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identified candidates, thus preventing, for example, a one-quarter page advertisement in a major metropolitan newspaper. n28 The Court found that the governmental interest in preventing corruption and the appearance of corruption was inadequate to justify the ceiling on independent expenditures, for two reasons. n29 First, the "exacting interpretation" needed to avoid unconstitutional vagueness would render the ceiling ineffective. n30 Second, there was little danger genuinely independent expenditures (those absent prearrangement and coordination) would be made as a quid pro quo for the candidate's "improper commitments." n31 The ceiling therefore served no "substantial government interest" but heavily burdened core First Amendment expression. n32 The Court also rejected, as insufficiently compelling, other rationales for campaign finance reform, including "leveling the playing field." n33

n27 See *Buckley, 424 U.S. at 19-20, 39, 58-59.*

n28 See *id. at 40.*

n29 See *id. at 45-47.*

n30 *Id. at 45.*

n31 *Id. at 47.*

n32 *Id. at 47-48.*

n33 *Id. at 48-51.* The Court stated:

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."
>
> *Id. at 48-49* (quoting *New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)* (citations omitted)).

The Court also rejected expenditure limits on campaigns for federal office, noting that the Act's contribution limits and disclosure provisions would serve to alleviate the "major evil" associated with rapidly increasing expenditures -- "the danger of candidate dependence on large contributions." *424 U.S. at 55.*

**[**16]**

But the Court reasoned that contribution limitations, in contrast, primarily implicate associational rights. n34 The Court explained that

> a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. ... The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. n35

n34 See *id. at 24-25.*

n35 *Id. at 20-21.*

The Court held that while the interest in preventing corruption and the appearance of corruption is not compelling enough to limit speech directly by limiting expenditures, it is a sufficiently compelling interest to justify contribution restrictions. n36 The Court noted the absence of any indication the contribution limits "would have any dramatic adverse effect" on the funding of campaigns **[**17]** and political associations:

> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings **[*605]** is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression. n37

The Court then discussed the primary purpose of the 1974 amendments: "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." **[**18]** n38

It is unnecessary to look beyond the Act's primary purpose -- to limit the actuality and appearance of

corruption resulting from large individual financial contributions -- in order to find a constitutionally sufficient justification for the $ 1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. ...

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. [**19]

... Here ... Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." n39

n36 See *id. at 25-29.*

n37 *Id. at 21-22* (footnote omitted).

n38 *Id. at 25.*

n39 *Id. at 26-27* (quoting *CSC v. Letter Carriers, 413 U.S. 548, 565, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973)).*

The Court also rejected contentions that other less restrictive means -- bribery laws and disclosure requirements -- existed. n40 "Congress was surely entitled," the Court said, to view contribution ceilings as "a necessary legislative concomitant" for dealing with even disclosed contributions. n41

n40 See *424 U.S. at 28-29.*

n41 *Id. at 28.*

The Court concluded that the $ 1,000 contribution ceiling was valid, [**20] and noted: "Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." n42 The Court similarly rejected challenges to a $ 5,000 limitation on political committees' contributions, a limitation on volunteers' incidental expenses, and a $ 25,000 annual limitation on individuals' total contributions. n43

n42 *Id. at 28-29.*

n43 See *id. at 35-38.*

The Buckley Court set out three potential outer limits on contribution restrictions. First, it noted that "given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." n44 Restrictions preventing "effective advocacy" would [**21] directly impact speech, and therefore would be invalid. Second, the Court warned that at some level contribution limits would become so low that "distinctions in degree" between limits would become "differences in kind." n45 [*606] Third, it approved the limits intended to prevent corruption through "large" contributions, but warned that a statute barring contributions that were not "large" would be presumptively overbroad and thus invalid. n46

n44 *Buckley, 424 U.S. at 21.*

n45 *Id. at 30.*

n46 *Id. at 28-29.*

2. After Buckley

Since deciding Buckley, the Court has fleshed out its implications. The Court has invalidated some restrictions, finding no danger of corruption in independent expenditures by political action committees (PACs) n47 or political parties, n48 or in individual contributions relating to initiative campaigns, where there is no danger of an improper quid pro quo. n49 The Court has upheld restrictions on indirect contributions to candidates, such as contributions to PACs. [**22] n50 It has also rejected speech-restrictive campaign reforms whose only purpose was to lower the cost of elections. n51

n47 See *National Conservative Political Action Comm., 470 U.S. at 497-98.*

n48 See *Colorado Republican, 518 U.S. at 618-19.*

n49 See *Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298-300, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981).*

n50 See *California Med. Ass'n, 453 U.S. at 197-99.*

n51 See, e.g., *Colorado Republican, 518 U.S. at 618* (striking down limit on independent political party expenditures).

Its decisions have closely examined campaign restrictions on various organizations. Long before Buckley, federal law had prohibited contributions and expenditures by corporations and labor organizations. n52 Post-Buckley decisions narrowed the permissibility of such restrictions. In 1978 the Court reaffirmed the corporate right to speak and invalidated restrictions on corporate expenditures relating to ballot initiatives. n53 It reasoned that corporate speech, like **[**23]** individual speech, "furthers the societal interest in the 'free flow of commercial information.'" n54

n52 See *MCFL, 479 U.S. at 246-47;* see also Taft-Hartley Act, ch. 120, § 304, 61 Stat. 136, 159 (1947).

n53 See *First Nat'l Bank v. Bellotti, 435 U.S. 765, 784, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978).*

n54 *Id. at 783* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764, 48 L. Ed 2d 346, 96 S. Ct. 1817 (1976)).* The Court also found no danger of corruption in a ballot initiative campaign, where no corruptible candidate existed. See *id. at 790.*

In 1986, in Federal Election Comm'n v. Massachusetts Citizens for Life (MCFL), the Supreme Court declared that some nonbusiness, political corporations are protected from campaign finance limitations. n55 Because the corporation involved there, Massachusetts Citizens for Life (MCFL), had been formed to promote political ideas, had no shareholders, and was independent from the influence of business corporations, the Court reasoned that MCFL's political **[**24]** expenditures did not pose the same dangers as those of a typical corporation. n56

n55 See *MCFL, 479 U.S. at 263-64.*

n56 See id.

In 1990, in Austin v. Michigan Chamber of Commerce, the Supreme Court upheld the application of a state corporate campaign expenditure ban to a nonprofit corporation. n57 Its rationale -- that corporations' "unique state-conferred corporate structure that facilitates the amassing of large treasuries" poses a danger of corruption -- announced a second model for potential political corruption which justifies regulation of political speech. n58 Austin preserved, however, the exception for nonbusiness, political corporations that meet the three criteria announced in MCFL. n59

n57 See *Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990).*

n58 Id.

n59 See *id. at 661-65.*

**[**25]**

These cases leave us with a jurisprudence based on the threat of corruption and the appearance of corruption, and dependent on case-specific analysis. Speech relating **[*607]** to ballot initiatives (where quid pro quo corruption is not a significant danger) is entirely protected. n60 In campaigns for political office, individual speech is protected to the extent it is independent and poses no danger of quid pro quo arrangements; contributions and coordinated expenditures are subject to regulation. Corporations that meet special nonbusiness criteria (as per MCFL) pose no danger of corruption, and have rights similar to those of individuals. But corporations that do not meet those criteria are -- given the threat of corruption their state-created advantages pose -- completely subject to regulation.

n60 See *Citizens Against Rent Control, 454 U.S. at 298-300; Bellotti, 435 U.S. at 790.*

We should note here that AKCLU would have us apply a strict "real harm" standard, over and above the "compelling interest-narrowly **[**26]** tailored" standard. AKCLU argues that "the Supreme Court -- and all other courts -- require a threshold showing that a proposed

restriction on First Amendment rights is justified by evidence of 'real harm' of a constitutionally cognizable interest ...."

The Supreme Court articulated this threshold test in Turner Broadcasting System, Inc. v. FCC:

When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. n61

n61 *Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)* (quoting *Quincy Cable TV v. FCC, 248 U.S. App. D.C. 1, 768 F.2d 1434, 1455 (D.C. Cir. 1985))*.

But the Court tempered that statement:

We agree that courts must accord substantial deference to the predictive judgments of Congress. [**27] Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. ... That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. n62

This standard of review, said the Court,

is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence .... "When trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures." n63

n62 *512 U.S. at 666* (citations omitted).

n63 Id. (quoting *Century Communications Corp. v. FCC, 266 U.S. App. D.C. 228, 835 F.2d 292, 304 (D.C. Cir. 1987))*.

We believe the real harm test does not require exhaustive proof of corruption in this context, but merely, in [**28] the words of the Court, "empirical support or at least sound reasoning" in favor of the measures defended.

We turn now to those provisions of the Act specifically challenged by AKCLU.

C. Ban on Independent Expenditures by "Non-group" Entities; AS 15.13.135

The Act bans any entity from making independent expenditures n64 to support or oppose a candidate for state office unless the entity qualifies as a "group." n65 The definition [*608] of "group" in AS 15.13.135 effectively precludes business corporations, labor organizations, and other entities from making such expenditures. n66

n64 AS 15.13.400(7) defines an "independent expenditure" as:

an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate.

n65 AS 15.13.400(5)(B) defines "group" to mean "any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election." An "individual" is a "natural person." AS 15.13.400(8). [**29]

n66 AS 15.13.135(a) provides, in pertinent part: "Only an individual or group may make an independent expenditure supporting or opposing a candidate for election to public office ...."

AKCLU and Amicus Alaska State Chamber of Commerce argue that the Act as a whole, and in part through AS 15.13.135, unconstitutionally interferes with the political speech of corporations, labor unions, unincorporated organizations, the Chamber, and its members by banning or limiting their independent expenditures and campaign contributions. AKCLU claims that the State has not articulated a compelling interest and has offered no evidence of "real harm" justifying any restraint on speech, and that the State's evidence of corruption is little more than a discussion of the amounts corporations contributed before the Act became effective. It asserts that the State's desire to limit

corporations' disproportionate influence reflects the discredited "level playing field" motive. It argues that the independent expenditures ban cannot satisfy federal law because Alaska law does not permit alternative participation by [**30] business and labor entities. AKCLU notes, for example, that federal law allows corporations and other entities to make unlimited contributions to political parties to use in general party activities. n67 AKCLU also argues that Alaska law restricts non-group "issue advocacy."

n67 The Act, by contrast, bans such contributions. See AS 15.13.074(f).

The State, relying on Austin, argues that the expenditure prohibition is justified by the need to avoid the "disproportionate impact" non-group entities would have on the political process. Citing Austin n68 and Brookings Institution scholar Daniel Ortiz, n69 the State argues that while the Supreme Court has characterized the interest as one of preventing a form of corruption, "the interest is actually an interest in preventing the corporate voice from overwhelming individuals' voices, i.e., in leveling the playing field."

n68 See *Austin, 494 U.S. at 658-61.*

n69 See Daniel Ortiz, "The First Amendment at Work: Constitutional Restrictions on Campaign Finance Regulation," Campaign Finance Reform: A Sourcebook (1997).

[**31]

The State also argues that the expenditure prohibition is needed to prevent these entities from avoiding the contribution prohibition, contained in AS 15.13.074(f) and discussed below, that also applies to them. It argues that courts have upheld restraints on union and corporate expenditures in candidate elections, and it minimizes the impact of the ban by arguing that these entities still have ample alternatives for political expression. It responds to the overbreadth issue by arguing that APOC has prohibited independent expenditures for or against candidates by corporations or labor organizations using corporate or union treasury funds. n70 It argues that in cases involving issue-oriented nonprofit corporations, courts apply a narrow construction to avoid any constitutional defect.

n70 See Greg Granquist, APOC Advisory Opinion AO 97-09-CD (approved June 19, 1997).

Absent meaningful argument tracing the cumulative effect of the Act's limitations on independent expenditures and contributions of "non-group" [**32] entities, we cannot assess exactly how these restraints function together, and how they differ in actual, real-world effect from restrictions found in the Federal Election Campaign Act or the Michigan statutes discussed in Austin. Given the Supreme Court's distinction between independent expenditures and contributions, n71 we deal here with these provisions separately, and first address AS 15.13.135 because the First Amendment gives greater protection to independent expenditures.

n71 See *Buckley, 424 U.S. at 14-23.*

1. Corporations and labor unions

Our review of AS 15.13.135 requires us to return to Austin. Restraints on campaign expenditures by corporations and labor unions have long been part of federal law, and have long been upheld. In Austin, the Supreme [*609] Court upheld an independent expenditure ban as applied to a nonprofit corporation, the Michigan State Chamber of Commerce. n72 Because the Michigan statute permitted an alternative method for making expenditures, through "separate segregated [**33] funds," the Court held that the restriction was narrowly tailored. n73 It based its holding on "'the compelling governmental interest in preventing corruption [from] political war chests funneled through the corporate form.'" n74 The Court determined that the special "state-created advantages" of the corporate form allow corporations to amass large sums of money, potentially giving them "an unfair advantage in the political marketplace." n75

n72 See *Austin, 494 U.S. at 660.*

n73 *Id. at 660.*

n74 *Id. at 659* (quoting *National Conservative Political Action Comm., 470 U.S. 480, 500-01 (1985)).*

n75 Id. (quoting *MCFL, 479 U.S. at 257).*

The Court reiterated its explanation from MCFL that the political advantage of corporations is

unfair because "the resources in the treasury of a business corporation ... are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. [**34] The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." n76

The Michigan State Chamber argued that concern about corporate domination was insufficient to justify restricting independent expenditures. The Austin Court noted that in First National Bank v. Bellotti, it had recognized that a legislature might demonstrate a danger of real or apparent corruption posed by corporate expenditures made to influence candidate elections. n77 The Austin Court then noted that the danger of financial quid pro quo corruption is not the only possible justification for restricting independent expenditures:

Regardless of whether this danger of "financial quid pro quo" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political [**35] ideas. n78

The Court thus identified a second way in which the political process may be corrupted: through the disproportionate political influence corporate wealth can have because it bears no necessary relationship to the actual public support for the corporation's political views. This potential for distortion, rather than any actual or apparent danger of quid pro quo corruption, provided the threat that justified the Michigan statute in the Court's eyes. The Court has not retreated from its analysis in Austin.

n76 Id. (quoting *MCFL, 479 U.S. at 258).*

n77 See id. (citing *Bellotti, 435 U.S. at 788 n.26).*

n78 *494 U.S. at 659-60* (citations omitted) (quoting *National Conservative Political Action Comm., 470 U.S. at 497).*

Applying Austin, we must first determine whether a "compelling state interest" justifies any restriction on non-group entities' independent expenditures in campaigns for elected office.

The State introduced substantial evidence -- discussed in Part [**36] II -- generally relating to corruption and the appearance of corruption. Some of the State's evidence discussing both expenditures and contributions confirms the disproportionate influence of corporate and labor union participation recognized in Austin.

For example, Larry Makinson states in Open Secrets that the top fifty contributors (not including political parties) donated about a third of the dollars received by Alaska [*610] legislative candidates in the 1986 election. n79 These fifty consisted of twenty-one corporations, nine labor unions, eight PACs and trade associations, six law and lobbying firms, and six individuals. n80

n79 See Larry Makinson, Open Secrets 7 (1987).

n80 See id. at 9.

Former Alaska Governor Steve Cowper affied that under the old rules "contributions were bundled by corporations and unions from officers and employees associated with them so that greater amounts were given to candidates thereby increasing the amount given to a particular candidate and increasing the [**37] influence of the core contributor." He also stated that "these business entities are given a special ability to accumulate money for business purposes .... Because of the wealth of unions and corporations, they can obtain more influence over elected officials than the individuals who elect them."

An Alaska Public Interest Research Group (AKPIRG) report claimed to show that "business interests control over half of campaign contributions" to candidates. n81 This did not, the report said, consider "the fact that donations to political parties are largely dominated by business." n82

n81 Janet Campbell, The Best Politicians Money Can Buy 15 (1995).

n82 Id.

APOC data supported the disproportionate-influence theory by demonstrating that the vast majority of donations to the House Republican Majority Fund in

1996 was made by corporations, trade associations, or their PACs.

In 1989 four of the five APOC members supported bans on contributions by PACs, unions, and corporations. They explained their stance [**38] under the theory that "apart from political parties, only those who may vote should be entitled to contribute to candidates" to minimize the appearance of "special influence" by "special interests."

The State introduced the proposed campaign finance initiative and affidavits relating to the drive to place it on the ballot in 1996. As noted in Part II, the initiative contained a finding that "organized special interests are responsible for raising a significant portion of all campaign funds, and may thereby gain an undue influence over campaigns and elected officials, particularly incumbents." n83

n83 This perception of the dangers of undue influence is reinforced by a recent study of federal government written by Charles Lewis and the Center for Public Integrity. In The Buying of the Congress, Lewis discusses examples of areas in which members of Congress accepted large contributions and resisted compelling legislation that would have been costly to their contributors. See Charles Lewis, The Buying of the Congress 83-104 (food safety), 105-25 (tobacco), 142-65 (pharmaceuticals), 166-83 (occupational safety), 184-95 (aviation safety), 199-218 (health care), 253-66 (telecommunications), 285-302 (antitrust regulation) (1998).

[**39]

No evidence regarding business corporations seems necessary. We think the reasoning underlying Austin resolved that issue as a matter of law. And it is equally clear that labor organizations may be barred from making independent expenditures in candidate campaigns. n84 The Court considered and upheld the constitutionality of the segregation requirements as they applied to labor unions. n85 We therefore hold that the State has a compelling interest that justifies applying AS 15.13.135 to business corporations and labor unions.

n84 See *2 U.S.C. § 441b*(a) (1994); *MCFL, 479 U.S. at 247-48.*

n85 See *Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 210, 74 L. Ed. 2d 364, 103 S. Ct. 552 (1982).*

2. Other non-group entities

But the evidence discussed above and in Parts II and III.D of this opinion and the other evidence introduced in the superior court does not directly establish whether AS 15.13.135 permissibly may be applied to entities other than business corporations and labor unions.

The Supreme Court [**40] appears to have recognized that unions and corporations are not the only organizations potentially subject to treatment different from that accorded individuals. In Federal Election Comm'n v. National [*611] Right to Work Committee, the Court noted that "there is no reason why [the governmental interest in preventing actual corruption and the appearance of corruption of elected representatives] may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals." n86 In MCFL, the Court noted that corporations are "by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth." n87

n86 *Id. at 210-11* (emphasis added).

n87 See *MCFL, 479 U.S. at 258 n.11.*

Although AS 15.13.135 clearly includes organizations that are not business corporations or labor organizations, the parties have not meaningfully discussed the differences in the organizational forms of "non-group" entities. The [**41] Alaska statutes permit various forms of unincorporated organizations. n88 Some, such as limited partnerships, have many of the attributes of corporations. A general partnership or limited liability partnership has some of these attributes, if not perpetual life. These organizations, like corporations, can amass large treasuries from their business operations and the capital contributions of their investors. And controlling partners or general partners might vote to spend some of the business treasury to support or oppose state election candidates over the objections of minority or limited partners, who, like corporate shareholders, have a stake in the business but no effective voice.

n88 See, e.g., AS 10.50.010 (limited liability companies); AS 32.05.010 (partnerships); AS 32.11.010 (limited partnerships).

Some aspects of the corporate form are unique, as Austin seems to recognize. But we conclude that the corporate form is not determinative. Nor is size determinative, because the Court has declined to [**42] distinguish between widely-held and closely-held corporations. n89 Equally non-determinative is actual wealth, because the Court has reasoned that it is the potential for unfair influence that justifies regulation. n90 For instance, in MCFL the Court invalidated an independent expenditure ban as it applied to a small, nonprofit corporation that had purely political purposes. n91 The Court reasoned:

Regulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. n92

n89 See *Austin, 494 U.S. at 661; National Right to Work Comm., 459 U.S. at 199, 210-11* (a nonprofit corporation without capital stock).

n90 See *Austin, 494 U.S. at 661; National Right to Work Comm., 459 U.S. at 210* ("We accept Congress's judgment that it is the potential for such influence that demands regulation.").

n91 See *MCFL, 479 U.S. at 263.* [**43]

n92 *Id. at 259.*

We agree with AKCLU that AS 15.13.135 as written embraces "non-group" entities whose speech may not be permissibly restricted by an expenditure prohibition. n93 But we cannot fully resolve the extent of any statutory overbreadth in this appeal in context of particular organizational forms or specific entities on the basis of the arguments and record before us.

n93 It appears that APOC reads AS 15.13.135 in a manner consistent with MCFL, holding that the Republican Party of Alaska is not subject to the corporate prohibitions of AS 15.13.074(f) (prohibiting political contributions by corporations). The APOC has held that the Republican Party of Alaska, notwithstanding its corporate status, is a political party. See APOC Advisory Opinion AO 97-08b-CD (approved November 5, 1997).

We decline to strike down the statute on the theory the expenditure ban is overbroad as written. We choose instead to [**44] read the statute narrowly in order to prevent it from applying to "non-group" entities whose speech is constitutionally protected. n94 Entities which are neither labor unions nor [*612] corporations are subject to expenditure bans only to the extent they are within the class of organizations potentially able to amass great wealth through state-created advantages. n95 We therefore read AS 15.13.135 in accordance with the three conditions Austin discussed in describing the MCFL exception. Thus, entities must be exempted from AS 15.13.135's ban if (1) they cannot participate in business activities, (2) they have no shareholders who have a claim on corporate earnings, and (3) they are independent from the influence of business corporations. n96

n94 See *Bonjour v. Bonjour, 592 P.2d 1233, 1237 (Alaska 1979); Gottschalk v. State, 575 P.2d 289, 295 (Alaska 1978).*

n95 See *Austin, 494 U.S. at 659.*

n96 See *Federal Election Comm'n v. Survival Educ. Fund, 65 F.3d 285, 291 (2d Cir. 1995)* (citing *Austin, 494 U.S. at 662-64).*

[**45]

AkCLU asserts that exemptions may not be sufficient to avoid chilling speech because even entities that meet these criteria for exemption might be afraid to make expenditures for fear of prosecution. But we conclude that those criteria, approved by the Supreme Court, are sufficiently definite to provide meaningful guidance to would-be contributors. We also think it wise to resolve the ultimate boundaries of this statutory prohibition in the context of legal challenges asserting specific facts concerning particular organizations or types of organizations.

This narrowed construction of the prohibition leaves ample room for individuals involved in organizations to engage in political speech.

AkCLU argues, in essence, that this prohibition, in conjunction with other provisions -- such as AS 15.13.074(f) -- leaves affected entities with no avenues for political speech. It suggests that there is no opportunity for such entities to establish segregated funds, in comparison with the Michigan statute discussed in Austin. It claims that these restraints on independent expenditures and candidate contributions are far more restrictive than those imposed by federal law, which it notes permits [**46] corporations and other entities to

make unlimited contributions to a political party for use in general party activities. n97 The Alaska State Chamber of Commerce notes that the Michigan statute permitted corporations to form PACs.

n97 Federal law bars contributions or expenditures by corporations "in connection with" federal elections. See *2 U.S.C. § 441b*(a). This impliedly leaves room for corporations to give parties contributions not "in connection with" particular candidates or elections. Cf. *2 U.S.C. § 441b*(b)(2) (permitting nonpartisan registration and get-out-the-vote campaigns by corporations aimed at associated individuals).

But in our view, nothing prevents individual organizers of non-group entities from either forming a "group" to collect contributions and make expenditures, or soliciting individual contributions from other members without relying on treasury funds. Further, it appears that non-group entities may communicate their endorsements to their employees or members. n98 The State [**47] also contends that because organized entities meet the definition of "person" in AS 01.10.060(8), they may make contributions and expenditures for ballot propositions or questions even though they may not make them for or against candidates under AS 15.13.135 and AS 15.13.065.

n98 2 AAC 50.313(1)(4) provides that the following does not constitute a "contribution" under 2 AAC 50.310-.405:

a payment made by a business, corporation, trade association, labor organization, or other organization not organized primarily to influence elections to communicate directly with its members or employees, or their families, on any subject, if the communication is of the same format and nature used by the organization when it has communicated in the past on nonpolitical subjects, does not request members or their families to do anything other than exercise the right to vote, and does not solicit individual contributions to a clearly identified candidate or group chosen by the organization ....

See also J. Kohout, APOC Advisory Opinion AO 97-20-CD (approved June 24, 1998).

[**48]

We note too that the only remedy a dissident participant may have in such business entities, regardless of their size, when disagreeing with use of the entity's wealth for political speech, is potentially ruinous: withdrawal from the organization. In National Right to Work Committee, the Court upheld a statute barring contributions or expenditures by corporations, labor unions, and national [*613] banks in connection with federal elections, in part because it protected individuals who have paid money into the entity for purposes "other than the support of candidates from having that money used to support political candidates to whom they may be opposed." n99 In Austin, the Court noted that because members have a significant incentive to continue their financial support for the Michigan State Chamber whatever their opinion of its political agenda, disclosure will not ensure that the funds in the Chamber's treasury correspond to members' support for its ideas. n100

n99 *National Right to Work Committee, 459 U.S. at 208.* See also *2 U.S.C. § 441b; MCFL, 479 U.S. at 264* (discussing the importance of ensuring that persons connected with the organization "will have no economic disincentive for dissociating with it if they disagree with its political activity."). [**49]

n100 See *Austin, 494 U.S. at 663 n.2.*

Because the expenditure ban serves all these myriad purposes in a narrowly tailored fashion, we reverse the superior court's invalidation of AS 15.13.135.

D. Contribution Restrictions

1. Contribution bans

a. Bans on contributions by "non-group" entities; AS 15.13.074(f)

The Act prohibits a "corporation, company, partnership, firm, association, organization, business trust or surety, n101 [or] labor union" from contributing to a candidate or "group." n102

n101 The origin and purpose of the reference to "surety" is uncertain. A "surety" is "[a] person who is primarily liable for payment of debt or performance of obligation of another." Black's Law Dictionary 1441 (6th ed. 1990). It is not obvious how suretyship relates to campaign finance.

The State suggests that "surety" was inadvertently substituted for "society," a term

which appears in AS 01.10.060(8). Four statutes contain equivalent lists which include "society" but not "surety." See AS 01.10.060(8) (general list of statutory definitions); AS 16.43.990(5) (commercial fisheries); AS 30.13.900(5) (regional resource development authorities); AS 30.17.900(7) (Adak Reuse Authority).

Sutherland Statutory Construction states that "if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results," courts will ordinarily modify the statute to comport with legislative intent. Norman J. Singer, Sutherland Statutory Construction § 46.07 (5th ed. 1992). We agreed with that proposition when we held that "to construe statutes so as to avoid results glaringly absurd has long been a judicial function." *Sherman v. Holiday Constr. Co., 435 P.2d 16, 19 (1967)* (quoting *Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 332-33, 83 L. Ed. 195, 59 S. Ct. 191 (1938))*. But for purposes of the present appeal it is not necessary to decide whether AS 15.13.074(f) applies to a "surety" or a "society." **[**50]**

n102 AS 15.13.074(f) provides: "A corporation, company, partnership, firm, association, organization, business trust or surety, labor union, or publicly funded entity that does not satisfy the definition of group in AS 15.13.400 may not make a contribution to a candidate or group."

This outright ban on contributions directly implicates both political speech rights and associational rights of would-be contributors.

But, in light of the facts discussed in Part II and III.C, we hold that Alaska has a substantial governmental interest in campaign finance reform that justifies some restriction on First Amendment freedoms. We conclude that the considerations which justify the ban on independent expenditures by "non-group" entities (see Part III.C) also justify this contribution ban.

As we noted in Part III.C.2, the list of "non-group" entities subject to the ban is overbroad, and must be read in a manner consistent with the constitution. We again agree with the State's argument that such bans are potentially valid for reasons discussed in Austin: the "state-created advantages" of the corporate **[**51]** form create "an unfair advantage in the political marketplace." n103 Organizations that do not benefit from such advantages -- most clearly, entities like MCFL n104 -- are not subject to such restrictions. Entities which are neither labor unions nor corporations are subject to contribution bans only to the extent they are within the class of organizations **[*614]** potentially able to amass great wealth through state-created advantages. n105 We believe the permissible scope of these bans is best determined in context of fact- and class-specific litigation, n106 especially given the lack of briefing on the issue here. We therefore do not now attempt to list which types of entities the statute may permissibly affect. n107

n103 *Austin, 494 U.S. at 659* (citations omitted).

n104 See *MCFL, 479 U.S. at 259.*

n105 See supra Part III.C. See also *Survival Educ. Fund, 65 F.3d at 291.*

n106 See *Trustees for Alaska v. State, 736 P.2d 324, 329 (Alaska 1987)* ("standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has [brought] or is likely to bring suit"); see also *San Francisco Drydock, Inc. v. Dalton, 131 F.3d 776, 778 (9th Cir. 1997)* (noting that it is appellate court's "obligation to be sure that standing exists and to raise, sua sponte if need be, any deficiency"). **[**52]**

n107 AS 15.13.074(f) also bans contributions by a "publicly funded entity." This provision potentially implicates the "unconstitutional conditions" doctrine. But no party discusses the issue here or the seminal case, *Rust v. Sullivan, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991)*, in which the Supreme Court upheld a speech regulation as a valid condition on federal funding, and distinguished between a permissible withheld subsidy and an impermissible forced silence. See *id. at 194, 196.*

We therefore do not consider whether this section simply bans the use of government funds, or completely bans campaign-related political speech.

AkCLU and the Chamber both contend that the restrictions on contributions and expenditures by corporations and labor unions, considered together, are so extreme as to constitute bans on issue advocacy. We disagree. Alaska Statute 15.13.135 (under our restricted interpretation) bars corporations and corporation-like entities only from making "independent expenditure[s] supporting or opposing a candidate for election to public

office." Under this rule, if "explicit words of advocacy of [**53] election or defeat of a clearly identified candidate" n108 are required to show support or opposition, issue advocacy will not be affected by the Act. We therefore reject AkCLU's argument that Austin must be read narrowly and that the State has offered no evidence justifying the contribution ban.

n108 *Federal Election Comm'n v. Christian Action Network, 110 F.3d 1049, 1062 (4th Cir. 1997)* (quoting *Buckley, 424 U.S. at 80).*

We also reject the Chamber's assertion that the ban is overbroad because it includes organizations that are not wealthy. Because it is the potential for corruption or the appearance of corruption that justifies the restraint, the actual wealth of a given organization is irrelevant. It is enough that the entity operate in a form which has benefitted from "state-created advantages" that give it "an unfair advantage in the political marketplace." n109

N109 Austin, 494 U.S. at 659.

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b. Restrictions on contributions by nonresidents; AS 15.13.072(a), (e), (f)

Alaska Statute 15.13.072 prohibits a candidate, group, or political party from soliciting or accepting contributions from nonresident individuals except to the extent that all the contributions received from nonresidents do not exceed specified limits. n110 It also prohibits a candidate from soliciting or accepting any contributions from a group which is organized under the laws of another [*615] state, which is resident in another state, or whose participants are not Alaska residents when the contribution is made. n111 Consequently, nonresident individuals may make contributions to a candidate subject to the sliding limitations of AS 15.13.072(e) and to a group or political party subject to the ten-percent limitation of AS 15.13.072(f); nonresident groups may make no contributions at all. Nonresident individuals and groups may make unlimited independent expenditures.

n110 AS 15.13.072(a)(2) prohibits a candidate from soliciting or accepting a contribution from "an individual who is not a resident of the state at the time the contribution is made, except as provided in (e) of this section."

AS 15.13.072(e) permits a candidate to solicit and accept contributions from nonresident individuals if the amounts contributed by the nonresident individuals do not exceed: "(1) $ 20,000, if the candidate ... is seeking the office of governor or lieutenant governor; (2) $ 5,000, if the candidate ... is seeking the office of state senator; (3) $ 3,000, if the candidate ... is seeking the office of state representative or municipal or other office."

AS 15.13.072(f) applies a ten-percent limitation on contributions by nonresident individuals to groups or political parties:

A group or political party may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made, but the amounts accepted from individuals who are not residents may not exceed 10 percent of total contributions made to the group or political party during the calendar or group year in which the contributions are received.

[**55]

n111 AS 15.13.072(a)(3) prohibits a candidate from soliciting or accepting a contribution from "a group organized under the laws of another state, resident in another state, or whose participants are not residents of this state at the time the contribution is made."

These restrictions on the speech of nonresidents must meet the "narrowly tailored-compelling interest" test discussed in Part III.B. In justification, the State argues that these restrictions "prevent nonresidents from dominating the process," and that "by restricting the influence of nonresidents ... the reforms promote the valid state goal of encouraging voter participation in campaigns." The State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints.

Applicable to this issue is the general evidence of the influence of money and political system corruption and appearance of corruption. n112 In addition, two former Alaska governors submitted affidavits in which they affied that contributions [**56] from outside the state create serious loyalty problems. Former Governor Walter Hickel stated that "whenever a candidate has to seek donations from outside the state, the candidate is buying a potential conflict of interest." Former Governor Jay Hammond stated that

the necessity of having to raise substantial sums of money from non-Alaska resident contributors discourages many qualified Alaskans from becoming candidates. And it taints those who do. How can the average Alaska voter believe that a candidate who has accepted thousands of dollars from non-Alaska resident contributors who have pecuniary interests at stake in the votes the candidate will cast if he or she is elected is not obligated to the contributors as much as he or she is to the voters? And there is an unfortunate basis in fact for that perception. Once elected, it is all too easy for candidates to accommodate mores to money, particularly since non-Alaska resident contributors do not ask the candidates that their money has helped to elect to act unlawfully, and most issues of public importance are rarely black and white. It is amazing how a flash of green can help clarify an ambiguous policy choice.

n112 See Parts II, III.C.

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The State cites O'Callaghan v. State n113 and Vote Choice, Inc. v. DiStefano n114 in defense of the restrictions. But neither case certifies nonresident domination or enhanced voter participation as a compelling interest. O'Callaghan discusses a Wisconsin opinion holding that an interest in voter participation is compelling, but the United States Supreme Court reversed that ruling on other grounds. n115 Vote Choice portrays facilitated communication between the candidate and the electorate as only a "valid" interest. n116 The Supreme Court has never held that fear of nonresident domination or a goal of enhanced voter participation is a compelling state interest justifying restraints on campaign finance.

n113 *914 P.2d 1250 (Alaska 1996).*

n114 *4 F.3d 26 (1st Cir. 1993).*

n115 See *O'Callaghan v. State, 914 P.2d at 1257* (discussing *Wisconsin ex rel. LaFollette v. Democratic Party of United States, 93 Wis. 2d 473, 287 N.W.2d 519 (Wis. 1980)*, rev'd sub nom., *Democratic Party of United States v. Wisconsin, 450 U.S. 107, 67 L. Ed. 2d 82, 101 S. Ct. 1010 (1981)).*

n116 *Vote Choice, 4 F.3d at 39.*

[**58]

AkCLU argues that absent "some evidence showing the corruptive influence of non-resident contributions, there can be no legitimate reason to preclude them from participating in the election process." It claims that these restraints are merely intended to "level the playing field," an insufficient justification. Because the contribution limits applicable to [*616] residents also apply to nonresidents, n117 AkCLU contends that the State must show special corruption caused by out-of-state contributions in order to uphold additional restrictions on nonresidents. It cites evidence discussing contributions by out-of-state groups as minimal, but the sources cited use a far less expansive definition for nonresidence than the statute, making the evidence an unreliable barometer of the statute's impact.

n117 See AS 15.13.070.

AkCLU relies on VanNatta v. Keisling. n118 The Ninth Circuit, applying a "less-than-strict, rigorous scrutiny," there struck down an Oregon constitutional amendment that restricted out-of-district [**59] contributions made to state candidates. n119 The Ninth Circuit unanimously held that the amendment was not closely drawn to advance the goal of reducing corruption because it banned all out-of-district donations, regardless of size. n120 But Judge Brunetti also concluded in his dissenting opinion that "Oregon has a sufficiently important interest in protecting its republican form of government," n121 reasoning that

> if states have flexibility in determining who is a resident for voting purposes and in taking steps to make sure non-residents do not have access to some state services, it follows that states also have a strong interest in making sure that elections are decided by those who vote. The Supreme Court has come very close to saying as much in Shaw, Holt, and Austin. With the increasing importance of fundraising in elections generally, ... and in Oregon in particular, elections are for all intents and purposes are [sic] often decided well before any resident steps into a voting booth. n122

n118 *151 F.3d 1215 (9th Cir. 1998).*

n119 *Id. at 1220-21.*

n120 See *id. at 1221.* [**60]

n121 *Id. at 1222* (Brunetti, J., dissenting).

n122 *Id. at 1223* (Brunetti, J., dissenting).

Although Judge Brunetti's analysis is intriguing and we have recognized a similar theme in a different

context, n123 we need not consider it here, because we think VanNatta is distinguishable on its facts. Oregon's out-of-district restrictions applied to both nonresidents and residents of Oregon. n124 But Alaska's challenged provisions apply only to nonresidents of Alaska, and do not limit speech of those most likely to be directly affected by the outcome of a campaign for state office -- Alaska residents regardless of what district they live in. Also, Alaska is not contiguous to any other state, and the general state residence requirement does not have the same impact on nonresidents that Oregon's district-specific restrictions had.

n123 In *Robison v. Francis, 713 P.2d 259 (Alaska 1986),* we noted that each state has the obligation "to preserve the basic conception of a political community," that this includes the "power to prescribe the qualifications of its officers and the manner in which they shall be chosen," and that this power and responsibility "applies not only to the qualifications of voters, but also to [the qualifications of various elected and unelected officers]." *Id. at 270 n.14* (citing and quoting from *Sugarman v. Dougall, 413 U.S. 634, 647, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973)).* The state's power to preserve the political community by excluding nonresidents from voting is self-evident. Although we have not previously affirmed the authority of the state to limit the influence of nonresidents over state elections through regulation of their campaign contributions, such an extension would not be illogical. **[**61]**

n124 See *VanNatta, 151 F.3d at 1217.*

Further, we respectfully disagree with the VanNatta court's discussion of "largeness," even though Alaska's restrictions do not directly distinguish based on the size of the individual contributions. Alaska's restrictions attempt "to ensure the integrity of political structures and processes." n125 They are aimed not at very large individual contributions, by which a single contributor can influence a candidate, but at cumulatively vast out-of-state contributions. Austin recognized this sort of corrupting influence. n126 **[*617]** Further, the limits here are closely drawn to achieve the goal of preventing non-resident contributors from drowning out the voices of Alaska residents. Though the State introduced evidence of the extent of what it called "out of state" contributions in recent elections, we are uncertain of the value of the State's evidence. The Act's limitation on nonresident groups applies, as noted above, to groups whose participants are not Alaska residents at the time of the contribution. n127 No records of sufficient specificity have been **[**62]** kept to show how many groups this might affect. We therefore conclude the record contains no evidence relating to the potential impact of this provision.

n125 *Id. at 1225* (Brunetti, J., dissenting).

n126 See *Austin, 494 U.S. at 660-61.* AkCLU also cites *Whitmore v. Federal Election Comm'n, 68 F.3d 1212 (9th Cir. 1996),* which it describes as rejecting a California statute prohibiting out-of-state contributions. As Judge Brunetti in VanNatta concluded, "the Whitmore court did not intend to resolve the First Amendment rights of the contributors." *VanNatta, 151 F.3d at 1225* (Brunetti, J., dissenting).

n127 See AS 15.13.072(a)(3).

Alaska has a long history of both support from and exploitation by nonresident interests. Its beauty and resources have long been lightning rods for social, developmental, and environmental interests. More than 100 years of experience, stemming from days when Alaska was only a district and later a territory without an elected governor or voting representation **[**63]** in Congress, have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska and its internal policies for dealing with social or resource issues. Outside influence plays a legitimate part in Alaska politics, but it is not one that Alaskans embrace without reservation. The Act's restraints on nonresident contributions attempt to limit this influence, and attempt to prevent elected officials from becoming beholden to those influences. Through mass marketing and solicitations, organizations can marshal vast numbers of contributions by individuals. These nonresident contributions may be individually modest, but can cumulatively overwhelm Alaskans' political contributions. Without restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by elections, Alaska residents. These restraints therefore limit the "potential for distortion." We hold that this is a sufficiently compelling state interest. n128 Any question whether the dollar and percentage **[**64]** limits are unduly low turns on a "difference in kind" analysis, and we do not read the record to indicate that these limits in fact impinge on nonresidents' speech or associational rights.

n128 See *Austin, 494 U.S. at 661.*

AkCLU also objects to the "tracing rule" of AS 15.13.072(f), which states that contributions from "individuals who are not residents may not exceed 10 percent of total contributions" made to groups or political parties in a given year. AkCLU also asks that reporting requirements imposed on "non-resident" groups be invalidated for overbreadth. Because AkCLU's brief has devoted only five lines to these arguments, we decline to consider their merits. These provisions are not so obviously invalid that we will invalidate them based on the limited briefing before us.

c. Ban on registered lobbyists' out-of-district contributions; AS 15.13.074(g)

Alaska Statute 15.13.074(g) prohibits a registered lobbyist from contributing to legislative candidates in districts outside the district in which [**65] the lobbyist is eligible to vote. n129

n129 AS 15.13.074(g) reads:

> An individual required to register as a lobbyist under AS 24.45 may not make a contribution to a candidate for the legislature at any time the individual is subject to the registration requirement under AS 24.45 and for one year after the date of the individual's initial registration or its renewal. However, the individual may make a contribution under this section to a candidate for the legislature in a district in which the individual is eligible to vote or will be eligible to vote on the date of the election. An individual who is subject to the restrictions of this subsection shall report to the commission, on a form provided by the commission, each contribution made while required to register as a lobbyist under AS 24.45. This subsection does not apply to a representational lobbyist as defined in regulations of the commission.

AS 24.45.041 requires lobbyists to register before engaging in lobbying. AS 24.45.171(8) defines "lobbyist" to mean:

> (A) a person who is employed and receives pa ments, or who contracts for economic consideration, including reimbursement for reasonable travel and living expenses, to communicate directly or through the person's agents with any public official for the purpose of influencing legislative or administrative action if a substantial or regular portion of the activities for which the person receives consideration is for the purpose of influencing legislative or administrative action; or
>
> (B) a person who represents oneself as engaging in the influencing of legislative or administrative action as a business, occupation, or profession.

AS 24.45.161(a) exempts the following from registration:

> (1) an individual
>
> (A) who lobbies without payment of compensation or other consideration and makes no disbursement or expenditure for or on behalf of a public official to influence legislative or administrative action other than to pay the individual's reasonable personal travel and living expenses; and
>
> (B) who limits lobbying activities to appearances before public sessions of the legislature, or its committees or subcommittees, or to public hearings or other public proceedings of state agencies;
>
> (2) an elected or appointed state or municipal public officer or an employee of the state or a municipality acting in an official capacity or within the scope of employment;
>
> (3) any newspaper or other periodical of general circulation, book publisher, radio or television station (including an individual who owns, publishes, or is employed by that newspaper or periodical, radio or television station) that publishes news items, editorials, or other comments, or paid advertisements, that directly or indirectly urge legislative or administrative action if the newspaper, periodical, book publisher, radio or television station, or individual engages in no further or other activities in connection with urging or advocating legislative or administrative action other than to appear before public sessions of the legislature, or its committees or subcommittees, or public hearings or other public proceedings of state agencies;
>
> (4) a person who appears before the legislature or either house, or standing, special, or interim committee, in response to an invitation issued under (c) of this section.

[**66]

[*618] The State contends that AS 15.13.074(g) reduces corruption and the appearance of corruption, and argues that lobbyists are like other persons whose contributions create "special risks" of actual or apparent corruption. It asserts that "greater risks of corruption attend lobbyists' special relationship with elected officials."

AKCLU counters that the State has not demonstrated what real harm is alleviated by the restriction and that the $ 500 individual contribution limit already prevents "large" contributions that could corrupt. It claims the ban violates free speech. (The heading in AKCLU's brief also asserts that this ban violates lobbyists' rights to equal protection but because AKCLU has not briefed this contention, we do not reach it.)

The State introduced evidence, through affidavits and a survey commissioned by the state senate, of perceptions of the role lobbyists play in political fund-raising. According to the survey, fifty percent of registered lobbyists believe fund-raising pressure by special interests is a "serious problem," because monied interests get special access to and influence over legislators.

Eighty-seven percent of lobbyists said that the refusal to make [**67] campaign contributions sometimes adversely affects lobbying. Thirty-seven percent said that this happens frequently and that lobbyists often give contributions "defensively to ward off negative reactions and the loss of access."

The State submitted an Anchorage Daily News (ADN) article, attached to the Frank affidavit, about one lobbyist's settlement of campaign finance law violations. Frank's affidavit also attached another article from an unspecified national journal comparing lobbyist contributions to bribery of judges.

David Finkelstein affied that lobbyists serve as conduits for the clients they serve. He stated that "the clear message" lobbyists gave him as a legislator was that "I was expected to give them special consideration." He recalled that large contributors had an effect on some of his early votes.

The State also discussed APOC records that imply that substantial risks of actual or perceived corruption attend lobbyists' special relationship with elected officials. The records concerned questionable financial relations between legislators and lobbyists, including informal loan arrangements and unreported lobbyist payment of air travel costs.

This evidence supports [**68] the State's assertion that lobbyists' contributions are "especially susceptible creating an appearance of corruption." The State argues.

When in session, Alaska's legislature is geographically isolated from the state's [*619] core population. Lobbyists are, by definition, paid to influence administrative or legislative action. AS 24.45.171(8). Their professional purpose, coupled with their proximity to legislators during the legislative session, makes them particularly susceptible to the perception that they are buying access when they make contributions.

Based on this evidence we conclude that the State had a compelling interest justifying some restraint on speech.

The next question is whether the challenged ban is narrowly tailored to serve the purpose of preventing actual or perceived corruption. Unlike most individuals, who are unlikely to have any incentive to contribute to many of the candidates for the fifty legislative seats at issue each general election, n130 a lobbyist has some incentive to contribute to candidates whose election will place them in a position to introduce or thwart legislation and to vote in committee or on the floor on matters of professional [**69] interest to the lobbyist.

n130 Alaska Const. art. II, § § 1, 3.

The cumulative effect of numerous $ 500 contributions by a single lobbyist is substantial. By virtue of the lobbyist's special role in the legislative system, his or her broad distribution of campaign money creates a very real perception of influence-buying. The diffusion of cash is all the more dangerous because it has the potential to achieve influence with a significant portion of sitting legislators. For example, in the 1990 election cycle, fifty-one lobbyists made 485 contributions averaging $ 433 each, for a total of $ 210,047. Seventy-six candidates received these contributions. Perhaps other alternatives would have been effective in carrying out the State's purpose, but the out-of-district ban draws a logical compromise between lobbyists' private rights and their professional obligations.

We also conclude that the restraint does not foreclose lobbyists from engaging in political speech. As the State notes, lobbyists retain other contribution [**70] avenues. For example, "[they] may also participate in and contribute to 'groups' -- including political parties -- which may contribute to any legislative candidate." And they may make independent expenditures for any legislative candidate.

Other courts have imposed campaign speech restrictions on individuals based on their professions. The Vermont Supreme Court, for example, upheld a lobbyist speech restriction four years ago in Kimbell v. Hooper. n131 There the court rejected a challenge to a Vermont statute that prohibited contributions by registered lobbyists to legislators while the legislature is in session. n132 The court concluded that "the legislature has chosen a narrowly drawn measure to avoid a serious appearance of impropriety, and we see no reason to strike that measure down." n133 In our view, lobbyists are similar to those professionals whose contribution rights have been permissibly restricted by federal and state law, because their contributions create special risks of actual or apparent corruption. n134

n131 *164 Vt. 80, 665 A.2d 44 (Vt. 1995).*

n132 See id. at 46 n.2, 51. [**71]

n133 Id. at 51.

n134 See *Blount v. Securities & Exchange Comm'n, 314 U.S. App. D.C. 52, 61 F.3d 938, 941-48 (D.C. Cir. 1995)* (upholding regulation restricting ability of municipal securities professionals to contribute to or solicit contributions for political campaigns of elected officials from whom they may obtain business); *Schiller Park Colonial Inn, Inc. v. Berz, 63 Ill. 2d 499, 349 N.E.2d 61, 66-69 (Ill. 1976)* (upholding ban on contributions from liquor licensees); *Soto v. New Jersey, 236 N.J. Super. 303, 565 A.2d 1088, 1105-06 (N.J. Super. App. Div. 1989)* (upholding ban on campaign contributions by key casino employees). We decline to follow *Fair Political Practices Comm'n v. Superior Ct. of L.A. County, 25 Cal. 3d 33, 599 P.2d 46, 51-53, 157 Cal. Rptr. 855 (Cal. 1979)*, which struck down bans on lobbyists' contributions. The law in Fair Political Practices Commission banned all contributions by lobbyists, and was therefore not narrowly tailored. See id. Here, by contrast, lobbyists may still participate in the campaign process by contributing to candidates from their own districts. See AS 15.13.074(g).

While the State may not "burden substantially [**72] more speech than is necessary to further the government's legitimate interests," n135 [*620] we conclude that the ban on out-of-district lobbyist contributions is narrowly tailored to further the State's compelling interest. We therefore uphold the ban on out-of-district contributions by lobbyists.

n135 See *California Prolife Council v. Scully, 989 F. Supp. 1282, 1296 (E.D. Cal. 1998)* (quoting *Ward v. Rock Against Racism, 491 U.S. 781, 799, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)).*

2. Contribution limits

The Supreme Court has encapsulated the problem of judging contribution limits: "'if it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $ 2,000 ceiling might not serve as well as a $ 1,000.' Such distinctions in degree become significant only when they can be said to amount to differences in kind." n136 Another court observed that "every jurisdiction is sui generis, and thus every campaign contribution limitation must be judged on its own circumstances." n137

n136 *Buckley, 424 U.S. at 30* (emphasis added) (quoting *Buckley v. Valeo, 171 U.S. App. D.C. 172, 519 F.2d 821, 842 (D.C. Cir. 1975)).* [**73]

n137 *California Prolife Council, 989 F. Supp. at 1298.*

In addition to the evidence discussed in Parts II and III.C, the State submitted evidence directly relating to the influence of large contributions.

According to the Josephson Report survey, only eight percent of lobbyists said no legislator can be influenced by campaign contributions to take or withhold some significant legislative action. Forty-seven percent said at least a quarter of the legislature could be so influenced.

Michael Frank attached to his affidavit copies of newspaper articles and columns to support his contention that people are generally "fed up" with the corruption of the system as it currently stands. These include: (1) an ADN editorial pointing out the conflicts of interest on a tax issue faced by legislators who received money from the oil industry. "It's absurd to believe that any legislator can receive thousands of dollars from mighty contributors and remain totally unaffected by it," the editorial argues; (2) an ADN article about the proposed initiative, quoting lobbyist Jerry Reinwand as saying "I can't imagine [**74] anything more distasteful than the system we have now." The article also quotes AKPIRG director Stephen Conn as criticizing the system for

making politicians beholden to large contributors, and as saying "the game seems rigged right from the beginning"; (3) an ADN editorial column by Howard Weaver articulating the view that "as the price of politics gets higher, politicians are necessarily forced to pay more attention to those who can give them money"; (4) an ADN editorial criticizing a state senator who had dismissed the public concern that contributions taint state politics as "a great paranoid myth." The editorial mocked the senator's statement as patently false; (5) an ADN column by Mike Doogan implying that Governor Tony Knowles's stance on some issues is governed by the fact that British Petroleum was a large contributor to Knowles's political party, the Democratic Party; and (6) an ADN article quoting David Finkelstein as saying, "It's obvious that much of what goes on is buying influence, not influencing elections."

Some of the evidence implies that campaign contributions actually corrupt. Larry Makinson's Open Secrets strongly implies that an immense infusion of oil money [**75] into the Republican Party in 1986 brought about the demise of a North Slope tax proposal that would have cost oil companies $ 100 million. n138

n138 See Larry Makinson, Open Secrets 20 (1987).

An AKPIRG report postulated in 1995 that candidates considered election funding when passing bills that exempted cruise lines from gambling and alcohol taxes, exempted price-setting commercial fishermen from antitrust laws, repealed seafood processing quality assurance plans, reduced oil royalties payable to the state, and "slashed funding for consumer protection and antitrust cases." n139 The report author asserted that "only the most naive would miss the connection between [*621] large contributions and protection of interests." n140

n139 Alaska Public Interest Research Group, The Best Politicians Money Can Buy 9 (1995).

n140 Id.

[**76]

Former Alaska Governor Steve Cowper affied that he believes the current state of campaign finance breeds "cynicism and distrust." "There is very little practical difference," Cowper affied, "between a large campaign contribution and a bribe." He further stated that the public "generally understands that campaign contributions are an important factor taken into consideration by elected officials in every vote taken or decision made."

Former Alaska Governor Jay Hammond described an unusual position he faced in his first senate term. Having accepted money from oil interests, he felt compelled to vote against them just to show he had not been bought. He ultimately voted against "Big Oil," and "although I like to think that I cast those votes based on the merits of each bill," he said, "to this day I am not sure of my true motivation."

David Finkelstein affied that while he resisted the influence of big contributors on major bills, "I do recall that large contributors had an effect on my vote" on some minor bills.

Charles Wohlforth, a member of the Anchorage Municipal Assembly, affied that

... I have at times found it impossible to dissect my own motives in voting on complex issues [**77] with conflicting and incomplete information and faced by advocacy from important contributors to my campaigns. Despite my best efforts and particular concern about campaign finance reform I cannot with complete confidence say I have never been influenced by campaign contributions.

... I have developed the belief and the working assumption that campaign contributions received and the prospect of receiving future contributions often affects the outcome of Assembly votes.

We conclude that the State's evidence demonstrated that there is a legitimate concern about corruption or the appearance of corruption, and the potential for resulting erosion of public confidence in the electoral process. This evidence established the existence of a compelling governmental interest justifying some restrictions on local and state election campaign contributions. The question is whether the contribution limits adopted in SB 191 are narrowly tailored or whether they unconstitutionally prevent "effective advocacy" n141 or represent "differences in kind." n142

n141 *Buckley, 424 U.S. at 21.*

n142 *Id. at 30.*

[**78]

a. Limits on individuals' contributions; AS 15.13.070(b)

Individuals are prohibited by AS 15.13.070(b) from contributing more than $ 500 per year to a candidate or

to a "group" that is not a political party, and from contributing more than $ 5,000 per year to a political party. n143 Prior to 1996, Alaska's individual contribution limit was $ 1,000 per year. n144

n143 Following repeal and re-enactment of AS 15.13.070 by ch. 48 § 10, SLA 1996, AS 15.13.070(b) provides: "An individual may contribute not more than (1) $ 500 per year to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party; (2) $ 5,000 per year to a political party."

n144 See former AS 15.13.070 (1995).

The State defends these limits as necessary to "avoid the risks of corruption and its appearance that large contributions create, without interfering with the expressive and associational aspects of contributing." The State acknowledges that to be held valid, the limits [**79] cannot undermine "robust and effective" public debate and must withstand strict scrutiny.

The State argues that federal law requires that each jurisdiction's restrictions be judged based on the applicable context. n145 The State contends that deference to legislative determinations is the general practice in such cases. It relies on documents it filed in the superior court as proof that the total amount [*622] contributed to candidates under the reforms has not declined from pre-reform totals. The State would justify the limits on contributions to groups and political parties as preventing backdoor evasion of the candidate contribution limits.

n145 See *California Prolife Council, 989 F. Supp. at 1298.*

AKCLU, on the other hand, argues that the $ 500 limit per candidate is too sweeping, and insufficiently justified. It argues that the initial limits authorized in Buckley were intended to prevent "the problem of large campaign contributions -- the narrow aspect of political association where the actuality and [**80] potential for corruption had been identified." n146 Not only are these limits lower than needed to prevent corruption, AKCLU contends, but the State has failed to demonstrate "real harm" caused by contributions in the $ 500 to $ 1,000 range, given that the pre-reform limit was $ 1,000.

n146 *Buckley, 424 U.S. at 28.*

AKCLU contends that the restriction merits no deference to the legislature, given the high cost of elections in Alaska, and the fact that, after adjustment for inflation, the Alaska limit is only eight percent of the limit approved in Buckley in 1976. According to AKCLU, the restriction is an impermissible "difference in kind."

AKCLU also argues that the State's restrictions on contributions to political parties are unnecessary and not narrowly tailored. AKCLU contends that the State offers no evidence of backdoor violations of the current limit, and that existing law, by prohibiting laundering, already closes such loopholes.

In support of its cross-summary judgment motion, the State introduced [**81] evidence to show that the reforms would not impede the ability of candidates to run successful campaigns.

Robert Stern, of the Center for Governmental Studies, examined past contributions and made predictions about the effects of reform. He predicted that contributions would drop, but not so much as to place a "substantial burden" on candidates. He determined that house candidates would need only ninety-four contributions of $ 500 to reach the median total successful candidates raised for the 1990-96 elections. Following Stern's statistics, senate candidates would require only 185 contributions of $ 500 each to reach the median total successful candidates raised for the 1990-96 elections. Likewise, candidates for governor would need only 2,448 contributions of $ 500 to reach the median total successful candidates reached during the 1990-94 elections. Stern predicted that the off-year ban would impact incumbents more than challengers. And he predicted that the ban on inter-candidate transfers would have minimal effects.

Nadine Hargesheimer, a campaign staffer for two Fairbanks mayoral candidates, affied that the reforms "did not materially affect Mayor Hove's ability to raise enough [**82] money to run an effective campaign" for that office in 1997. Despite the fact that there were three fewer mayoral candidates in 1997, the amount raised in that race was in fact about ten percent more than the $ 148,228 candidates raised in 1991.

Harriet Drummond, a member of the Anchorage School Board, affied that the reforms "had no substantial impact on my fundraising" in her 1997 campaign for re-election.

Thomas Begich, a campaign consultant, affied that no specific amount of money is required to run a viable

campaign; he stated that "I believe it is clear that competitive campaigns can be run in Alaska under the present campaign finance reform law." He added that "while a campaign's competitiveness does not appear to be affected" by the reforms' restrictions, "the proportional impact of an individual's influence on the election process over that of a non-individual (PAC, business or labor union) has increased."

AKCLU opposed this evidence in the summary judgment proceeding with one affidavit. James Lottsfeldt, an advertising firm account manager, affied that the reforms "will so severely limit the available resources to candidates that, except in unusual circumstances, the limitations [**83] will materially impair a candidate's ability to conduct an effective campaign." Such a system will, Lottsfeldt stated, benefit individuals with enough private [*623] wealth to campaign without contributions.

To support its motion for a preliminary injunction, AKCLU submitted two other affidavits.

Tom McKay, Chairman of the Republican Party of Alaska, affied that the Act "substantially impairs the Republican Party's ability to raise sufficient funds to support its activities." He cited a drop in fundraising from $ 362,525 in 1995 to $ 119,917 in 1997 (both non-election years).

Gary Jacobson, a professor of political science at the University of California, San Diego, disputed the relevance of the Drummond and Hargesheimer affidavits. He maintained that analyses of effects based on municipal election data are not valid for elections to the state legislature.

Both sides cite case law to support their contentions. So far as we are aware, no court has invalid ted individual-to-candidate contribution limits similar to those at issue here on the ground they are per se unconstitutional. n147 Rather, the Supreme Court upheld as a matter of law a $ 5,000 limit on individuals' contributions to multicandidate [**84] political committees. n148 And in Buckley, it upheld the FECA $ 1,000 limit on individuals' contributions to candidates, even though the FECA also imposed a $ 25,000 cumulative annual limit on an individual's contributions. n149 The Sixth Circuit affirmed a grant of summary judgment approving a $ 1,000 limit on contributions by individuals to a single candidate in an election year. n150 The Eighth Circuit invalidated a $ 100 contribution limit on the basis of undisputed facts that indicated the limit was too low to allow meaningful political speech in campaigns. n151 The Oregon Supreme Court invalidated a $ 500 limit on individual campaign contributions because the legislation did not specify any harm it was intended to fix. n152

n147 Cf. William J. Connolly, How Low Can You Go?: State Campaign Contribution Limits and the First Amendment, *76 B.U. L. Rev. 483, 484 (1996)* ("As a general proposition, contribution limits are not per se unconstitutional."); *Arkansas Right to Life State Political Action Comm. v. Butler, 29 F. Supp. 2d 540 (W.D. Ark. 1998)* (invalidating a $ 500 state limit on contributions to committees that could make only "independent expenditures"). [**85]

n148 See *California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182, 198-201, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981).*

n149 See *Buckley, 424 U.S. at 7, 35.*

n150 See *Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 648 (6th Cir. 1997).*

n151 See *Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir. 1994).*

n152 See *VanNatta, 931 P.2d at 784-87.*

Other courts, examining contribution limits following trial, have considered a variety of factors to determine whether a particular limit is constitutionally permissible. In Carver v. Nixon, the Eighth Circuit considered multiple quantitative factors -- including the cost of elections and the percentages of small-contribution donors -- to find that the $ 100-$ 300 limits there in issue were invalid because they entailed a "difference in kind." n153 In National Black Police Ass'n v. District of Columbia Board of Elections and Ethics, the court invalidated $ 100 and $ 50 limits as too restrictive of candidate speech after a full trial. n154

n153 *Carver v. Nixon, 72 F.3d 633, 644 (8th Cir. 1995).* [**86]

n154 See *National Black Police Ass'n v. District of Columbia Bd. of Elections & Ethics, 924 F. Supp. 270, 273, 282 (D.D.C. 1996),* vacated on other grounds, *323 U.S. App. D.C. 292, 108 F.3d 346 (D.C. Cir. 1997).*

In Montana Right to Life Ass'n v. Eddleman, the district court held that "a determination of what constitutes a 'large' contribution associated with campaign corruption or the appearance of corruption is based upon the particular facts and circumstances of the campaign at issue." n155

n155 *Montana Right to Life Ass'n v. Eddleman, 999 F. Supp. 1380, 1386 (D. Mont. 1998).*

The same sentiment was expressed in California Prolife Council v. Scully, where the district court held that "the facts pertinent to each jurisdiction, such as the size of the district, the cost of media, printing, staff support, news media coverage, and the divergent [*624] provisions of the various statutes and ordinances undermines the value of crude comparisons." [**87] n156

n156 *California Prolife Council, 989 F. Supp. at 1298.*

(1) Individual contributions to candidates

The affidavits and other documents filed by the State in the superior court support a finding that the contribution limits do not place a substantial burden on the ability of candidates to run competitive local or state election campaigns. The opinions of the State's experts also support that conclusion. Facts adduced by the State memorializing experience in local and statewide races support the experts' opinions. The excerpt contains a summary of candidates' disclosure statements indicating that the total amount of contributions has not declined significantly since enactment of SB 191. The record suggests that the contribution totals for 1998, the first election year after the reforms took effect, exceed the comparable 1996 campaign totals.

As we noted above, AkCLU offered two affidavits to support its injunction request and one to support its summary judgment argument. They generally assert that [**88] the Act's provisions impair fund-raising and advocacy, but do not explain the impact of particular provisions of the Act, including these contribution limits. Nor do they discuss the effect of the two temporal limitations that we hold to be invalid in Part III.D.3. Even standing alone, the affidavits would not support findings that the contribution limits are different in kind than Alaska's preexisting $ 1,000 limit or the limit the Supreme Court approved in Buckley, or are any lower than the lowest limit the Supreme Court would approve for state election campaigns. Buckley did not hold that $ 1,000 was the lowest individual contribution limit that would be consistent with the First Amendment. n157 Moreover, Buckley dealt only with the FECA, which governs campaigns for federal office. n158 It is not apparent that a campaign for local or state elected office is as complex or potentially expensive (given the numbers of voters involved) as a campaign for the federal offices of president, vicepresident, senator, or representative. Buckley did not intimate that a limit of $ 1,000 was the lowest limit permissible for state elections. Nor can the Act's provisions be readily [**89] compared with FECA's. Some provisions have no counterpart. FECA, for example, imposes a $ 25,000 cumulative annual limit on individual contributors, n159 intuitively lessening a justification for a federal candidate limit lower than $ 1,000.

n157 See *Day, 34 F.3d at 1366.*

n158 See id.

n159 See *2 U.S.C. § 441a*(a)(3).

Other courts have noted that it is important to look to the circumstances of the elections to determine what limitations are and are not constitutionally permissible. But absent evidence that diminished contribution limits have impaired effective advocacy or are qualitatively different in kind, we see no justification for a trial. The United States Supreme Court has made it clear that a court is not to substitute its judgment for the legislature's by wielding a scalpel the legislature chose to forego. That the legislature may not have "fine-tuned" the Act does not justify its invalidation. The evidence the State introduced is, we find, sufficiently compelling to justify the [**90] $ 500 limitation on individual contributions for electoral campaigns in Alaska. We therefore uphold the limitation.

In doing so, we necessarily reject AkCLU's arguments that the new limits do not address the real danger: "large" contributions. The Supreme Court rejected a similar argument in Buckley. n160 We also reject AkCLU's argument that, because the new limits fail to recognize the high cost of Alaska elections and are, when adjusted for inflation, only eight percent of the limit approved in Buckley in 1976, the new limits are invalid as a matter of law. The Supreme Court has not held contribution limits to be invalid on a theory that they fail to keep pace with inflation.

n160 See *424 U.S. at 30.*

[*625] (2) Individual contributions to groups and political parties

The State argues that limits on individuals' contributions to groups and political parties are also

reasonable and that such limits are necessary to protect the "integrity" of the limit on individuals' contributions to candidates by [**91] closing loopholes. We conclude that preventing individuals from channeling their contributions through a group or a party, and thus avoiding the limit on individuals' contributions to candidates, is a valid purpose. We also conclude that the $ 5,000 limit is not so patently "different in kind" as to justify invalidation. We uphold the limit on individual contributions to groups or political parties, keeping in mind the Court's words in Buckley: "If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $ 2,000 ceiling might not serve as well as $ 1,000." n161

n161 *424 U.S. at 30* (quoting *Buckley v. Valeo, 171 U.S. App. D.C. 172, 519 F.2d 821, 842 (D.C. Cir. 1975)).*

b. Limits on contributions by groups; AS 15.13.070(c)

Under AS 15.13.070(c), a "group" that is not a political party may not contribute more than $ 1,000 per year to a candidate, another group, or a political party. n162

n162 AS 15.13.070(c) provides: "A group that is not a political party may contribute not more than $ 1,000 per year (1) to a candidate, or to an individual who conducts a write-in campaign as a candidate; or (2) to another group or to a political party."

[**92]

The State's evidence with respect to large contributions discussed above (see supra Part III.D.2) also applies to "group" contributions. AkCLU contends that groups' contributions merit greater protection because they implicate both associational and speech rights. It asserts that contributions not made by an individual to a candidate have no quid pro quo effect, and that backdoor funneling concerns are irrelevant because existing law already prohibited funneling excess contributions through a group. It also claims that the $ 1,000 limits are significantly lower than the $ 5,000 group limit approved in Buckley, and are so low that they prohibit contributions that no longer threaten corruption.

It appears to us, however, that this $ 1,000 limit cannot be said to be different in kind. Buckley actually upheld individual contribution limits of $ 1,000 per election for federal elections, subject to a cumulative annual maximum of $ 25,000. n163 And even though funneling was already illegal in Alaska, there is no indication that existing law was either an adequate protection or effectively enforceable, and there was instead evidence it was not. n164

n163 See *424 U.S. at 7, 28-29.* [**93]

n164 David Finkelstein affied that during his tenure with the House Democratic Campaign Committee,

> nearly all the money came from large contributors who had already given the maximum amount in many races and wanted to see additional money (beyond the limits of the law) go to these candidates. In a number of cases business interests went even further and attempted to direct their contributions as pass-throughs to specific candidates.

Because the question is ultimately whether these limits are "large," prevent "effective advocacy," or constitute a "difference in kind," our comments relative to the individual contribution limits apply equally here. We consequently reverse the grant of summary judgment with respect to these limits and uphold this provision of the Act.

c. Limits on contributions by political parties; AS 15.13.070(d)

The Act sets graduated limits for political parties' contributions to candidates: they range from $ 100,000 to candidates for governor or lieutenant governor to $ 5,000 to candidates for certain other offices. n165

n165 AS 15.13.070(d) provides:

> A political party may contribute to a candidate, or to an individual who conducts a write-in campaign, for the following offices an amount not to exceed
> (1) $ 100,000 per year, if the election is for governor or lieutenant governor;
> (2) $ 15,000 per year, if the election is for the state senate;
> (3) $ 10,000 per year, if the election is for the state house of representatives; and
> (4) $ 5,000 per year, if the election is for

(A) delegate to a constitutional convention;

(B) judge seeking retention; or

(C) municipal office.

[**94]

[*626] The State argues that these limits are necessary to prevent groups and individuals from circumventing their contribution limits by funneling contributions through political parties; in support it cites APOC inquiries regarding use of political parties to pass funds to candidates. The State also introduced an affidavit from former Alaska Governor Steve Cowper, who affied that pass-throughs (donations to a party that are earmarked for a candidate) under the pre-reform system "made a mockery of contribution limits and turned political parties into money launderers."

Relying on Colorado Republican Federal Campaign Committee v. Federal Election Comm'n, n166 AkCLU argues that all limits on political parties' campaign finance activities are unconstitutional. It concludes that a majority of the Court there stated its belief that contributions or coordinated expenditures made by a political party do not have a corrupting impact on the political process.

n166 *518 U.S. 604, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996).*

But, because Colorado Republican [**95] addresses limits on parties' independent expenditures, not contributions, it does not squarely apply here. As noted above, the Court has held that expenditure limits infringe much more directly on speech than do contribution limits. Further, the Court primarily analyzes contribution limits in context of associational rights. A party's associational rights are not unduly infringed by contribution limits that are not different in kind. We are not prepared to say, based on the record before us, that these limits are different in kind.

We note that federal law contains equivalent limits. Under FECA, a political party is categorized as a "multicandidate political committee." n167 *2 U.S.C. § 441a* imposes the following limits on contributions by multicandidate political committees: (a) $ 15,000 per year to a political party, n168 (b) $ 5,000 per year to non-party multicandidate political committees, n169 and (c) $ 5,000 per election to candidates for federal office. n170 National parties and party senate campaign committees may give up to $ 17,500 to senate candidates during an election year. n171

n167 See *2 U.S.C. § 431.* [**96]

n168 See *2 U.S.C. § 441a*(a)(2)(B). But see *2 U.S.C. § 441a*(a)(4) ("The limitations on contributions contained in [paragraph 2] do not apply to transfers between and among political committees which are national, State, district, or local committees ... of the same political party.").

n169 See *2 U.S.C. § 441a*(a)(2)(C).

n170 See *2 U.S.C. § 441a*(a)(2)(A).

n171 See *2 U.S.C. § 441a*(h).

Another provision treats parties differently for purposes of expenditures, but it does not affect the contribution limits to which parties are otherwise subject. n172

n172 See *2 U.S.C. § 441a*(d).

Absent any limits on contributions by parties, we believe there would be substantial potential for undue influence, i.e., quid pro quo corruption or the appearance of corruption. The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent [**97] consideration of issues and adhere to positions taken by the party itself. The relatively large ($ 5,000) limits on contributions by individuals to parties would also encourage channeling individual contributions to favored candidates absent any party limits. We therefore conclude that the State has a legitimate governmental interest in limiting a party's contributions. Further, to the extent the ban on "non-group" contributions may be invalid, limits on party contributions become even more justified. We therefore reverse the judgment below with respect to AS 15.13.070(d) and uphold the limit on contributions by political parties.

3. Restrictions on when contributions may be made and received

a. Bans on nonelection year contributions; AS 15.13.074(c), (d)

Two statutes which restrict the timing of contributions effectively ban "non-election [*627] year" contributions. Alaska Statute 15.13.074(c)(1) limits pre-election contributions. For candidates for offices filled at general elections, the statute prohibits making contributions before January 1 of the election year. n173 For candidates for offices filled at municipal or special

elections, it prohibits making contributions earlier [**98] than nine months before the election. n174 Alaska Statute 15.13.074(c)(4), as amended in 1998, bars post-election contributions, i.e., after December 31 of the election year or sixty days after the candidate's last contested election, whichever comes first. n175 Alaska Statute 15.13.072(c) correspondingly restricts when contributions may be solicited or accepted. n176 The Act also contains contingent timing restrictions that take effect only if a final court order declares AS 15.13.074(c) unconstitutional. n177

n173 AS 15.13.074(c), though amended in 1998, reads largely as it did in the 1996 Act. Compare ch. 48 § 11, SLA 1996 with ch. 74 § 5, SLA 1998. The 1996 Act provided:

A person or group may not make a contribution
(1) to a candidate for governor or lieutenant governor or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for governor or lieutenant governor, before the later of the following dates:

(A) the date the individual

(i) becomes a candidate; or

(ii) files with the commission the document necessary to permit the individual to incur certain election-related expenses as authorized by AS 15.13.100; or

(B) January 1 of the year of the election ....
....(2) to a candidate for the state legislature or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for the state legislature while the legislature is convened in a regular or special legislative session, unless the contribution is made in a place other than the capital city during the 90 days immediately preceding an election in which the candidate or individual is a candidate, or before the later of the following dates:

(A) the date the individual

(i) becomes a candidate; or

(ii) files with the commission the document necessary to permit the individual to incur certain election-related expenses as authorized by AS 15.13.100; or

(B) January 1 of the year of the election;
(3) to a candidate or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for an office that is to be filled at a municipal election before the later of the following dates:

(A) the date the individual

(i) becomes a candidate; or

(ii) files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100;

(B) the date that is nine months before the date of the municipal election; or
(4) to any candidate after the earlier of December 31 of the year of the election or the 60th day

(A) after the date of a primary election if the candidate

(i) has been nominated at the primary election or is running as a write-in candidate; and

(ii) is not opposed at the general election;

(B) after the date of the primary election if the candidate was not nominated at the primary election; or

(C) after the date of the general election, or after the date of a municipal or municipal runoff election, if the candidate was opposed at the general, municipal, or municipal runoff election;
(5) in the capital city to a candidate for governor or lieutenant governor or the state legislature when the legislature is convened in a regular or special legislative session.

AS 15.13.074(c) (1996). [**99]

n174 See AS 15.13.074(c)(3)(B).

n175 See AS 15.13.074(c)(4), as amended by ch. 74 § 5, SLA 1998. Before its amendment in 1998, AS 15.13.074(c)(4) imposed a post-election cutoff of forty-five days. See ch. 48 § 11, SLA 1996.

n176 AS 15.13.072(c) provides:

(c) An individual, or one acting directly or indirectly on behalf of that individual, may not solicit or accept a contribution

(1) before the date for which contributions may be made as determined under AS 15.13.074(c); or

(2) later than the day after which contributions may not be made as determined under AS 15.13.074(c).

n177 See ch. 48 § 33(b), SLA 1996.

At the outset, we note that Buckley authorizes "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication," provided that the regulations do not impose direct [*628] quantity restrictions on political communication and association. n178

n178 *424 U.S. at 18.*

[**100]

The State offered evidence bearing on the need for contribution time limits. In Open Secrets, author Larry Makinson argues that off-year contributions allow donors effectively to double the existing contribution limits by giving twice in a single election cycle. n179

n179 See Larry Makinson, Open Secrets 6 (1987).

In 1989 the APOC staff examined the proportion of contributions made after elections. n180 Less than two percent of all contributions in the 1988 cycle were post-election contributions. n181 At that time a majority of the APOC commissioners stated strong support for barring post-election contributions, and hoped such a ban would curtail contributions "intended to influence a successful candidate rather than the outcome of an election." n182

n180 See Alaska Public Offices Commission, Impact of Reform Proposals on Campaign Funding Patterns in Alaska (1989).

n181 See id.

n182 APOC Ann. Rep. to the Legislature 10 (1989).

[**101]

Former Alaska Governor Hickel affied that "post-election contributions can too easily be viewed as an attempt to purchase influence and are one of the most troubling kinds of contribution."

The State submitted a news article quoting 1994 gubernatorial candidate Jim Campbell as saying that "there is an appearance of conflict of interest when a winning candidate raises money after the election is over."

In the superior court the State argued that the timing limits "address the problem of the perpetual campaign." It argues on appeal that these restrictions help ensure that contributions will be used only to finance election campaigns. It asserts that contributions "remote in time" to an election are "very susceptible to the appearance that they were made to purchase influence." It contends that APOC reports demonstrate the need for fund-raising time limits. These reports show that between 1989 and 1995, eighty percent of all nonelection-year contributions were made directly to incumbents. Only three percent of nonelection-year contributions were directed to challengers. Candidates for seats with no incumbent candidate received seventeen percent of nonelection-year contributions. [**102]

The State claims that the pre-election year ban -- "before candidacies are declared and platform issues are identified" -- eliminates contributions that have "the appearance of being made to purchase access or influence, particularly if the candidate ... is an incumbent."

The evidence the State cites shows, at most, that incumbents who received pre-election year contributions may have had a fund-raising advantage over the challengers, but it does not distinguish on the basis of when the incumbents and challengers declared their candidacies, or rebut the possibility that incumbents, whom voters had previously favored, and whose political platform was previously successful, were more in tune with the electorate or better organized than their challengers.

That pre-election year contributors strongly favored incumbents may imply a desire by those contributors to purchase access or influence. But it does not give the appearance of corruption absent some evidence implying that incumbents have used pre-election year contributions to help raise funds substantially exceeding their probable campaign needs. Nor is it apparent how the temporal limits address any corruption that might arise [**103] from giving some contributors inordinate opportunity to influence the process. n183

n183 Cf. *Austin, 494 U.S. at 658-61* (recognizing danger of "corrosive and distorting effects of immense aggregations of wealth").

The State emphasizes the negative public perception of post-election contributions:

Obviously a postelection contribution cannot be intended to assist the candidate in his or her efforts to win because the election is over. While some contributors may simply wish to assist in retiring campaign debts, a more likely perception is that the [*629] purpose is to buy influence or, at the very least, access.

To bolster its argument, the State cites cases from other jurisdictions with what it admits are "mixed results." In two cases, courts upheld the restrictions. n184 In Gable v. Patton, the restriction barred acceptance of contributions during the four weeks preceding a primary. n185 In Ferre v. Florida ex rel. Reno, the restriction prohibited post-election contributions. n186 In [**104] the other two cases (both involving off-year bans), courts held the time restrictions unconstitutional. n187

n184 See *Gable v. Patton, 142 F.3d 940 (6th Cir. 1998); Ferre v. Florida ex rel. Reno, 478 So. 2d 1077 (Fla. Dist. App. 1985).*

n185 See *142 F.3d at 944.*

n186 See *478 So. 2d at 1078-79.*

n187 See *Zeller v. Florida Bar, 909 F. Supp. 1518 (N.D. Fla. 1995); Opinion of the Justices to the House of Representatives, 418 Mass. 1201, 637 N.E.2d 213 (Mass. 1994).*

AkCLU argues that the State has failed to provide evidence of "real harm." Likewise, AkCLU maintains that "the identified harm of a quid pro quo receipt of money in exchange for political favors simply does not apply to non-incumbents." It asserts that, if anything, the evidence suggests the aggregate effect of the temporal limits would be to increase, not diminish, the possibility of corruption.

It also contends that the limits are not narrowly tailored, and that even though the contingent temporal restrictions reduce the harm, [**105] they unconstitutionally interfere with the right of association.

While we recognize that these limits would have a significant effect on a candidate's power to spend money during non-election years, we consider these provisions to be contribution limits, not expenditure limits. n188 It is not apparent how the relatively short pre-election contribution window addresses corruption or the appearance of corruption. Neither the minimal evidence nor the State's arguments justify the compressed time limits of AS 15.13.074(c) (1), (2), and (3). The cases the State cites do not explain how the pre-election limits can be justified. n189 We agree with the core rationale of the Massachusetts Supreme Judicial Court, which concluded in Opinion of the Justices to the House of Representatives that a cap on nonelection-year contributions was unconstitutional. n190 That court held:

Legislation that has the effect of prohibiting a contributor from expressing support and affiliation with a candidate for a lengthy period constitutes a significant interference with the right of association. A contributor might have compelling reasons for desiring to express that support at a particular time [**106] other than the year of the election. n191

We therefore affirm the superior court's invalidation of the pre-election contribution limits of AS 15.13.074(c) (1), (2), and (3).

n188 Until contributions are received, they are unavailable to expend. But see *Opinion of the Justices, 637 N.E.2d at 217.*

n189 See *Gable, 142 F.3d at 949-53* (upholding restriction that prohibited acceptance of contributions from outside sources during the twenty-eight days preceding an election, and that was part of a scheme for publicly financing election campaigns); *Service Employees Int'l Union v. Fair Political Practices Comm'n, 955 F.2d 1312, 1318-21 (9th Cir. 1992)* (striking down fiscal year limit on campaign fund-raising because it discriminated against challengers).

The State also cites Ferre. But that decision upheld restrictions on post-election contributions, and it does not address the sort of pre-election restrictions challenged here.

*Zeller, 909 F. Supp. at 1525-26* (holding unconstitutional prohibition on contributions made more than one year before judicial elections).

n190 See *Opinion of the Justices, 637 N.E.2d at 218.* [**107]

n191 Id. at 218.

Our affirmance of this aspect of the judgment below causes the eighteen-month contingent pre-election time limits in the Act to take effect. n192 Because neither side has substantively [*630] discussed the validity of these

contingent limits, and because they are not patently unconstitutional, we decline to address their validity here. n193

n192 See ch. 48 § 12, SLA 1996:

AS 15.13.074(c) is repealed and reenacted to read:

A person or group may not make a contribution (1) to a candidate or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 when the office is to be filled at a general election before the date that is 18 months before the general election;
(2) to a candidate or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for an office that is to be filled at a special election or municipal election before the date that is 18 months before the date of the regular municipal election or that is before the date of the proclamation of the special election at which the candidate or individual seeks election to public office; or
(3) to any candidate later than the 45th day

(A) after the date of a primary election if the candidate

(i) has been nominated at the primary election or is running as a write-in candidate; and

(ii) is not opposed at the general election;

(B) after the date of the primary election if the candidate was not nominated at the primary election; or

(C) after the date of the general election, or after the date of a municipal or municipal runoff election, if the candidate was opposed at the general, municipal, or municipal runoff election.

[**108]

n193 We observe that the invalidation of the pre-election year contribution bans affords candidates a greater time period in which to raise campaign funds. Such added time necessarily lessens the danger that candidates may be prevented from "amassing the resources necessary for effective advocacy." *Buckley, 424 U.S. at 21.*

Post-election time limits, however, far more clearly address corruption and its appearance because the election has resolved the critical contingency of which candidate will hold office. We think this latter impact on associational rights is narrowly tailored to further compelling state interests. We therefore uphold the post-election contribution limits of AS 15.13.074(c) (4).

b. Ban on contributions during the legislative session; AS 15.13.074(c)

Alaska Statute 15.13.074(c) (2) prohibits making contributions to legislative candidates, including both challengers and incumbents, during a regular legislative session. n194

n194 See AS 15.13.074(c) (2) set out supra note 173. The legislature amended this provision and AS 15.13.072(d) (the corresponding ban on soliciting or accepting contributions during the session) in 1998. Now if the legislature is in session during the ninety days immediately preceding the election in which the legislative candidates are competing, candidates may solicit or accept contributions during that period, so long as they do so outside the capital city. See ch. 14 § § 1, 2, SLA 1998; ch. 74 § § 3, 5, 19, SLA 1998.

[**109]

AkCLU argues that this ban severely constrains effective campaign advocacy by legislative candidates. "Given the length of the Alaska legislative session, fundraising [under the ban] is limited to a two-month period before a primary election and [to] two and one-half [additional] months before a general election." n195 Moreover, AkCLU claims the associational rights of potential contributors are severely restricted during the legislative session.

n195 As the Florida Supreme Court noted, "during this period, incumbents have virtually unlimited access to the press and free publicity merely by virtue of the public forum they are privileged to occupy," thus creating obvious potential imbalances. *Florida v. Dodd, 561 So. 2d 263, 265 (Fla. 1990).*

The State argues that this ban "addresses the perception that contributions are made to influence the conduct of elected officials during the session." It also

contends that "the prohibition frees sitting legislators from the fund-raising treadmill and allows them [**110] to focus on the public's business during the legislative session." The State claims that this interest is compelling enough to support the ban. The Josephson Report survey, in which about sixty percent of legislators stated they believed fundraising during the legislative session needed to be regulated, supports this contention to a limited extent.

Considered in isolation, the "legislator-freeing" rationale is not sufficiently compelling to justify this restriction. In Rosenstiel v. Rodriguez, the Eighth Circuit held that freeing legislators to deal with issues was only relevant as a by-product of corruption-fighting measures. n196 In other cases cited by the State, the interest was found sufficient [*631] only to promote a speech-enhancing measure. n197

n196 See *Rosenstiel v. Rodriguez, 101 F.3d 1544, 1553 (8th Cir. 1996).*

n197 See *Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39-40 (1st Cir. 1993); Republican Nat'l Comm. v. Fed. Election Comm'n, 487 F. Supp. 280, 284 (S.D.N.Y. 1980).*

Preventing [**111] corruption or its appearance is a compelling interest justifying narrowly-tailored restraints on First Amendment rights. But the very circumstance most relevant to the appearance of corruption -- receipt of contributions by incumbent candidates during the session -- does not imply that in-session contributions to challengers also give the appearance of corruption. The ban is therefore not narrowly tailored to the State's compelling interest, and is invalid as to non-incumbents. But invalidating the ban only as to challengers would fundamentally unbalance a restriction which the legislature clearly intended to apply to incumbents and challengers alike, and would defeat the legislature's clear intention as to this prohibition. We therefore decline to invalidate only part of this ban while upholding it with respect to incumbent candidates.

Accordingly, we affirm the decision holding these provisions invalid.

E. Restrictions on the Use of Campaign Funds

1. Carry-forward restriction; AS 15.13.116

Alaska Statute 15.13.116 limits the amount of unused contributions a candidate may carry forward to the next campaign. n198

n198 AS 15.13.116 reads, in pertinent part:

(a) A candidate who, after the date of the general, special, municipal, or municipal runoff election or after the date the candidate withdraws as a candidate, whichever comes first, holds unused campaign contributions shall distribute the amount held within 90 days. The distribution may only be made to

....(8) transfer all or a portion of the unused campaign contributions to an account for a future election campaign; a transfer under this paragraph is limited to

(A) $ 50,000, if the transfer is made by a candidate for governor or lieutenant governor;

(B) $ 10,000, if the transfer is made by a candidate for the state senate;

(C) $ 5,000, if the transfer is made by a candidate for the state house of representatives; and

(D) $ 5,000, if the transfer is made by a candidate for an office not described in (A)-(C) of this paragraph;

....(b) After a general, special, municipal, or municipal runoff election, a candidate may retain the ownership of one computer and one printer and of personal property, except money, that was acquired by and for use in the campaign. The current fair market value of the property retained, exclusive of the computer and printer, may not exceed $ 2,500. All other property shall be disposed of, or sold and the sale proceeds disposed of, in accordance with (a) or (c) of this section.

(c) Property remaining after disbursements are made under (a)-(b) of this section is forfeited to the state.

[**112]

AkCLU argues that these "spend down" requirements function as expenditure limits and are invalid. (AkCLU does not challenge AS 15.13.112, which prohibits using contributions for a candidate's personal benefit, or converting contributions to a candidate's personal income.)

The threshold question is whether the carry-forward restriction burdens speech. Two cases the State cites held that similar restrictions directly limited expenditures, and therefore burdened speech. n199 We agree with that analysis. We must therefore decide whether the State has compelling interests justifying this burden.

n199 See *Shrink Mo. Gov't Political Action Comm. v. Maupin, 71 F.3d 1422, 1427-29 (8th Cir. 1995)* (invalidating Missouri's carry-forward restriction); *Service Employees, 955 F.2d at 1315, 1323* (discussing provision barring expenditure of funds raised before challenged reform measure was enacted).

The State argues that the limits are justified because they prevent candidates who are unopposed, or opposed by weak candidates, [**113] from taking contributions in one campaign to avoid limits in the next one. This rationale is plausible. Contribution limits fight corruption, and therefore relate to a compelling state interest. Contribution limits for future campaigns of presently unopposed candidates would effectively double without this provision. n200 [*632] Neither of the State's cited cases n201 presented this issue, because the associated contribution limits in both of those cases had been invalidated.

n200 In Open Secrets, Larry Makinson cites numerous "popular" methods of evading the former $ 1,000 contribution limit, including making off-year contributions, donating through family members, donating through corporations, donating through union locals, and pooling donations of employees. See Larry Makinson, Open Secrets 14.

n201 See *Shrink, 71 F.3d at 1428-29; Service Employees, 955 F.2d at 1318-21.*

There is evidence of substantial carryovers that appear large in comparison with the total projected expense of campaigns [**114] for contested seats. The average victorious state senate candidate in the 1990 general election had a surplus (for our purposes, meaning cash on hand less debts) of $ 11,450 at the end of the year. The average victorious house candidate that year had a surplus of $ 8,759. One successful house candidate had a surplus of $ 33,043; one successful senate candidate had a surplus of $ 77,034. By way of comparison, the average victorious house campaign for 1994 cost $ 43,764; the corresponding senate election cost $ 72,784.

We hold that the State's interest in preventing avoidance of valid contribution limits by use of carry-forwards is both compelling and served by this restriction. We also conclude that this provision is narrowly tailored to accomplish this interest. We therefore reverse that portion of the judgment below.

2. Ban on inter-candidate contributions; AS 15.13.112(b)(7)

The Act prohibits a candidate from using campaign funds to contribute to another candidate or to a group. n202

n202 AS 15.13.112(b) reads, in pertinent part:

(b) Campaign contributions held by a candidate or group may not be

....(7) used to make contributions to another candidate or to a group.

[**115]

The State argues that the ban is valid because it prevents: (1) use of donations contrary to the purpose of the original contributor; (2) corrupt use of campaign funds for power-brokering; and (3) evasion of contribution limits by funneling. The State relies on David Finkelstein's affidavit for support. Finkelstein affied that "throughout my time in the Legislature it was common knowledge that certain legislators used campaign contributions to try to secure leadership positions, particularly the Speaker or President." He cited the 1992 speaker's contest as an example, claiming that Republicans threw fundraisers for Democrats to gain support for their speakership candidacies.

A number of candidates apparently have the wherewithal to wield such power. At the end of the 1990 campaign cycle, according to APOC records, ten state senate candidates had surpluses ranging as high as $ 33,043. Fifty-two house candidates had surpluses, six of which exceeded $ 20,000.

The State also notes that the law does not impair the candidate's ability to donate personal funds to another candidate.

AkCLU responds by citing Service Employees, which dealt with a similar ban contained in a California [**116] initiative. n203 The Ninth Circuit there addressed each of the arguments raised by the State here, and rejected each for a different reason. The court refused to accept the "misuse of donations" rationale because it was not sufficiently narrowly tailored. The court, discussing the rationale in the context of intra-candidate transfers, asserted that "this interest in ensuring that contributors are not misled could be served simply by requiring candidates to inform contributors that their

contributions might be spent on other races." n204 The court dismissed the concern about power brokering as follows:

The Authors [of the initiative] argue that the inter-candidate transfer ban may be justified by the state's interest in preventing corruption or the appearance of corruption by "political power brokers." Even if we assume this to be an important state interest, the ban is not "closely [*633] drawn to avoid unnecessary abridgement of associational freedoms." The potential for corruption stems not from campaign contributions per se but from large campaign contributions. The inter-candidate transfer ban prohibits small contributions from one candidate to another as well as large contributions. [**117] We hold, therefore, that the inter-candidate transfer ban is unconstitutional .... n205

n203 See *955 F.2d at 1315.*

n204 *Id. at 1322* ("Concerns about the unintended use of contributors' money can be met 'by means far more narrowly tailored and less burdensome than a restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.'") (quoting *FEC v. MCFL, 479 U.S. 238, 261, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986)).*

n205 *955 F.2d at 1323.*

But because the court in Service Employees had already invalidated the contribution limits of the California initiative, there was no longer any danger that inter-candidate contributions could be used to avoid valid contribution limits. The court therefore rejected funneling as a valid basis for the ban. n206

n206 See *id. at 1322.*

[**118]

In this case, however, we have upheld the individual contribution limits. Prevention of funneling therefore remains a reasonable rationale for some restriction on inter-candidate contributions. Without restrictions, a candidate experiencing a very easy election or a candidate very successful at fundraising could pass along contributions to other candidates at will; allowing inter-candidate transfers could conceivably permit contributors to evade limits not just once but multiple times. A contributor wishing to make four $ 500 contributions to candidate A (three more than the individual limit permits) would be able to contribute to candidates B, C, and D, with the expectation they would each pass their surplus contributions on to candidate A.

Because the State has a compelling interest in enforcing contribution limits, and because candidates still retain the right to make contributions from personal funds, we conclude that this provision is constitutional.

F. Severability of Unconstitutional Provisions

Because we have concluded that some of these provisions are unconstitutional we must consider the question of severability. Severability is a matter of state law. n207 The seminal [**119] case in Alaska is Lynden Transport, Inc. v. State, which holds that

the test for determining the severability of a statute is twofold. A provision will not be deemed severable "unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." n208

n207 See *Leavitt v. Jane L., 518 U.S. 137, 139, 135 L. Ed. 2d 443, 116 S. Ct. 2068 (1996).*

n208 *Lynden Transport, Inc. v. State, 532 P.2d 700, 713 (Alaska 1975)* (quoting *Dorchy v. Kansas, 264 U.S. 286, 290, 68 L. Ed. 686, 44 S. Ct. 323 (1924));* see also *Sonneman v. Hickel, 836 P.2d 936, 940-41 (Alaska 1992).*

The Act contains a severability clause. n209 Its inclusion indicates that the legislature intended the remainder of the Act to stand if part of it were invalidated. It is also significant that the legislature enacted contingent provisions that were to become effective if parts of the Act were held to be invalid.

n209 See Ch. 48 § 31, SLA 1996 ("Under AS 01.10.030, if any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected thereby."). AS 01.10.030 provides:

Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language, "If any provision of this Act, or the application thereof to

any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

[**120]

Although we hold today that some parts of the Act are unconstitutional, we do not believe that their invalidation so undermines the structure of the Act as a whole that the entire Act must fall. Standing alone, legal effect can be given to the remaining provisions.

Other courts considering severability in the campaign finance context have reached the same conclusion. In Buckley, the Supreme Court let stand the public financing provisions of the Federal Election Campaign [*634] Act while invalidating expenditure limits. n210 In Russell v. Burris, the Eighth Circuit severed the constitutional provisions of an Arkansas campaign reform act, holding that the purpose of the valid provisions would not be thwarted by the invalidation of the others. n211 The district court considering Colorado Republican on remand refused to hold that the unconstitutional independent expenditure limitation could not be severed from the remainder of the party expenditure provision. n212

n210 See *424 U.S. at 108-09.*

n211 See *146 F.3d at 573.*

n212 See *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 41 F. Supp. 2d 1197, 1999 WL 86840,* at * 10 (D. Colo. 1999).

[**121]

Because we believe the constitutional parts of this Act satisfy the conditions discussed in Lynden Transport, we hold those provisions to be severable and reject AkCLU's argument to the contrary.

G. Other Arguments

AkCLU's complaint alleges that the ban on anonymous contributions, AS 15.13.074(b), n213 is unconstitutional.

n213 AS 15.13.074(b) reads: "A person or group may not make a contribution anonymously, using a fictitious name, or using the name of another."

The Supreme Court stated in dictum that a ban on anonymous contributions would be permissible. n214 But because the briefs have not discussed this provision, we decline to reach the issue.

n214 See *Citizens Against Rent Control, 454 U.S. at 299-300.*

IV. CONCLUSION

To recapitulate:

(1) Because the constitutional parts of the Act can be given legal effect [**122] standing alone, in accordance with the legislature's intention, we REVERSE the judgment on the issue of severability, and address each part of the Act on its own merits.

(2) We AFFIRM the judgment to the extent it held invalid the ban on non-election year contributions in the 1996 Act (AS 15.13.074(c)(1), (2), and (3)); and the ban on contributions to candidates during the legislative session (AS 15.13.074(c)(2)).

(3) We REVERSE the judgment with respect to the following provisions, which we hold to be valid as a matter of law:

(a) the ban on independent expenditures by non-group entities, to the extent it applies to corporations, labor unions, and other entities meeting the three-part test outlined in Part III (AS 15.13.135);

(b) the ban on contributions by corporations, labor unions, and other entities meeting the three-part test outlined in Part III (AS 15.13.074(f));

(c) the limits on contributions by individuals (AS 15.13.070(b)), groups (AS 15.13.070(c)), and political parties (AS 15.13.070(d));

(d) the restrictions on contributions by nonresident individuals and groups (AS 15.13.072(a)(2) and (3), (e), and (f));

(e) the ban on lobbyists' contributions to out-of-district [**123] candidates (AS 15.13.074(g));

(f) the restriction on carry-forwards (AS 15.13.116); and

(g) the ban on inter-candidate contributions (AS 15.13.112(b)(7)).

(6) We leave it to future legal challenges to determine which specific classes of "non-group" entities besides corporations and labor unions may be permissibly subject to the expenditure and contribution bans set out in AS 15.13.135 and 15.13.074(f).

LEXSEE 212 F.3d 761

**RENATO P. MARIANI, Plaintiff v. UNITED STATES OF AMERICA, Defendant; FEDERAL ELECTION COMMISSION (Intervenor in D.C.)**

**NO. 99-3875**

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

***212 F.3d 761; 2000 U.S. App. LEXIS 11002***

**February 16, 2000, Argued En Banc**

**May 18, 2000, Filed**

**SUBSEQUENT HISTORY:**
[**1] As Modified June 13, 2000. Certiorari Denied November 27, 2000, Reported at: *2000 U.S. LEXIS 7798.*

**PRIOR HISTORY:**
On Appeal From the United States District Court For the Middle District of Pennsylvania. (D.C. Civ. No. 98-cv-01701). District Judge: Honorable Thomas I. Vanaskie, Chief Judge.

**DISPOSITION:**
Rejected Mariani's challenges to § § 441b(a) and 441f. Judgment entered in favor of government.

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**JUDGES:**
Before: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, and BARRY, Circuit Judges.

**OPINIONBY:**
BECKER

**OPINION:**

[*764] OPINION OF THE COURT

BECKER, Chief Judge.

This proceeding is before us pursuant to *2 U.S.C. § 437h,* which channels constitutional challenges to the Federal Election Campaign Act, *2 U.S.C. § 431* et seq. ("FECA"), as amended, directly to the en banc Court of Appeals. The present challenge was filed in the District Court for the Middle District of Pennsylvania by Renato P. Mariani. A criminal indictment pending in that court charges Mariani and other officers of Empire Sanitary Landfill, Inc., and Danella Environmental Technologies,

Inc., with violating the FECA, *2 U.S.C. § § 441b*(a) and 441f, by making campaign contributions to a number of candidates for federal office through enlisting company employees [**3] and others to forward contributions to the candidates that were thereafter reimbursed by one of the companies. Mariani argues that § § 441b(a) and 441f violate the First Amendment to the United States Constitution.

Mariani's principal argument regards "soft money," or funds lawfully raised by national and congressional political party organizations for party-building activities from corporations, labor unions, and individuals who have reached their federal direct contribution limits. Soft money is sometimes used to fund so-called "issue advocacy," advertisements that advocate a candidate's positions or criticize his opponents without specifically urging viewers to vote for or defeat the candidate. Issue ads are often only marginally distinguishable from ads directly supporting a candidate, which corporations cannot lawfully fund under the FECA. [*765] Mariani contends that § 441b(a), which proscribes corporate contributions made directly to candidates for federal office, has been completely undermined by the staggering increase in recent years of the amount of corporate soft money donations. In Mariani's submission, this avalanche of soft money has made § 441b(a) so underinclusive, and [**4] so incapable of materially advancing the intended purpose of the federal election statute, that it must be struck down. Alternatively, because the bellwether cases in this area, including *Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)* (per curiam), validate statutes limiting campaign contributions, but not banning them outright, and recognize that corporate speech is protected under the First Amendment, see *First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978)*, Mariani challenges the total ban on direct corporate contributions as inconsistent with the First Amendment. Mariani also challenges the constitutionality of § 441f, which prohibits making campaign contributions in the name of another to a candidate for federal elective office.

The Supreme Court has construed § 437h so that, if a district court concludes that a challenge to the FECA is frivolous, the court may dismiss the case without certifying it. See *California Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 193-94 n.14, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981)*. The District Court concluded that the challenge to [**5] § 441b(a) was not frivolous, made comprehensive findings, and certified Mariani's challenge to this Court. Section 437h, as construed by the Supreme Court, required the District Court to make fact findings. Many of the District Court's findings were stipulated to by the parties and are uncontested. The government and the Federal Election Commission ("FEC"), however, assail other findings and the Court's 21 ultimate findings of fact as being excessive or beyond its powers. They also argue that a number of them, including the ultimate findings, are unsupported by the record. Our review of the District Court's findings, made in a setting outside the traditional adversary crucible, is not deferential. As we note in Part II, we agree that some of the District Court's findings are unsupported by proper evidence and that some stray from appropriate fact finding into legal conclusions. But even assuming that the role of soft money is that asserted by Mariani and found by the District Court, we conclude that the record could not support a holding that § 441b(a) violates the First Amendment.

The government and the FEC not only defend the constitutionality of § § 441b(a) and 441f, but contend [**6] that Mariani's challenges are legally frivolous and thus never should have been certified to the en banc court. They also submit that the District Court employed an insufficiently stringent standard for measuring frivolousness. We are satisfied that the District Court did not apply an incorrect standard of legal frivolousness and that it acted correctly in not dismissing the case without certifying it, at least with respect to the challenges to § 441b(a), for which it made an independent assessment of frivolousness. Though the District Court did not make an independent assessment of the frivolousness of the challenge to § 441f as it should have, the government does not challenge the lack of an independent assessment here, and because the pending criminal case awaits a determination of this action, we will reach the challenges to § 441f without remanding for such a determination.

Although not legally frivolous, Mariani's challenge to § 441b(a) fails. As we explain in detail, both the underinclusiveness and outright-ban challenges are interred by the Supreme Court's jurisprudence in the area. See especially *Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990)*; [**7] *Federal Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 74 L. Ed. 2d 364, 103 S. Ct. 552 (1982)*. Although Mariani's factual portrayal of the impact of [*766] soft money on contemporary elections is impressive, it falls short. Section 441b(a) is not fatally underinclusive under our precedents, because we cannot say that there is no meaningful distinction between hard and soft money. We cannot exchange our robes for togas; any reform in this area must be sought from Congress.

Finally, we conclude that the challenge to § 441f is patently without merit. Accordingly we shall enter judgment in favor of the government.

I. Procedural History

In October 1997, the United States filed an indictment charging Mariani and several other individuals with, inter alia, violating the FECA. That action, United States v. Mariani, 3:CR-97-225, is pending before the District Court. The indictment charges that between August 1994 and December 1996, Mariani and other officers and employees of Empire Sanitary Landfill, Inc. ("Empire") and Danella Environmental Technologies, Inc. ("Danella") solicited numerous employees of the corporations, as well as business associates, friends, [**8] and family members, to make contributions to the campaigns of designated candidates for federal election. According to the indictment, these contributions were reimbursed either directly or indirectly by Empire. The indictment also alleges that Mariani and other officers and employees at Empire and Danella made individual contributions to these federal candidates, which were also reimbursed by Empire.

More particularly, the indictment alleges that in April 1995, Mariani and other officers and employees of Empire and Danella contacted employees, associates, friends, and family members in an effort to raise funds for the New Jersey Steering Committee, a state fundraising arm of the Robert Dole campaign for President. Contributors allegedly were asked to write personal checks in amounts of $ 1,000 (or, in the case of couples, $ 2,000) and were reimbursed with Empire corporate funds. It is also alleged that on April 29, 1995, Mariani and another defendant in the criminal case, Michael Serafini, attended a Steering Committee luncheon at which they handed an envelope containing the contributions to Dole campaign officials. When the Dole campaign reported the contributions to the Federal [**9] Election Commission ("FEC"), its filing allegedly attributed these $ 80,000 worth of contributions to the individual contributors, rather than to Empire. The Dole contributions came approximately ten days prior to a vote in the Senate on the Interstate Transportation of Municipal Waste bill, in which Empire and Danella were interested. Dole was the Senate majority leader at the time.

The indictment charges Mariani (and others) with violations of *2 U.S.C. § § 441b*(a) and 441f. Section 441b(a) of the FECA prohibits any corporation from making any contribution in connection with any campaign for federal office and renders it unlawful for any officer of a corporation to consent to any prohibited corporate contribution. Section 441f of the FECA, the conduit contribution ban or "anti-conduit" provision, prohibits one from making a contribution "in the name of another person" or "knowingly permitting his name to be used to effect such a contribution." *2 U.S.C. § 441f.* Mariani moved to dismiss the FECA charges in the indictment and simultaneously filed this action against the United States seeking declaratory relief pursuant to *2 U.S.C. § 437h.* [**10] The FEC was granted leave to intervene as a defendant.

Section 437h provides that

> any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of [the] [FECA]. The district court immediately shall certify all questions of constitutionality of this Act to the United [*767] States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

*2 U.S.C. § 437h.* n1 The Supreme Court has construed § 437h so that, if a plaintiff brings a claim that is frivolous, a district court may dismiss the case without certifying it. See *California Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 193-94 n.14, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981).* The Supreme Court also has interpreted § 437h to require the district court to develop a record and make findings of fact sufficient to allow the en banc court of appeals to decide the constitutional issues. See *Bread Political Action Comm. v. Fed. Election Comm'n, 455 U.S. 577, 580, 71 L. Ed. 2d 432, 102 S. Ct. 1235 (1982)* [**11] ("The District Court, as required by § 437h, first made findings of fact and then certified the case ...."). The District Court concluded that the challenge to § 441b(a) was not frivolous, and that the interests of judicial economy "militated against" a separate determination that the challenge to § 441f was not frivolous. See *Mariani v. United States, 80 F. Supp. 2d 352, 355 (M.D. Pa. 1999).* The District Court then made comprehensive findings and certified the challenge to this Court.

n1 It is uncontested that Mariani meets the voter eligibility requirement.

II. The District Court's Findings of Fact

Some of the District Court's findings are disputed, are unsupported by proper evidence, or go beyond appropriate fact finding into legal conclusion. For example, an opinion expressed by the New York Times Editorial page that one individual's experiences with the Democratic National Committee "deepen the cynicism of Americans" is not a proper evidentiary source for a finding that Americans have [**12] become more

cynical about government as a result of the role of soft money in the political system. n2 See *Mariani v. United States, 80 F. Supp. 2d 352, 412 (M.D. Pa. 1999).* Similarly, the very title of the segment of the findings called "Due to the Effects of Soft Money on the Political System, FECA is not Serving the Goals it was Intended to Serve," *id. at 418,* as well as the finding that "most issue ads are financed in large part with soft money ... from sources and in amounts that the FECA was meant to prohibit," *id. at 377,* demonstrate that the fact-finding effort sometimes metamorphosed into conclusions regarding the legal issues in this case; see *id. at 418-19.* Given the unique procedural posture of the case, we need not (and do not) defer to such findings in our analysis. Although some of the District Court's findings went beyond what was proper both as a matter of evidence and by crossing the line into forming legal conclusions, the court compiled an impressive factual showing that soft money plays an increasingly large role in federal elections.

n2 Johnny Chung, the individual referred to in the editorial, stated in an interview with NBC News anchor Tom Brokaw that he was solicited to make contributions to the Democratic National Committee in exchange for invitations to meetings at which he could meet government officials and discuss business concerns.

[**13]

Contributions made to or expenditures made on behalf of candidates for federal elective office are referred to as "hard money." Under § 441b(a), corporations are not permitted to make contributions of hard money to campaigns for federal office. Corporations can, however, make contributions to political parties in unlimited amounts. These contributions, which are referred to as "soft money," can be used to fund "issue advocacy." "Issue advocacy" includes advertisements or other campaign materials that advocate positions supported by a candidate, often comparing those positions with those of an opponent, without directly advocating the election of the candidate. Donors of soft money are able to avoid the FECA contribution limits and disclosure requirements [*768] applicable to hard money and direct advocacy. The amount of soft money contributed in each election cycle has grown tremendously in the last two decades, from about $ 19 million in 1980 to more than $ 260 million in 1996. n3 Soft money donations by the 544 largest public and private companies more than tripled between 1992 and 1996.

n3 During the 1995-96 election year cycle, the Republican national party committees (the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee) raised approximately $ 138.2 million in soft money and the Democratic national party committees (the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee) raised approximately $ 123.9 million in soft money. (The term "election cycle" refers to the period from January 1 of the year preceding the election through December 31 of the year during which the election occurs). Corporations were major contributors of these funds.

[**14]

With respect to Mariani's challenge, the parties agree on the following facts. Candidates for federal elective office help their parties raise soft money. Candidates who raise large amounts of soft money often receive more support from their party than candidates who are less effective at raising soft money. Committee officials often act as intermediaries between donors and candidates.

Soft money is used to fund (or partially fund) issue advocacy that, on occasion, is hard to distinguish from direct advocacy for a particular candidate for federal office. Campaigns sometimes coordinate with outside entities regarding these ads. These ads promote or criticize federal candidates in order to influence the outcome of elections, although avoiding words of direct advocacy such as "vote for," "elect," or "defeat." n4

n4 The following ads aired in the 1995-95 election cycle illustrate this proposition. The Republican National Committee financed the following ad:

ANNOUNCER: Three years ago Bill Clinton gave us the largest tax increase in history, including a 4 cent a gallon increase on gasoline. Bill Clinton said he felt bad about it.

CLINTON: People in this room are still mad at me over the budget because you think I raised your taxes too much. It might surprise you to know I think I raised them too much, too.

ANNOUNCER: OK, Mr. President, We are surprised. So now, surprise us again. Support Senator Dole's plan to repeal your gas tax. And learn that actions ... do speak louder than words.

The Democratic National Committee financed the following issue ad:

ANNOUNCER: American Values. Do our duty to our parents. President Clinton protects Medicare. The Dole/Gingrich budget tried to cut Medicare $ 270 Billion.

Protect families. President Clinton cut taxes for millions of working families. The Dole/Gingrich budget tried to raise taxes on 8 million of them. Opportunity. President Clinton proposes tax breaks for tuition. The Dole/Gingrich budget tried to slash college scholarships. Only President Clinton's plan meets our challenges, protects our values.

[**15]

Corporations play an important role in campaign finance. Candidates for federal elective office often know which corporations are large contributors of soft money. Because there are no limits on soft money contributions, soft money is easier to raise than hard money. Soft money contributions of corporate treasury funds can result in access (and thus a forum to express their interests) for corporate officials to high government officials, including elected officials, as well as to candidates for federal elective office. Large and repeat donors sometime get more access than other donors, and donating soft money can be a more effective means for getting access than hard money. Corporate soft money contributions enable corporations to some extent to circumvent the corporate hard money contribution ban and support (indirectly) candidates for federal elective office.

Corporations are solicited for and give large sums of soft money in federal elections; according to reports filed with the FEC, during the 1994 and 1998 election [*769] cycles, corporations donated more than 50 percent of all itemized soft money contributions. Additionally, in the 1995-96 election cycle, corporations in industries [**16] in which legislation was contemplated gave large sums of soft money.

III. The Test for Frivolousness

In *California Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 193-94 n.14, 69 L. Ed. 2d 567, 101 S. Ct. 2712 (1981)*, the Supreme Court stated that "we do not construe § 437h to require certification of constitutional claims that are frivolous." The Court cited with approval a district court decision from an in forma pauperis action that employed the standard from the in forma pauperis statute, *28 U.S.C. § 1915*(e)(2)(B), to determine whether a challenge to FECA was frivolous. See id. (citing *Gifford v. Congress, 452 F. Supp. 802 (E.D. Cal. 1978)).* The in forma pauperis statute authorizes a district court to dismiss sua sponte any action that it determines to be legally frivolous. An action is not frivolous under the statute where the complaint raises an arguable question of law that ultimately will be resolved against the plaintiff. See *Neitzke v. Williams, 490 U.S. 319, 328, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989).* The District Court applied the standard for frivolousness set forth in Neitzke [**17] and certified Mariani's challenge to the en banc Court of Appeals after concluding that "it cannot be said that the constitutional challenges are plainly foreclosed by existing precedent." Mariani v. United States, No.3 CV-98-1701 (March 25, 1999).

The government and the FEC argue that the District Court should have used a more exacting standard for frivolousness and rejected Mariani's challenge. They submit that the correct standard is that set forth by the Ninth Circuit in *Goland v. United States, 903 F.2d 1247, 1257 (9th Cir. 1990),* which viewed the role of the district court as akin to that of a single judge deciding a motion to convene a three-judge court to hear a constitutional challenge and noted that this standard is closer to the standard used to review a claim under FED. R. CIV. P. 12(b)(6) than it is to the in forma pauperis standard.

We need not decide which standard applies, because under either standard Mariani's claim is not frivolous. As the Ninth Circuit noted, a genuinely new variation on an issue raised under a particular section of the FECA that already has been challenged and upheld may give rise to a nonfrivolous challenge to that section: "once [**18] a core provision of FECA has been reviewed and approved by the courts, unanticipated variations also may deserve the full attention of the appellate court. At the same time, not every sophistic twist that arguably presents a 'new' question should be certified." *Id. at 1257;* see also *Khachaturian v. Fed. Election Comm'n, 980 F.2d 330, 331 (5th Cir. 1992).* Mariani's challenge to § 441b(a) is not simply a sophistic twist, but can fairly be characterized as a new challenge based on the rise in importance in campaign finance of soft money and issue advocacy. Moreover, the facial validity of the statute never has been squarely determined by the Supreme Court.

The District Court did not make an independent assessment of the frivolousness of the challenge to § 441f. Hereafter, district courts considering challenges to

separate provisions of the FECA should make the required determination regarding frivolousness for each of the challenges. n5 However, because the government does not challenge the lack of an independent assessment here, and because the pending criminal case awaits a determination of this action, we will reach the challenges to § 441f [**19] without remanding for a determination regarding frivolousness.

n5 That determination is best made initially by District Courts.

IV. The Challenge to § 441b(a)

Section 441b(a) bans corporations and unions from using funds from [*770] their corporate treasuries to contribute to or make expenditures in connection with any campaign for federal office. See *2 U.S.C. § 441b*(a). In *Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 208-09, 74 L. Ed. 2d 364, 103 S. Ct. 552 (1982),* the Supreme Court chronicled the history of § 441b(a):

Seventy-five years ago Congress first made financial contributions to federal candidates by corporations illegal by enacting the Tillman Act, 34 Stat. 864 (1907). Within the next few years Congress went further and required financial disclosure by federal candidates following election, Act of July 25, 1910, 36 Stat. 822, and the following year required pre-election disclosure as well. Act of August 19, 1911, 37 Stat. 25. The Federal Corrupt [**20] Practices Act, passed in 1925, extended the prohibition against corporate contributions to include "anything of value," and made acceptance of a corporate contribution as well as the giving of such a contribution a crime. 43 Stat. 1070.

The first restrictions on union contributions were contained in the second Hatch Act, 54 Stat. 767 (1940), and later, in the War Labor Disputes Act of 1943, 57 Stat. 167, union contributions in connection with federal elections were prohibited altogether. These prohibitions on union political activity were extended and strengthened in the Taft-Hartley Act, 61 Stat. 136 (1947), which broadened the earlier prohibition against contributions to "expenditures" as well. Congress codified most of these provisions in the Federal Election Campaign Act of 1971, 86 Stat. 3, and enacted later amendments in 1974, 88 Stat. 1263, and in 1976, 90 Stat. 475.

Under *Buckley v. Valeo, 424 U.S. 1, 19, 22, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)* (per curiam), it is clear that spending for political campaigns is protected speech that implicates both the right to free expression and the right of free association. Moreover, because there is "no support in [**21] the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation," *First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1977),* the ban on corporate contributions under § 441b(a) is subject to the same level of scrutiny as other regulations limiting spending for political campaigns. In *Buckley, 424 U.S. at 16,* the Court held that limitations on spending for campaigns should be subjected to "exacting scrutiny": "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." The Court added that the First Amendment guarantee "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id. at 15* (citing *Monitor Patriot v. Roy, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971)).*

Buckley, of course, distinguished campaign contributions [**22] from direct expenditures, striking down a limit on expenditures while upholding a limit on campaign contributions. As the Court's recent decision in *Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 145 L. Ed. 2d 886, 120 S. Ct. 897, 904 (2000)* (citing *Buckley, 424 U.S. at 20-21),* explains, in the area of contributions, even under the exacting scrutiny standard, "limiting contributions [leaves] communication significantly unimpaired." "Under Buckley's standard of scrutiny, a contribution limit involving 'significant interference' with associational rights could survive if the government demonstrated that contribution regulation was 'closely drawn' to match a 'sufficiently important interest.' " Id. at 904 (citation omitted). Accordingly, in considering Mariani's challenge to § 441b(a), while we treat campaign contributions from the corporate treasury as speech and subject the ban on [*771] them in § 441b(a) to exacting scrutiny, we do so against a background principle that limits on contributions--though not necessarily bans on contributions--can withstand this scrutiny if they are " 'closely drawn' to match a 'sufficiently important interest. [**23] ' "

The District Court certified two issues regarding § 441b(a) to this Court. The first is whether the prohibition in § 441b(a) on contributions by corporations from corporate treasuries to candidates for federal elective office is unconstitutional on its face. The second is

whether the prohibition in § 441b(a) on contributions by corporations from corporate treasuries to candidates for federal office, in the context of the presently existing law that otherwise permits corporations to expend unlimited amounts of corporate funds to influence the outcome of federal elections (via soft money contributions), violates the First Amendment.

A. The Constitutionality of § 441b(a) on its Face

In considering the $ 1,000 contribution limit at issue in Buckley, the Supreme Court stressed the importance of the right to association through support of the candidate of one's choice:

The primary first amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association . . The right of association is a 'basic constitutional freedom,' *Kusper v. Pontikes, 414 U.S. 51, 38 L. Ed. 2d 260, 94 S. Ct. 303,* [**24] that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker, 364 U.S. 479, 486, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960).* In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama, [357 U.S. 449]* at 460-461, [ *78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)].*

*Buckley, 424 U.S. at 24-25* (internal citations partially omitted).

Nevertheless, the Court concluded that the $ 1,000 limit was constitutional. The Court identified two principal reasons for upholding the limit. First, the Court recognized a strong governmental interest in deterring corruption and the appearance of corruption in campaign finance, particularly from large contributions. See *id. at 28;* see also *id. at 30* ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."). Second, the Court concluded that the $ 1,000 limit was narrowly [**25] tailored insofar as it still permitted individual donors to register their political preferences in a substantial way, reasoning that the expressive value of the contribution lies in the act of contributing rather than the amount given. See *id. at 21.* Accordingly, Buckley seems to leave open the question whether an outright ban on campaign contributions--such as that found in § 441b(a)--would pass constitutional muster.

The government and the FEC argue that, even if Buckley left the door open for a constitutional challenge to an outright ban, *Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 74 L. Ed. 2d 364, 103 S. Ct. 552 (1982)* (hereinafter *NRWC*), slammed the door shut. In NRWC, the Supreme Court addressed indirectly the issue of limiting direct corporate contributions to candidates. There, the Court upheld federal restrictions upon corporate solicitation of campaign funds from individuals found in a subsection of § 441b-441b(b)(4)(c)--that prohibits nonstock corporations from soliciting funds to be used for political purposes (through a separate segregated fund) from people who are not members of the corporation. See *id. at 198 n.1, 205-11.* [**26] [*772] Subsection 441b(b)(4)(c) permits corporations to make limited campaign contributions from separate segregated funds solicited explicitly for that purpose. See *id. at 201-02.* In upholding the statute, the Court suggested that Congress could prohibit direct contributions by corporations to candidates for public office, stating that

The first purpose of § 441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. *See United States v. International Union United Auto., etc., 352 U.S. 567, 579, 77 S. Ct. 529, 535, 1 L. Ed. 2d 563 (1957).* The second purpose of the provisions, the government argues, is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. See *United States v. CIO, 335 U.S. 106, 113, 68 S. Ct. 1349, 1353, 92 L. Ed. 1849 (1948).* [**27] We agree with the government that these purposes are sufficient to justify the regulation at issue.

*459 U.S. at 207-08;* see also *Fed. Election Comm'n v. Nat'l Conservative PAC, 470 U.S. 480, 495, 84 L. Ed 2d 455, 105 S. Ct. 1459 (1985)* (stating that NRWC upheld "the prohibition of corporate campaign contributions to political candidates").

Although § 441b(a) was not directly at issue in NRWC, the Eleventh and Sixth Circuits have read NRWC to uphold the constitutionality of its ban on contributions from corporate treasuries. See *Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 645-46 (6th Cir. 1997); Athens Lumber Co., Inc. v. Fed. Election Comm'n, 718 F.2d 363, 363 (11th Cir. 1983)* (en banc).

There is some room for doubt as to whether the Court can be said to have held squarely that the ban in § 441b(a) is constitutional. NRWC stated that "We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes to avoid undue restriction on the associational interests asserted by respondent." *459 U.S. at 208* (emphasis added). Moreover, the first purpose identified by the Court--limiting the effect [**28] of the advantage flowing from the corporate form--could be met by a limit on contributions from corporate treasuries instead of a ban; and the second purpose could perhaps be addressed in corporate charters and state laws regulating corporations. Nevertheless, we feel constrained to read NRWC, and the Court's statements on NRWC in National Conservative PAC, as at least strong suggestions that § 441b(a) is constitutional.

*Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 108 L. Ed. 2d 652, 110 S. Ct. 1391 (1990),* which upheld a Michigan statute that prohibited corporations from using corporate funds for independent expenditures in support of or in opposition to candidates for state office, also implies that the flat ban in § 441b(a) is constitutional. The analysis proceeds from Buckley, which distinguished independent expenditures from contributions: "Although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions." *Buckley, 424 U.S. at 23.* [**29] Austin upheld a ban on independent expenditures from the corporate treasury because it found the ban sufficiently narrowly tailored to the purpose of limiting the influence of the unique state-conferred benefit of the corporate structure, which allows corporations to amass large treasuries. See *Austin, 494* [*773] *U.S. at 660-61.* Because Buckley treats limits on independent expenditures as more severe than limits on contributions, Austin suggests that a ban on contributions from the corporate treasury also would be constitutional if sufficiently narrowly tailored to achieve the goal.

Austin also counsels that the ban on contributions from the corporate treasury here is sufficiently narrowly tailored to the interest of limiting the influence of corporate treasuries amassed under the state-conferred corporate structure. Austin reasoned that the Michigan statute prohibiting independent expenditures by corporations was sufficiently narrowly tailored to its purpose because, by permitting corporations to make independent political expenditures from separate segregated funds, it avoided an absolute ban on all forms of corporate political spending. See *494 U.S. at 660-61.* [**30] The FECA also permits such indirect corporate political expenditures (via soft money), and under the teachings of Austin would thus seem to be sufficiently narrowly tailored to pass constitutional muster.

We are mindful that the flat ban on corporate contributions has never been directly addressed by a holding of the Supreme Court, and that this issue involves important First Amendment values. Because of the strong implication we draw from NRCW, National Conservative PAC, and Austin, however, we feel compelled to reject Mariani's facial challenge to § 441b(a). It will be for the Supreme Court itself to decide otherwise.

B. Section 441b(a) and Soft Money

The second challenge Mariani raises with respect to § 441b(a) is that the development of issue advocacy and the prevalence of soft money in campaigns for federal office has so eroded the theoretical distinction between hard and soft money that any justification for the ban on contributions from corporate treasuries has been vitiated. Mariani argues that under present conditions the ban cannot advance a compelling state interest and therefore must be invalidated. Significantly, Mariani does not complain that § 441b(a) itself fails [**31] to ban contributions from corporate treasuries. Rather, he argues that under the FECA--as interpreted by the Supreme Court and FEC regulations--it is possible for corporations to accomplish through other means that which they cannot accomplish through direct contributions from corporate treasuries. Mariani contends that, by funding soft money issue advocacy, contributors come so close to accomplishing what they would accomplish by hard money campaign contributions that the two are basically indistinguishable in terms of the danger they pose of corrupting the political process.

This contention amounts to an argument that § 441b(a) does too little by way of banning corporate political spending and is thereby fatally underinclusive. The Supreme Court has made clear, however, that Congress can act incrementally in this and other areas. See *Buckley, 424 U.S. at 105* ("[A] statute is not invalid under the constitution because it might have gone farther than it did.") (citations omitted). As we have explained in a case regarding solicitation of campaign funds by a candidate for judicial office, the government may "take steps, albeit tiny ones, that only partially solve a [**32] problem without totally eradicating it." *Stretton v. Disciplinary Bd. of the Supreme Court of Penn., 944 F.2d 137, 146 (3d Cir. 1991).*

The underinclusiveness analysis employed for First Amendment questions does not change this principle. The First Amendment requires that the rule chosen must "fit" the asserted goals, *City of Cincinnati v. Discovery*

*Network, Inc., 507 U.S. 410, 428, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993)*, and it must also strike an appropriate balance between achieving those goals and protecting constitutional rights. Underinclusiveness analysis serves to "ensure that the proffered state interest actually [*774] underlies the law," *Austin, 494 U.S. at 677* (Brennan, J., concurring). But a rule fails the test only if it cannot "fairly be said to advance any genuinely substantial governmental interest," *Federal Communication Comm'n v. League of Women Voters, 468 U.S. 364, 396, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984)*, because it provides only "ineffective or remote" support for the asserted goals, id. (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980))*, [**33] or "the most limited incremental" support, *Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983)*.

Thus, First Amendment underinclusiveness analysis requires neither a perfect nor even the best available fit between means and ends. See *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52-53, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986)* (zoning ordinance regulating adult theaters was not constitutionally underinclusive "in that it failed to regulate other kinds of adult businesses ... We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses."); see also *Blount v. Sec. Exch. Comm'n, 314 U.S. App. D.C. 52, 61 F.3d 938, 946 (D.C. Cir. 1995)* ("[A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more or the speech of more people could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals.").

Applying this standard, section 441b(a) is not fatally underinclusive. The regulation in *Federal Communications Commission v. League of Women Voters, 468 U.S. at 397*, [**34] which banned editorial speech by station management, but not editorial control over the content of programs and guests on news programs, was struck down because it did "virtually nothing" to prevent noncommercial stations from serving as outlets for expression of narrow partisan views. In contrast, § 441b(a) prevents corporations from donating hard money entirely. The important theoretical differences between hard and soft money, which include that a candidate cannot directly control how to spend soft money, are intended to avoid the corrupting influence of large contributors supporting a particular candidate. The practical distinctions between hard and soft money may have diminished in the past decade with the rise of issue advocacy, but not to such an extent that we can say that there is no benefit from distinguishing between the two. If hard and soft money were equivalent, it would be hard to imagine why Mariani would have gone to the lengths he allegedly went to in order to give hard money instead of soft.

Mariani attempts to counter this analysis by citing to *United States v. National Treasury Employees Union, 513 U.S. 454, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995)*: [**35]

> when the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' ... It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

*Id. at 475* (quoting *Turner Broadcasting System v. Fed. Communications Comm'n, 512 U.S. 622, 664, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)*). The underinclusiveness analysis explicated above is not inconsistent with National Treasury Employees Union. Congress may regulate speech so long as it demonstrates that the recited harms are real, and it may, consistent with that principle, choose to regulate just some part of that speech. The requirement that the regulation alleviate the harm in a direct and material way is not a requirement that it redress the harm completely. And in light of the broad language in NRWC regarding the legitimacy of Congress's purpose in enacting § 441b(a), it is simply too late in [*775] the day to argue that Congress has failed to demonstrate that the recited harms are real. [**36]

Congress might well have concluded that direct contributions from corporate treasuries were more important to regulate than expenditures or contributions made through committees, because hard money can be used by a candidate in more and different ways than soft money. We note that no party to this case has argued that there is no compelling government interest in banning contributions from corporations. Indeed, Mariani's argument that the rise of soft money fatally undermines the purpose of § 441b(a) seems to depend on the assumption that limiting corporate contributions--if done effectively--would be constitutionally valid.

V. The Challenge to § 441f

Section 441f provides that "no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." *2 U.S.C. § 441f.* Mariani argues that the prohibition in §

441f on contributions in the name of another to candidates for federal elective office violates the First Amendment because it fails to advance any compelling state interest and because [**37] it is underinclusive since it only applies to contributions of hard money (and can be circumvented by donating soft money).

The Buckley Court accorded broad acceptance to the FECA's reporting and disclosure requirements, explaining that they impose "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley v. Valeo, 424 U.S. 1, 21-22, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976).* Although acknowledging the dangers of compelled disclosure of political activity, the Court found that the governmental interests in disciosure were of such magnitude that the requirements passed the strict test established by *NAACP v. Alabama, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958).* The Court accepted as compelling three purposes behind the disclosure requirement: to provide the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office; to deter actual or apparent corruption; and to gather the data necessary to detect violations of the contribution limits. See *Buckley, 424 U.S. at 66-68.*

Buckley [**38] carefully considered the danger posed by compelled disclosure. It held that the state interests promoted by the FECA's reporting and disclosure requirements justified the indirect burden imposed on First Amendment interests, and that the compelled disclosure requirements were constitutional in the absence of a "reasonable probability" that disclosures would subject their contributors to "threats, harassment, or reprisals." *Id. at 74.* Proscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to be at the very core of the Court's analysis. In light of Buckley, we reject Mariani's argument that § 441f fails to advance a compelling state interest.

We also conclude that Congress's decision to limit the disclosure requirement to contributions of hard money does not make the requirement fatally underinclusive. Mariani's argument that the disclosure requirement is fatally underinclusive is similar to his argument that § 441b(a) has been undermined by the rise of soft money. As with that challenge, however, we conclude that Congress was free to determine that disclosure of hard money donations was [**39] the most important form of disclosure, and to limit the regulation to that area.

VI. Conclusion

For the foregoing reasons, we reject Mariani's challenges to § § 441b(a) and [*776] 441f. Judgment will be entered in favor of the government.

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interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586. The instant case, however, does not fit within the *Paralyzed Veterans/Alaska Professional Hunters* line for the simple reason that it does not involve an *interpretation* of a regulation. As we stated in *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C.Cir.1997), "[I]nterpretative rules and policy statements are quite different agency instruments. An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm." Although petitioners argue that *Alaska Professional Hunters* is pertinent because it, like this case, involved a long-term agency practice which constituted an implicit interpretation or application of the relevant regulation, that is not so. In that case, a formal adjudication by an associate agency had adopted an interpretation of the regulation in accord with the informal practice. *See Alaska Professional Hunters*, 177 F.3d at 1031.

In the instant case there is no dispute as to the regulation's meaning. The regulation states that where the Administrator finds that a combination of analysis and testing provides data equivalent to an actual evacuation, the former may be used in place of the latter. Whether this test is met requires a factual determination by the FAA, and clearly, as methods of analysis and other considerations develop over time, the FAA's response to the test can also. In 1989 the FAA did not believe that analysis would provide equivalent data when seating capacity changed by over five percent, but in 1998, spurred on by injuries to demonstration participants, it reviewed its policy and concluded that the situation had changed such that analysis and testing were now sufficient. *See* 63 Fed.Reg. at 13,096 ("The FAA has now determined that standardized methodologies *have been* developed and there are sufficient data *now* available" (emphasis added)). This is not a different interpretation of the regulation, just an application of the regulation to a changed situation which calls for a different policy.

## III.

[3] Petitioners alternatively argue that the FAA was at least obliged to give a fuller explanation for the switch of position that led to the issuance of the certificate—one that took into account the adverse comments submitted in response to the policy statement. The agency was not, however, required to seek comments on its policy statement nor its pending certificate decision. The APA includes no such requirement and we are not at liberty to create one. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653–55, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990). A policy statement can be issued at any time without a comment period and the certificate is merely an administrative action, a so-called informal adjudication, for which an agency is only obliged to provide an explanation adequate to give a reviewing court a basic understanding—and not a very detailed one—of its action. *See Camp v. Pitts*, 411 U.S. 138, 143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). In this case the policy statement—and the explanation provided in the government's brief[4] combined with Boeing's submission—easily meets that standard. The agency decided that a full-scale demonstration created too great a risk of injury to the demonstrators and this spurred an examination of the use of analysis. The administrator concluded that, in particular cases, testing and analysis would provide equivalent data to an actual demonstration even if the capacity increase were greater than five percent, and also found that such was the case for the 777–300. That some "commentators"—whether or not their views should be considered part of the record[5]—disagreed with the FAA's policy shift is of no moment. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.")

Petitioners do not really claim that the FAA's position was arbitrary and capricious, only that its failure to respond to the comments and give a fuller explanation is illegal. For the reasons we have given, we think petitioners are wrong. The petition for review is denied.

4. Since an agency engaged in informal adjudication is not obliged to give much of an explanation before a petition for review, *cf. Pension Benefit Guar.*, 496 U.S. at 655–56, 110 S.Ct. 2668, we tend to look to its brief for fuller explanation of its action. *See, e.g., Guardian Moving & Storage Co., Inc. v. ICC*, 954 F.2d 1428, 1433–34 (8th Cir.1992)



Federal Election Commission (FEC) moved to dismiss. The United States District Court for the District of Columbia, 31 F.Supp.2d 13, 41 F.Supp.2d 1, Paul L. Friedman, J., dismissed counts, and government appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) indictment sufficiently alleged causation element; (2) FEC reasonably interpreted its soft money reporting regulation to require political committees to report "true" sources of their soft money donations; and (3) defendants had fair notice of what conduct was forbidden.

Reversed.

1. Courts ⇨90(2)

One three-judge panel of Court of Appeals does not have authority to overrule another three-judge panel; that power may be exercised only by full court.

2. Elections ⇨328(1)

Indictment sufficiently alleged causation element of charge of causing false statements to be made to Federal Election Commission (FEC) by alleging that defendants used conduit checks to make improper political contributions to political committees, resulting in committees' submission of false statements as to identities of contributors. 18 U.S.C.A. §§ 2(b), 1001; 11 C.F.R. § 104.8(e).

3. Elections ⇨317.4

Federal Election Commission (FEC) reasonably interpreted its soft money reporting regulation to require political committees to report "true" sources of their soft money donations; subsection expressly incorporated earlier hard money disclosure provisions, including one permitting committees to report name of signer of check as the donor only if there was no "evidence to the contrary." 11 C.F.R. § 104.8(e).

UNITED STATES of America, Appellant,

v.

Pornpimol KANCHANALAK a/k/a Pornpimol Pariehatthkul, and Duangnet Georgie Kronenberg, Appellees.

Nos. 99-3019 & 99-3031.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 8, 1999.

Decided Oct. 8, 1999.

Defendants charged with causing submission of material false statements to

5. The parties dispute whether those comments [illegible] and in the informal adjudications. We need

1. Administrative Law and Procedure ⇨413

In interpreting regulation, court may consider contemporaneous statement of agency's policy reasons for promulgating it.

5. Constitutional Law ⇨258(1)

Due Process Clause of Fifth Amendment prohibits punishing criminal defendant for conduct which he could not reasonably understand to be proscribed. U.S.C.A. Const.Amend. 5.

6. Constitutional Law ⇨258(3.1)
Elections ⇨324.1

Defendants charged with causing submission of material false statements to Federal Election Commission (FEC) had fair notice, as required by due process, that not reporting true source of soft money donations was illegal; defendants should reasonably have understood that federal laws required political committees to report true source of soft money donations and that disguising those true sources would cause false statements to be made. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. §§ 2(b), 1001; 11 C.F.R. § 104.8(e).

7. Statutes ⇨219(2)

If statute has not directly addressed precise question at issue, then agency's construction, if reasonable, should be honored.

8. Elections ⇨317.2

Federal Election Commission (FEC) reasonably interpreted section of Federal Election Campaign Act (FECA) barring foreign nationals from making hard money contributions and soft money donations in connection with election to "any political office" as applying to federal, state and local elections. Federal Election Campaign Act of 1971, § 319, 2 U.S.C.A. § 441e.

Jonathan Biran, Attorney, United States Department of Justice, argued the cause for appellant. With him on the briefs was John P. Kacadas, Attorney, United States Department of Justice. Eric K. Yaffe, Attorney, entered an appearance.

Reid H. Weingarten argued the cause for appellees. With him on the brief were Erik L. Kitchen, Brian M. Heberlig, and James Hamilton. Michael Spafford entered an appearance.

Before: WALD, SILBERMAN and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

[1] The government charged Pornpimol "Pauline" Kanchanalak (aka Pornpimol Parichattikul) and Duangnet "Georgie" Kronenberg with a scheme to disguise illegal hard money contributions and soft money donations from foreign nationals and corporations to national and state political committees. Defendants were also alleged to have caused political committees to file reports with the Federal Election Commission ("FEC") falsely identifying lawful permanent residents as the source of funds that actually originated with foreign nationals and corporations in violation of 18 U.S.C. §§ 2(b), 1001. The government argued that § 441e of the Federal Election Campaign Act ("FECA") prohibits any infusion of money from foreign nationals into federal, state, and local elections and that section 104.8 of the FEC regulations requires that political committees report the true source of their contributions and donations. Defendants asserted that as to both hard and soft money, political committees were not required to report the true sources of their receipts, and as to soft money, FECA did not restrict such donations by foreign nationals.[1] They also argued that the FEC reporting regulation could not reasonably be read to require disclosures of the original sources of soft money receipts.

Based on its prior rulings in *United States v. Hsia* and *United States v. Trie*, the district court dismissed the hard money counts, determining that the government needed to demonstrate affirmative conduct beyond using conduit checks for a false statement prosecution. *See United States v. Hsia*, 24 F.Supp.2d 33 (D.D.C. 1998), *rev'd*, 176 F.3d 517, 523–24 (D.C.Cir. 1999); *United States v. Trie*, 23 F.Supp.2d 55 (D.D.C.1998). The district court also dismissed the soft money counts, holding that the disclosure regulation, section 104.8(e), did not require political committees to reveal the original sources of their soft money.

[2] This court subsequently reversed the district court's ruling in *Hsia*, finding that, in fact, the government had sufficiently alleged affirmative conduct for a false statement prosecution by charging that the defendant utilized conduit checks, and that FECA requires the "true source" of hard money to be reported. *See United States v. Hsia*, 176 F.3d 517 (D.C.Cir. 1999). On the basis of that ruling, the government seeks reinstatement of the hard money counts in this case. We agree that our decision in *Hsia* mandates reinstatement of the hard money false statement counts, and thus we summarily reverse the district court's order with respect to those counts.

We also find that the FEC regulation, section 104.8(e), prohibits the reporting of conduit contributions with respect to soft money and that § 441e of FECA also prohibits foreign soft money donations. Accordingly, we reverse the judgment of the district court with respect to the soft money counts as well.

## I. Background

Defendants, Pauline Kanchanalak and Duangnet Kronenberg, were charged with "knowingly and willfully caus[ing] the submission of material false statements to the FEC." *See* Superceding Indictment, at 24. Defendants are officers of Ban Chang International (USA) Inc. ("BCI USA"), a foreign corporation. Kanchanalak is neither a citizen nor a permanent resident of the United States. Kronenberg is a permanent resident of the United States. The contributions in question are checks made out to political committees and signed by permanent residents of the United States, even though the signing individuals were not the actual source of the donated funds.

On November 13, 1998, a federal grand jury issued an eighteen count superceding indictment against defendants. The indictment charged violations of FECA, 2 U.S.C. §§ 431 *et seq.*, and regulations issued by the FEC pursuant to FECA. The indictment generally alleges a scheme in which defendants illegally provided both "hard money contributions" and "soft money donations" to the Democratic National Committee ("DNC" or "the Committee") and other political committees.[2] "Hard

1. Defendants now concede that in *United States v. Hsia*, 176 F.3d 517 (D.C.Cir.1999), we rejected their contention that political committees are not required to report the true sources of their hard money but ask us to reconsider that decision. We have no authority to do so. *See LaShawn v. Barry*, 87 F.3d 1389, 1396 (D.C.Cir.1996) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court. . . . That power may be exercised only by the full court.").

2. A "political committee" is defined under FECA as follows:

> (A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or
>
> . . . .
>
> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure . . . in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

money" refers to funds that have been deposited by the Committee into a "federal account" and are used to finance federal election campaigns. "Soft money" refers to funds that are deposited into a "non-federal" account and are supposed to be used for, among other things, state and local campaigns. *See Trie*, 23 F.Supp.2d at 55. Defendants are alleged to have illegally used conduits to donate to the Committee both hard and soft money funds that originated with foreign nationals and corporations. The conduits were Duangnet Kronenberg and Praitun Kanchanalak, a relative of both defendants and an unindicted co-conspirator.[3]

More specifically, Count One charges that defendants engaged in a conspiracy to defraud the United States by disguising the fact that the true source of funds contributed to the DNC was BCI USA. *See* Appendix ("App.") 60-82; Superceding Indictment ¶¶ 1-66. Counts Two through Fourteen charge that defendants knowingly and willfully caused the DNC and other political committees to file false reports with the FEC, which erroneously identified the sources of contributions and donations, in violation of 18 U.S.C. §§ 2(b), 1001.[4] *See* App. 83-85, Superceding Indictment ¶¶ 1-2. The false statements were contained in thirteen reports filed with the FEC; each report is the subject of a separate count.

2 U.S.C. § 434(b).

3. The indictment alleges that the defendants caused political committees to receive checks signed "P. Kanchanalak," leading political committees to believe that they were being made by Pauline Kanchanalak, even as they were being drawn on Pratun Kanchanalak's account. *See* Appendix at 67.

4. Section 1001 currently provides, in relevant part, that:

> (a) Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully ... makes any materially false, fictitious, or fraudulent statement or representation ... shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001. Some counts allege violations of the previous version of § 1001. However, the differences between these versions are not relevant to the appeal.

Section 2(b) provides: "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2(b).

5. A contribution is defined under FECA's definitional provision as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

Counts Two through Four, Six through Eight and Thirteen of the superceding indictment were based solely on hard money "contributions."[5] The remaining false statement counts were based either partly or wholly on soft money funds that were not deposited into a federal account. Defendants sought dismissal of both the hard and soft money counts, arguing that under 18 U.S.C. §§ 2(b), 1001, the government had failed to demonstrate adequately that defendants "caused" the submission of false statements. Additionally, on the soft money counts, defendants argued that soft money conduit contributions—even from foreign nationals—were not prohibited under FECA.

On December 31, 1998, the district court, largely agreeing with the defendants, dismissed Counts Two through Four and Seven through Fourteen. *See United States v. Kanchanalak*, 31 F.Supp.2d 13, 14 (D.D.C.1999) ("*Kanchanalak I*"). The district court's decision was based on its own prior reasoning in *United States v. Hsia*, 24 F.Supp.2d at 33, and *Trie*, 23 F.Supp.2d at 55. In both *Hsia* and *Trie*, the government had alleged only that the defendants signed conduit checks, or solicited others to act as signers for conduit checks. The court found that merely signing (or soliciting others to sign) checks was not sufficient to demonstrate that the defendants had "caused" the making of false statements about the actual source of the contributions.[6] In *Hsia*, it also found that the "statements" at issue were literally true, since the check writers were a source (if not the only source) of the contributed funds. In *Kanchanalak I*, the court found that the allegations were "virtually indistinguishable from the allegations at issue in *Hsia* and *Trie*." *Kanchanalak I*, 31 F.Supp.2d at 14. Again, the government had failed to allege any conduct that could satisfy the necessary causal elements of a violation under 18 U.S.C. §§ 2(b), 1001. In *Kanchanalak I*, the district court did not reach the issue of whether there was a basis—statutory or otherwise—for the government to allege false statements at all with respect to soft money.[7]

On February 3, 1999, in *United States v. Kanchanalak*, 41 F.Supp.2d 1 (D.D.C.1999) ("*Kanchanalak II*"), the district court dismissed all of the remaining false statement counts as to Ms. Kanchanalak and all but one as to Ms. Kronenberg. Even as to those counts for which the government had sufficiently met its burden of alleging "affirmative conduct," the district court found that there was an additional reason supporting dismissal, namely, the inapplicability of FECA to soft money.

The court found only one provision in FECA that arguably provided a basis for alleging a false statement, namely § 441f, which prohibits contributions in another person's name, and that indisputably applied only to hard money.[8] In the court's words, "[o]n the thin reed of Section 441f, the government ... has a plausible argument that a report submitted by a political committee to the FEC that lists the identity of a 'conduit' or a person other than the true source of a contribution contains a false statement." *Kanchanalak II*, 41 F.Supp.2d at 7 (internal quotations omitted). However, that argument "relied heavily on the definitions and operation of FECA, definitions that apply only to hard money 'contributions' regulated by FECA." *Id.* Although FECA requires political committees to report their hard money contributions, the court could find no corresponding FECA provision requiring political committees to report soft money donations. *Id.* (discussing 2 U.S.C. § 434(b)(2)(A)).

The only reporting requirement directly applicable to soft money donations was 11 C.F.R. § 104.8(c), which the court characterized as a "stand alone provision in the regulations." *Id.* at 8. However, that provision in "the regulations provided no indication of whether a national party committee is obligated to report the 'true source' of any such donation"; thus the court said that the government "lacks any basis to argue that the statute and regulations require a political committee to list the names of 'true sources' of soft money donations in reports to the FEC." *Id.* Since neither FECA nor FEC regulations required committee treasurers to report

6. In *Hsia* and *Trie*, the district court said that the indictment's lack of specificity in this regard was constitutionally impermissible, given that it charged conduct in an area which implicated First Amendment considerations. The court found that "[t]he combination of First Amendment interests at stake and the threat of a criminal prosecution necessitates a close examination of any indictment to ensure that the statutes utilized are neither overly vague nor overly broad in their language or in their application." *Hsia*, 24 F.Supp.2d at 56. This court later rejected this vagueness argument, holding that the application of the statute to the conduit check situation was not so broad so as to offend the First Amendment. *See Hsia*, 176 F.3d at 523.

7. In *Kanchanalak I*, the district court declined to dismiss some disputed counts, ordering the parties to file supplemental briefs indicating whether these remaining counts might survive *Hsia*. *See Kanchanalak I*, 31 F.Supp.2d at 15.

8. Section 441f, entitled "[c]ontributions in name of another prohibited," provides that:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

2 U.S.C. § 441f.

the "true sources" of soft money donations, the court reasoned, defendants had not "caused" political committees to issue "false statements," and, therefore, had not violated 18 U.S.C. §§ 2(b), 1001.

After the district court ruled in *Kanchanalak I* and *II*, this court reversed in large part the district court's decision in *Hsia*. *See Hsia*, 176 F.3d at 517. In *Hsia*, we rejected the district court's ruling that knowingly engaging in conduit check writing was not enough to "cause" a false statement to be made. *Id.* at 522-23. We found that § 434(b) of FECA requires political committees to report the "true source" of hard money contributions; thus, statements identifying conduits as the source of funds were not "literally true." *Id.* at 523-24.

The government now appeals the dismissal of the hard money counts in *Kanchanalak II* on the grounds that its reasoning was explicitly rejected in our *Hsia* decision. The government also seeks reinstatement of the soft money counts on the theory that the FEC reporting regulation, section 104.8(e), requires political committees to report the same information for soft money that they report for hard money, including the true sources of their receipts.

## II. Discussion

### A. *Hard Money Counts*

Our reasoning in *United States v. Hsia*, 176 F.3d 517 (D.C.Cir.1999), mandates reinstatement of the hard money counts in this case. In *Hsia* we found that "the simple interposition of conduits to sign the checks is certainly enough to 'cause' a committee to make false statements in its report." *Id.* at 523. We also held that FECA requires political committees to identify the true source of hard money contributions. Therefore, if committees "did not report the true sources, their statements would appear to be false." *Id.* at 524.

In these respects, this case is indistinguishable from *Hsia*. As in *Hsia*, defendants are alleged to have acted as conduits or utilized others as conduits in making contributions to political committees in federal elections. By thus causing political committees to report conduits instead of the true sources of donations, defendants have caused false statements to be made to a government agency. Accordingly, we summarily reverse the district court's orders dismissing the false statement counts predicated on hard money contributions.

### B. *Soft Money Counts*

#### 1. *The Soft Money Reporting Regulation*

The validity of the false statement prosecutions based on conduit soft money donations ultimately turns on whether the FEC's soft money regulation, 11 C.F.R. § 104.8(e), is read to require political committees to report the "true" sources of their soft money donations. As the district court correctly noted, there is no soft money counterpart to § 441f in FECA itself, which prohibits conduit transfers of "contributions," *i.e.*, hard money. We note at the outset, however, that defendants do not attack the FEC's authority under the Act to promulgate regulations that address the disclosure of soft money donations.[9] However, defendants do contest the FEC's interpretation of section 104.8(e) as a valid basis for a false statements prosecution.

[1] We first discuss the standard under which we review the FEC's interpretation of its soft money disclosure regulation, keeping well in mind that this interpretation must also satisfy due process notice requirements of a criminal conviction for false statements. In *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 584 (D.C.Cir.1997) (citations omitted), we said:

> Agency interpretations of their own regulations have been afforded deference by federal reviewing courts for a very long time and are sustained unless "plainly erroneous or inconsistent" with the regulation. It is sometimes said that this deference is even greater than that granted an agency interpretation of a statute it is entrusted to administer.

We have followed that standard in FEC cases, explaining:

> The Supreme Court, we note, explicitly concluded in *DSSC [FEC v. Democratic Senatorial Campaign Committee]* "that the [Federal Election] Commission is precisely the type of agency to which deference should presumptively be afforded."

*John Glenn Presidential Comm., Inc. v. FEC*, 822 F.2d 1097 (D.C.Cir.1987) (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981)); *see also Fulani v. FEC*, 147 F.3d 924 (D.C.Cir.1998) (FEC entitled to "substantial deference" when interpreting own regulation). Quite apart from the substantial deference that we owe the agency, we find it eminently reasonable for the FEC to interpret section 104.8(e) to require political committees to report the true source of their soft money donations.

We begin with the language of the provision itself. *See Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). Section 104.8(e) provides, in relevant part, that:

> National party committees shall disclose in a memo Schedule A information about each individual, committee, corporation, labor organization or other entity that donates an aggregate amount in excess of $200 in a calendar year to the committee's non-federal account(s). This information shall include the donating individual's or entity's name, mailing address, occupation, or type of business, and the date of receipt and amount of any such donation.... The memo entry shall also include, where applicable, the information required by paragraphs (b) through (d) of this section.

11 C.F.R. § 104.8(e).

There can be no doubt, and indeed the district court acknowledged, that section 104.8(e) imposes a reporting requirement with respect to soft money that includes the identity of the "donating individual[ ]," as well as, "where applicable," the information required for hard money sources in section 104.8(b)-(d).[10] The district court, however, focused on the fact that "donates" is nowhere defined in the regulation (or in FECA), and does not have an ordinary meaning that confined it to the true source of the donated funds. In the district court's words:

> [T]he regulations provide no indication of whether a national party committee is obligated to report the "true source" of any such donation. In fact, the word "donates" is never defined in either the statute or regulations. The government therefore lacks any basis to argue that the statute and regulations require a political committee to list the names of

9. FECA explicitly grants the FEC broad powers to administer its duties under the Act. *See, e.g.*, 2 U.S.C. § 437c(b)(1) (granting FECA the authority to formulate general policy with respect to the administration of FECA); *accord* 2 U.S.C. §§ 437d(a)(8), 437d(e) & 437g(a).

10. The district court deemed it a "stand alone provision in the regulations," not rooted in any particular provision within the FECA. *Kanchanalak II*, 41 F.Supp.2d at 7. We are not sure why this is relevant. We also point out that in its effort to locate a statutory source for the prohibition against soft money conduit contributions, the district court discussed only 2 U.S.C. § 441f, the provision which prohibits hard money contributions in the name of another, and which it found was not applicable to soft money. *See id.* Notably, the district court opinion never addressed § 441e, which proscribes contributions from foreign nationals, as a potential source for the statutory prohibition on at least some soft money conduit contributions. One reason it may not have done so is that it had previously found in *Trie* that, contrary to the FEC's interpretation, § 441e is inapplicable to soft money.

"true sources" of soft money donations in reports to the FEC.

*Id.*

Defendants reiterate here the district court's reasoning, concluding that "an individual who writes a soft money donation check to a committee literally constitutes a 'donating individual' or an individual that 'donates' to the committee's non-federal account, even if that individual is in fact reimbursed for the donation." Br. of Appellees, at 11–12.

That proposition does not seem so apparent to us. To donate ordinarily signifies the act of giving away something over which the giver has control or sovereignty. Thus a donation is defined, *inter alia*, as "a formal grant of sovereignty or dominion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 672 (1976). And indeed in *Hsia*, this court rejected a similarly restrictive definition of persons who "make the contribution" in the case of hard money, declaring that the "demand for identification of the 'person who makes the contribution' is not a demand for a report on the person in whose name money is given; it refers to the true source of money." *Hsia*, 176 F.3d at 521. We see no critical distinction between the ordinary meaning of the terms "contribute" and "donate" in that respect.[11]

There is, however, an even more crucial sentence in section 104.8(e) that validates the FEC's interpretation, namely, the requirement that "the memo entry shall also include, where applicable, the information required by paragraphs (b) through (d) of this section." 11 C.F.R. § 104.8(e). Thus, subsection (e), by its own terms, cannot be read in isolation, but must be read to incorporate (unless inapplicable) the earlier hard money disclosure requirements of paragraphs (b) through (d). Among those provisions is subsection (c), which provides that: "*[a]bsent evidence to the contrary*, any contribution made by check, money order, or other written instrument shall be reported as a contribution by the last person signing the instrument." 11 C.F.R. § 104.8(c) (emphasis added).[12] The incorporation of this disclosure provision into section 104.8(e) is significant. Its language is transparent; a committee may not report that a signer is the actual source of funds if it is aware that the signer is not the source.[13] The plain implication of this is that a signer, who through a knowing conduit transaction, causes a committee to make an erroneous identification by withholding "evidence to the contrary," may be held responsible for causing the false statement.

Defendants offer one counter-argument. The term "contribution" contained in 11 C.F.R. § 104.8(c) is defined as "any gift . . . for the purpose of influencing any election to *Federal office*." 2 U.S.C. § 431(8)(A) (emphasis added). Since the term "contribution" in subsection (c) is thus limited to hard money used for federal elections, the entire subsection (c) by its own terms is similarly limited and hence not "applicable" to the soft money reporting requirements of section 104.8(e).

A closer and more contextual reading of section 104.8 and its various subsections disposes of this argument. Subsections (b), (c), and (d) of section 104.8, all incorporated by reference into subsection (e), address requirements for "contributions." On defendants' apocalyptic reasoning none would ever be applicable to subsection (e); this reading in turn would render the entire incorporation clause referring to subsections (b) through (d) superfluous. *See Benavides v. DEA*, 968 F.2d 1243, 1248 (D.C.Cir.1992) (declining to interpret a provision so as to render it superfluous). Surely it is not reasonable to think that the FEC would have incorporated other subsections into subsection (e), when "applicable," if it knew or intended that none of these subsections could ever apply to soft money. The more reasonable interpretation by far is that these hard money disclosure requirements apply to soft money reporting unless there is an obvious reason why they should not.[14]

[4] Not only is the FEC's construction of section 104.8(e) reasonable, but it also advances the articulated concerns that impelled the FEC to adopt the regulation in the first place. *See Methods of Allocation Between Federal and Non-Federal Accounts*, 55 Fed.Reg. at 26,058.[15] Adopted in 1990 as part of a "comprehensive set of allocation rules" drafted to "provide additional safeguards against the use of impermissible [soft money] funds in federal election activity by expanding the disclosure of receipts and disbursements by national party committees," section 104.8, in particular, was "[r]evised [to] . . . require national party committees to disclose the source and amount of receipts by their non-federal accounts . . . as well as by their federal accounts under the current rules." The revised section was retitled "Uniform Reporting of Receipts," *id.*, "to reflect its broadened application" to both hard and soft money. To that end, "[n]ew paragraph (e)," the FEC explained, "require[s] national party committees to also disclose information about receipts to their non-federal accounts." *Id.* This "broadened disclosure" was designed to "help eliminate the perception that prohibited funds [soft money] have been used to benefit federal elections and campaigns." *Id.*

Given our druthers, we might have wished that the FEC elaborated in greater detail just why identifying the true source of soft money would prevent the reality or

11. We recognize that because of the special definition of contribution in the Act, § 441i prohibits conduit contributions of hard money only. But this limitation on the scope of § 441i does not upset the ordinarily synonymous meanings ascribed to both terms.

12. The district court did refer to subsection (c) in addressing the hard money reporting requirements in *Hsia*, but limited its application to committee treasurers. *Hsia*, 24 F.Supp.2d at 59 (noting that the provision "implies that if there is 'evidence to the contrary' of which the political committee is aware, the committee may not report the contribution as having been made by the last person signing the instrument. The FEC regulation, if not the statute itself, therefore implies that the term 'contributor' is not synonymous with the phrase 'the last person signing the instrument' and that the political committee is supposed to identify the 'true source' of a contribution if it knows the true source."). The district court thus found that while 11 C.F.R. § 104.8 (c) may impose obligations on the committee treasurer, it does not impose the same obligation on a donor, absent a knowing conspiracy with the treasurer to conceal the true source.

In *Kanchanalak II*, the district court acknowledged subsection (c) in a footnote, but failed to draw the connection we find between subsection (c) and subsection (e). *See Kanchanalak II*, 41 F.Supp.2d at 7 n. 6.

13. Our analysis in *Hsia* is relevant here again. If political committees did not report the true sources of their donations, their statements would appear to be false. Even if the defendants did not themselves make false statements to the FEC (and are not being charged as such), "the simple interposition of conduits to sign the checks is certainly enough to 'cause' a committee to make false statements in its report." *Hsia*, 176 F.3d at 523.

14. It bears noting that the FEC has not been particularly consistent when it has employed the term "contribution" in regulations and opinions. Indeed, the term is often used synonymously with "donation." *See, e.g.*, 11 C.F.R § 113.3 (referring to "funds *donated* . . . to a candidate for federal office"); 11 C.F.R. § 115.2 (a) (prohibition on federal contractor "contributions" not applicable to "*contributions* . . . in connection with *State* or *local* elections"); FEC Advisory Op.1998-11 (Sept. 3, 1998), 1998 WL 600994, at *3 (discussing "*contributions* in connection with *State* and *local* elections"); FEC Advisory Op.1997-14 (Aug. 22, 1997), 1997 WL 529606, at *2 (discussing "*contributions*" to "*State* party building funds") (emphasis added in all citations).

15. In interpreting a regulation, we may consider a contemporaneous statement of the agency's policy reasons for promulgating it. *See Sierra Pac. Power v. EPA*, 647 F.2d 60, 65 (9th Cir.1981) ("An appellate court will ordinarily give substantial deference to a contemporaneous agency interpretation of a statute it administers. When dealing with an interpretation of regulations the agency has itself promulgated, 'deference is even more clearly in order.' ") (quoting *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965)).

the perception of soft money being illicitly used for federal election purposes. We do know that the overall design of the new allocation and reporting requirements was "to track the flow of non-federal funds transferred into federal accounts" to insure they were used only for legitimate allocation of joint expenses. It does not seem to require any leap from that premise to the conclusion that tracking such a flow will often be easier if the true source of the soft money is identified. For instance, the identity of the real donor may suggest to the FEC monitor that special scrutiny is in order to insure the pristineness of the federal side of the ledger. Ultimately, however, we know of no bar to an agency's interpretation of a prophylactic disclosure rule, such as this one, that may overshoot the mark a bit, so long as it stays in reasonable range.[16]

To cut to the chase, we find that the language and purpose of section 104.8(e) permits only one reasonable interpretation. In an effort to enhance its ability to prohibit the illegal commingling of hard and soft money receipts, the FEC required identifying information for the donors of both to assist it in tracking the flow of funds between the two.

2. *Fair Notice*

[5] That the FEC's interpretation of its disclosure regulation as applying to the true source of soft money is a reasonable one does not end the matter. For to support a criminal prosecution, it must give fair notice to the subject of what conduct is forbidden. The Due Process Clause of the Fifth Amendment prohibits punishing a criminal defendant for conduct "which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The Supreme Court has held that this "fair warning" requirement prohibits application of a criminal statute to a defendant unless it was reasonably clear at the time of the alleged action that defendants' actions were criminal. *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

[6] The Superceding Indictment does not offend the principles of due process and fair notice because the defendants should reasonably have understood federal laws to require committees to report the true source of soft money donations. Additionally, they should reasonably have understood that disguising those true sources would cause false statements to be made in violation of 18 U.S.C. §§ 2(b), 1001. The court in *Hsia*, which addressed the hard money reporting requirement, found that this "case fits comfortably within the clear and previously accepted scope of §§ 2(b) and 1001." *Hsia*, 176 F.3d at 523. We find likewise in this case. In arguing that §§ 2(b), 1001 may not comfortably be applied to soft money reporting, defendants assert that it was previously unclear that section 104.8(e) required real source identification for soft money, thus it would violate the due process requirement of clear notice to hold them criminally accountable now. We disagree.

Section 104.8(e) explicitly covers soft money; the FEC has interpreted it as such since its promulgation and announced its prophylactic purpose at that time. It also expressly incorporated several hard money disclosure requirements laid down in earlier subsections (b) through (d) into the subsection (e) requirement. One of those, subsection (c), unambiguously permits committees to report the name of the signer of a check as the donor only if there is no "evidence to the contrary." If an individual possesses that contrary evidence and participates in the conduit transaction by signing the check himself or conspiring with another to do so, he is "causing" a false statement to be made to the FEC in violation of §§ 2(b), 1001. That is clear notice enough.

3. *The Foreign National Prohibition*

The government offers a further justification for the soft money reporting requirement. It contends that § 441e of FECA bars foreign nationals from making both hard money contributions and soft money donations, indirectly or directly, for use in either federal or local elections. This statutory bar, it says, provides a powerful justification for the true source reporting requirement of soft money—that is, to ensure that United States citizens and permanent residents are not conduits for soft money that originates with foreign nationals. Defendants resolutely maintain that the statutory language of § 441e restricts that provision's scope to federal elections.

[7] In determining whether an agency's interpretation of a statute is appropriate, we apply *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).[17] Under *Chevron*, the court examines whether the statute speaks "directly ... to the precise question at issue." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. 2778. If the statute "has not directly addressed the precise question at issue," then the agency's construction, if reasonable, should be honored. *Id.*

[8] Through a promulgated regulation and an advisory opinion, the FEC has indicated that § 441e prohibits soft money donations as well as hard money contributions by foreign nationals. *See, e.g.*, 11 C.F.R. § 110.4(a); FEC Advisory Opinion, 1987-25 (Sept. 17, 1987), 1987 WL 61721. Section 441e provides, in relevant part, that:

> It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office; or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national.

2 U.S.C. § 441e.

Although the text by itself might appear comprehensive enough to encompass soft money, the defendants point to the use of the word "contribution" in that section; contribution is defined elsewhere in the Act as applying to hard money for federal elections. The term "contribution," as we have noted, includes: "(i) any gift ... made by any person for the purpose of influencing any election for Federal office ..." 2 U.S.C. § 431(8)(A)(i).

This definition, say defendants, limits the scope of § 441e to federal elections. Principles of consistent usage in statutory interpretation must, however, be applied consistently. While defendants focus exclusively on the term "contribution," they ignore the phrase "any political office" which appears not only in § 441e but also in its neighboring provision, § 441b. Section 441b distinguishes between contributions to federal offices and those tendered to "any political office."[18] Thus while § 441b regulates the manner in which

16. Defendants also counter that "no purpose would be served by requiring the reporting of the original source of soft money," given that "soft money donations in the name of another are not prohibited by FECA." Br. of Appellees, at 12, n.13. This ignores the FEC's longstanding interpretation of § 441e as barring foreign national contributions of soft money in section 110.4(a).

17. Defendants argue that this court should not give *Chevron* deference to the FEC's interpretation of an ambiguous statute in a criminal proceeding. Defendants' support for this proposition is scant. That criminal liability is at issue does not alter the fact that reasonable interpretations of the act are entitled to deference. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 703-05, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (according *Chevron* deference to a Department of the Interior regulation which interpreted a criminal provision of the Endangered Species Act).

18. Section 441b provides, in relevant part, that:

> (a) It is unlawful for any national bank, or any corporation organized by authority

most corporations and labor organizations may contribute to federal offices, that same provision limits the contributions that nationally chartered banks and corporations may make "in connection ... with *any political office*." 2 U.S.C. § 441b (emphasis added). By distinguishing federal offices from "any political office," Congress plainly intended to reach certain contributions made to state and local offices. Guided by the same canon of consistent usage that the defendants invoke on behalf of the term contribution, we think it telling that Congress employed the phrase "any political office" when defining the scope of the foreign-national contribution provision. Accordingly, the language of § 441e does not unambiguously cabin its reach to only federal offices.[19]

The legislative history and structural scheme of the statute tend to buttress the

> of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices ...
>
> (b)(2) For purposes of this section ... the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value ... to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section ...
>
> 2 U.S.C. § 441b

Defendants concede that the term "any political office" in § 441b(a) must include non-federal offices since elsewhere in the same subsection, the statute prohibits "any corporation whatever" (presumably, including, but not limited to federally chartered corporations) from making a contribution in connection with elections to federal offices. Presumably, if Congress had intended to prohibit only the entities referenced in subsection (a) (including national banks and federally chartered corporations) from making federal contributions, the clause concerning national banks and federally chartered corporations would have been surplusage.

But then defendants go on to argue that if Congress had intended to modify the Act's generic definition of "contribution" for purposes of § 441e to cover non-federal elections, it could have done so explicitly as it did with § 441b. In response to this, the government notes that §§ 441b and 441e were both preceded by provisions in Title 18, which were moved to Title 2 as part of the amendment to FECA in 1976. The government argues that § 441b's special definition of the term contribution is a vestigial remainder from the preceding provision, 18 U.S.C. § 610, which Congress inadvertently failed to remove. It also points out that there was no definition of "contribution" in the predecessor to § 441e (which was part of the Foreign Agents Registration Act ("FARA")).

Candidly we see no way to definitively resolve this statutory puzzle other than to declare an ambiguity and move on to our traditional rules for resolving ambiguities.

As a final note, we do think both defendants and the district court make too much of the definition of "contribution" as controlling the interpretation of every section in which it appears. Congress itself performed with no such consistency. Although contribution by itself does mean contribution to a federal candidate, Congress in many sections of the Act added contributions "for Federal office" although that seems surplusage. In contrast to others like §§ 441e and 441b, it used contribution in conjunction with the phrase "for

19. Defendants attempt to answer the government's § 441b argument by noting that § 441b(b)(2) carries its own definition of the term contribution, distinct from that contained in § 431(8)(A)(i). It defines a contribution as "any direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any services, or anything of value ... to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices *referred to in this section*." 2 U.S.C. § 441b (b)(2) (emphasis added). The question then becomes what are the offices referred to in this section. Subsection (a), for example, prohibits national banks and federally chartered corporations from making contributions "in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office." 2 U.S.C. § 441b(a).



FEC's broader interpretation of section 441e but can hardly be read as making its case conclusively. Section 441e was preceded by 18 U.S.C. § 613, a subsection of the Foreign Agents Registration Act ("FARA"), which made it unlawful for "agents of foreign principals" to "knowingly mak[e] any contribution of money or other thing of value ... in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office." 18 U.S.C. § 613 (repealed 1976). Nothing in the committee report that accompanied the original passage of section 613 indicated that Congress intended for the phrase "an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office" to be restricted to federal office.[20] And significantly, this relevant language of § 441e has remained identical through multiple amendments to FARA and to the provision itself, when the 1976 amendments moved the provision from Title 18 to FECA. The 1976 FECA Amendments Report said "[section 441e] is the *same* as Section 613." H.R. Conf. Rep. No. 94-165, at 67 (1976) (emphasis added). Ultimately, neither the plain language of § 441e nor its legislative history reveals Congress's unambiguous intent.

In the face of such statutory ambiguity, we are required to reach *Chevron*'s second prong, which requires judicial deference to an agency's reasonable interpretation. Indeed, this court has noted in several opinions that the FEC's express authorization to elucidate statutory policy in administering FECA "implies that Congress intended the FEC ... to resolve any ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference." *Orloski v. FEC*, 795 F.2d 156, 164 (D.C.Cir. 1986); *accord Fulani v. FEC*, 147 F.3d 924 (D.C.Cir.1998); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400 (D.C.Cir.1996); *LaRouche v. FEC*, 28 F.3d 137 (D.C.Cir. 1994).

The FEC has consistently interpreted § 441e as applicable to federal, state, and local elections since 1976. In that year it promulgated 11 C.F.R. § 110.4 which provides, in relevant part:[21]

> (1) A foreign national shall not directly or through any other person make a contribution, or an expenditure, or expressly or impliedly promise to make a contribution, or an expenditure, in connection with a convention, a caucus, or a primary, general, special, or runoff election in connection with any local, State, or Federal public office.
>
> (2) No person shall solicit, accept, or receive a contribution as set out above from a foreign national.
>
> 11 C.F.R. § 110.4(a).

It is unfortunate, but true, that neither the FARA, in which the predecessor of § 441e first appeared, nor FECA, to which it was removed in 1976, provides detailed reasons why Congress extended the ban in those sections to state and local elections. However, the legislative history of FARA does state repeatedly that it is designed to

any political office." *Compare* §§ 441a, 441b, and 441e.

20. Indeed, the House Conference report accompanying the amendments to FARA, which established § 613, explain that the "new section relating to agents of foreign principals ... would prohibit such agents from making or promising to make in their capacity as agents contributions in connection with any election to any political office or in connection with any primary election, convention, or caucus to select new candidates." H.R.Rep. No. 89-1470, at 15, *reprinted in* 1966 U.S.C.C.A.N. 2397, 2410-11. Notably the relevant language of the provision ("an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office") remains unchanged in the present provision.

21. *See* Establishment Clause, 41 Fed.Reg. 35,950 (Aug. 25, 1976) (establishing 11 C.F.R. § 110.4(a) and other regulations following the 1976 amendments to FECA); *see also* 11 C.F.R. § 110.4(a); FEC Advisory Opinion, 1987-25 (Sept. 17, 1987), 1987 WL [illegible]

"protect the interests of the United States by requiring complete public disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature." S.Rep. No.88-875, at 1 (1964).[22] Hence, we do not regard the absence of any more explicit reasons by Congress (or the FEC) to be fatal to the reasonableness of the FEC's interpretation. The language of the statute and the explicit regulation of the FEC interpreting it provide an additional reason that the defendants should have known that 104.8(e) imposed a true source reporting requirement for soft money donations.[23]

### III. Conclusion

For the reasons previously stated in our decision in *Hsia*, we reverse the district court's orders that dismissed the false statement counts predicated on hard money contributions. We also find that the reporting regulation, section 104.8 (e), requires the reporting of the true sources of conduit contributions with respect to soft money and that § 441e forbids foreign national donations of soft money. Thus, the judgment of the district court, with respect to the soft money counts, is reversed as well.

*So ordered.*

22. The Report continues: "Such public disclosure as required by the Act will permit the Government and the people of the United States to be informed as to the identities and interests of such persons and so be better able to appraise them and the purposes for which they work." S.Rep. No.88-875, at 1; see also H.R.Rep. No.89-1470, at 2 (1966). Senator Fulbright also commented on the floor that foreign agents "will have to make public *all* their political contributions." 109 Cong.Rec. 16398 (1963) (emphasis added). Finally, in old § 613, "agent of a foreign principal" was defined as "one who *within the United States* solicits ... or disburses contributions, loans, money or other things of value for or in the interests of such foreign principal" (emphasis added).

23. To argue, as defendants do, that the rule of lenity compels us to reject the FEC's otherwise reasonable interpretation of an ambiguous statutory provision is to ignore established principles of law. *See Babbitt*, 515 U.S. at 704 n. 18, 115 S.Ct. 2407 ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal material provide such inadequate notice of potential liability, the ... regulation [at issue], which has existed for two decades and gives fair warning of its consequences, cannot be one of them.").

**NAVEGAR, INCORPORATED, d/b/a Intratec, and Penn Arms, Incorporated, Appellants,**

**v.**

**UNITED STATES of America, Appellee.**

**No. 98-5191.**

**United States Court of Appeals, District of Columbia Circuit.**

**Argued Sept. 10, 1999.**

**Decided Oct. 8, 1999.**

Licensed manufacturers of firearms brought declaratory judgment action challenging constitutionality of Violent Crime Control and Law Enforcement Act section making it unlawful to manufacture, transfer, or possess a semiautomatic assault weapon and specifically identifying manufacturers' weapons as semiautomatic assault weapons. The United States District Court for the District of Columbia granted summary judgment for government, and manufacturers appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) statute prohibiting manufacture, transfer, or possession of semiautomatic assault weapons did not exceed Congress's author-



ity under commerce clause, and (2) statute was not unconstitutional Bill of Attainder.

Affirmed.

1. Commerce ⇐82.50
Weapons ⇐3

Violent Crime Control and Law Enforcement Act section which prohibited manufacture, transfer, or possession of semiautomatic assault weapons regulated activities having substantial effect on interstate commerce, and thus did not exceed Congress's authority under commerce clause, in view of clear congressional intent to reduce demand for, and restrict interstate flow of, semiautomatic assault weapons, especially across borders of states which had laws prohibiting such weapons, and in view of congressional findings accompanying previously-enacted firearm legislation. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 922(v)(1).

2. Commerce ⇐5

Congress' power under commerce clause is not limited to regulation of economic or commercial activities but may extend to activities solely on basis of their substantial effect on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3

3. Constitutional Law ⇐82.5
Weapons ⇐3

Statute making it unlawful to manufacture, transfer, or possess a semiautomatic assault weapon, and specifically identifying manufacturers' weapons as semiautomatic assault weapons, did not impose "punishment" on manufacturers, and thus was not unconstitutional Bill of Attainder, as there was no indication that Congress was singling out manufacturers for punishment because they were disloyal or disfavored, statute served nonpunitive purposes, and manufacturers failed to show sufficient punitive intent. U.S.C.A. Const. Art. 1, § 9, cl. 3; 18 U.S.C.A. §§ 921(a)(30)(A)(viii, ix), 922(v)(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐82.5

A law is constitutionally impermissible under Bill of Attainder clause if it both specifically singles out individuals or businesses and imposes punishment on them. U.S.C.A. Const. Art. 1, § 9, cl. 3.

5. Constitutional Law ⇐82.5

Whether a statute inflicts a punishment under the Bill of Attainder clause depends on (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further non-punitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish. U.S.C.A. Const. Art. 1, § 9, cl. 3.

6. Constitutional Law ⇐82.5

Party claiming that legislation constitutes unlawful Bill of Attainder must show unmistakable evidence of punitive intent, and isolated statements are not sufficient to show a punitive intent. U.S.C.A. Const. Art. 1, § 9, cl. 3.

7. Constitutional Law ⇐82.5

Mere fact that statute imposes a criminal penalty does not automatically satisfy punishment requirement of a bill of attainder. U.S.C.A. Const. Art. 1, § 9, cl. 3.

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Appeal from the United States District Court for the District of Columbia (No. 95cv00550)

Richard E. Gardiner argued the cause and was on the briefs for appellants.

Mark B. Stern, Attorney, United States Department of Justice, argued the cause for appellee. With him on the brief were David W. Ogden, Acting Assistant Attor-

[4] Rule 25 provides, "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party...." Fed.R.Civ.P. 25(a)(1). In the second part of our analysis in *Mallick*, we held that Rule 25 did not bar a fellow union member from substituting for the deceased plaintiff because the language of the LMRDA showed "the right to disclosure established by Congress is one shared without differentiation among all union members.... Since the union is under the same duty to all members enforceable by any of its members, it should not matter who the particular plaintiff is at any particular point in the lawsuit." 814 F.2d at 678. We allowed the union member's substitution because "there is no sensible basis for construing the procedural rules governing substitution of parties more rigidly than the rules providing for joinder and intervention of parties." *See id.* at 679 (citing Fed. Rules Civ. P. 20(a), 24(b), 25(a); Fed. R.App. P. 43(a)). Under the LMRDA, although the right of access to information may be prosecuted in the name of just one union member, it is viewed as a commonly held right that can be pursued by other members as well. In this case, however, Frank Sinito could not have joined his father's original lawsuit. Thomas Sinito did not bring a lawsuit under FOIA to acquit a right that was also violated as to his son. In addition, the FOIA requires each requestor to exhaust administrative remedies, *see Oglesby v. United States Dep't of the Army*, 920 F.2d 57 (D.C.Cir.1990), and Frank Sinito unquestionably did not do so.

[5] Frank Sinito might, however, substitute for his father if he is found to be his father's legal representative under Rule 25. We have previously held that the purpose of the 1963 amendments to Rule 25, which replaced a harsher prior rule regarding proper party plaintiffs, was " 'to liberalize the rule and to allow flexibility in substitution of parties.' " *McSurely v. McClellan*, 753 F.2d 88, 98–99 (D.C.Cir.1985) (per curiam) (citation omitted). Although it is generally accepted that a proper party for substitution must be a "legal representative" of the deceased, *see* 7C Wright, Miller & Kane, at § 1956 (citing *Mallonee v. Fahey*, 200 F.2d 918, 919 (9th Cir.1952) (opinion of Circuit Justice Douglas)), the addition of the word "successor" to the rule means that a proper party need not necessarily be the appointed executor or administrator of the deceased party's estate. *See Rende v. Kay*, 415 F.2d 983, 986 (D.C.Cir.1969) (compelling a plaintiff to "institut[e] machinery in order to produce some representative of the estate *ad litem*" would contravene the purpose of Rule 25 as amended). Thus, we have held not only that an executor or administrator of a decedent's estate is a proper party for substitution, but also that the distributee of a decedent's estate may be a "successor" of an estate that has been distributed and thus can be a proper party. *See McSurely*, 753 F.2d at 98–99 (listing cases); *Rende*, 415 F.2d at 985. Since there is no record evidence on whether Frank Sinito is a proper party for substitution under Rule 25, we remand the case to the district court to determine if he qualifies under the Rule.

Restricting substitution to Thomas Sinito's "successor[ ] or representative[ ]" goes a long way toward assuaging the government's concern that allowing a FOIA case to survive the death of the requestor would allow "any person," 5 U.S.C. § 552(a)(3), to step into the shoes of the decedent. It is axiomatic that Rule 25 limits properly substituted parties to those individuals who can adequately represent the interests of the deceased party. Under the FOIA, for example, a person who requests records pertaining to himself has rights that will sometimes—albeit rarely—differ from those of other, third-party requestors. *See Reporters Committee*, 489 U.S. at 771 ("Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure



is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request."). The FOIA was "clearly intended ... to give any member of the public as much right to disclosure as one with a special interest [in a particular document]," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), but a privilege or privacy exemption that would block disclosure of documents requested by a third party might not always apply with equal force when the requestor *is* the subject of the sought-after documents. *See, e.g., United States Dep't of Justice v. Julian*, 486 U.S. 1, 14, 108 S.Ct. 1606, 100 L.Ed.2d 1 (1988) ("there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report"); *Reporters Committee*, 489 U.S. at 771 ("the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public"). This court has also recently held that the death of a person who is a subject of the requested material does not extinguish all of that person's privacy-related interests; accordingly a court must "account for the fact that certain reputational interests and family-related privacy expectations survive death." *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 33 (D.C.Cir.1998). Moreover, the estate of a deceased requestor may have an interest in attorneys' fees to be recovered under the Act, as well as an interest in the waiver of any duplicating fees for which the requestor might have been eligible under the statute, *see* 5 U.S.C. § 552(a)(4)(A)(iii). Restricting the class of individuals who can substitute for the original requestor to "successors" and "legal representatives" strikes a balance, limiting substitution to "proper parties" in compliance with Rule 25(a)(1) while at the same time protecting any surviving rights of the requestor.

Finally, we take note of the government's acknowledgment in oral argument that Rule 25 substitution would not create extra work on the government's part or otherwise impede its interests. Indeed, it would seem to us more expeditious from the government's point of view to allow the appeal to be pursued on the record already made than to begin the process all over again with a new requestor.

## Conclusion

For the reasons outlined above, we hold that a FOIA cause of action may survive the death of the requestor, and we remand this case for the district court to determine whether Frank Sinito, the requestor's son, can properly substitute for his deceased father under Rule 25.

*So ordered.*

UNITED STATES of America, Appellant/Cross-Appellee,

v.

Merin HSIA, Appellee/Cross-Appellant.

Nos. 98-3111, 98-3125.

United States Court of Appeals, District of Columbia Circuit.

Argued March 15, 1999.

Decided May 18, 1999.

Defendant charged with conspiracy to defraud Federal Election Commission (FEC) and Immigration and Naturalization Service (INS) and with five counts of causing false statements to be made to FEC moved to dismiss. The United States District Court for the District of Columbia, Paul L. Friedman, J., 24 F.Supp.2d 11, 21

F.Supp.2d 33, granted motion as to false statement counts and denied defendant's motion for reconsideration, 24 F.Supp.2d 63. Parties cross-appealed. The Court of Appeals, Stephen F. Williams, Circuit Judge, held that: (1) in prosecution for causing false statements to be made to FEC, government was not required to show that defendant knew her acts to be unlawful; (2) indictment sufficiently alleged elements of charges of causing false statements to be made to FEC; (3) defendant's alleged conduct in soliciting conduit contributions to political committees and nominal "contributions" from conduits themselves was not protected activity under free speech principles; (4) Federal Election Campaign Act (FECA) did not effect pro tanto repeal of general criminal statutes proscribing making of false statements to federal agency and making person causing act to be done punishable as principal; and (5) refusal to dismiss conspiracy charge was not final decision for purposes of appellate review.

Reversed, cross-appeal dismissed, and case remanded.

Rogers, Circuit Judge, concurred and filed a separate opinion.

1. Fraud ⇐68.10(2)

In prosecution for causing false statements to be made to Federal Election Commission, government was not required to show that defendant knew her acts to be unlawful. 18 U.S.C.A. §§ 2(b), 1001.

2. Fraud ⇐68.10(2)

In prosecution for causing false statements to be made to federal agency, the government may show mens rea simply by proof (1) that the defendant knew that the statements to be made were false, and (2) that the defendant intentionally caused such statements to be made by another. 18 U.S.C.A. §§ 2(b), 1001.

3. Fraud ⇐69(2)

Indictment sufficiently alleged causation element of charge that defendant caused false statements to be made to Federal Election Commission when it alleged that she arranged for conduits to make improper political contributions for nonprofit corporation and her immigration clients, resulting in political committees' submission of false statements as to identities of contributors. 18 U.S.C.A. §§ 2(b), 1001; 11 C.F.R. § 104.8(c).

4. Criminal Law ⇐59(1)

Statute providing for one who willfully causes an act to be done by another to be punishable as principal does not limit by its terms the particular means by which the defendant may "cause" another to commit the act, nor the degree of permissible "attenuation" between these two people's actions. 18 U.S.C.A. § 2(b).

5. Constitutional Law ⇐82(8)

Fraud ⇐68.10(1)

Overbreadth principles were not violated by use of statute providing for person who willfully causes act to be done to be punishable as principal and statute proscribing making of false statements to federal agency to prosecute defendant who allegedly arranged for others to make improper political contributions for her immigration clients and nonprofit organization, thereby resulting in submission of false reports by political committees to Federal Election Commission, given absence of showing of what protected activity could be chilled by statutes' application to defendant's case. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. §§ 2(b), 1001.

6. Fraud ⇐68.10(1)

Provision of Federal Election Campaign Act (FECA) requiring political committees to file periodic reports identifying persons who made contributions sought identification of true source of contribution, not person in whose name money was given, and therefore political committees' reports that reflected names of conduits through whom defendant allegedly arranged to have contributions made, rather than names of those who actually paid money contributed, were not "literally true" for purposes of prosecution for causing false statements to be made to Federal Election Commission. Federal Election Campaign Act of 1971, §§ 301(8)(A)(i), 304(b)(3), 315(a)(8), 320, as amended, 2 U.S.C.A. §§ 431(8)(A)(i), 434(b)(3), 441a(a)(8), 441f; 18 U.S.C.A. §§ 2(b), 1001.



7. Fraud ⇐68.10(1)

Safe harbor provision of Federal Election Campaign Act (FECA), treating as in compliance reports submitted by political committee for which treasurer showed best efforts to obtain required information, did not apply to protect from prosecution, under statute proscribing making of false statements to federal agency, defendant who allegedly caused others to make contributions for her immigration clients and nonprofit organization, thereby causing political committees to submit reports incorrectly identifying contribution sources. Federal Election Campaign Act of 1971, § 302(i), as amended, 2 U.S.C.A. § 432(i); 18 U.S.C.A. §§ 2(b), 1001.

8. Fraud ⇐68.10(1)

As with provisions of Federal Election Campaign Act (FECA) requiring political committees to file periodic reports identifying contribution sources, forms used by Federal Election Commission (FEC) sought identification of actual source of money contributed, and not persons in whose name contributions were made, and therefore forms did not provide basis for treating as "literally true" forms filed by political committees to which defendant allegedly arranged contributions to be made through conduits on behalf of nonprofit corporation and immigration clients, so as to preclude defendant's prosecution for causing false statements to be made to FEC. Federal Election Campaign Act of 1971, §§ 301(8)(A)(i), 304(b)(3), 315(a)(8), 320, as amended, 2 U.S.C.A. §§ 431(8)(A)(i), 434(b)(3), 441a(a)(8), 441f; 18 U.S.C.A. §§ 2(b), 1001.

9. Constitutional Law ⇐81.5(7.1)

Elections ⇐328(1)

Free exercise claims asserted by defendant on behalf of religious nonprofit corporation and its members did not establish legal deficiency in indictment, but rather at most provided basis for defense, with respect to charges that defendant caused false statements to be made to Federal Election Commission when she arranged for conduits to make political contributions for corporation, which was barred from making such contributions. Federal Election Campaign Act of 1971, § 316(a), as amended, 2 U.S.C.A. § 441b(a); 18 U.S.C.A. §§ 2(b), 1001; 26 U.S.C.A. § 501(c)(3).

10. Constitutional Law ⇐90.1(1.2)

Elections ⇐328(1)

Defendant's alleged conduct in soliciting conduit contributions to political committees and nominal "contributions" from conduits themselves was not protected activity under free speech principles, and therefore First Amendment did not mandate dismissal of indictment charging defendant with causing political committees to make false statements to Federal Election Commission. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. §§ 2(b), 1001.

11. Elections ⇐317.4

Federal Election Campaign Act (FECA) did not effect pro tanto repeal of general criminal statutes proscribing making of false statements to federal agency and making person causing act to be done punishable as principal. Federal Election Campaign Act of 1971, § 301 et seq., as amended, 2 U.S.C.A. § 431 et seq.; 18 U.S.C.A. §§ 2(b), 1001.

12. Statutes ⇐158

There is a presumption against repeal by implication, and therefore Court of Appeals will not find repeal absent clear and manifest evidence that it was intended.

13. Criminal Law ⇐1023(8)

Refusal to dismiss conspiracy charge was not final decision for purposes of appellate review. 28 U.S.C.A. § 1291.

14. Criminal Law ⇐1023(8)

Defendant's First Amendment rights of free speech and free exercise of religion did not convey right to avoid trial on charge of conspiracy to defraud Federal Election Commission (FEC) and Immigration and Naturalization Service (INS), based on alleged scheme to solicit illegal political contributions on behalf of religious nonprofit organization, so as to make order refusing to dismiss charge immediately appealable under collateral order doctrine. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 371; 28 U.S.C.A. § 1291.

15. Criminal Law ⇐1023(3)

To qualify as a final, appealable collateral order, the order must, among other things, be effectively unreviewable on appeal from a final judgment; that is, it must involve an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial. 28 U.S.C.A. § 1291.

16. Criminal Law ⇐1023(3)

Court of Appeals applies the collateral order doctrine with the utmost strictness in criminal cases. 28 U.S.C.A. § 1291.

17. Criminal Law ⇐1134(10)

Refusal to dismiss charge of conspiracy to defraud Federal Election Commission (FEC) and Immigration and Naturalization Service (INS) was not immediately appealable under pendent jurisdiction.

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Appeals from the United States District Court for the District of Columbia (No. 98cr00057-01).

Elizabeth D. Collery, Attorney, U.S. Department of Justice, argued the cause for appellant/cross-appellee. With her on the briefs was Eric L. Yaffe, Trial Attorney.

Nancy Luque and Rangeley Wallace argued the cause and filed the briefs for appellee/cross-appellant.

Reid H. Weingarten, William T. Hassler and Brian M. Heberlig were on the brief for amicus curiae Yah Lin Trie.

Before: WILLIAMS, ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

Concurring opinion filed by Circuit Judge ROGERS.

STEPHEN F. WILLIAMS, Circuit Judge:

A six-count indictment charged Maria Hsia with various offenses deriving from a scheme to solicit illegal political contributions and disguise them as lawful ones. Hsia filed numerous motions to dismiss. The district court denied the motions as to Count One—conspiracy to defraud the Federal Election Commission ("FEC") and the Immigration and Naturalization Service ("INS")—but dismissed Counts Two through Six—causing false statements to be made to FEC. 24 F.Supp.2d 33, 38–47, 52–63 (D.D.C.1998); 24 F.Supp.2d 63, 64–65 (D.D.C.1998). The United States appeals this dismissal; we reverse. Hsia cross-appeals the refusal to dismiss Count One; we dismiss the appeal for lack of appellate jurisdiction.

* * *

The International Buddhist Progress Society ("IBPS"), one of Hsia's alleged co-conspirators and operator of the Hsi Lai Temple in Hacienda Heights, California, is a tax-exempt religious organization incorporated in California. The Federal Election Campaign Act ("FECA") forbids such a corporation from making contributions in federal election campaigns, 2 U.S.C. § 441b(a); the tax code bars participation in political campaigns whether they are federal or not, 26 U.S.C. § 501(c)(3).

Hsia herself is an immigration consultant in the Los Angeles area. The indictment alleges a series of actions taken by her and her co-conspirators to funnel money from IBPS through straw contributors into various campaigns. Hsia would either find and solicit individuals to serve as nominal contributors, see Indictment ¶¶ 32, 35, 38, 40(hh), 40(ii), or ask IBPS to do so, see *id.* ¶¶ 17, 19, 23, 26, 28, 33, 35, 40(h), 40(k), 40(n), 40(q), 40(t), 40(z), 40(ee), 40(gg). (She sometimes employed herself as such a contributor. See *id.* ¶¶ 15, 30, 38, 40(jj).) When IBPS complied with such a request—often employing people associated with the Temple as nominal contributors, see *id.* ¶ 13(b)—Hsia sometimes forwarded the checks to the campaign. See *id.* ¶¶ 23, 33, 38, 40(kk). All nominal contributors, whether solicited by Hsia or by IBPS, were reimbursed in full by IBPS from its corporate funds. See *id.* ¶¶ 17, 19, 23, 24, 26, 28, 30, 32, 33, 35, 39, 40(g), 40(i), 40(*l*), 40(o), 40(r), 40(u), 40(x), 40(aa), 40(dd), 40(*ll*). The individuals thus simply served as conduits for IBPS's money.

Hsia also allegedly used conduits to funnel money from two of her immigration clients—Hsieh San Yeh and Zhe Xu[1]—to the Clinton/Gore '96 Primary Committee, Inc. ("Clinton/Gore '96"). In these instances she instructed others to solicit the straw donors but conveyed the checks to the committee herself. See Indictment ¶¶ 47–49; Bill of Particulars at 14–16.

Count One charges that the actions involving IBPS constituted a conspiracy to defraud the United States, specifically the FEC and INS, in violation of 18 U.S.C. § 371. See Indictment ¶ 10. Counts Two through Six charge that Hsia, by means of her conduit contribution schemes, willfully caused certain recipients of such contributions—Clinton/Gore '96, the Democratic National Committee, and The Friends of Patrick J. Kennedy '96—to make false statements to the FEC in violation of 18 U.S.C. §§ 2 and 1001; these recipients filed reports listing the conduit contributions as being from their nominal sources, although the true source was either IBPS, Mr. Yeh, or Ms. Xu. See Indictment ¶¶ 43, 46, 49, 52, 55; Bill of Particulars at 14–16.

* * *

Counts Two through Six are based on 18 U.S.C. §§ 2(b), 1001(a):

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2(b).

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> ...
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation ...
>
> shall be fined under this title or imprisoned not more than 5 years, or both.

*Id.* § 1001(a).[2]

The most orderly fashion for addressing the district court's decision is by the elements of willfulness, causation, and falseness, with respect to all of which it found deficiencies.

"Willfully"

[1] According to the district court, the word "willfully" in § 2(b) requires the government to show that Hsia knew that her conduct was unlawful. 24 F.Supp.2d at 62

1. Ms. Xu was apparently a foreign national barred from making contributions by 2 U.S.C. § 441e.

2. This is the current form of § 1001, which applies only to Count Six. Counts Two through Five, alleging acts occurring before this current language went into effect, charge violations of the previous version of § 1001. That stated: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully ... makes any false, fictitious or fraudulent statements or representations ... shall be fined under this title or imprisoned not more than five years, or both." The differences between the versions are not relevant to this case, and we will refer to the current § 1001

n. 32; 21 F.Supp.2d 14, 21 (D.D.C.1998) (original decision on this issue); see also *United States v. Trie*, 21 F.Supp.2d 7, 14–16 (D.D.C.1998).[3] Believing that the charges here required an unconventional and extreme interpretation of §§ 2(b) and 1001, the court found that Hsia could not have known that her conduct would fall within their grasp.

Although we find no material novelty in the government's reading of the statutes (see below), our decision on whether the element of willfulness is adequately alleged does not turn on this point. We believe that the government need not prove that Hsia knew her acts to be unlawful; the question whether she could in fact have had such knowledge is therefore irrelevant.

[2] The natural reading of §§ 2(b) and 1001 is this: the government may show mens rea simply by proof (1) that the defendant knew that the statements to be made were false (the mens rea for the underlying offense—§ 1001) and (2) that the defendant intentionally caused such statements to be made by another (the additional mens rea for § 2(b)). See *United States v. Gabriel*, 125 F.3d 89, 101 (2d Cir.1997). The district court, like the Third Circuit in *United States v. Curran*, 20 F.3d 560 (3d Cir.1994), relied on *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), for its contrary result. But this extends *Ratzlaf* too far: that case did not universalize a broad reading of "willfully" and thus overturn the general rule that ignorance of the law is no excuse. *Ratzlaf* found a knowledge-of-criminality requirement in a statute that independently required the act at issue to be "for the purpose of evading" various reporting requirements; reading "willfully violating" there as only requiring intention would have made it surplusage. *Id.* at 139–41. In this case, no such problem exists. We find *Ratzlaf*'s narrow exception inapplicable and adopt the natural reading of mens rea above. Accordingly, nothing in the indictment's allegations contradicts the government's capacity to prove the statutorily required mens rea.

3. Although the district judge appeared to attribute this knowledge-of-criminality requirement to § 1001's "knowingly and willfully" language, it must, if it exists at all, be a gloss of "willfully" in § 2(b): no court adopting such a requirement has questioned the rule that knowledge of criminality need not be shown in direct § 1001 prosecutions. See *United States v. Curran*, 20 F.3d 560, 567–68 (3d Cir.1994) (analyzing issue as § 2(b) requirement)

"Causes"

[3] It is not entirely clear what defects the district court found in the government's theory of causation. The initial objection—that "a check is not a statement," 24 F.Supp.2d at 62–63—appears not only incorrect (the cases indicate, at most, that a check does not assert that it will not bounce) but irrelevant. The false statements here are the political committees' reports identifying certain listed names as sources of specific contributions; the names on the checks, together with the rest of the alleged conduit contribution scheme, could have "caused" these false statements to be made whether or not the checks were themselves statements of anything. But the district court seems also to have had a more general objection—that the causal link between Hsia's conduct and the making of false statements was too "attenuated." *Id.* at 61–62.

[4] Section 2(b) does not, of course, limit by its terms the particular means by which the defendant may "cause" another to commit the act, nor the degree of permissible "attenuation" between these two people's actions. Cf., e.g., *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 307 (3d Cir.1997) (defendant may be prosecuted under §§ 2(b) and 1001 even if people who actually made false statements are not criminally liable). The mens rea element of the statute provides an outer limit on the latter, for a weak or implausible causal link would make it more difficult to prove that the defendant brought the effect about "willfully."

Nor is the general scheme of the indictment novel; the application of § 2(b) to a conduit contribution scheme has been several times upheld. See *Curran*, 20 F.3d 560; *United States v. Hopkins*, 916 F.2d 207 (5th Cir.1990); *Goland v. United States*, 903 F.2d 1247 (9th Cir.1990); cf. *United States v. Yermian*, 468 U.S. 63, 68–75, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984) (§ 1001 conviction requires no proof that defendant was aware of any federal agency jurisdiction). In those cases, defendants were convicted under §§ 2(b) and 1001 for employing such a scheme to conceal their own contributions: they had found nominal donors, had these conduits make payments to a committee, and reimbursed them. Here, the money was not Hsia's; it belonged instead to her immigration clients or to her co-conspirator IBPS. But Hsia arranged—directly or indirectly—for the conduits to do their part. That she did this to channel *others'* money does not help her. As FEC regulations direct committees to report "any contribution made by check, money order, or other written instrument" "as a contribution by the last person signing the instrument" "[a]bsent evidence to the contrary," 11 CFR § 104.8(c), the simple interposition of conduits to sign the checks is certainly enough to "cause" a committee to make false statements in its report. The indictment and bill of particulars straightforwardly lay out the government's account of Hsia's affirmative steps toward that result.

[5] Invocation of the due process clause or the First Amendment does not change the analysis, at least for review of the indictment. As the case fits comfortably within the clear and previously accepted scope of §§ 2(b) and 1001, there is no question of notice or vagueness. As for overbreadth, we do not understand how it might apply here. There is no suggestion that the statutes are facially invalid. While the absence of any claim that Hsia's activity was itself constitutionally protected is consonant with the general form of overbreadth standing, see *Board of Trustees v. Fox*, 492 U.S. 469, 484, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), neither Hsia nor the district court ever specified just what protected activity could be chilled by the application of §§ 2(b) and 1001 to this case. "Overbreadth" appears, at bottom, to have been another tag for the court's concern that the indictment stretched §§ 2(b) and 1001 unreasonably far. We see no constitutional difficulty in use of the statutes against the conduct alleged here.

"False"

[6] The final strand of the district court's reasoning was its suggestion that the statements at issue were "literally true." 24 F.Supp.2d 33, 58.

FECA requires that political committees file periodic reports containing, among other things,

> the identification of each—
>
> (A) person . . . who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . . together with the date and amount of any such contribution.

2 U.S.C. § 434(b)(3). "Contribution" is defined, in relevant part, as

> any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

*Id.* § 431(8)(A)(i). FECA also provides that

> For purposes of the limitations (on contributions and expenditures) imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as con-

tributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

*Id.* § 441a(a)(8). Finally, FECA specifically states:

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

*Id.* § 441f.

We are convinced by these latter provisions that § 434(b)(3)'s demand for identification of the "person ... who makes a contribution" is *not* a demand for a report on the person in whose name money is given; it refers to the true source of the money. As the committees here did not report the true sources, their statements would appear to be false.

[7] The district court, for the most part, appears to have agreed with this analysis. See 24 F.Supp.2d at 59–60. It determined, however, that FECA's safe harbor provision, 2 U.S.C. § 432(i), controlled the case. That subsection, added five years after FECA's original enactment, states:

When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act.

*Id.* Because the indictment does not allege that the committee treasurers had any wrongful knowledge, the district court found, the statements in the reports must be considered FECA-compliant (and therefore not false). 24 F.Supp.2d at 60–61.

The argument assumes that this safe harbor does not merely provide an affirmative defense for the committee and its officers but actually modifies the substantive reporting requirements of FECA. Even if the provision wrought some substantive amendment, however, it could not be so drastic as to aid Hsia here. Section 432(i) conditions its relief on the treasurer's making "best efforts" to ascertain the necessary information, and FEC has spelled such efforts out in 11 CFR § 104.7. But not even Hsia argues that the section would shield a treasurer who went through the motions of the "best efforts" and then submitted information contrary to facts known to her. Thus, if the act of filing the report with conduits listed as contributors were "directly performed by" Hsia, 18 U.S.C. § 2(b), her actual knowledge of falsity—required to be shown anyway—would make the statements culpable regardless of any ritualistic performance of "best efforts."

In any event, we find no substantive modification. The statute allows the safe harbor only when the treasurer "shows" the use of best efforts, suggesting that the provision only applies to a proceeding against the committee itself or one in a position to make such efforts on the committee's behalf. 2 U.S.C. § 432(i). Further, there remains no qualifying language in the actual reporting requirements, and indeed § 432(i) refers to "the information required by this Act." *Id.* Finally, it would make no sense for Congress to allow treasurers to rely on the provision of information by others while at the same time giving others a virtual carte blanche to provide inaccurate information. We believe § 432(i) does not benefit those not associated with the committee at issue.

[8] On appeal, amicus Yah Lin ("Charlie") Trie presents an alternate theory of truth. Trie relies on the FEC forms' themselves, claiming that they did not request identification of the actual source of the money. This argument might make some sense if the forms employed terms other than those of the statute itself, but



they do not. Schedule A—the list of names at issue—is simply an itemized list of "Contributions (other than loans) From (a) Individuals/Persons Other Than Political Committees." This, like the rest of the form, simply echoes and implements the language of § 434(b)—a subsection which, as we have noted above, requires that the true source of money be reported.

We thus reject all arguments that the statements alleged in the indictment were "literally true."[4]

* * *

Although Hsia conclusorily restates the theories adopted by the district court, most of her briefs are devoted to alternate theories for affirming the dismissal.

[9, 10] Hsia's initial claims are all of First Amendment protection. Her free exercise arguments (asserted on behalf of IBPS and its members) we can dismiss immediately: these are—at most—a basis for a defense at trial, not a legal deficiency in the indictment. Her free speech argument appears to be this: since Hsia was simply soliciting political contributions, her actions here were protected speech; therefore the indictment must be subject to strict scrutiny.

This misframes the issue. The only solicitations alleged are those of *conduit* contributions and of nominal "contributions" from the conduits themselves. Neither is protected. FECA's reporting requirements were upheld by the Supreme Court. See *Buckley v. Valeo*, 424 U.S. 1, 60–68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Hsia has not suggested any plausible grounds for a right to tamper with these reports. Cf., e.g., *Goland*, 903 F.2d at 1258 (rejecting as frivolous defendant's asserted right to contribute anonymously via conduits).

[11] Finally, turning to Hsia's argument that FECA constitutes a pro tanto repeal of §§ 2 and 1001, we agree with the district court that it does not.

[12] We work in these cases under a presumption against repeal by implication. In *United States v. Hansen*, 772 F.2d 940 (D.C.Cir.1985), rejecting an argument that the financial disclosure requirements of the Ethics in Government Act effected a pro tanto repeal of § 1001, we said that the presumption rests on the view "that Congress legislate[s] with knowledge of former related statutes, ... and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction." *Id.* at 944–45 (internal quotation omitted). Thus we will not find repeal absent "clear and manifest" evidence that it was intended. *Id.* at 947–48.

Hsia presents no evidence of this sort. Instead, she relies on our decision in *Galliano v. United States Postal Service*, 836 F.2d 1362 (D.C.Cir.1988). There the Postal Service, exercising its administrative power under the general postal fraud provisions of 39 U.S.C. § 3005, had attacked as misleading the name and disclaimers on a solicitation for political contributions. To the extent FECA set out standards for these elements of such a solicitation, we held, it displaced the Service's authority under § 3005.

Hsia reads the case broadly, as indicating that FECA generally displaces more general statutes. Like the district court, we disagree. *Galliano* concerned the relative scope of jurisdiction for two administrative agencies—FEC and the Postal Service. The Department of Justice's authority to enforce general criminal statutes is quite different.[5]

4. We also reject Trie's contention, based on his same theory, that the counts must be dismissed because the FEC forms were "fundamentally ambiguous." Read in context, the forms have no such defect

5. *Galliano* did not purport to disturb the long recognized rule that the power of the Department to prosecute criminal violations is not displaced merely by the fact of a more focused later enactment, see *Hansen*, 772 F.2d at 945–46 (citing cases)—a corollary to the

Unlike the Postal Service, the Department of Justice has no authority to develop substantive standards of its own. As a criminal enforcer, it brings cases in federal court, where judges interpret the underlying statutes without deference to the Department. See *Crandon v. United States*, 494 U.S. 152, 177–78, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring). There is, therefore, no risk that Congress might have empowered two bodies to promulgate conflicting substantive standards—a result that *Galliano* presumed Congress would seek to avoid. We thus rely on our general requirement of clear evidence and find no repeal.

* * *

[13] On both statutory and First Amendment grounds, Hsia cross-appeals the district court's refusal to dismiss Count One (conspiracy). On its face, of course, this refusal is plainly not a "final decision" over which 28 U.S.C. § 1291 gives us jurisdiction. Hsia nevertheless suggests two grounds for appellate jurisdiction: the collateral order doctrine and pendent appellate jurisdiction. We reject both.

[14–16] To qualify as a final collateral order appealable under § 1291, the order at issue must, among other things, "be effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)—that is, it must involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978). Hsia's asserted rights—principally free speech and free exercise—do not so qualify. Unlike congressional Speech or Debate immunity, see *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979), for example, they are not rights to avoid trial altogether. But see *United States v. P.H.E., Inc.*, 965 F.2d 848, 855 (10th Cir.1992) (finding the "unique confluence of factors" made First Amendment-based collateral appeal permissible). We apply the collateral order doctrine "with the utmost strictness in criminal cases," *Flanagan v. United States*, 465 U.S. 259, 265, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984); any rule allowing immediate appeals for defendants advancing some First Amendment reason why an indictment should be dismissed would expose a vast array of criminal trials to interruption.

[17] Hsia alternatively asserts pendent jurisdiction. But in dictum in *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), the Supreme Court appeared to rule out such a theory:

> In determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well.... [S]uch claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

*Id.* at 662–63. Though the statement is only dictum, we think it right to take it literally, at least as to defendants' attempted appeals. Cf. *United States v. Zafiro*, 945 F.2d 881, 885 (7th Cir.1991) (suggesting that pendent appellate jurisdiction may allow government to challenge, at time of an interlocutory appeal authorized by § 3731, grant of severance to multiple defendants). An even partly open door could enable defendants to achieve untoward delay by coupling extra claims with a weak interlocutory appeal, and thus would give them an incentive to raise weak claims before the trial court on issues allowing interlocutory appeals; even where the interlocutory appeal is brought by the government, as here, we see no reason to give the defendant a windfall opportunity to delay proceedings via cross-appeal.

* * *

We reverse the district court's dismissal of Counts Two through Six, dismiss Hsia's cross-appeal for lack of jurisdiction, and remand the case for proceedings consistent with this opinion.

*So ordered.*

ROGERS, Circuit Judge, concurring:

I join the court in reversing dismissal of counts two through six, and remanding the case for trial. Our remand order means that any appellate disposition of count one could not resolve the entire case on appeal. Absent such an efficiency ground for review, or any other compelling reason to act now rather than after trial, there is no basis for exercising pendent appellate jurisdiction over Hsia's challenges to count one. The court therefore need not decide whether and under what conditions a court may exercise pendent jurisdiction over interlocutory appeals in criminal cases that may arise in the future. Consequently, the court's dictum purporting to bar such jurisdiction over claims raised by defendants is unnecessarily broad.

Hsia's pendent appellate jurisdiction claim would fail even under the standards applicable to civil cases. Addressing her challenges to count one now would not dispose of the case, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nehyan*, 115 F.3d 1020, 1026–27 (D.C.Cir.1997), and there is nothing in the record to suggest that her cross-appeal is one of those "rare exceptions" where "substantial considerations of fairness or efficiency" justify exercising pendent jurisdiction. *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678–79 (D.C.Cir.1996). Our remand of counts two through six demonstrates, moreover, that the issues on cross-appeal are not so "inextricably intertwined" with those of the jurisdictionally proper appeal that "review of the former ... [is] necessary to ensure meaningful review of the latter." *Swint v. Chambers County Com'n*, 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). In short, Hsia has not advanced a compelling reason to review count one before trial.

Hence, the court has no occasion to decide whether exercising pendent appellate jurisdiction over a criminal defendant's claim may in some circumstances be appropriate. Contrary to the court's suggestion, the Supreme Court has not foreclosed such jurisdiction. The court relies on dictum from *Abney v. United States*, 431 U.S. 651, 662–63, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), that it reads to hold by negative implication that pendent appellate jurisdiction is not available over claims by defendants in criminal cases. *See* opinion at 13. The Supreme Court's subsequent decision in *Swint* suggests a less rigid civil-criminal distinction than this court attempts to extract from *Abney*. First, the *Swint* Court did not characterize *Abney* as completely barring pendent appellate review in criminal cases, but rather as rejecting a rule "loosely allowing" such review. *See Swint*, 514 U.S. at 49–50. Second, in *Swint*, a civil case, the Court noted that *Abney*'s reasoning applied in both civil and criminal contexts, but went on to permit at least some pendent jurisdiction in civil appeals. *See id.* This extension of *Abney* to the civil context does not automatically mean that *Swint* likewise extends to the criminal context, but suggests that the *Abney* dictum may not be a sturdy foundation upon which to base a categorical limit to this court's appellate jurisdiction.

All of the reasons offered by the court to deny pendent jurisdiction in criminal appeals would also justify withholding such review over claims raised by defendants in

rule that where various criminal prohibitions intersect, a prosecutor may choose among them, see *United States v. Batchelder*, 442 U.S. 114, 123–24, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

civil appeals, *see* opinion at 13–14, and yet review is available in civil cases if certain strict standards are satisfied. *See, e.g., Swint*, 514 U.S. at 46–50; *Clinton v. Jones*, 520 U.S. 681, 707 n. 41, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *Gilda Marx*, 85 F.3d at 678. While these standards may apply more stringently in criminal cases, *cf. United States v. Rostenkowski*, 59 F.3d 1291, 1301 (D.C.Cir.1995), it is not clear that criminal appeals are so fundamentally different from civil appeals that a safety-valve to the finality requirement applies in one but never in the other, nor that the asymmetric scheme posited by the court, categorically foreclosing review only of defendants' claims, even when the government has also filed an interlocutory appeal, *see* opinion at 526, necessarily follows.

Accordingly, I would dismiss Hsia's cross-appeal on the relatively narrow grounds discussed above, and leave broader questions for a case that actually raises them.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, Petitioner,

v.

LIBRARIAN OF CONGRESS, Respondent.

Digital Cable Radio Associates, et al., Intervenors.

No. 98–1263.

United States Court of Appeals, District of Columbia Circuit.

Argued March 19, 1999.

Decided May 21, 1999.

Petitioner, which had been designated sole collection and disbursement agent for copyright royalties from music services that transmitted digital audio music, sought review of order from the Librarian of Congress that set compulsory license rate and imposed additional conditions on petitioner. The Court of Appeals, Harry T. Edwards, Chief Judge, held that: (1) reasonableness of rate established for compulsory license could be determined based on four statutory objectives rather than market rates; (2) 6.5 percent royalty rate was not contrary to relevant precedent; (3) Librarian had authority to impose terms on petitioner; but (4) terms imposed by Librarian on petitioner were not supported by evidence.

Petition denied in part and granted in part, and case remanded.

1. Copyrights and Intellectual Property ⇐48.1

Copyright Act's standard for judicial review of royalty rates established by Librarian of Congress is exceptionally deferential, requiring the court to uphold a royalty award if the Librarian has offered a facially plausible explanation for it in terms of the record evidence. 17 U.S.C.A. §§ 114, 802(g).

2. Copyrights and Intellectual Property ⇐48.1

Copyright Act section governing determination of rates for compulsory copyright licenses for subscription transmissions of digital audio music did not require use of market rates to guide determination of reasonableness, and interpretation of section by Librarian of Congress as requiring determination of reasonableness based on four statutory objectives was reasonable and thus entitled to deference under *Chevron*. 17 U.S.C.A. §§ 114(f), 801(b).

3. Copyrights and Intellectual Property ⇐48.1

Order of Librarian of Congress setting 6.5 percent royalty rate for compulsory copyright license for subscription transmissions of digital audio music was not arbitrary to relevant precedent of former Copyright Royalty Tribunal, in violation of Copyright Act, as only Tribunal decisions that were relevant were those that applied designated statutory objectives, and prior decisions did not require use of market rates to determine reasonableness of royalty. 17 U.S.C.A. §§ 114, 802(c).

4. Copyrights and Intellectual Property ⇐48.1

Librarian of Congress had authority to impose terms on agent for copyright owners, which was designated as sole collection and disbursement agent for royalties from music services that transmitted digital audio music, since Librarian had explicit authority to impose terms on copyright owners of sound recordings and entities performing sound recordings. 17 U.S.C.A. § 114(f)(1)(B).

5. Copyrights and Intellectual Property ⇐48.1

Terms imposed by Librarian of Congress on sole collector of copyright royalties from music services that transmitted digital audio music, including requirement that collector value each performance equally when distributing royalties, instructions as to what costs collector could deduct from royalties, permission for interested parties to audit collector, and instructions as to way in which collector had to deal with unknown copyright owners, were not supported by evidence, and thus were arbitrary, even though Librarian explained terms, and some terms were parallel to those imposed on services. 17 U.S.C.A. § 114(f)(1)(B), 802(g); 37 C.F.R. §§ 260.2(d), 260.3(d), 260.6(b), 260.7.

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On Petition for Review of an Order from the Librarian of Congress.

Robert A. Garrett argued the cause for petitioner. With him on the briefs was Cary H. Sherman. Eric A. Rubel entered an appearance.



Mark W. Pennak, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were Frank W. Hunger, Assistant Attorney General, and William Kanter, Deputy Director.

Bruce D. Sokler, Fernando R. Laguarda, Joni Lupovitz and Jon L. Praed were on the brief for intervenors.

Before: EDWARDS, Chief Judge, SENTELLE and TATEL, Circuit Judges.

Opinion for the Court filed by Chief Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Chief Judge:

Under § 114(f) of the Copyright Act ("Act"), 17 U.S.C. §§ 101–1332, the Librarian of Congress is charged with establishing the rates and terms for compulsory licenses of certain subscription transmissions of digital audio music. In this first-ever proceeding under § 114, the Librarian determined that three music services subject to the terms of the license must pay the Recording Industry Association of America ("RIAA") 6.5 percent of their gross domestic residential revenues in exchange for the right to transmit digital audio music. The Librarian also imposed certain terms and conditions of operation on both RIAA and the music services. RIAA now challenges the 6.5 percent rate set by the Librarian, claiming that it is too low. RIAA also challenges the additional conditions imposed by the Librarian, *i.e.*, conditions imposed on RIAA in its capacity as the collection agent for copyright owners.

The rate set by the Librarian survives challenge, because the Librarian's interpretation and application of the statute are permissible and consistent with established law. We reject the additional conditions imposed by the Librarian, however, for want of support in the record. The petition for review is denied in part and granted in part, and the case is hereby remanded.

Sec. 15.13.040. Contributions, expenditures and supplying of services to be reported.

(a) Except as provided in (g) of this section, each candidate shall make a full report, upon a form prescribed by the commission, listing the date and amount of all expenditures made by the candidate, the total amount of all contributions, including all funds contributed by the candidate, and for all contributions in excess of $100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor and the date and amount contributed by each contributor. The report shall be filed in accordance with AS 15.13.110 and shall be certified correct by the candidate or campaign treasurer.

(b) Each group shall make a full report upon a form prescribed by the commission, listing

(1) the name and address of each officer and director;

(2) the aggregate amount of all contributions made to it; and, for all contributions in excess of $100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor; and

(3) the date and amount of all contributions made by it and all expenditures made, incurred or authorized by it.

(c) The report required under (b) of this section shall be filed in accordance with AS 15.13.110 and shall be certified as correct by the group's treasurer.

(d) Every individual, person, or group making a contribution or expenditure shall make a full report, upon a form prescribed by the commission, of

(1) contributions made to a candidate or group and expenditures made on behalf of a candidate or group

(A) as soon as the total contributions and expenditures to that candidate or group reaches $500 in a year; and

(B) for all subsequent contributions and expenditures to that candidate or group in a year whenever the total contributions and expenditures to that candidate or group that have not been reported under this paragraph reaches $500;

(2) unless exempted from reporting by (h) of this section, any expenditure whatsoever for advertising in newspapers or other periodicals, on radio, or on television; or, for the publication, distribution, or circulation of brochures, flyers, or other campaign material for any candidate or ballot proposition or question.

(e) The report required under (d) of this section shall contain the name, address, principal occupation and employer of the individual filing the report, and an itemized list of expenditures. The report shall be filed with the commission by the contributor no later than 10 days after the contribution or expenditure is made. A copy of the report shall be furnished to the candidate, campaign treasurer or deputy campaign treasurer at the time the contribution is made.

(f) During each year in which an election occurs, all businesses, persons, or groups that furnish any of the following services, facilities, or supplies to a candidate or group shall maintain a record of each transaction: newspapers, radio, television, advertising, advertising agency services, accounting, billboards, printing, secretarial, public opinion polls, or research and professional campaign consultation or management, media production or preparation, or computer services. Records of provision of services, facilities, or supplies shall be available for inspection by the commission.

(g) The provisions of (a) of this section do not apply if a candidate

(1) indicates, on a form prescribed by the commission, an intent not to raise and not to expend more than $2,500 in seeking election to office, including both the primary and general elections;

(2) accepts contributions totaling not more than $2,500 in seeking election to

office, including both the primary and general elections; and

(3) makes expenditures totaling not more than $2,500 in seeking election to office, including both the primary and general elections.

(h) The provisions of (d)(2) of this section do not apply to one or more expenditures made by an individual acting independently of any group and independently of any other individual if the expenditures

(1) cumulatively do not exceed $250 during a calendar year; and

(2) are made only for billboards, signs, or printed material concerning a ballot proposition as that term is defined by AS 15.13.065(c).

(i) The permission of the owner of real or personal property to post political signs, including bumper stickers, or to use space for an event or to store campaign-related materials is not considered to be a contribution to a candidate under this chapter unless the owner customarily charges a fee or receives payment for that activity. The fact that the owner customarily charges a fee or receives payment for posting signs that are not political signs is not determinative of whether the owner customarily does so for political signs.

Sec. 15.13.400. Definitions.
In this chapter,

(1) "candidate"

(A) means an individual who files for election to the state legislature, for governor, for lieutenant governor, for municipal office, for retention in judicial office, or for constitutional convention delegate, or who campaigns as a write-in candidate for any of these offices; and

(B) when used in a provision of this chapter that limits or prohibits the donation, solicitation, or acceptance of campaign contributions, or limits or prohibits an expenditure, includes

(i) a candidate's campaign treasurer and a deputy campaign treasurer;

(ii) a member of the candidate's immediate family;

(iii) a person acting as agent for the candidate;

(iv) the candidate's campaign committee; and

(v) a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of the candidate;

(2) "commission" means the Alaska Public Offices Commission;

(3) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made and that is made for the purpose of influencing the nomination or election of a candidate, and in AS 15.13.010(b) for the purpose of influencing a ballot proposition or question, including the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that are rendered to the candidate or political party;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or ballot proposition or question, but it does include professional services volunteered by individuals for which they ordinarily would be paid a fee or wage;

(ii) services provided by an accountant or other person to prepare reports and statements required by this chapter; or

(iii) ordinary hospitality in a home;

(4) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballot proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports

and statements required by this chapter;

(5) "group" means

(A) every state and regional executive committee of a political party; and

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate;

(6) "immediate family" means the spouse, parents, children, including a stepchild and an adoptive child, and siblings of an individual;

(7) "independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

(8) "individual" means a natural person;

(9) "person" has the meaning given in AS 01.10.060, and includes a labor union and a group;

(10) "political party" means

(A) an organized group of voters that represents a political program and that nominated a candidate for governor who received at least three percent of the total votes cast at any one of the last five preceding general elections for governor; and

(B) a subordinate unit of the organized group of voters qualifying as a political party under (A) of this paragraph if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, election district, or precinct;

(11) "publicly funded entity" means a person, other than an individual, that receives half or more of the money on which it operates during a calendar year from government, including a public corporation.

Sec. 15.13.070. Limitations on amount of political contributions.

(a) An individual or group may make contributions, subject only to the limitations of this chapter and AS 24.45, including the limitations on the maximum amounts set out in this section.

(b) An individual may contribute not more than

(1) $500 per year to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;

(2) $5,000 per year to a political party.

(c) A group that is not a political party may contribute not more than $1,000 per year

(1) to a candidate, or to an individual who conducts a write-in campaign as a candidate; or

(2) to another group or to a political party.

(d) A political party may contribute to a candidate, or to an individual who conducts a write-in campaign, for the following offices an amount not to exceed

(1) $100,000 per year, if the election is for governor or lieutenant governor;

(2) $15,000 per year, if the election is for the state senate;

(3) $10,000 per year, if the election is for the state house of representatives; and

(4) $5,000 per year, if the election is for

(A) delegate to a constitutional convention;

(B) judge seeking retention; or

(C) municipal office.

(e) This section does not prohibit a candidate from using up to a total of $1,000 from campaign contributions in a year to pay the cost of

(1) attendance by a candidate or guests of the candidate at an event or other function sponsored by a political party or by a subordinate unit of a political party;

(2) membership in a political party, subordinate unit of a political party, or other entity within a political party, or subscription to a publication from a political party; or

(3) co-sponsorship of an event or other function sponsored by a political party or by a subordinate unit of a political party.

# HB 189

# HOUSE COMMITTEE REPORT

(7)

**Date Referred to Committee:** March 16, 2001 **FURTHER REFERRALS:** Judiciary

**Date of Committee Action:** April 19, 2001

**The STATE AFFAIRS Committee considered:** HB 189

**HOUSE BILL NO. 189** **REPEAL TERM LIMITS/TERM LIMITS PLEDGES**

**"An Act repealing statutory provisions relating to term limits and term limit pledges."**

**Recommends it be replaced with** _____**CS** _____(_____) [ ] Same Title [ ] New Title
*For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR* _____

[ ] attach amendments
[ ] add new referral to _____ Committee
[ ] Letter of Intent _____Committee

*List of Abbrev. For Depts.:*
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
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LAW
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DNR
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| *NEW* FISCAL NOTES *For Chief Clerk's Office Use Only | | | | |
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| | STEVENS | X | | | |
| Hanna J Crawford Jr | CRAWFORD | ✓ | | | |
| Jeannette James | JAMES | ✓ | | | |
| Joseph Foster | Foster | ✓ | | | |
| [illegible] | Hayes | ✓ | | | |
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| Chair: John Cogswell | Cogswell | ✓ | | | |
| Chair: | | | | | |

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April 5, 2001

House Committee on State Affairs
Alaska State Legislature
Juneau, Alaska 99801-1182

RE: **HB 189: Term Limits and Term Limit Pledges**

Dear Honorable Members,

It is my understanding that you are having a hearing on this bill on April 12. I would appreciate it if this letter could be made a part of the record of testimony on the subject bill.

I support this measure and urge its passage. I was reminded of the provisions of state law when confronted with this term limits language on the ballot in the last election. This kind of government sponsored electioneering is totally out of place on the ballot which should be kept clean so as not to impede a voters choice. How can we penalize a voter for campaigning within a hundred feet of the polling booth when we have the state of Alaska campaigning on an issue right in the privacy of the polling booth? The State is saying that the term limits issue is important more than any other issue before the voters, which is nonsense. I happen to support Representative Young's position on term limits and as a voter I resent the State implying that there may be something wrong with his position on the ballot.

In addition to the policy reasons for supporting the repeals provided for in HB 189, as a lawyer and former Attorney General I am sensitive to the legal problems with these provisions of our statutes. The government has no business telling us why we should vote for a candidate. This is a First Amendment issue. While I understand Attorney General Botelho has toned down the effect of the statutes in an attempt to give the legislative intent some life, I fear he has not been stern enough. The government can abridge free speech by singling out an issue of policy discussion for government control. I fear it has done so here.

Under any analysis there is little gained here but the possibility of a lawsuit, a suit which I anticipate would be lost by the government. I have been asked whether I would bring a constitutional case against these sections, but why waste government and personal assets on defending such an action when the policy is so bad, however the Supreme Court may rule? Let the legislature act.

I urge you to enact this bill and repeal these provisions that constrain the right of the public to consider a clean ballot in exercising the right to vote.

Sincerely,

John Havelock

cc: Attorney General Botelho

# *Summary of Argument in ACLU amicus brief*

Docket Nos. 93-1456 and 93-1828

**U.S. TERM LIMITS, INC., et al., Petitioners,**
**v.**
**RAY THORNTON, et al., Respondents.**

**STATE OF ARKANSAS EX REL.**
**WINSTON BRYANT, Attorney General**
**of the State of Arkansas,**
**Petitioners,**
**v.**
**BOBBIE E. HILL, et al., Respondents.**

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This case concerns issues of fundamental importance in any constitutional democracy. As Chief Justice Warren wrote, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). Because of their unique perspective and history of defense of voting rights and constitutional liberties, these amici respectfully submit this brief in support of respondents on the merits.

## STATEMENT OF THE CASE

This case involves a challenge to Amendment 73 to the Arkansas Constitution, adopted in November 1992 by an initiative petition. The relevant portion of the amendment provides that a person who has been elected to three or more terms to the U.S. House of Representatives, or to two or more terms to the U.S. Senate, is thereafter barred for life from appearing on the ballot for that office. Such incumbents may gain reelection only through write-in campaigns.

This lawsuit was filed in November 1992 in the Pulaski County Circuit Court. The circuit court granted summary judgment for the plaintiffs, finding the law an impermissible, state-imposed qualification for federal office. Pet. App. at 49a. The Arkansas Supreme Court affirmed. Pet. App. at 14a.

## SUMMARY OF ARGUMENT

By imposing term limits on Members of Congress, the State of Arkansas baldly

asserts a power to influence the election of federal legislators. The effort is plainly inconsistent with the text, history, and consistent judicial construction of the federal Constitution.

First, the Qualification Clauses do not authorize states to add new qualifications for federal office, and have historically been interpreted to deny such a power by implication. The qualifications of federal legislators are governed by the Constitution, and do not fall within the residual state power to regulate private conduct. By imposing ballot access restrictions on certain incumbent candidates for federal office with the express purpose, and almost certain effect, of barring reelection, Arkansas has attempted to impose an additional qualification for federal office that must be rejected.

Arkansas identifies no other source of constitutional authority that permits interference with the outcome of federal elections. The Ninth and Tenth Amendments preserve only preexisting powers of the states, and confer no new power over federal offices created by the Constitution. Nor can the term limits amendment be justified as a permissible regulation of the time, place, or manner of congressional elections. Its sole and explicit purpose is to prevent the reelection of designated congressional officeholders, an effort to control the outcome of a federal election plainly unauthorized by Article I, Section 4.

Accordingly, these amici respectfully urge this Court to affirm the decision of the Arkansas Supreme Court.

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News
American Civil Liberties Union
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# January 26, 1998 -- Colorado Court Axes Term-Limits Pledges

DENVER -- A state constitutional amendment that told state legislators to vote for a proposed term-limits amendment to the U.S. Constitution has been struck down by the Colorado Supreme Court.

According to the Denver Post, the unanimous court called the measure both improperly coercive and a political death sentence for legislators who did not follow the amendment's directives.

The decision was widely hailed, from the American Civil Liberties Union of Colorado to state Sen. Charles Duke, R-Monument. Both strongly opposed Amendment 12, passed in November 1996.

"The amendment is coercive and inconsistent with representative government," Duke told the newspaper. ""It coerced a state legislator into following a compulsory statewide mandate" instead of following his own best judgment or the will of his constituents. Amendment 12 did not receive much attention prior to the 1996 election. But its passage surprised a number of people who keep track of proposed constitutional amendments, the Post said. One of those, Karen A. Morrissey, challenged the amendment in court, picking up the support of Duke, several others, and the ACLU.

Specifically, the amendment directed Colorado's state and congressional representatives to support a proposed "Term Limits Amendment" to the U.S. Constitution, which would limit U.S. senators to two terms and U.S. representatives to three terms. The legislators were directed to apply for a constitutional convention and ratify the amendment when it was referred to the state.

Should the legislators fail to do as Amendment 12 directed, the words "disregarded voter instructions on term limits" were to appear on all primary and general election ballots beside the name of the politician.

Also, the amendment instructed non-incumbent candidates to sign a pledge promising to use all their legislative powers to enact the term-limits amendment to the U.S. Constitution. If they failed to take the pledge, it would be noted on the ballot next to their name.

The court said that Amendment 12 violated the political process by carving a "wholly new and unacceptable method of decision-making" and was unfair to legislators.

"Without any effective means to combat these ballot designations, lawmakers are essentially forced to choose between wholesale adherence to Amendment 12's instructions and political death," said Chief Justice Anthony Vollack.

**Source: Denver Post, January 21, 1998**

# ALASKA STATE LEGISLATURE
## HOUSE JUDICIARY COMMITTEE



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### Sponsor Statement for HB 189

On February 28, 2001, in a case entitled *Cook v. Gralike, et al.*, the United States Supreme Court ruled that printing term limit pledges on the ballot next to a Cc ngressional candidate's name is unconstitutional. The Missouri act which was struck down required "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" to be printed on ballots by the names of members failing to take certain legislative acts in support of the proposed term limit amendment. It also provided that "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed by the names of the non-incumbent candidates refusing to take a "Term Limit" pledge to bring about a specified "Congressional Term Limits Amendment."

Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places, Manner of holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." The states may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.

The Supreme Court found that the requirement of printing on the ballot a candidate's lack of acceptance of a term limit pledge was not a procedural regulation. It did not regulate the time of elections; it did not regulate the place of elections; nor did it regulate the manner of elections. Rather, the court fc. ınd, the requirement was plainly designed to favor candidates who are willing to support the particular form of a term limits amendment, and to disfavor those who either oppose term limits entirely or who would prefer a different proposal. The Court stated that:

> ...it seems clear that the adverse labels handicap candidates at the most crucial state in the election process-the instant before the vote is cast. The labels imply that the issue 'is an important-perhaps paramount-consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot' against candidates branded as unfaithful. Thus far from regulating the procedural mechanisms of elections, the Missouri act attempts to dictate electoral outcomes. Such 'regulation' of congressional elections simply is not authorized by the 'Elections Clause.'

Alaska statutes AS 15.15.500-575 require that "VIOLATED VOTER INSTRUCTION ON TERM LIMITS" be printed on the ballot adjacent to the name of any respective state senator or representative who failed to take appropriate action in support of a congressional term limit amendment to the constitution, during the preceding term of office. The same shall be printed

on the ballot adjacent to the name of any United States Senator or Representative who also fails to take appropriate action during the preceding term.

Non-incumbent candidates for United States Senator and Representative, and state senator and representative who decline to take a "Term Limits' pledge shall have "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to their name on every primary and general election ballot.

Any candidate for the United States Congress and the Alaska Legislature is permitted to submit to the lieutenant governor an executed copy of the Term Limits Pledge set for in AS 15.15.560(b). The lieutenant governor shall place on every election ballot "Signed TERM LIMITS pledge: Will serve no more than [3 terms] [2 terms]" next to the name of any candidate who has ever executed the Term Limits Pledge. In addition, "Broke TERM LIMITS pledge" shall be placed on every ballot next to the name of any candidate, who at any time executes the applicable Term Limits Pledge, and thereafter qualifies as a candidate for a term that would exceed the number of terms or years set for in the applicable Term Limits Pledge.

Since the Alaska statutes are so similar to those of Missouri, this United States Supreme Court ruling suggests that our statutes are unconstitutional. This bill will repeal these unconstitutional statutes.

The committee urges your support of this bill.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## COOK *v.* GRALIKE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99–929. Argued November 6, 2000— Decided February 28, 2001

In *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, the Court held that an Arkansas law prohibiting otherwise eligible congressional candidates from appearing on the general election ballot if they had already served two Senate terms or three House terms was an impermissible attempt to add qualifications to congressional office rather than a permissible exercise of the States' Elections Clause power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," U. S. Const., Art., I, §4, cl. 1. In response, Missouri voters adopted an amendment to Article VIII of their State Constitution designed to bring about a specified "Congressional Term Limits Amendment" to the Federal Constitution. Among other things, Article VIII "instruct[s]" Missouri Congress Members to use all their powers to pass the federal amendment; prescribes that "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on ballots by the names of Members failing to take certain legislative acts in support of the proposed amendment; provides that "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed by the names of nonincumbent candidates refusing to take a "Term Limit" pledge to perform those acts if elected; and directs the Missouri Secretary of State (Secretary), the petitioner here, to determine and declare whether either statement should be printed by candidates' names. Respondent Gralike, a nonincumbent House candidate, sued to enjoin petitioner from implementing Article VIII on the ground it violated the Federal Constitution. The District Court granted Gralike summary judgment, and the Eighth Circuit affirmed.

*Held:* Article VIII is unconstitutional. Pp. 6–15.

(a) Because petitioners' arguments that Article VIII is an exercise

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of the people's right to instruct their representatives reserved by the Tenth Amendment, as well as a permissible regulation of the "manner" of electing federal legislators under the Elections Clause, rely on different sources of state power, the Court reviews the distinction in kind between reserved state powers and those delegated to the States by the Constitution. The Constitution draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. *U. S. Term Limits*, 514 U. S., at 801. On the one hand, such retained powers proceed, not from the American people, but from the people of the several States. They remain, after the Constitution's adoption, what they were before, except insofar as they are abridged by that instrument. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193. On the other hand, the States can exercise no powers springing exclusively from the National Government's existence which the Constitution did not delegate. Pp. 6–8.

(b) Petitioner's argument that Article VIII is a valid exercise of the State's reserved power to give binding instructions to its representatives is unpersuasive for three reasons. First, the historical precedents on which she relies—concerning the part instructions played in the Second Continental Congress, the Constitutional Convention, the early Congress, the selection of United States Senators before the Seventeenth Amendment's passage, and the ratification of certain federal constitutional amendments—are distinguishable because, unlike Article VIII, none of petitioner's examples was coupled with an express legal sanction for disobedience. Second, countervailing historical evidence is provided by the fact that the First Congress rejected a proposal to insert a right of the people "to instruct their representatives" into what would become the First Amendment. Third, and of decisive significance, the means employed to issue the instructions, ballots for congressional elections, are unacceptable unless Article VIII is a permissible exercise of the State's power to regulate the manner of holding congressional elections. Pp. 8–10.

(c) The federal offices at stake arise from the Constitution itself. See *U. S. Term Limits*, 514 U. S., at 805. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to the States, rather than reserved under the Tenth Amendment. *Id.*, at 804. No constitutional provision other than the Elections Clause gives the States authority over congressional elections. By process of elimination then, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of their Elections Clause power. The Court disagrees with petitioner's argument that Article VIII is a valid exercise of that power in that it

Syllabus

regulates the 'manner" in which elections are held by disclosing information about congressional candidates. The Clause grants to the States 'broad power" to prescribe the procedural mechanisms for holding congressional elections, *e.g., Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217, but does not authorize them to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints, *U. S. Term Limits*, 514 U. S., at 833–834. Article VIII is not a procedural regulation. It does not control the 'manner" of elections, for that term encompasses matters like notices, registration, supervision of voting, and other requirements as to procedure and safeguards which experience shows are necessary to enforce the fundamental right involved. See, *e.g., Smiley* v. *Holm*, 285 U. S. 355, 366. Rather, Article VIII is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal. Cf. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9. It not only 'instruct[s]" Missouri's congressional Members to promote the passage of the specified term limits amendment, but also attaches a concrete consequence to noncompliance— the printing of an adverse label by the candidate's name on ballots. The two labels impose substantial political risk on candidates who fail to comply with Article VIII, handicapping them at the most crucial stage in the election process— the instant before the vote is cast, *Anderson* v. *Martin*, 375 U. S. 399, 402. And, by directing the citizen's attention to the single consideration of the candidates' fidelity to term limits, the labels imply that the issue is an important— perhaps paramount— consideration in the citizen's choice. *Ibid.* Article VIII thus attempts to 'dictate electoral outcomes." *U. S. Term Limits*, 514 U. S., at 833–834. Such 'regulation" of congressional elections is not authorized by the Elections Clause. Pp. 11–15.

191 F. 3d 911, affirmed.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined, in which SOUTER, J., joined, as to Parts I, II, and IV, and in which THOMAS, J., joined as to Parts I and IV. KENNEDY, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined.

# SUPREME COURT OF THE UNITED STATES

No. 99–929

REBECCA McDOWELL COOK, PETITIONER *v.*
DONALD J. GRALIKE AND MIKE HARMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 28, 2001]

JUSTICE STEVENS delivered the opinion of the Court.

In *U. S. Term Limits, Inc.* v. *Thornton,* 514 U. S. 779 (1995), we reviewed a challenge to an Arkansas law that prohibited the name of an otherwise eligible candidate for the United States Congress from appearing on the general election ballot if he or she had already served three terms in the House of Representatives or two terms in the Senate. We held that the ballot restriction was an indirect attempt to impose term limits on congressional incumbents that violated the Qualifications Clauses in Article I of the Constitution rather than a permissible exercise of the State's power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives" within the meaning of Article I, §4, cl. 1.

In response to that decision, the voters of Missouri adopted in 1996 an amendment to Article VIII[1] of their State Constitution designed to lead to the adoption of a

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[1] We shall follow the parties' practice of referring to the amendment as "Article VIII" even though it merely added new §§15 through 22 to the pre-existing article.

specified 'Congressional Term Limits Amendment" to the Federal Constitution. At issue in this case is the constitutionality of Article VIII.

I

Article VIII 'instruct[s]" each Member of Missouri's congressional delegation 'to use all of his or her delegated powers to pass the Congressional Term Limits Amendment" set forth in §16 of the Article. Mo. Const., Art. VIII, §17(1). That proposed amendment would limit service in the United States Congress to three terms in the House of Representatives and two terms in the Senate.[2]

Three provisions in Article VIII combine to advance its purpose. Section 17 prescribes that the statement 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on all primary and general ballots adjacent to the name of a Senator or Representative who fails to take any one of eight legislative acts in support of the proposed amendment.[3] Section 18 provides that the

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[2] The full text of the proposed amendment is as follows:

'Congressional Term Limits Amendment

'(a) No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of the United States Representative or who then holds the office shall serve for more than two additional terms.

'(b) No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve in the office for more than one additional term.

'(c) Any state may enact by state constitutional amendment longer or shorter limits than those specified in section 'a' or 'b' herein.

'(d) This article shall have no time limit within which it must be ratified to become operative upon the ratification of the legislatures of three-fourths of the several States."

[3] Section 17(2) provides that the statement shall be printed 'adjacent to the name of any United States Senator or Representative who:

statement 'DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed on all primary and general election ballots next to the name of every nonincumbent congressional candidate who refuses to take a 'Term Limit" pledge that commits the candidate, if elected, to performing the legislative acts enumerated in §17.[4] And §19 directs the Missouri Secretary of State to determine and declare, pursuant to §§17 and 18, whether either

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'(a) fails to vote in favor of the proposed Congressional Term Limits Amendment set forth above when brought to a vote or;

'(b) fails to second the proposed Congressional Term Limits Amendment set forth above if it lacks for a second before any proceeding of the legislative body or;

'(c) fails to propose or otherwise bring to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above if it otherwise lacks a legislator who so proposes or brings to a vote of the full legislative body the proposed Congressional Term Limits Amendment set forth above or;

'(d) fails to vote in favor of all votes bringing the proposed Congressional Term Limits Amendment set forth above before any committee or subcommittee of the respective house upon which he or she serves or;

'(e) fails to reject any attempt to delay, table or otherwise prevent a vote by the full legislative body of the proposed Congressional Term Limits Amendment set forth above or;

'(f) fails to vote against any proposed constitutional amendment that would establish longer term limits than those in the proposed Congressional Term Limits Amendment set forth above regardless of any other actions in support of the proposed Congressional Term Limits Amendment set forth above or;

'(g) sponsors or cosponsors any proposed constitutional amendment or law that would increase term limits beyond those in the proposed Congressional Term Limits Amendment set forth above or;

'(h) fails to ensure that all votes on Congressional Term Limits are recorded and made available to the public."

[4] The pledge, contained in §18(3), reads:

'I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITSwill not appear adjacent to my name."

statement should be printed alongside the name of each candidate for Congress.[5]

Respondent Don Gralike was a nonincumbent candidate for election in 1998 to the United States House of Representatives from Missouri's Third Congressional District. A month after Article VIII was amended, respondent brought suit[6] in the United States District Court for the Western District of Missouri to enjoin petitioner, the Secretary of State of Missouri, from implementing the Article, which the complaint alleges violates several provisions of the Federal Constitution.

The District Court decided the case on the pleadings, granting Gralike's motion for summary judgment. The court first held that Article VIII contravened the Qualifications Clauses of Article I of the Federal Constitution because it "has the sole purpose of creating additional qualifications for Congress indirectly and has the likely effect of handicapping a class of candidates for Congress." 996 F. Supp. 917, 920 (1998); see 996 F. Supp. 901, 905–909 (1998). The court further held that Article VIII places an impermissible burden on the candidates' First Amendment right to speak freely on the issue of term limits by

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[5] Section 19(5) permits a voter to appeal to the Missouri Supreme Court a determination that a statement should not be placed next to a candidate's name, and §19(6) allows a candidate to appeal to the State's highest court a determination that such a statement should be printed. In either case, clear and convincing evidence is required to demonstrate that the statement does not belong on the ballot adjacent to the candidate's name.

The remainder of Article VIII provides for automatic repeal of the Article should the specified Congressional Term Limits Amendment be ratified, §20; exclusive jurisdiction of challenges to the Amendment in the Supreme Court of Missouri, §21; and severance of "any portion, clause, or phrase" of Article VIII that is declared invalid, §22.

[6] Although respondent intended to run for Congress when he filed suit, under Missouri law he could not formally file a declaration for candidacy until February 1998. App. 25–26.

'punish[ing] candidates for speaking out against term limits" through putting 'negative words next to their names on the ballot," and by 'us[ing] the threat of being disadvantaged in the election to coerce candidates into taking a position on the term limits issue." 996 F. Supp., at 910; see 996 F. Supp., at 920. Lastly, the court found Article VIII to be an indirect and unconstitutional attempt by the people of Missouri to interject themselves into the amending process authorized by Article V of the Federal Constitution. In doing so, the court endorsed the reasoning of other decisions invalidating provisions similar to Article VIII on the ground that negative ballot designations 'place an undue influence on the legislator to vote in favor of term limits rather than exercise his or her own independent judgment as is contemplated by Article V." 996 F. Supp., at 916; see 996 F. Supp., at 920.[7] Accordingly, the court permanently enjoined petitioner from enforcing §§15 through 19 of Article VIII.

The United States Court of Appeals for the Eighth Circuit affirmed.[8] Like the District Court, it found that Article VIII 'threatens a penalty that is serious enough to compel candidates to speak— the potential political damage of the ballot labels"; 'seeks to impose an additional qualification for candidacy for Congress and does so in a manner which is highly likely to handicap term limit opponents and other labeled candidates"; and 'coerce[s] legislators into proposing or ratifying a particular consti-

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[7] See *League of Women Voters of Me.* v. *Gwadosky*, 966 F. Supp. 52 (Me. 1997); *Donovan* v. *Priest*, 931 S. W. 2d 119 (Ark. 1996).

[8] While the appeal was pending, respondent Gralike withdrew from the 1998 election and respondent Harmon, a nonincumbent candidate in the 2000 Republican congressional primary in the Seventh District of Missouri, intervened as an appellee. In view of Harmon's participation, there is no contention that this case is moot. See *Storer* v. *Brown*, 415 U. S. 724, 737, n. 8 (1974).