbroad--both in their application to minor-party and independent candidates and in their

extension to [small] contributions...."; Id. at 61 (emphasis added) and again: "Appellants contend that the Act's [disclosure] requirements are overbroad insofar as they apply to contributions to minor parties and independent candidates because the governmental interest in this information is minimal and the danger of significant infringement on First Amendment rights is greatly increased." 424 U.S. at 68-69 (emphasis added). */

As Buckley makes clear, the "facial" validity of a statute often turns on whether it can constitutionally be applied to certain activities or actors. Here, for example, if the application of the two provisions at issue to the defendants' activities is found to be unconstitutional, because there is no compelling interest in regulation, that conclusion could be embodied in a finding either that the sections are thereby overbroad and/or vague because they reach privileged activity, or that they are invalid in that application. The choice turns on prudential concerns over the scope of judicial relief, not upon jurisdictional concerns over the scope of adjudicative authority.

It is for this reason that the Court has long eschewed making jurisdictional determinations turn on whether the statute

*/ The FEC suggests that the legislative history underlying the enactment of §437h supports the assertion that the unique appellate review procedure contemplated by 437h enables this Court only to review the facial constitutionality of the FECA. This legislative history argument turns upon the FEC claim that 437h was enacted specifically to allow Senator Buckley to challenge the constitutionality of the Act. In this regard, the FEC quotes Senator Buckley: "It [§437h] merely provides for the expeditious constitutional questions I have raised." But, as the above-discussion makes clear, the constitutional questions that Senator Buckley had raised in Buckley v. Valeo involved issues of the constitutionality of the FECA both on its face and as applied. Thus

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at issue was challenged or invalidated on its face or as applied. Thus, for example, in supervising its mandatory appellate jurisdiction over state court decisions rejecting constitutional challenges to state statutes, the Court has long rejected the kind of "facial" - "as applied" distinction being urged here. In the leading case, Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921), the Court, in construing the predecessor of 28 U.S.C. §1257, stated:

> That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another.
>
> ****
>
> Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff reasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error. 257 U.S. at 289-290.

Accord: Marcus v. Search Warrant, 367 U.S. 717, 721 (1961).

The point is equally well illustrated by the practice under the three-judge court statutes, 28 U.S.C. §§2281-2284, prior to their revision in 1976. Similar to §437h here, the three-judge court statute provided for the convening of special statutory courts whenever the operation of a state statute was sought to be enjoined "upon the ground of the unconstitutionality of such statute," 28 U.S.C. §2281, or a federal statute enjoined

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(fn. cont. from preceding page.)
Buckley v. Valeo, supra, stands in stark refutation to the FEC's legislative history argument. Indeed, the legislative history that the FEC has provided thus supports the defendants' contention that this Court is thereby entitled to adjudicate the entire range of constitutional issues.

"for repugnance to the Constitution." 28 U.S.C. §2282. Even though the Court had traditionally interpreted the extraordinary three-judge court statute as narrowly as possible, see, e.g., Gonzales v. Automatic Employees Credit Union, 419 U.S. 90 (1974), it always held that such a special statutory court was required regardless of whether the target statute was claimed to be unconstitutional on its face or as applied. Zemel v. Rusk, 381 U.S. 1, 5-8 (1965); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 158 n. 9 (1971); Steffel v. Thompson, 415 U.S. 452 (1974). In Steffel, the Court made the point explicitly:

> Since the complaint had originally sought to enjoin enforcement of the state statute on grounds of unconstitutionality, a three-judge court should have been convened. [citations omitted.] A three-judge court is required even if the constitutional attack--as here--is upon the statute as applied....Id. at 457, n. 7.

Accord: Turner v. Fouche, 396 U.S. 346, 353, n. 10 (1970). Steffel involved as an applied attack, by one demonstrator, on a generally valid trespass statute; nevertheless, a statutory court was properly convened and empowered to consider the challenge. See also, Query v. United States, 316 U.S. 486, 490 (1942); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Boddie v. Connecticut, 401 U.S. 371 (1971).*/

The teachings under these various "extraordinary" jurisdictional provisions make it apparent that distinctions between

*/ Indeed, in a case very much like this one, the district of Columbia Circuit sustained the post-Buckley use of a three-judge court to adjudicate a challenge to the FECA's political committee disclosure requirements, in a suit by a controversial minor party claiming that those provisions were unconstitutional in their application to that particular group. See Socialist Workers 1974 Campaign Committee v. Jennings, 567 F. 2d 1133 (D.C. Cir. 1977).

facial and as applied "questions of constitutionality" have been rejected, and they should likewise be rejected here.

B. Prudential Concerns Regarding Constitutional Adjudications.

Prudential concerns similarly dictate that the position of the FEC be rejected. Throughout this litigation the instant defendants have strenuously and repeatedly suggested procedures to afford this Court and the District Court the opportunity and capacity to decide this case in accordance with the normal and orderly adjudicative techniques deeply etched in our jurisprudence. */

We have pursued these efforts because, in our view, it would be amiss for the Courts to treat this case in the narrow and antiseptic manner pressed by the FEC. More specifically, we have previously contended, in our March 22, 1979 Motion to Remand, that the extraordinary judicial review procedures of §437h had to be read in conformity with the elaborate §437g procedures that were intended to safeguard the Commission's interest, and also to provide an expeditious way for defendants to resist enforcement. Indeed, Congress mandated that a §437g enforcement action "shall be advanced on the docket of the court and in which filed, and put ahead of all other actions..." except a §437h proceeding. See 2 U.S.C. §437g(a)(11). Given the detailed §437g procedures, it would be improper to conclude that Congress intended those procedures - designed to provide expeditious consideration of both FEC claims and enforcement target defenses -

*/ Thus, we moved to dismiss the complaint on a variety of grounds which would have avoided the need to pass upon the constitutionality of any FECA provision. When the District Court felt compelled by 2 U.S.C. §437h to certify the entire case to this Court, we sought to have that certification comprehend more than sheer facial

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to be wholly ignored and totally displaced whenever a §437h certification is made. Thus, a Circuit Court directing or accepting a 437h certification should conduct the proceeding in harmony with, rather than in antipathy to, the goals sought to be achieved by §437g. Prudential concerns embedded in Article III counsel the same conclusion, and §437h should not be read, or employed in a way that ignores such concerns and insists upon an undue and hasty rush to constitutional judgment. See, Clark v. Valeo, 559 F. 2d 642, 660-662 (D.C. Cir.) (en banc) (Leventhal, J., concurring), aff'd, sub. nom. Clark v. Kimmitt 431 U.S. 950 (1977).

C. Ancillary Jurisdiction Over Issues of Statutory Interpretation.

Just as the line between facial and as applied adjudication is not meaningful for jurisdictional purposes, neither should the distinction between questions of constitutionality and issues of limiting statutory construction be accorded significance. What obtains, instead, is a continuum: As facial constitutional challenges may be avoided by as applied invalidations; so are as applied challenges frequently turned aside by interpreting the challenged provision as inapplicable to the challenger's conduct. Even in this area of campaign finance disclosure, two clear examples exist. See United States v. National Committee for

(fn. cont. from preceding page.)
constitutionality. Following this Court's remand, and the District Court's hearing, we submitted a proposed Order which would have certified questions of statutory interpretation pursuant to 28 U.S.C. §1292(b). Judge Pratt, however, did not act on the proposed order, but, instead, identified the statutory issues for this Court as part of his August 22, 1979 certification.

Impeachment, 469 F. 2d 1135, (2d Cir. 1972); ACLU v. Jennings, 366 F. Supp. 1041, (D.D.C. 1973), vacated on other grounds, sum nom. Staats v. ACLU, 422 U.S. 1030 (1975). This Court, expressly seeking to avoid constitutional difficulties, construed the political committee provisions as inapplicable to the issue organization in the Impeachment Committee case. Even more important, the three-judge court in ACLU v. Jennings, whose very jurisdiction depended on a constitutional challenge, nevertheless was free to adjudicate that case on statutory interpretation grounds and avoided constitutional decision by construing the campaign disclosure provisions as inapplicable to the ACLU and similar issue groups.

That case perfectly illustrates the point made in our opening brief at p. 57: Just as three-judge courts, convened only when there were constitutional challenges to federal or state statutes, were nevertheless free, on principles of ancillary jurisdiction, to consider and adjudicate statutory interpretation and coverage issues, so too is this Court empowered to consider and resolve similar issues. Finally, what ancillary jurisdiction principles permit, prudential principles compel, namely, that this Court first consider the question of whether the Trim Bulletin embodied "express advocacy" within the meaning of the Act, and only then, if necessary, engage in constitutional adjudication.

II. THE FEC SUBMISSION, RATHER THAN CURING THE VAGUENESS AND OVERBREADTH OF THE CHALLENGED PROVISIONS, MAGNIFIES THOSE DEFECTS AND MANIFESTS THE UNCONSTITUTIONALITY OF THE APPLICATION OF THE STATUTE TO THE TRIM BULLETIN.

As a prelude to our discussion of the Commission's contentions on the constitutional questions in this case, we would briefly remind the Court of the unique way that history bears on the analysis of those questions. Few attempts by government to burden free speech evoke the kinds of historical memories that are conjured in this case, involving, as it does, official efforts to penalize and restrain the circulation of pamphlets critical of officials of the state. The history was best summed up in Talley v. California, 362 U.S. 60 (1960), a case strikingly similar to this one:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The The obnoxious press licensing law of England, which was also enforced on the colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. . .Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. 362 U.S. at 64-65.

Tom Paine, James Madison, Alexander Hamilton and the other framers and anonymous pamphleteers whose labors gave birth

to our enduring constitutional structure might be surprised if not shocked, to learn that their heirs had spawned something called a Federal Election Commission, empowered to prosecute the very conduct which played so vital a role in the creation of that constitutional government.

Be that as it may, and historical irony aside, the task of this Court is to cabin such claims of governmental power within the strictest confines, so as to keep alive a modicum of the spirit of Madison, Hamilton and Paine.

The Commission's brief is singularly unhelpful in that regard. The FEC's tortured efforts to show that the challenged statutory sections can pass constitutional muster simply make matters worse by exacerbating the vaugeness and overbreadth of those provisions that the FEC brought suit to enforce. At each point that the brief seeks to assure this Court of the precision and focus of the statute, the effect is to render such use of those provisions more vague and broad than before. At each point that the Commission attempts to show that its use of the statute will not threaten the activities of issue-oriented groups that all previous decisions in this area have sought to insulate from governmental regulation, the hole is dug deeper.

A. The "Facial" Invalidity of the Challenged Sections

The basic thrust of the Commission's brief is directed at the "facial" validity of the challenged statutory provisions, as it argues that "facial" validity is the only issue before the Court. We have responded in Point I to the FEC's jurisdictional

assertion.*/ We shall demonstrate here, that even the FEC's facial defense of the statute is without merit.

The Commission agrees that, in enacting the current versions of §§434(e) and 441d, "consistently intended to remain within the limitations of the constitution. . ." and that these provisions were drafted to follow explicitly the mandate of the Supreme Court in Buckley v. Valeo, supra." (FEC Br. at 21) Yet the brief repeatedly obscures the fact that the current provisions at issue here were not the ones whose validity were considered and upheld by the Court in Buckley. The validity of the version of §434(e) which was before the Buckley court was assessed only after a careful and detailed effort to eliminate serious vagueness and overbreadth problems by limiting that section to independent campaign spending, involving express advocacy of election or defeat, which spending was the precise equivalent of a direct financial contribution to a candidate and which thereby implicated the substantial governmental interests thought sufficient to warrant disclosure of the identity of

*/ An additional observation must, however, be made regarding the FEC attempt to focus the Court's attention exclusively upon the facial validity of the statute. It should be noted that this lawsuit was not commenced by CLITRIM or Cozzettee seeking declaratory or injunctive relief with respect to a statute that only speculatively might be applied to them. Rather this lawsuit was initiated by the FEC. It sought to have the statute applied to the instant defendants. And by bringing this enforcement action, the FEC has impliedly vouched that the statute reaches the TRIM Bulletin and is constitutional in that application. Inasmuch as the FEC has, therefore, put the issue of the constitutional application of the statute in this case, it seems, at once, odd and audacious for the Commission to now claim that the question of the "constitutional application" of the statute is not before this Court.

such contributors by candidates and campaign committees.*/ Thus, while the statute was recast to reflect the Supreme Court's teachings, that current statute was not the provision at issue in Buckley, and that case does not foreclose scrutiny of the "facial" issue here.**/

*/ Of the three interests identified in Buckley, and rehearsed by the FEC, Br. at pp. 13-14, as sufficiently substantive to justify disclosure of campaign contributors--(1) informing the public, (2) deterring corruption or the appearance thereof, and (3) detecting violation of contribution limits--the last two are totally irrelevant here, and only the first interest is arguably implicated.

**/ Moreover, in two respects, the current provisions being enforced raise issues not laid to rest by the Supreme Court's indication that regulation of independent express advocacy of election or defeat could be subject to disclosure by a properly drawn statute. First, the monetary threshhold that triggers the reporting and disclosure requirements--$100.01--which was seriously questioned, but ultimately upheld in Buckley, in its application both to campaign contributions and independent campaign spending, is rendered questionable simply by the rate of inflation since January 1976, if nothing else. Had the reporting threshhold been set at approximately $60 in January 1976, it is extremely doubtful that the Court would have reluctantly deferred to congressional judgment as to where to draw that line.

More importantly, §441d, which was not before the Buckley Court in any form, contains no monetary threshhold and would be triggered by the expenditure if one cent on any communication which the FEC deemed to constitute "express advocacy."

The FEC's brief disingenuously suggests that Congress intended the disclaimer and identification requirements of §441d to serve as the rehabilitated version of the issue-oriented disclosure requirements of 2 U.S.C. §437a, which was unanimously invalidated by the Court of Appeals in Buckley. But the section of legislative history cited by the FEC is utterly silent on that point and makes absolutely no such reference to the invalidation of §437a. See S.Rep.No. 94-677, 94th Cong., 2nd Sess., p. 11 (1976). The true successor to the invalidated §437a is the new §434(e) as employed by the Commission in an unconstitutional effort to reach the very type of issue advocacy regulated by §437a and protected by the D.C. Circuit.

B. The "As Applied" Invalidity of the Challenged Provisions.

The gravamen of the constitutional problems is manifest by the FEC's application of the statute in this case and by its efforts to show that the statute is neither vague nor overbroad. We submit that precisely the opposite is the case.

1. Vagueness

The very effort to apply the statute to the TRIM Bulletin demonstrates that, in the hands of the Commission, the Act is like "a loose cannon," cf. Stump v. Sparkman, 435 U.S. 349, 368 (1978) (Stewart, J. dissenting), susceptible of wide-ranging application beyond the area intended by the Congress or permitted by the Constitution to be subjected to governmental control.*/

At various points in its brief, the FEC attempts to demonstrate that the Act's vagueness is more imagined than real. Just the contrary is shown.

The Commission confidently advises the Court that §434(e) does not apply to contributions or expenditures made to publish non-partisan "unbiased" voting charts on members of Congress. (FEC Br. at 19) The curative is, if possible, worse than the malady. In one word, the FEC has multiplied the uncertainty of application ten-fold. The notion that the existence of "express advocacy" and thereby statutory coverage will turn on

*/ Perhaps part of the Commission's problem stems from a misunderstanding of the vagueness issues in this case. The FEC seems to be defending the precision and clarity of the Act's reporting requirements with which one subject to the Act must comply. FEC Br. at 22-23. While the precise nature of those requirements is indeed problematic, the grave vagueness defect stems from the Commission-induced uncertainty as to whether those requirements are triggered and apply in the first instance. And that critical inquiry, in turn, depends on what is meant and (cont. of next page)

an assessment of whether information about a public official's conduct in office is "unbiased", injects a concept found nowhere in the pre-Buckley cases, the Buckley decision, the 1976 Amendments or the new provisions themselves. What could possibly constitute an "unbiased" communication about a Congressman's voting record?*/ Is it a "biased" presentation of a voting record for an issue group to rate a member only on the issues of interest to that group, to the exclusion of the member's performance on all other public issues? Or to base a member's "box score" on substantive votes in the chosen area, without including votes on procedural dispositions that affect the substantive posture of such legislation? And if an "unbiased" voting chart precludes any statement as to whether and how the official's vote corresponds to the issue group's views, then every issue group whose activities are portrayed in this record - the ACLU, the environmental groups, Public Citizen, the United Church of Christ - becomes vulnerable, since all such groups "rate" the member's performance against the group's stands on the issues. (See CLITRIM App. A67-A70; A77-A82; A92-A118; A135; A150-155; U.S. v. Nat. Comm. for Impeachment, supra; and ACLU v. Jennings, supra.)

Nor can the issue groups assertedly not reached by the FEC's interpretation of "express advocacy" draw comfort from the Commission's assertion that the Act does not apply to communications which "do not 'endorse or oppose the election of candidates'."

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(cont. from prev. page) reached by statutory controls of "express advocacy." It is the latter problem, as caused by the FEC's actions, which is at the core of the vagueness problems.

*/ Bias: An inclination of temperament or outlook; esp. prejudice, Webster's Seventh New Collegiate Dictionary.

(FEC Br. at 19) The 1971 Act's use of almost identical words to trigger statutory coverage of issue group publications was held to be unconstitutionally broad and vague in ACLU v. Jennings, supra.

Last, and perhaps worst of all, is the Commission's triumphantly-underscored assertion that issue groups are safe because the statute "does not apply to communications discussing. . . Congressional voting records which are not geared towards" advocating the election or defeat of members of Congress. (FEC Br. at 24) The assertion that vagueness is cured by having constitutional protection turn on whether a discussion is "geared towards advocating" election or defeat demonstrates the poverty of the FEC's position. Indeed, one of the first cases where the Supreme Court invalidated a statute on First Amendment vagueness grounds involved a similar gloss designed to "cure" vagueness. In Winters v. New York, 333 U.S. 507 (1948), a bookseller was convicted under a New York statute which prohibited the sale of printed material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." Id. at 508. In an effort to cure the law's vagueness, the New York courts had limited it to prohibit publications where the stories of crime and bloodshed were "so massed" as to become vehicles for muting violent or criminal conduct. Id. at 512-3. The Supreme Court held that, even though detective novels, criminology and crime magazines would not be covered, the "so massed" gloss failed to save the statute from being unconstitutionally vague ". . .because of the utter impossibility of the actor or trier to know where this new standard of guilt would draw the line between the allowable and the

forbidden publications." 333 U.S. at 519. The "geared toward advocacy" gloss suggested here is deficient in precisely the same way. Far from clarifying the statute, the suggested gloss broadens it.

The various concepts and labels that the FEC uses to show the precision of the statute inject a whole new dimension of uncertainty. In the FEC's composite sketch of the statute, communications "expressly advocating" election or defeat are those which contain a "message" to that effect, or "impliedly" advocate election or defeat, or are "geared towards advocacy" of election or defeat, or set forth voting records in a "biased" way, or in a way that "endorses or opposes" the election of candidates. A statute so extraordinarily standardless and vague affords almost total discretion to the enforcement agency.

The Supreme Court said a century ago:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. United States v. Reese, 92 U.S. 214, 23 L.Ed.2d 563, 566 (1876).

Fortunately, here the large net sought to be cast has been fashioned not by the legislature or the courts, but by the Commission. For both the Court and the Congress have made clear what they had in mind by use of the term "expressly advocating" election or defeat. In Buckley, the Supreme Court fully recognized the vital importance of precision in this area and yet the difficulty of separating candidate speech from issue speech. 424 U.S. at 42-44. The solution fashioned by the Court was the eminently sensible one of limiting the valid area of FECA regulation to

those expenditures for communications that "in express terms advocate the election or defeat" of a federal candidate. 424 U.S. at 44 (emphasis added). To avoid any possible misunderstanding of its meaning, the Court then set forth its list of "express words of advocacy or defeat." Id. at 44, n. 52. Congress, in turn, quickly rewrote the subject provisions to limit their reach to communications "expressly advocating" election or defeat, clearly stating its intent to reflect the Court's teaching and track its constitutionally-mandated distinctions.

Now the FEC seeks to overturn and obliterate those imperative distinctions. Derisively dismissing the "Buckley list" of express words of advocacy as "magic words", (FEC Brief at 42), the FEC substitutes instead its own vague and overbroad approach to the meaning and enforcement of the Act. That, we submit, is precisely what the Courts since 1972 have sought to avoid in their rulings in the campaign law area.

In drawing the line at "express words" of electoral advocacy, the Court in Buckley was in the doctrinal mainstream of constitutional adjudication of protected political advocacy. See Brandenburg v. Ohio, 395 U.S. 444 (1969)*/ The Court drew that line because only where express advocacy is concerned are governmental interests significantly implicated. Equally important, the Court saw an imperative need for a bright-line distinction between candidate advocacy which could be subjected to

*/ The Brandenburg focus on a content-based line of constitutional protection ultimately can be traced to the prophetic opinion of Judge Learned Hand in Masses Publishing Co v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1979), as two of the nation's leading constitutional scholars have observed. See Gunther, Cases and Materials on Constitutional Law, 9th Ed., pp. 1069-1075, 1123-1128 (1975); Tribe, American Constitutional Law, (1977), pp. 608-617.

regulation and issue advocacy which could not. That imperative implicates the core constitutional policies underlying both the vagueness and overbreadth doctrines, namely, that the government must regulate with precision in the free speech area so that speakers will not be deterred by imprecise laws or by laws capable of interdicting privileged speech. The "express advocacy" line drawn by the Court simultaneously achieves both goals. It reaches only the area of candidate-advocacy expenditures, where the Court has recognized substantial governmental interests in regulation. And it draws a crisp, precise intelligible line so that speakers will not be compelled to "hedge and trim" Thomas v. Collins, 323 U.S. 516, 535 (1945) in an effort to "steer far wider of the unlawful zone," Speiser v. Randall, 357 U.S. 513, 526 (1958).

The FEC's position in this case would wholly undo these carefully-wrought, bright-line distinctions and would substitute instead a treacherously wavering line, drawn in each case on the basis of the government's assessment of a variety of subjective factors: Did the communication contain a "message," express or implied, advocating an electoral result; was it "biased" toward such a result; was it "geared" toward such a result? As part of that inquiry, the FEC would scrutinize the layout and color schemes of the offending literature, the month of the year in which the speech went forward, the geographical area in which the speech occurred,

and the "purpose" with which the speech was undertaken. */

The last factor, whereby "purpose" or "motive", would transform protected issue advocacy into unprotected candidate advocacy subject to FECA control is particularly dangerous. See FEC Br. at 43-44. Here, too, developments in contemporary constitutional doctrine point in precisely the opposite direction, and the Court has refused to permit protection to turn on the speaker's motive or intent. See, e.g., Brandenburg v. Ohio, supra; New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Indeed, both courts in Buckley specifically rejected any inquiry that would permit FECA coverage to turn on whether the speaker's "purpose" was to influence an electoral outcome. The very reason that the Supreme Court adopted its "expressly advocating" distinction was to avoid the vagueness problems generated by having coverage turn on whether an expenditure or contribution was made "for the purpose of...influencing" the outcome of an election. 424 U.S. at 76-80. Yet, the FEC would open the same door of uncertainty which the Supreme Court went to such lengths to close. The FEC would also overturn the D.C. Circuit's unanimous ruling that 2 U.S.C. §437a, the section purposely aimed at box-score issue organizations, was unconstitutional:

> Section 437a, with a "purpose of influencing" and a "design [] to influence" as criteria undertaking to partially shape its operation, does not meet the governing standards. These criteria do not

*/ In the District Court, the FEC pointed to all these factors as being relevant to the determination of whether the TRIM Bulletin was a communication "expressly advocating" election or defeat. See Plaintiff's Answers and Objections to Defendant TRIM's Interrogatories, filed May 3, 1979, ¶¶ 89-81; Plaintiff's Memorandum in Opposition to Defendants Motion to Dismiss, filed June 18, 1979, pp. 21-23.

> mark boundaries between affected and unaffected conduct "with narrow specificity"; they do not "clearly inform. . .[of] what is being proscribed." Rather, they leave the disclosure requirement open to application for protected exercises of speech, and to deterrence of expression deemed close to the line. Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their position, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections. In this milieu, where do "purpose" and "design []" "to influence" draw the line?
> Buckley v. Valeo, 519 F.2d at 875 (emphasis added)

Accordingly, that en banc Court invalidated the section on vagueness and overbreadth grounds. The FEC's position here, and its proposed use of §434(e) against these defendants would transform that section into the equivalent of the provision which the Court of Appeals so willingly dispatched.

2. Overbreadth

Throughout this litigation the FEC has consistently rendered interpretations of the pertinent statutory provisions and has asserted regulatory authority over the instant defendants in a manner that, in addition to transgressing void-for-vagueness principles, violates the First Amendment overbreadth doctrine. See "The First Amendment Overbreadth Doctrine," 83 Harv.L.Rev. 844 (1970). It should therefore be unsurprising that the FEC Brief filed with this Court continues this unfortunate pattern.

At page 42 of its brief, the FEC examines the instant TRIM Bulletin and identifies five characteristics that leads the Commission to conclude that the TRIM Bulletin constitutes

"express advocacy of the election or defeat of a candidate." According to the Commission, the Bulletin (1) "discuss[es] the issue [s]..."; (2) "make[s] clear TRIM's position on the issue[s]"; (3) "identif [ies] federal candidates"; (4) "interprets their position on the issue[s]"; and (5) urge[s] the voter to vote with TRIM." (FEC Brief at 42).

Indeed a careful examination of the TRIM Bulletin, (See CLITRIM Appendix at A22-A25) at issue here, will reveal that two of the characteristics which the FEC apparently identifies as pointing to "express advocacy" simply do not appear anywhere in the TRIM Bulletin. The Bulletin does not identify Congressman Ambro or anyone else as a federal candidate. And the Bulletin does not urge the voter to vote for anyone. The Commission has simply invented these characteristics that it ascribes to the TRIM Bulletin.

The FEC is correct, however, with respect to three characteristics that can be attributed to the TRIM Bulletin. The Bulletin does discuss issues. It does make clear TRIM's position on the issues. And it does interpret Congressman Ambro's position on the issues. But with regard to these characteristics, the TRIM voting index is no different from the voting charts prepared by the ACLU or the Chamber of Commerce, or Public Citizen or the United Church of Christ or any number of other issue-oriented educational organizations. As Judge Pratt found,

> the publication and dissemination of Congressional Voting Records by the United Church of Christ by Public Citizen, by the NYCLU, by the ACLU and by the Chamber of Commerce are similar to the

> leafletting activity undertaken by CLITRIM, which is the subject of this action, in the following respects: All such activity represents traditional non-partisan speech where no express advocacy of particular electoral candidates is undertaken. Moreover, such expression constitutes a longstanding form of public [discourse] in this country which substantially advances the exchange of ideas about social and political issues. Such expression would be significantly impeded and deterred if the Federal Election Campaign Act were held to impose regulatory restrictions upon such activity.
> TRIM Appendix at 178.

In order to avoid an obvious overbreadth problem, the FEC attempts to dispute Judge Pratt's findings and it continues to try to distinguish these other issue-oriented groups from CLITRIM. The FEC argues "the CLITRIM/National TRIM bulletins are not merely information or educational compilations of congressional voting records. The bulletins not only record congressional votes but they also evaluate the members of Congress. . ." (FEC Br. at 43.) In this regard, as well, FEC's purported distinction is simply nonsense. For all of the organizations whose voting records were introduced in evidence "evaluate the members of Congress" with respect to the issues that are of concern to each of the organizations.

It is thus the case that the FEC cannot distinguish the issue-oriented activity of CLITRIM from similar activity undertaken by numerous other organizations. And if the Commission's interpretation of the FECA were given currency, the statute would extend to all of these organizations. Indeed, at trial, the defendants introduced extensive evidence pertaining to the issue-oriented activities of such organization for three purposes: First, to dramatize the fact that the

FEC has not been able to fashion any interpretative distinctions that would limit the reach of the FECA to CLITRIM and not have it apply to the ACLU or the United Church of Chirst or Public Citizen or any number of other groups; secondly, to demonstrate the importance of such issue-oriented activity to public education and debate in this country; and thirdly, to show the drastic curtailment of such vital activity that would ensue were such forms of communication to be regulated by the FEC. In these respects, the instant record, rather than being "bare," as suggested by the FEC at p. 45 of its Brief, extensively sets forth the chilling consequences of the FEC's attempted regulation. Ira Glasser, Executive Director of the ACLU, identified one aspect of those consequences, thusly: "I thought if they [the FEC] could do it to TRIM, they could do it to me, since I looked at the TRIM newsletter, and in form, if not in substance, it was exactly the same as [what] we do, and I was at first puzzled, because it seemed to be inconsistent with what I thought the settled law was. But [the FEC action in this case] certainly has me worried and has had me worried ever since."

Finally, the FEC attempts to minimize the nature of its regulation of defendants' leafletting activity. The FEC assures us it is not enjoinging speech and that all it is trying to do is impose disclosure requirements upon the defendants. This, the FEC asserts, does no violence to the First Amendment freedoms of defendants because the statutory provisions that are invoked "in no sense can be considered a prior restraint on first amendment activity since they merely state the requirements for compliance with FECA and provide penalties for non-compliance."

(FEC Br. at 26). This claim is explicitly refuted by the recent Supreme Court decision in Smith v. Daily Mail Publishing Co. _____ U.S. _____, 61 L.Ed.2d. 399, 404 which points out that "First Amendment protection reaches beyond prior restraints" and that "even when a state attempts to punish publication after the event it must. . .demonstrate" that such punishment was necessary to advance "the highest form of state interest." But perhaps more significantly, the FEC position, in this regard, ignores Justice Harlan's sage counsel in NAACP v. Alabama 357 U.S. 449, 461-462 (1958):

> "In the domain of these indispensible liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.... The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment." [citations omitted].
>
> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."

The overreaching excesses of the plaintiff Commission have now placed the responsibility upon this Court to protect the vital relationship and indispensible liberties of speech and political association, identified above by Justice Harlan.

## CONCLUSION

For these reasons, as well as for the reasons recited in defendants' earlier brief, this Court should hold that the TRIM Bulletin does not fall within the relevant FECA provisions governing communications "expressly advocating" an electoral outcome. If necessary, the Court should hold 2 U.S.C. §§434(e) and 441d unconstitutional. In either event, the Court should remand the matter to the District Court with instructions to dismiss the complaint.

Respectfully submitted,

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