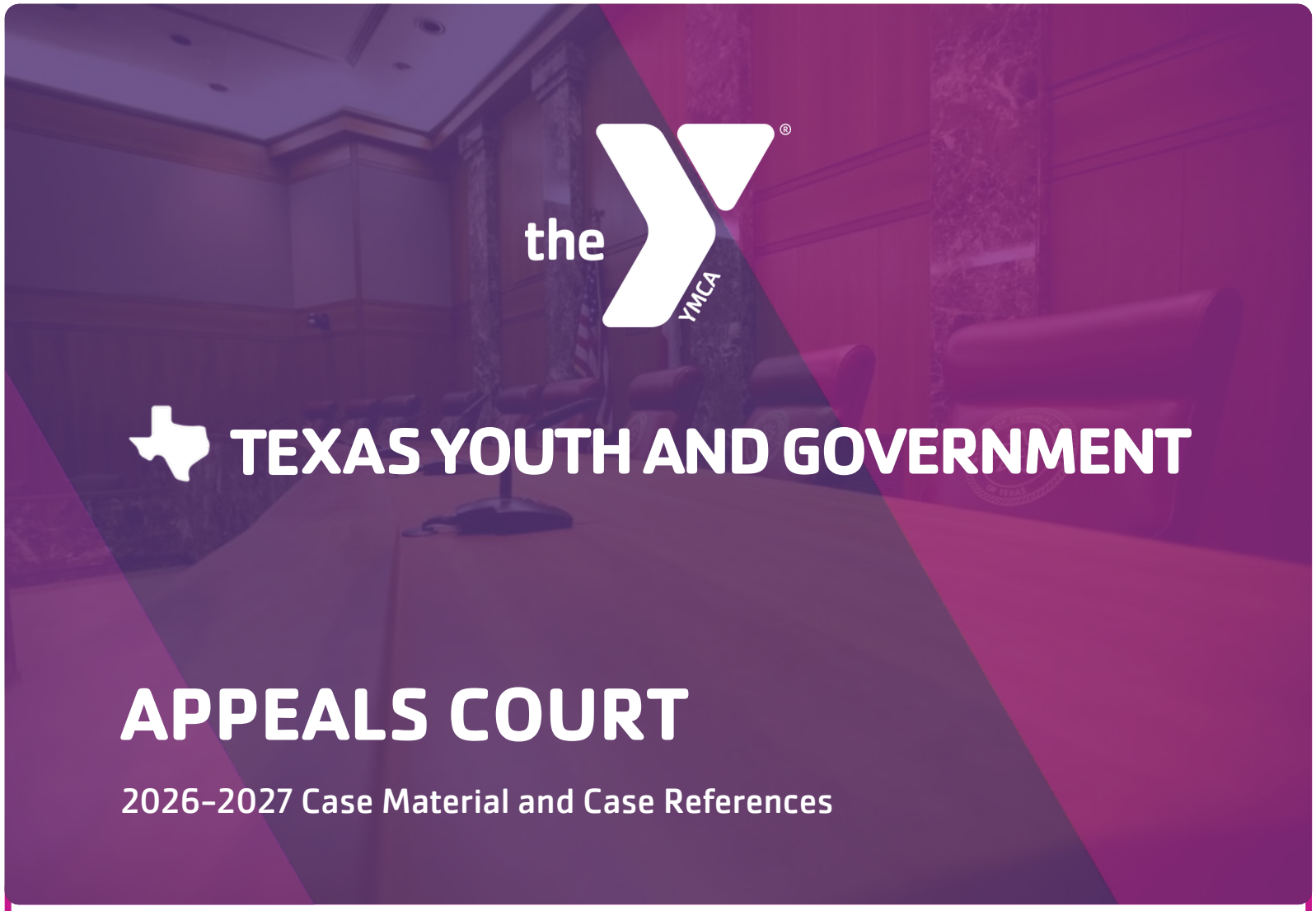

TEXAS YOUTH AND GOVERNMENT

APPEALS COURT

2026-2027 Case Material and Case References

CALLIE MCDANIEL

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

WRITTEN BY ISAIAH WILLIAMS & JASMINE JOHN, TXYG ALUM

SECTION 1:

CASE SUMMARY

Case Summary

Callie McDaniel, a college student and political influencer, created and posted an AI-generated video depicting Texas Agriculture Commissioner David Thierra accepting money from the CEO of a shellfish company that had publicly supported his reelection campaign. The video was posted less than 30 days before the 2026 party primary election and quickly went viral. Texas prosecutors charged McDaniel under Texas Election Code § 255.004(d), which makes it a crime to create and distribute certain deceptive AI-generated videos intended to influence an election within 30 days of Election Day. Before trial, McDaniel argued that the law violated her First Amendment right to free speech, but the trial court denied her motion to dismiss.

During the trial, prosecutors introduced several of McDaniel's earlier social media posts criticizing Commissioner Thierra to help prove that she intended to influence the election. McDaniel objected, arguing that the posts were improper character evidence, but the trial court admitted them. A jury convicted McDaniel, and she was sentenced to eight months in jail and fined $2,000.

Callie McDaniel is now appealing her conviction. There are two issues on appeal:

1. Whether the trial court abused its discretion by admitting the defendant's prior political social media posts under Rule 404(b) of the Texas Rules of Evidence to establish intent?

AND

2. Whether the defendant's prosecution under Texas Election Code § 255.004(d) for creating and distributing an AI-generated political deepfake violated the defendant's rights under the Free Speech Clause of the First Amendment?

In Section 2, you will find the case documents and trial court record, including motions, orders, exhibits, and an excerpt of the reporter's record. These materials provide additional background and context for the appeal. You may reference relevant facts contained in these documents when developing your arguments. However, you should not challenge witness credibility, dispute the jury's factual findings, or raise factual inconsistencies as separate issues on appeal. Your arguments should remain narrowly focused on the two issues presented above. The cases provided in Section 3 should serve as the primary legal authority for your arguments.

In Section 3, you will find all cases you may reference when constructing your argument for this case. **This is a closed case**, meaning you may only cite those case opinions provided. It is recommended that attorneys, while consulting these materials, first use the highlighted portions of the opinions as a roadmap. These sections are highlighted as they will be the most beneficial to your argument and should provide guidance when analyzing longer case excerpts.

Please also refer to the Appellate Rules and Instructions packet for additional procedural information.

SECTION 2:

CASE DOCUMENTS



Case Documents

Document 1:

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THE TEXAS COURT OF CRIMINAL APPEALS

No. YAG-APP-2027

Callie McDaniel, Appellant

v.

The State of Texas, Appellee

On Appeal from
The 16th Court of Appeals

ORDER OF THE COURT ON SUBMISSION

The appeal is granted for consideration of the following questions presented:

IT IS THEREFORE ORDERED that counsel appear before the Texas Court of Criminal Appeals to present oral argument on the following issues:

1. Whether the trial court abused its discretion by admitting the defendant's prior political social media posts under Rule 404(b) of the Texas Rules of Evidence to establish intent?

AND

2. Whether the defendant's prosecution under Texas Election Code § 255.004(d) for creating and distributing an AI-generated political deepfake violated the defendant's rights under the Free Speech Clause of the First Amendment?

THE MAJORITY OPINION OF THE 16th COURT OF APPEALS

I.

FACTUAL BACKGROUND

Appellant Callie McDaniel is a political influencer and sophomore advertising student at Davy Crockett University School of the Arts with approximately 650,000 followers across multiple social media platforms. McDaniel is a vocal advocate for maritime animal rights and has frequently criticized commercial fishing and crabbing practices, as well as the policies of David Thierra, the incumbent Agriculture Commissioner for the State of Texas. At the time relevant to this appeal, Thierra was seeking reelection in the March 2026 Olive Branch Party primary following eight years in office. His campaign prominently supported the emerging Texas seafood industry and received endorsements from numerous shellfish companies and affiliated political action committees, including Island Shells Inc., a prominent shellfish distributor in Texas. Polling leading up to the primary indicated that Thierra faced a closely contested race against his challenger.

On February 11, 2026, McDaniel published an artificial intelligence-generated video on her social media accounts depicting Commissioner Thierra accepting money from C.K. Chase, the chief executive officer of Island Shells Inc. The video rapidly gained widespread attention after being shared across multiple online platforms. On February 25, 2026, District Attorney Jaylen Baccler charged McDaniel with violating Texas Election Code § 255.004(d), commonly referred to as the True Source of Communication provision, a Class A misdemeanor punishable by up to one year in jail and a fine not exceeding $4,000. One week later, on March 3, 2026, Thierra was defeated in the Olive Branch Party primary election.

Prior to trial, McDaniel moved to dismiss the information, arguing that Texas Election Code § 255.004(d), as applied to her publication of the AI-generated video, violated her right to freedom of expression under the First Amendment to the United States Constitution. Following a pretrial hearing on March 9, 2026, the trial court denied the motion, concluding that the prosecution could proceed under the statute. Trial commenced on July 6, 2026.

During the guilt-innocence phase of trial, the State introduced three prior social media posts published by McDaniel. The first, posted in December 2025, consisted of a carousel criticizing Commissioner Thierra's policies. The second, published in January 2026, was a video in which McDaniel discussed actions Thierra had taken while serving as Agriculture Commissioner. The third, posted in February 2026 on a text-based social media platform, expressed additional criticism of Thierra and his support for the commercial crabbing industry. McDaniel objected to the admission of these exhibits, arguing that they constituted

inadmissible evidence of prior extraneous acts or impermissible character evidence under Texas Rule of Evidence 404. The trial court overruled the objection, determining that the evidence was admissible for the limited purpose of demonstrating McDaniel's intent rather than her character or propensity.

On July 9, 2026, the jury found McDaniel guilty of violating Texas Election Code § 255.004(d). The trial court sentenced her to eight months' confinement in the Village County Jail and imposed a $2,000 fine. McDaniel timely appealed her conviction, contending that the trial court erred by admitting her prior political speech as evidence under Texas Rule of Evidence 404 and by denying her constitutional challenge to Texas Election Code § 255.004(d). **We disagree with both contentions and will affirm the judgment of the trial court.**

II.
Admission of Prior Political Speech

We review a trial court's ruling on the admissibility of evidence under Texas Rule of Evidence 404(b) for abuse of discretion. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). A trial court abuses its discretion only when its decision falls outside the "zone of reasonable disagreement." *Id.* In the present case, Appellant argues that the trial court erred by admitting three of her prior political social media posts criticizing Agriculture Commissioner David Thierra. According to Appellant, the posts constituted impermissible character evidence offered to demonstrate her political hostility toward Thierra and invited the jury to conclude that she acted in conformity with that character when she later published the artificial intelligence-generated video underlying the charged offense. The State responds that the exhibits were admitted not to establish Appellant's character, but to demonstrate her intent in publishing the challenged communication. We agree with the State.

Texas Rule of Evidence 404(b) prohibits the admission of evidence of "any other crime, wrong, or act" when offered solely "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Tex. R. Evid. 404(b)(1). The Rule, however, expressly permits such evidence when offered for another purpose, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Tex. R. Evid. 404(b)(2). As the Court of Criminal Appeals has repeatedly explained, Rule 404(b) is a "rule of inclusion rather than exclusion," permitting the admission of relevant evidence so long as it has relevance apart from character conformity. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009); *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003). The Rule excludes only evidence whose sole logical relevance is to demonstrate that a defendant acted in conformity with a particular character trait. *Montgomery*, 810 S.W.2d at 387

Intent has long been recognized as a permissible non-character purpose under Rule 404(b), but prior acts are admissible only when intent is genuinely contested. *Robbins v. State*, 88 S.W.3d 256, 260–61 (Tex. Crim. App. 2002). Likewise, before admitting evidence of prior acts, the trial court must determine that the evidence is relevant to an issue other than character and that its probative value is not substantially outweighed by the danger of unfair prejudice. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc); *Montgomery*, 810 S.W.2d at 389. The Supreme Court has similarly recognized that other-acts evidence is admissible when sufficient evidence supports the prior act and the evidence is introduced for a legitimate evidentiary purpose apart from proving propensity. *Huddleston v. United States*, 485 U.S. 681, 686 (1988). Accordingly, the central inquiry is not whether the challenged evidence reflects negatively upon the accused, but whether it logically advances a fact of consequence independent of any inference that the defendant acted in accordance with a particular character trait. *Moses*, 105 S.W.3d at 626.

Applying these principles to the facts before us, we conclude that the trial court acted within its discretion by admitting Appellant's prior social media posts. Although Appellant did not dispute that she published the AI-generated video, the State nevertheless bore the burden of proving the requisite mental state under Texas Election Code § 255.004(d). Appellant's defense was that her publication constituted protected political expression rather than criminal conduct. In doing so, she necessarily placed her purpose and intent in publishing the communication at issue. See *Robbins*, 88 S.W.3d at 261. The prior posts, each published within months of the charged offense and each criticizing Commissioner Thierra's policies and political campaign, were probative of Appellant's intent in creating and disseminating the challenged communication. They therefore served a permissible evidentiary purpose apart from demonstrating Appellant's political disposition.

Nor do we agree that the challenged exhibits merely invited the jury to punish Appellant for engaging in protected political speech. Standing alone, evidence that a defendant opposed a political candidate would be insufficient to justify admission under Rule 404(b). Here, however, the State did not rely upon the exhibits simply to establish that Appellant disliked Commissioner Thierra or possessed a propensity to criticize public officials. Rather, the prior posts involved the same political figure, the same election cycle, and substantially the same subject matter as the charged offense. Their probative value derived from their tendency to illuminate Appellant's intent and purpose in publishing the AI-generated video, not from any inference that she acted consistently with a particular political viewpoint. This distinction is precisely the one contemplated by Rule 404(b). See *Moses*, 105 S.W.3d at 626.

Nor was the trial court required to exclude the evidence under Rule 403. Although the prior posts undoubtedly portrayed Appellant as a vocal critic of Commissioner Thierra, virtually all relevant evidence offered by the State is prejudicial to some degree. Rule 403 excludes only evidence whose unfair prejudice substantially outweighs its probative value. *Montgomery*, 810 S.W.2d at 389. Here, the challenged exhibits possessed considerable

probative force because they directly related to the same public official, the same political controversy, and the same election during which the charged offense occurred. While Appellant argues that the jury may have viewed the exhibits as evidence of her political beliefs, any such prejudice did not substantially outweigh their significant probative value in establishing intent. See *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Moreover, the trial court instructed the jury that the exhibits were admitted solely for the limited purpose of determining Appellant's intent, thereby reducing any danger that the evidence would be considered for an improper propensity purpose.

We are mindful that an evidentiary ruling involving political expression requires careful judicial scrutiny to ensure that protected speech is not chilled by the prospect of it being transformed into impermissible character evidence. Nevertheless, Appellant was not prosecuted because she criticized Commissioner Thierra or opposed his political platform. The challenged posts were admitted only after the trial court determined that they were relevant to a material issue apart from character conformity and that their probative value outweighed any risk of unfair prejudice. Because reasonable jurists could conclude that the exhibits assisted the jury in determining Appellant's intent rather than her propensity, the trial court's ruling fell well within the zone of reasonable disagreement. Accordingly, we hold that the trial court did not abuse its discretion by admitting Appellant's prior social media posts under Rule 404(b), and we uphold the judgment of the trial court.

III.
The First Amendment

We review de novo whether a criminal statute, as applied, violates the Free Speech Clause of the First Amendment. *Ex parte Lo*, 424 S.W.3d 10, 14-15 (Tex. Crim. App. 2013). Appellant also invokes Article I, Section 8 of the Texas Constitution, which provides that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege." Although the Texas Constitution may, in some circumstances, provide greater protection than its federal counterpart, Appellant identifies no basis upon which Article I, Section 8 affords broader protection under the facts presented here. We therefore analyze Appellant's claim under the First Amendment while remaining mindful of the protections embodied in our state constitution.

Political speech "occupies the highest rung of the hierarchy of First Amendment values" and is entitled to the fullest constitutional protection. *Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))*. Speech concerning candidates for public office and matters of public concern lies at the core of the First Amendment. *Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982). Likewise, the Supreme Court has recognized that an author's decision to remain anonymous "is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995).

The First Amendment likewise protects many forms of false or fabricated expression. In *United States v. Alvarez*, the Supreme Court rejected the proposition that false statements "have no value and hence no First Amendment protection." 567 U.S. 709, 718 (2012). Rather, false speech is not categorically excluded from constitutional protection. *Id.* at 718–19. Similarly, the Court has cautioned that it may not recognize new categories of unprotected speech merely because the speech is considered harmful. *United States v. Stevens*, 559 U.S. 460, 472 (2010). Nor does the use of computer-generated technology alter that conclusion. Accordingly, the fact that Appellant's communication was generated through artificial intelligence does not remove it from the protection of the First Amendment.

That conclusion does not resolve the constitutional question presented here. Content-based regulations of protected speech are subject to strict scrutiny and must be narrowly tailored to further a compelling governmental interest. *Alvarez*, 567 U.S. at 724. Among the interests the Supreme Court has consistently recognized as compelling is preserving the integrity of the electoral process. In *Burson v. Freeman*, the Court concluded that protecting voters from confusion and preserving public confidence in elections are interests of the highest order. 504 U.S. 191, 199 (1992). Likewise, the Court has recognized that States possess a compelling interest in maintaining fair and honest elections, even while political speech receives the highest constitutional protection. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 231 (1989).

Our decision in this case is consistent with *Ex parte Stafford*, in which the Court of Criminal Appeals considered a constitutional challenge to Texas's election-communication statutes under both the First Amendment and Article I, Section 8. Although Stafford addressed and found unconstitutional a different subsection of § 255.004, it recognized that the Legislature possesses authority to enact appropriately tailored measures designed to preserve the integrity of elections without impermissibly burdening protected speech. For the reasons discussed above, we conclude that § 255.004(d), as applied here, falls within that authority.

Applying those principles, we conclude that Appellant has failed to demonstrate that § 255.004(d) is unconstitutional as applied to her conduct. The statute does not prohibit criticism of public officials, political advocacy, satire, or commentary concerning matters of public concern. Nor does it criminalize false political speech as a class. Instead, it regulates a limited category of election-related communications that the Legislature has determined present a substantial risk of deceiving voters during an ongoing election. In that respect, the statute bears little resemblance to the broad prohibition invalidated in *Alvarez*. Rather than imposing a sweeping restriction on false expression, § 255.004(d) addresses a discrete form of conduct occurring in the unique context of an election, where the State's interest in preserving electoral integrity is well established.

Appellant nevertheless argues that the statute impermissibly burdens political expression

because the challenged communication concerned a candidate seeking public office. We do not disagree that the communication constituted political speech. But the First Amendment does not foreclose every regulation affecting political expression. As the Court of Criminal Appeals observed in *Ex parte Stafford*, election regulations designed to prevent fraud and protect the integrity of the electoral process may withstand constitutional scrutiny when appropriately tailored to serve those interests. Here, Appellant was not prosecuted because she criticized Commissioner Thierra or opposed his policies. Rather, she was prosecuted for conduct the State alleges falls within the limited scope of § 255.004(d). The statute's application therefore turns upon the nature of the communication regulated, not the viewpoint it expressed.

Nor does today's decision recognize a new category of unprotected speech. *Stevens* forecloses that approach. Our holding instead reflects the settled principle that even protected expression may be subject to narrowly tailored regulation when necessary to further a compelling governmental interest. The Legislature's decision to regulate a limited class of knowingly deceptive election communications does not diminish the constitutional protection afforded political speech generally. It reflects the equally established principle that the State possesses a compelling interest in protecting the integrity and reliability of its elections.

Accordingly, we hold that Appellant has not established that Texas Election Code § 255.004(d), as applied to her conduct, violates the Free Speech Clause of the First Amendment. Because the statute survives constitutional scrutiny under these circumstances, the trial court did not err in denying Appellant's motion to dismiss. We overrule Appellant's second point of error.

IV.
CONCLUSION

Having overruled Appellant’s two issues, we affirm the judgment of the trial court.

Signed,
The Honorable Judge Ian Spalding, 16th Court of Appeals and joined by Judge Anya Johnson

DISSENTING OPINION OF THE 16th COURT OF APPEALS

Judge Grace Corbion, dissenting.

I respectfully dissent. In my view, the Court errs in two respects. First, it affirms the admission of Appellant's prior political speech under Texas Rule of Evidence 404(b), notwithstanding that the evidence served principally to establish her political disposition rather than any genuinely disputed issue of intent. Second, it upholds the application of Texas Election Code § 255.004(d) to speech that lies at the core of the First Amendment. Because I would conclude that the evidentiary ruling constituted an abuse of discretion and that Appellant's prosecution cannot withstand constitutional scrutiny, I would reverse the judgment of the trial court.

I.
Admission of Prior Political Speech

Texas Rule of Evidence 404(b) prohibits the admission of other acts to prove "a person's character in order to show that on a particular occasion the person acted in accordance with the character." Tex. R. Evid. 404(b)(1). Although the Rule permits such evidence for non-character purposes, including proof of intent, the Court of Criminal Appeals has consistently emphasized that Rule 404(b) is not an invitation to admit evidence merely because it casts the defendant in an unfavorable light. *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990). Rather, the challenged evidence must have relevance apart from character conformity. *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003). Likewise, while Rule 404(b) is a rule of inclusion, it is so only when the evidence subject to analysis genuinely serves a permissible purpose. *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009).

That requirement was not satisfied here. The State introduced three social media posts criticizing Commissioner Thierra months before the charged offense. Each reflected Appellant's opposition to the Commissioner's policies and his reelection campaign. None tended to establish how the challenged AI-generated video was created, whether Appellant knowingly distributed it, or whether it satisfied the elements of Texas Election Code § 255.004(d). Instead, the evidence invited the jury to conclude that because Appellant had repeatedly criticized Commissioner Thierra in the past, she was more likely to have committed the charged offense. That is the precise propensity inference Rule 404(b) prohibits.

The majority concludes that the prior posts were admissible because they demonstrated Appellant's intent. But intent is not automatically placed in issue simply because the State bears the burden of proving it. In *Robbins v. State*, the Court of Criminal Appeals recognized

that extraneous-act evidence is admissible to prove intent only when intent is genuinely disputed. 88 S.W.3d 256, 260–61 (Tex. Crim. App. 2002). Here, Appellant did not dispute that she created and published the AI-generated video. No party denies that Ms. McDaniel opposed Commissioner Thierra politically. Whether Appellant opposed Commissioner Thierra was therefore of little consequence. The prior posts added nothing to the State's proof except the impermissible suggestion that Appellant acted consistently with her longstanding political views.

The challenged posts portrayed Appellant as an outspoken political activist and invited the jury to evaluate her views rather than her conduct. Because the evidence possessed limited probative value and carried a substantial risk that the jury would convict on the basis of Appellant's political beliefs, I would conclude that the trial court abused its discretion by admitting the exhibits.

II.
The First Amendment

The majority correctly acknowledges that Appellant's AI-generated video constitutes protected political speech. It nevertheless concludes that the State may impose criminal liability because the communication was intentionally deceptive and disseminated during an election. In my view, that conclusion cannot be reconciled with the controlling precedent cited by the majority. In *United States v. Alvarez*, the Supreme Court rejected the proposition that false statements "have no value and hence no First Amendment protection." 567 U.S. 709, 718 (2012). Instead, the Court held that false speech is not categorically excluded from constitutional protection merely because it is false. *Id.* at 718–19. Two years earlier, the Court likewise explained that it may not create new categories of unprotected speech simply because the speech is considered harmful. *United States v. Stevens*, 559 U.S. 460, 472 (2010). Today's decision approaches precisely that result by treating AI-generated political expression as a form of speech the State may criminalize whenever it concludes that the communication risks misleading voters.

To be sure, the State possesses a compelling interest in preserving the integrity of elections. *Burson v. Freeman*, 504 U.S. 191, 199 (1992). But a compelling interest does not relieve the State of its obligation to employ narrowly tailored means. Here, the State seeks to impose criminal punishment for campaign speech based upon its content. Under no reading of the First Amendment is that permitted. The majority's analysis contains no showing that less restrictive alternatives, including disclosure requirements, disclaimers identifying AI-generated content, expedited counter speech, or civil enforcement mechanisms, would have been inadequate to protect the State's asserted interests. The First Amendment demands more before the government may imprison a citizen for engaging in political advocacy.

Nor am I persuaded that *Ex parte Stafford* compels a different result. Although the Court of

Criminal Appeals recognized the State's authority to regulate certain election practices, it did not hold that political speech may be criminalized whenever the Legislature invokes election integrity. The constitutional inquiry remains whether the challenged restriction is narrowly tailored to serve a compelling governmental interest. In my view, § 255.004(d), as applied here, sweeps too broadly by imposing criminal liability for core political expression without adequately distinguishing protected advocacy from constitutionally unprotected fraud or defamation.

The Court today approves a criminal prosecution arising from speech concerning a candidate for public office during the height of an election campaign. However troubling the challenged communication may have been, the First Amendment does not permit courts to dilute constitutional protections because advances in technology have made deception easier to accomplish. As Associate Justice Anthony Kennedy observed in *Alvarez*, "[t]he remedy for speech that is false is speech that is true." 567 U.S. at 727.

Because the trial court improperly admitted Appellant's prior political speech and because Texas Election Code § 255.004(d), as applied to Appellant, violates the Free Speech Clause of the First Amendment, I would reverse the judgment of conviction and remand the cause for further proceedings.

Signed,
The Honorable Judge Grace Corbion, 16th Court of Appeals

IN THE DISTRICT COURT OF VILLAGE COUNTY, TEXAS

The State of Texas
v.
Callie McDaniel

Cause No. YAG-IWJJ-2027

INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY for the County of Village, The State of Texas, duly selected, empaneled, sworn, charged, and organized as such at the July 2026 Term, A.D., of the 505th Judicial District Court for said County, upon its oath presents in and to said Court at said term that, in Village County, Texas, and anterior to the presentment of this indictment, Callie McDaniel committed the following offense:

COUNT ONE

On or about February 11, 2026, in the County of Village, Texas, Callie McDaniel, with intent to influence the outcome of an election, intentionally or knowingly created, published, and distributed an artificially generated audiovisual recording depicting David Thierra, the incumbent Texas Agriculture Commissioner and a candidate for renomination in the March 3, 2026, Olive Branch Party primary election, appearing to accept money from C. K. Chase, Chief Executive Officer of Island Shells Inc., when such depiction was materially false and did not accurately represent actual events, and the defendant intentionally or knowingly represented the communication as authentic without clearly disclosing that it had been generated or materially altered through artificial intelligence technology, such communication having been disseminated through multiple social media platforms during the period immediately preceding the primary election and being reasonably likely to influence the voting public, in violation of Texas Election Code § 255.004(d) (True Source of Communication).

AGAINST THE PEACE AND DIGNITY OF THE STATE OF TEXAS

John Williams
Foreperson of the Grand Jury

PUNISHMENT VERDICT

We, the Jury, having found the Defendant guilty of the offense of violating **Texas Election Code § 255.004(d),** assess her punishment at:

Eight (8) months confinement in the Village County Jail and a $2,000 fine.

Signed:

Adrien Maddison
Presiding Juror

The Court, having polled the jury at the request of defense counsel and each juror having affirmed the verdict, accepted the same and ordered it filed with the District Clerk of Village County.

On the 9th day of July, 2026, the Defendant was called before the Court for sentencing. The Defendant was asked whether she had anything to say why sentence should not be pronounced, and the Defendant stated that she respectfully maintained her innocence and renewed her constitutional objections to the judgment of conviction.

THEREFORE, IT IS THE JUDGMENT, ORDER, AND SENTENCE of this Court that the Defendant, **Callie McDaniel**, having been duly convicted by a jury of the Class A misdemeanor offense of violating **Texas Election Code § 255.004(d),** is hereby sentenced to serve **eight (8) months confinement in the Village County Jail** and to pay a **fine in the amount of $2,000**, together with all costs of court. The Defendant is remanded to the custody of the Sheriff of Village County for execution of this sentence.

SIGNED on this the 9th day of July, 2026.

THE HONORABLE ELIZABETH MORENO
Judge Presiding
505th District Court
Village County, Texas

IN THE DISTRICT COURT OF VILLAGE COUNTY, TEXAS

DEFENDANT'S MOTION TO EXCLUDE EXTRANEOUS OFFENSE EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, **CALLIE McDANIEL**, by and through counsel, and respectfully moves this Court to exclude evidence of Defendant's prior social media posts, and in support thereof would respectfully show:

1. The State has indicated its intent to introduce several social media posts published by Defendant prior to the charged offense criticizing Agriculture Commissioner David Thierra and his public policies.
2. The proposed exhibits constitute evidence of prior acts offered solely to demonstrate Defendant's political beliefs, character, or propensity, in violation of Texas Rule of Evidence 404(b).
3. Any minimal probative value the proposed exhibits may possess is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury under Texas Rule of Evidence 403.
4. Admission of Defendant's prior protected political speech would create a substantial risk that the jury will convict Defendant based upon her political viewpoints rather than the evidence relating to the charged offense.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests that this Court exclude all evidence and testimony concerning Defendant's prior social media posts and grant such other and further relief to which she may be justly entitled.

Respectfully submitted,

/s/ Counsel for Defendant

IN THE DISTRICT COURT OF VILLAGE COUNTY, TEXAS

DEFENDANT'S MOTION TO DISMISS INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, **CALLIE McDANIEL**, by and through counsel, and respectfully moves this Court to dismiss the Information filed against her, and in support thereof would respectfully show:

1. The State has charged Defendant with violating Texas Election Code § 255.004(d) arising from her publication of an artificial intelligence-generated political video concerning Agriculture Commissioner David Thierra.
2. Defendant's publication constitutes political expression concerning a candidate for public office and therefore occupies the highest level of protection afforded by the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution.
3. Texas Election Code § 255.004(d), as applied to Defendant's conduct, is an unconstitutional content-based restriction on protected political speech that cannot survive strict scrutiny.
4. The statute impermissibly criminalizes protected political advocacy and is not narrowly tailored to serve a compelling governmental interest, in violation of the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests that this Court dismiss the Information with prejudice and grant such other and further relief to which she may be justly entitled.

Respectfully submitted,

/s/ Counsel for Defendant

CAUSE NO. YAG-IWJJ-2027
THE STATE OF TEXAS
v.
CALLIE McDANIEL

IN THE DISTRICT COURT
VILLAGE COUNTY, TEXAS

ORDER DENYING DEFENDANT'S MOTION TO EXCLUDE EXTRANEOUS ACT EVIDENCE

On this 6th day of July, 2026, came on for hearing Defendant Callie McDaniel's Motion to Exclude Extraneous Act Evidence, in which Defendant sought to exclude three social media posts published prior to the charged offense. Defendant argued that the exhibits constituted inadmissible character evidence under Texas Rule of Evidence 404(b) and that any probative value was substantially outweighed by the danger of unfair prejudice under Texas Rule of Evidence 403. The Court, having reviewed the exhibits, the applicable law, and the arguments of counsel, finds as follows:

1. The State seeks to introduce three social media posts authored by Defendant in December 2025, January 2026, and February 2026 criticizing Agriculture Commissioner David Thierra, his official policies, and his campaign for reelection.
2. The challenged exhibits do not constitute evidence of prior criminal conduct but are prior acts offered for a purpose authorized under Texas Rule of Evidence 404(b).
3. The Court finds that the exhibits are relevant to Defendant's intent, motive, and absence of mistake in publishing the communication that forms the basis of the charged offense.
4. The Court further finds that the exhibits concern the same public official, the same election cycle, and substantially the same subject matter as the charged offense.
5. The Court determines that the exhibits possess relevance apart from any inference that Defendant acted in conformity with a particular character trait. *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App. 1990); *De La Paz v. State*, 279 S.W.3d 336 (Tex. Crim. App. 2009).
6. After conducting the balancing test required by Texas Rule of Evidence 403, the Court finds that the probative value of the challenged evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

7. The Court will, upon request, instruct the jury that the exhibits may be considered only for the limited purpose of determining Defendant's intent and for no other purpose.

IT IS THEREFORE ORDERED that Defendant's Motion to Exclude Extraneous Act Evidence is **DENIED**.

SIGNED this 6th day of July, 2026.

THE HONORABLE ELIZABETH MORENO
Judge Presiding
505th District Court
Village County, Texas

SOCIAL MEDIA VIDEO TRANSCRIPT

January 2026

CALLIE MCDANIEL:
When did you realize it was all about playing the game? Because for me, it was when I found out that Texas purposefully keeps things completely under the radar.

This guy, David Thierra, is in charge of all of our food and farming rules. And he thought he could just quietly renew what are called corporate coastal zoning grants. If you don't know what that means, let me translate.

It means he’s sending huge amounts of money straight to the largest destroyer of marine ecosystems in the state. The CEO of one of these companies literally said that he doesn't care that he’s wiping out entire wild populations of shellfish.

And Thierra is right on board. Tell me you are a corporate puppet without telling me you are a corporate puppet.

He acts like he’s completely untouchable because he thinks we aren’t paying attention. But the primary is coming up in March. Eight years of this guy is enough. He’s out.

SOCIAL MEDIA “X” Post

 @CallieMcDaniel

@CommissionerThierra spent last week at a luxury resort on a "private retreat" completely paid for by corporate donors. Must be nice to get a free tropical vacation from the exact same billionaires funding your campaigns.

SOCIAL MEDIA VISUAL POST



CAPTION:

Who is really being protected?
When corporate interests have a louder voice than the communities and ecosystems that depend on a healthy Gulf, it's worth asking tough questions.

#MarineConservation #ProtectTheGulf #TexasPolitics #CoastalConservation #GhostTraps #EnvironmentalJustice #TexasWildlife

CAUSE NO. YAG-IWJJ-2027
THE STATE OF TEXAS
v.
CALLIE McDANIEL

IN THE DISTRICT COURT
VILLAGE COUNTY, TEXAS

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

On this 9th day of March, 2026, came on for hearing Defendant Callie McDaniel's Motion to Dismiss the Information, in which Defendant contended that Texas Election Code § 255.004(d), as applied to her publication of an artificial intelligence-generated political video, violates the Free Speech Clause of the First Amendment to the United States Constitution and Article I, Section 8 of the Texas Constitution. The Court, having reviewed the pleadings, the applicable law, and the arguments of counsel, finds as follows:

1. Defendant is charged with violating Texas Election Code § 255.004(d) by creating and distributing an artificial intelligence-generated video depicting Agriculture Commissioner David Thierra accepting money from the chief executive officer of Island Shells Inc. during the 2026 primary election.
2. Defendant contends that the charged communication constitutes political expression concerning a candidate for public office and therefore receives the highest degree of constitutional protection.
3. The Court agrees that Defendant's communication constitutes protected political speech and that any content-based regulation of such speech is subject to strict scrutiny.
4. The State possesses a compelling governmental interest in protecting the integrity of elections and preventing materially deceptive communications that undermine public confidence in the electoral process. *Burson v. Freeman*, 504 U.S. 191 (1992).
5. Texas Election Code § 255.004(d) is directed toward a limited category of election-related communications and does not prohibit criticism of public officials, political advocacy, or speech based upon viewpoint.
6. The Court finds that, as applied to the facts alleged in this prosecution, the statute is narrowly tailored to further the State's compelling interest in preserving the integrity of Texas elections.

7. Defendant has failed to demonstrate that Texas Election Code § 255.004(d), as applied, violates either the First Amendment to the United States Constitution or Article I, Section 8 of the Texas Constitution.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss the Information is **DENIED**.

SIGNED this 9th day of March, 2026.

THE HONORABLE ELIZABETH MORENO
Judge Presiding
505th District Court
Village County, Texas

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EXCERPT OF REPORTER'S RECORD

THE STATE OF TEXAS v. CALLIE McDANIEL
Direct Examination of Callie McDaniel by the State

PROSECUTOR: Ms. McDaniel, you operate several social media accounts, correct?

McDANIEL: Yes.

PROSECUTOR: Approximately how many followers do you have across those accounts?

McDANIEL: Around 650,000.

PROSECUTOR: Prior to February 11, 2026, had you publicly criticized Agriculture Commissioner David Thierra?

McDANIEL: Yes.

PROSECUTOR: On February 11, 2026, did you publish the video admitted as State's Exhibit 1?

McDANIEL: I did.

PROSECUTOR: You created that video using artificial intelligence software?

McDANIEL: Yes.

PROSECUTOR: The events depicted in that video never actually occurred, correct?

McDANIEL: The video was AI-generated.

PROSECUTOR: Commissioner Thierra never accepted money from C.K. Chase in the manner shown in the video?

McDANIEL: I don’t know.

PROSECUTOR: Before posting the video, you understood that it portrayed Commissioner Thierra accepting money from the chief executive officer of Island Shells, Inc.?

McDANIEL: Yes.

PROSECUTOR: You also knew that Commissioner Thierra was seeking reelection at that time?

McDANIEL: Yes.

PROSECUTOR: The Olive Branch Party primary election was less than one month away?

McDANIEL: That's right.

PROSECUTOR: You intended for people to watch the video?

McDANIEL: Yes.

PROSECUTOR: You hoped the video would influence public opinion regarding Commissioner Thierra?

McDANIEL: I hoped to contribute to the public discussion.

PROSECUTOR: Including discussion among voters?

McDANIEL: Yes.

PROSECUTOR: Did you include any disclaimer informing viewers that the video had been generated using artificial intelligence?

McDANIEL: No.

PROSECUTOR: Did you identify the video as fictional?

McDANIEL: Not with a watermark or anything.

PROSECUTOR: Did you label it as satire?

McDANIEL: Not explicitly.

PROSECUTOR: You had previously posted content criticizing Commissioner Thierra, hadn't you?

DEFENSE COUNSEL: Objection, Your Honor. Rule 404(b).

THE COURT: Overruled.

McDANIEL: Yes.

PROSECUTOR: In December 2025, you published a social media post criticizing Commissioner Thierra's policies?

McDANIEL: Yes.

PROSECUTOR: In January 2026, you posted a video criticizing actions he had taken as Agriculture Commissioner?

McDANIEL: Yes.

PROSECUTOR: And in February 2026, before posting State's Exhibit 1, you published another post criticizing Commissioner Thierra and his support for the commercial crabbing industry?

McDANIEL: Yes.

PROSECUTOR: You have consistently opposed Commissioner Thierra's reelection campaign?

McDANIEL: Yes.

PROSECUTOR: No further questions.

SECTION 3:

CASE REFERENCES

Case References

- *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)
- *De La Paz v. State*, 279 S.W.3d 336, 343 (Tex. Crim. App. 2009)
- *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003)
- *Robbins v. State*, 88 S.W.3d 256, 260–61 (Tex. Crim. App. 2002)
- *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978)
- *Huddleston v. United States*, 485 U.S. 681, 686 (1988)
- *Old Chief v. United States*, 519 U.S. 172, 180 (1997)

- *Connick v. Myers, 461 U.S. 138, 145 (1983)*
- *Carey v. Brown, 447 U.S. 455, 467 (1980)*
- *Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982)
- *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995)
- *United States v. Alvarez,* 567 U.S. 709, 718 (2012)
- *United States v. Stevens*, 559 U.S. 460, 472 (2010)
- *Burson v. Freeman,* 504 U.S. 191, 199 (1992)
- *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 231 (1989)
- Ex parte Stafford

Montgomery v. State

Patrick Logan MONTGOMERY, Appellant, v. The STATE of Texas, Appellee.

Nos. 1090-88, 1091-88.

Court of Criminal Appeals of Texas, En Banc.

May 30, 1990.

Rehearing Granted February 20, 1991.

On Rehearing June 19, 1991.

*374 R.K. Weaver, on appeal only, Dallas, for appellant.

John Vance, Dist. Atty., and Patricia Poppoff Noble, Celia Barr and Karen Becak, Asst. Dist. Attys., Dallas, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

McCORMICK, Presiding Judge.

A jury found appellant, Patrick Logan Montgomery, guilty of two counts of indecency with a child and assessed a sentence of ten years' confinement for each offense. *375 He appealed. The Dallas Court of Appeals held that the trial court did not abuse its discretion in allowing the jury to hear testimony which appellant claimed constituted improper proof of an extraneous offense. Montgomery v. State, 760 S.W.2d 323, 324-325 (Tex.App Dallas 1988). We granted appellant's petition to review this holding[1] and now affirm.

During the trial of this case, over appellant's objection, the judge allowed the State to introduce testimony that appellant had on several occasions paraded around in front of his minor daughters, the complainants, in the nude with an erection. Before the Court of Appeals, appellant argued that the trial court erred when it allowed the State to introduce this testimony, arguing that:

"It is well settled that an accused may not be tried for some collateral crime or for being a criminal generally. For this reason, the courts have generally prohibited the introduction of testimony about extraneous offenses ... "The extraneous offense proffered by the State was prejudicial to the Defendant and was not material or relevant. The extraneous offense should not, therefore, have been admitted in the trial of this cause."

Appellant, citing Plante v. State, 692 S.W.2d 487 (Tex.Cr.App.1985), and Coleman v. State, 577 S.W.2d 695 (Tex.Cr.App. 1978), insisted that the aggrieved evidence, to be admissible, must fall into one of the "six generally accepted exceptions to the rule against admission of extraneous offenses." Appellant specifies these "generally accepted" exceptions as:

"1) [to] show the context in which the criminal act occurred ...; 2) to circumstantially prove identity where the State lacks direct evidence on this issue; 3) to prove scienter, where intent or guilty knowledge cannot be inferred from the act itself; 4) to show malice or state of mind where malice is an essential element of the State's case and it cannot be inferred from the criminal act; 5) to show the accused's motive; or 6) to refute a defensive theory raised by the accused."

Because the aggrieved testimony did not fit snugly into any exception, appellant argued to the Court of Appeals that the trial court erred when it allowed the jury to hear this testimony.

Before this Court, appellant repeats the argument he made before the Court of Appeals and prays that we reevaluate the evidence to find that the trial court erred when it permitted the aggrieved testimony to go before the jury. For the reasons below, we decline appellant's invitation.

THE TRIAL COURT'S ROLE

Initially, we reject appellant's invocation of the common-law's mechanistic rules which tended to favor exclusion of evidence. Appellant was tried after adoption of the Texas Rules of Criminal Evidence. The new rules favor the admission of all logically relevant evidence for the jury's consideration. See Crank v. State, 761 S.W.2d 328, 342 n. 5 (Tex.Cr.App.1988). Finding a piece of evidence to be "relevant" is the first step in a trial court's determination of whether the evidence should be admitted before the jury as "[a]ll relevant evidence is admissible.... Evidence which is not relevant is not admissible." Tex.R.Crim.Evid. 402. "Relevant evidence means having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tex.R. Crim.Evid. 401; Fed.R.Evid. 401. "Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee's Note to Fed.R.Evid. *376 401.[2] As this Court said in

Waldrop v. State, 138 Tex.Crim. 166, 133 S.W.2d 969 (1940):

"Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis a pertinent hypothesis being one which, if sustained would logically influence the issue. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less probable." 133 S.W.2d at 970 (emphasis added).

See also Brown v. State, 757 S.W.2d 739, 743 (Tex.Cr.App.1988) (McCormick, P.J., concurring); Johnson v. State, 698 S.W.2d 154, 160 (Tex.Cr.App.1985); Plante, 692 S.W.2d at 491. Thus, evidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant. Moreover, the evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence. See Advisory Committee's Note to Fed.R.Evid. 401 ("The fact to be proved may be ultimate, intermediate or evidentiary; it matters not so long as it is of consequence in the determination of the action").

In deciding whether a particular piece of evidence is relevant, a trial court judge should ask "would a reasonable person, with some experience in the real world believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit." See United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir.1976) (rule of thumb is to inquire whether a reasonable man might believe probability of truth of consequential fact to be different if he knew of proffered evidence, quoting Weinstein & Burger, Weinstein's Evidence, 11401[07], at 401-27 (1985)). If the trial court believes that a reasonable juror would conclude that the proffered evidence alters the probabilities involved to any degree, relevancy is present.

From Tex.R.Crim.Evid. 401, the trial court next moves to Tex.R.Crim.Evid. 402[3] to decide whether the logically relevant evidence should be admitted. Under the rules of evidence, once the proponent of an item of evidence shows that the evidence is logically relevant to some issue in the trial under Rule 401, it is admissible under Rule 402 unless the opponent of the evidence demonstrates that it should be excluded because of some other provision, whether constitutional, statutory, or evidentiary.[4]*377 In the case before us, appellant claims that the evidence constitutes proof of an extraneous offense and that its probative value does not outweigh its prejudicial affect. Although not cited in appellant's brief on the merits appellant attempts to invoke Tex.R.Crim.Evid. 404(b). That Rule provides:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction."

The exclusion of other wrongs evidence under Rule 404 is based, not on its lack of probative value, but rather on its unfair prejudicial effect. See Blakely, Article IV: Relevancy and Its Limits, 20 Hous.L.Rev. 151, 190 (1983). The Advisory Committee's Note to Fed.R.Evid. 404(b) states that the Rule offers "no mechanical solution" to excluding or admitting evidence of other wrongs committed by the defendant. Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of other factors appropriate for making decisions of this kind under Rule 403."[5] In short, Rule 404(b) is simply a specific codification for a general balancing determination under Rule 403. It must also be remembered that the enumerated exceptions to Rule 404(b) proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident are "neither mutually exclusive nor collectively exhaustive." Cleary, McCormick On Evidence, section 190 at 558 (3d Ed. 1984). "There are numerous other uses to which evidence of criminal acts may be put." Id.

Rule 403 provides that "[although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." It is with the adoption of this rule that Texas evidentiary law has altered. Under the former common-law rules in Texas, the proponent of a piece of evidence was required to show that the probative value of his offered evidence outweighed its prejudicial effect. See Bush v. State, 628 S.W.2d 441, 444-445 (Tex.Cr.App.1982). See also Williams v. State, 662 S.W.2d 344, 346 (Tex.Cr.App.1983). Under the new rules, however, there has been a alteration in focus; now it is the opponent's burden to not only demonstrate the proffered evidence's negative attributes but to show also that these negative attributes "substantially outweigh" any probative value. Crank, 761 S.W.2d at 342 n. 5; Rodda v. State, 745 S.W.2d 415, 417-18 (Tex.App. Houston [14th Dist.] 1988, pet. ref'd). Judge Clinton observed in Crank that "[t]he plain language of Rule 403 shifts the focus somewhat from the test enunciated in

Williams [v. State, 662 S.W.2d 344, 346 (Tex.Cr.App.1983)] and its progeny. The approach under Rule 403 is to admit all relevant evidence unless the probative value is substantially outweighed by the danger of unfair prejudice to a defendant." 761 S.W.2d at 342 n. 5 (emphasis in the original).

Most objections based upon the balancing required under Tex.R.Crim.Evid. 403 attack the prejudice to the aggrieved party (as *378 appellant does in the case before us). It must be remembered, however, that virtually all evidence proffered by a party to a lawsuit will be prejudicial to the opposing party. In United States v. Figueroa, 618 F.2d 934, 943 (2d Cir.1980), the court explained:

"All evidence introduced against a defendant, if material to an issue in the case, tends to prove guilt, but it is not necessarily prejudicial in any sense that matters to the rules of evidence.... Evidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence.... The prejudicial effect may be created by the tendency of the evidence to prove some adverse fact not properly in issue or unfairly to excite emotions against the defendant.... When material evidence has an additional prejudicial effect, Rule 403 requires the trial court to make a conscientious assessment of whether the probative value of the evidence on a disputed issue in the case is substantially outweighed by the prejudicial tendency of the evidence to have some other adverse effect upon the defendant." 618 F.2d at 943.

As such, only "unfair" prejudice provides the basis for exclusion of relevant evidence. See United States v. Jamil, 707 F.2d 638, 644-645 (2nd Cir.1983) ("prejudice" does not constitute showing of "unfair" prejudice). See also Advisory Committee's note to Fed.R.Evid. 403 ("Unfair" prejudice means an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.")

THE APPELLATE COURT'S ROLE

Concomitant with adoption of the Texas Rules of Evidence, there should be a corresponding reluctance on the part of an appellate court to reverse trial court decisions which admit or exclude evidence. Courts and commentators universally recognize that with the enactment of Federal Rule 403 there was a conscientious decision to give the trial court a considerable freedom in evaluating proffered evidence's probative value in relation to its prejudicial effect. See United States v. Robinson, 560 F.2d 507, 512-516 (2d Cir.1977) (applying "arbitrary-irrational" standard of judicial discretion); United States v. Wyers, 546 F.2d 599, 603 (5th Cir.1977) (rule well established that trial court's rulings as to relevancy and materiality not disturbed absent clear abuse of discretion); United States v. Cohen, 544 F.2d 781, 786 (5th Cir.1977) (same) cert, denied, 431 U.S. 914, 97 S. Ct. 2175, 53 L. Ed. 2d 224 (1977). See also Construction Ltd. v. Brooks-Skinner Bldg., 488 F.2d 427, 431 (3d Cir.1973) (if sitting as trial judge, appellate court might well have concluded that prejudicial nature of evidence outweighed probative worth; appellate court, however, could not say that action of the trial court constituted abuse of discretion).[6] Opinions from this Court have held the same. See, e.g., Marras v. State, 741 S.W.2d 395, 404 (Tex.Cr. App.1987); Stone v. State, 574 S.W.2d 85, 89 (Tex.Cr.App.1978).

The reason that appellate courts must afford a trial court great discretion in its evidentiary decisions is not based exclusively upon the wording of Rule 403.[7] Appellate *379 courts, bound by cold appellate records, must afford the trial courts discretion because the trial court judge is in a superior position to evaluate the impact of the evidence. The trial judge sees the witnesses, the defendant, the jurors and counsel; he alone is able to witness the participants' mannerism and reactions. As the court in Robinson opined: "[W]e cannot weigh on appeal ... the intonation and demeanor of the witnesses preceding the testimony in issue ... nor can we determine the emotional reaction of the jury to other pieces of evidence ... or judge the success of impeachment by cross-examination through observation of the jurors." 560 F.2d at 512-516.

The State, in its brief on the merits, directs this Court's attention to United States v. Long, 574 F.2d 761 (3rd Cir.1978), as providing the proper standard of appellate review for these cases. There the Federal Appellate Court concluded: "If judicial restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal....

"In view of ... the use of `may' in the final version of Rule 403, it is manifest that the draftsman intended that the trial judge be given a very substantial discretion in `balancing' probative value on the one hand and `unfair prejudice' on the other, and that he should not be reversed simply because an appellate court believes that it would have decided the matter otherwise because of a differing view of the highly subjective factors of (a) the probative value, or (b) the prejudice presented by the evidence. This inference is strengthened by the fact that the Rule does not establish a mere imbalance as the standard, but rather requires that the evidence `may' be barred only if its probative value is `substantially' outweighed by prejudice."

We agree; the trial court should be allowed the discretion to exclude or admit evidence before the jury and an

appellate court should not set aside the trial court's rulings absent a showing in the record that the trial court has abused that discretion. Marras, 741 S.W.2d at 404.

In an early opinion from this Court, there was an attempt to define "abuse of discretion." Remarkably, the Court wrote:

"We are cited to many cases of the different states of the Union relative to what is meant by an `abuse of discretion' and while not lending itself to an absolute measuring stick by which such abuse could be understood, the opinions seem to be in fair agreement that an abuse of discretion usually means doing something differently from what the reviewing authority would have felt called upon to do." Williams v. State, 159 Tex.Crim. 443, 265 S.W.2d 92, 95 (1954).

The Williams' Court cited no such authority for its proposition and "abuse of discretion" has never been so defined in any other jurisdiction. If this were the test, *380 then the trial court judge would have virtually no discretion to do other than that which the appellate court would do. The appellate court would then be the "superior trial judge"; such is the antithesis of abuse of discretion, not its embodiment. A more appropriate test for a determination of whether the trial court abuses its discretion is aptly stated by the Texas Supreme Court:

"The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. Another way of stating the test is whether the act was arbitrary or unreasonable. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-242 (Tex.1985), cert, denied 476 U.S. 1159, 106 S. Ct. 2279, 90 L. Ed. 2d 721 (1986) (citations omitted).

Thus, judicial rulings will be affirmed if the trial court follows the appropriate analysis and balancing factors, though the appellate court might disagree with the weight given to those individual factors. In short, a trial court judge is given a "limited right to be wrong," so long as the result is not reached in an arbitrary or capricious manner. See Rosenberg, Judicial Discretion, 38 Ohio Bar 819, 823 (1965).

De La Paz v. State

OPINION

Appellant, a former Dallas Police Department Narcotics detective, was convicted of (1) tampering with physical evidence for knowingly making false statements in a police report, and (2) aggravated perjury for making the same false statements under oath. The court of appeals reversed the convictions, holding that the trial court's admission of extraneous-offense evidence violated Rule of Evidence 404(b) and was harmful. We granted review to address the application of Rule 404(b) in this context. We find that the extraneous offenses were admissible to prove a fact of consequence-appellant's knowledge that his statements were false when he made them.

Delapaz v. State, No. 05-06-00963-CR No. 05-06-00964-CR, **2007 WL 4442990,** 2007 Tex.App. LEXIS 9928 (Tex.App.-Dallas Dec. 20, 2007) (not designated for publication). The court of appeals spells appellant's name "Delapaz," the reporter's record and the parties spell it "De La Paz." Following the reporter's record, we will also spell it "De La Paz."

We granted the State's petition asking: "When a police officer charged with perjury and falsifying police reports testified at his trial and admits making the alleged perjured statements but denied their falsity and knowledge of their falsity, does the trial court act within its discretion in admitting nearly identical extraneous acts of perjury to prove the officer, in fact, knew the statements to be false?"

I.

A. The State's Case: The Arrest of Jose Vega

The events that led to appellant's conviction arose out of the wrongful arrest of Jose Vega. Roberto Gonzalez, who had already been convicted for his part in Vega's wrongful arrest, testified that he and appellant's confidential informant, Daniel Alonso, manufactured fake drugs and then planted them in a Cadillac parked at the garage where Jose Vega worked. The next day, he and Alonso met appellant and another officer at a 7-11 to arrange a "buy-bust" deal. Appellant did not search either of them or their car. Gonzalez and Alonso then drove to the garage. Appellant, and his partner, Eddie Herrera, followed in appellant's red Chevy truck to do "moving surveillance."

They manufactured twenty-two, one-kilo packages of pool chalk.

According to Gonzalez, Alonso got out of the car alone and walked into the garage bay where Vega was working under a van. Shortly thereafter, Alonso walked out of the bay, over to the garage restroom, and then back to the car. A surveillance videotape, set up across from the garage, also captured the events: Alonso got out of his car, walked into the bay, and then turned left out of sight for about twenty seconds. He then walked out and around to an outside bathroom. Alonso then came back to his car and, with Gonzalez in the passenger seat, drove off. The tape also showed appellant and his partner driving by twice.

Back at the 7-11, Alonso delivered two of the fake kilos to appellant. Appellant paid Alonso for his work, and Alonso in turn paid Gonzalez $300. Appellant called in a report that Alonso had just purchased two kilos of cocaine from Vega and that there was more in the Cadillac parked outside the garage. This report was called in to "a direct entry clerk" to obtain a warrant. Uniformed officers appeared and arrested Vega, and then, in a search pursuant to the warrant, police found the rest of the "cocaine" in the Cadillac.

In both a supplemental police report and under oath at a previous trial, appellant testified that, as he and his partner drove by the garage, he observed Alonso come into contact with Vega inside the garage bay. No one else witnessed that contact. Vega testified that he was working under a van the entire time; he never even knew Alonso was in the garage. Gonzalez testified that Vega was under a van the entire time. Herrera testified that, although he saw Alonso walk into the bay, he lost sight of him as they drove away. The video operator, Detective Ledbetter, testified he did not see (nor did the video show) Alonso come into contact with anyone. He said he could not see into the bay from his camera angle: "There's just no angle that you could get there that you could see straight into that bay."

The report, made only hours after Vega's arrest, states, "Delapaz and Herrera were also conducting surveillance at the location and observed the C.I. come into contact with AP Vega."

Appellant's former testimony was read into the record: "I saw the informant pull up to the location, walk to the bay of the garage. I passed Ledbetter and his camera view. I have a better angle to see inside the garage, and I happened to see both of them together. Right in the corner of the garage, I see both of them together. By that time, I'm making the loop around and I lost sight of them." Appellant added that the two men were "face-to-face."

Herrera testified that, after Vega's arrest came under scrutiny, appellant asked him to lie to Public Integrity and to stick to the story in the police report-that they actually

saw the contact between Alonso and Vega inside the bay. After he was shown the surveillance video, Herrera knew "that there was no way they were going to believe that." Nevertheless, out of loyalty to his partner and friend, Herrera perjured himself when he testified before the grand jury. By the time of trial, he was cooperating with the State and hoping that his felony charges would be dismissed. On cross-examination, defense counsel intimated that Herrera was also cooperating because he wanted his old police job back.

B. Appellant's Defense

Appellant's defense was that his statements were true because he saw the contact between Alonso and Vega. Therefore, he had no intent to deceive, as is required for aggravated perjury, and he made no false police report, as is required for tampering with physical evidence.

Appellant put on evidence of an out-of-court experiment: photographs taken from the street into the garage bay to show that it was possible for him to have seen Vega and Alonso making contact. These photographs were taken by a defense investigator, and they show the investigator's father standing approximately three feet inside the garage bay. Appellant testified that he saw Alonso and Vega making contact as they stood about three or four feet inside the garage bay.

Q. Tell the jury — when you started looking back, tell the jury what you're seeing going on.

A. As I'm driving, I'm making sure there's not a car coming towards me. And then as I'm getting up there, I turn back around for a brief second, and then that's when I see Daniel Alonso walk right inside the bay of the garage.

Q. Okay. And how far did you see him go inside the garage?

A. It was — he just made the turn and came in maybe about three or four feet. It was maybe real close in there. He wasn't all the way to the back. He was right there at the front of the bay.

Q. Okay. And when you saw him at that location, did you see anything else?

A. Yes, I did. I saw a Hispanic male wearing a blue work shirt and he looked-dark hair and a mustache. That's all I saw.

Q. Okay. And how long did you have this vision of Daniel Alonso and this other person?

A. I just had it for a brief-a brief moment. As soon as I saw him come in contact, then I went back around.

Appellant said that he wrote the statement about Alonso and Vega coming into contact in his report for his "recollection when I go to testify in court." He said that his purpose was to tell the truth, and that he "was not trying to influence anything." He also denied telling Herrera to "stick with" his story.

On cross-examination appellant said that, although it turned out that Alonso had set Vega up with fake "cocaine," he did not make a false statement in the police report or testify falsely because he did see Alonso come into contact with Vega in the garage bay. Appellant said that the photos his investigator took of his father standing in the bay "show that you could see someone inside there." Appellant accused Vega and Herrera of lying.

C. The State's Proffer of Extraneous Offenses and the Trial Court's Ruling and Limiting Instruction.

After the defense rested, the State proffered evidence of two of appellant's other "buy-bust" deals. In each, appellant's police report stated that he witnessed either the exchange of drugs or the contact between the confidential informant and the suspect. The State contended that these police reports were false and that, in each instance, appellant did not see what he said he saw. The State argued that the extraneous offenses, which occurred very close in time to the charged offense, were admissible to rebut "the defensive theory that our witnesses lied in the Vega case." Appellant objected that the extraneous offenses were not admissible to rebut appellant's general denial of the offense, or to rebut any defensive theory that the State's witnesses were lying, because it was the State that elicited appellant's testimony that Vega and Herrera were liars. Thus, evidence of the two other "buy-bust" deals was inadmissible under Rules 404(b) and 403.

The State responded that "the prosecutor didn't elicit the evidence. The Defense put on their theory that Mr. Delapaz is telling the truth and everybody else is lying. He raised that on his direct examination. All Mr. Shook did was further explore that." The trial court found "that the proffered evidence could tend to rebut a defensive theory. The probative value outweighs any prejudicial effect, and it will be admitted."

D. Evidence of the Extraneous "Buy-Bust" Deals.

Evidence of the extraneous offenses was then offered by six witnesses. First, a police officer testified about appellant's statements in two different police reports: In the first case, "AO Delapaz observed AP Amador place the cooler into the informant's vehicle"; and in the second, "Arresting Officers Delapaz and Herrera were conducting surveillance at the location and observed Arrestee

Hernandez come in contact with the confidential informant." After that testimony, the court orally instructed the jury:

The evidence the State is now offering is being admitted for the limited purpose to rebut a defensive theory that the State's witnesses lied. You cannot consider this evidence unless you first find and believe beyond a reasonable doubt that the defendant committed such other offenses if any were committed.

1. Roberto Amador
Roberto Amador testified that he was wrongfully arrested on June 6, 2001, when he went to talk to someone who had called him about buying his wrecker, which was in a transmission shop bay getting fixed. The caller who was appellant's confidential informant (C.I.) Jose Ruiz-arrived, walked around the wrecker, and then went outside and made a phone call. As he was talking on the phone, police arrived and made everyone in the shop stand up against the wall. They arrested Amador and let everyone else go. Amador testified that he never made a drug deal with Ruiz; he never walked near Ruiz' Explorer; and he never took an ice cooler out of his truck and put it into Ruiz's Explorer.

Jose Ruiz, the C.I., testified that his plan was to pretend that he was going to purchase Amador's wrecker, but, in fact, to set him up with fake drugs. He and others, including Alonso, made the fake drugs on the morning of the arrest. They pressed pool chalk into squares and wrapped the squares into plastic. He put the fake drugs in a cooler in his Explorer and then drove the Explorer to the shop to meet Amador. He talked to him for about five minutes, and then he called the police to come and arrest Amador. He said that Amador never touched the cooler, which was always in Ruiz's Explorer. He said that appellant did not check his Explorer before the "buy-bust" deal.

2. Jorge Hernandez
Jorge Hernandez testified that, on September 24, 2001, his truck would not start. He walked to a nearby garage, looking for a mechanic. The mechanic wasn't there, but his helper was, and the helper lent Hernandez his car. When Hernandez returned the borrowed car to the garage, he noticed that the police were there, and they "had all the mechanics out on the street with their hands on the wall searching them." At the same time, a couple of men walked up to the garage carrying food and cokes, but the police prevented them from going in. Hernandez nevertheless walked over to return the car keys. A police officer came running towards him: "He took the keys. He took my wallet. He took my cigarettes. He checked them, and he put them back and then he handcuffed me." Hernandez said he was taken to jail, and he later learned he was being charged with selling drugs. Hernandez said that he never negotiated a drug deal at the garage.

Regarding the Hernandez arrest, Ruiz testified that he and Alonso made some fake crystal methamphetamine to set up a specific person-not Hernandez-at the garage. They planted the fake drugs in the garage when no one was there. They didn't see the man they meant to set up, but they did see Hernandez walking towards the garage, and they decided to "pick on that man." Neither of them had ever talked to Hernandez. They called appellant because they "were ready and the drugs were in place and the person we were going to plant the drugs on was there." When appellant did not get there right away, Ruiz and Alonso went to the Dairy Queen to get tacos, then they returned to the garage with their Dairy Queen bags. By then, the police were there, and they chased Ruiz and Alonso away. They went back to their car, called appellant again, and told him to arrest Hernandez.

The jury convicted appellant and sentenced him to five years' imprisonment.

E. The Appeal and Motion for Rehearing
Appellant appealed and challenged, *inter alia*, the trial court's admission of the extraneous offenses. The court of appeals correctly framed the issue as "whether evidence of appellant's extraneous misconduct was relevant to a `fact of consequence' other than its tendency to prove character conformity." First, it held that the misconduct was not relevant to rebut appellant's claim that Herrera was lying, because appellant did not accuse Herrera of lying until he was cross-examined by the State and specifically asked by the prosecutor whether Herrera was making up his story. *Id.* And, as a general rule, the State cannot itself elicit the alleged defensive issue it then wishes to rebut with extraneous offense evidence. Second, it held that appellant's attack on Herrera (or any other State's witness) was not a "defensive issue" that opened the door to extraneous offense evidence, because "allowing extraneous offenses to rebut a challenge to the credibility of the State's witnesses `would totally eviscerate rule 404(b) and the policies underlying the prohibition against the admission of such evidence.'"

Delapaz, **2007 WL 4442990, at *4,** 2007 Tex.App. LEXIS 9928, at *8.

Id. (citing *Wheeler v. State*, 67 S.W.3d 879, 885 (Tex.Crim.App. 2002)).

Id. **2007 WL 4442990, at *4,** 2007 Tex.App. LEXIS 9928, at *9 (quoting *Webb v. State*, 36 S.W.3d 164, 180-81 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd)).

The State filed a motion for rehearing arguing that: 1) the State did not elicit appellant's claim that Herrera was lying

by "prompting or maneuvering"; instead, defense counsel asked appellant on direct examination if he had asked Herrera to lie-as Herrera had testified he had-and appellant said that he had not; 2) the evidence was admissible to prove intent; and 3) the evidence was admissible under the Doctrine of Chances. The court of appeals denied rehearing, and the State petitioned for discretionary review, presenting these same arguments.

II.
A. Admissibility of Other Crimes, Wrongs or Acts.

Under the Texas Rules of Evidence, evidence of other crimes, wrongs, or acts is not admissible "to prove the character of a person in order to show action in conformity therewith." But it may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The exceptions listed under Rule 404(b) are neither mutually exclusive nor collectively exhaustive. "Rule 404(b) is a rule of inclusion rather than exclusion." The rule excludes only that evidence that is offered (or will be used) solely for the purpose of proving bad character and hence conduct in conformity with that bad character. The proponent of uncharged misconduct evidence need not "stuff a given set of facts into one of the laundry-list exceptions set out in Rule 404(b), but he must be able to explain to the trial court, and to the opponent, the logical and legal rationales that support its admission on a basis other than "bad character" or propensity purpose.

TEX.R. EVID. 404(b).

Pondexter v. State, 942 S.W.2d 577, 583-84 (Tex.Crim.App. 1996); *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App. 1991) (op. on reh'g); *Banda v. State*, 768 S.W.2d 294, 296 (Tex.Crim.App. 1989) (catalogue of "other purposes" is not exhaustive, and "[w]hether or not it fits neatly into one of these categories, an extraneous transaction will be admissible so long as it logically tends to make the existence of some fact of consequence more or less probable.").

United States v. Bowie, 232 F.3d 923, 929 (D.C. Cir. 2000).

See Rankin v. State, 974 S.W.2d 707, 709 (Tex.Crim.App. 1996) ("if evidence (1) is introduced for a purpose other than character conformity, (2) has relevance to a `fact of consequence' in the case and (3) remains free of any other constitutional or statutory prohibitions, it is admissible").

One well-established rationale for admitting evidence of uncharged misconduct is to rebut a defensive issue that negates one of the elements of the offense. That is, a "party may introduce evidence of other crimes, wrongs, or acts if such evidence logically serves to make more or less probable an elemental fact, an evidentiary fact that inferentially leads to an elemental fact, or defensive evidence that undermines an elemental fact." But a mere denial of commission of an offense generally does not open the door to extraneous offenses because, as appellant properly points out, "a defendant generally denies commission of the offense at trial-that is the reason for having a trial."

Martin v. State, 173 S.W.3d 463, 466 (Tex.Crim.App. 2005); *Montgomery*, 810 S.W.2d at 387.

Martin, 173 S.W.3d at 466.

Brief for Appellant at 1.

B. The Standard of Review
"Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court." So, too, is a ruling on the balance between probative value and the counter factors set out in Rule 403, although that balance is always slanted toward admission, not exclusion, of otherwise relevant evidence. Thus, a trial court's ruling on the admissibility of extraneous offenses is reviewed under an abuse-of-discretion standard. As long as the trial court's ruling is within the "zone of reasonable disagreement," there is no abuse of discretion, and the trial court's ruling will be upheld. A trial court's ruling is generally within this zone if the evidence shows that 1) an extraneous transaction is relevant to a material, non-propensity issue, and 2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. Furthermore, if the trial court's evidentiary ruling is correct on any theory of law applicable to that ruling, it will not be disturbed even if the trial judge gave the wrong reason for his right ruling.

Moses v. State, 105 S.W.3d 622, 627 (Tex.Crim.App. 2001).

See Montgomery, 810 S.W.2d at 388 (presumption under Rule 403 is that probative value outweighs prejudicial effect "unless in the posture of the particular case the trial court determines otherwise"); *Conner v. State*, 67 S.W.3d 192, 202 (Tex.Crim.App. 2001) ("Rule 403 requires exclusion of evidence only when there exists a clear disparity between the degree of prejudice of the offered

evidence and its probative value"); *Joiner v. State*, 825 S.W.2d 701, 708 (Tex.Crim.App. 1992).

Prible v. State, 175 S.W.3d 724, 731 (Tex.Crim.App. 2005); *Santellan v. State*, 939 S.W.2d 155, 169 (Tex.Crim.App. 1997).

Montgomery, 810 S.W.2d at 391.

See Santellan, 939 S.W.2d at 169.

Sewell v. State, 629 S.W.2d 42, 45 (Tex.Crim.App. 1982) ("when a trial court's ruling on the admission of evidence is correct, although giving a wrong or insufficient reason, this Court will not reverse if the evidence is admissible for any reason"); *see also Osbourn v. State*, 92 S.W.3d 531, 538 (Tex.Crim.App. 2002); *Shugart v. State*, 32 S.W.3d 355, 362 (Tex.App.-Waco 2000, pet. ref'd) ("It is well established that when a trial court's ruling on the admission of evidence is correct for any reason, although a wrong or insufficient reason is given for its admissibility, the ruling must be sustained on appeal.").

III.
A. Perjury and Tampering with Evidence

A person commits perjury if, with intent to deceive and with knowledge of the statement's meaning, he makes a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath. A person commits aggravated perjury if he commits perjury as defined in Section 37.02, and the false statement: (1) is made during or in connection with an official proceeding; and (2) is material. A jury must find not only that the statement in question is false, but that the speaker believed it was false. If the jury concludes that a defendant honestly, though mistakenly, thought that his statement was true when he made it, then the jury could not find that he "intended to deceive."

TEX. PENAL CODE § 37.02.

TEX. PENAL CODE § 37.03.

Thorn v. State, 961 S.W.2d 12, 18 (Tex.-Dallas 1996, pet. ref'd).

See Covalt v. State, 877 S.W.2d 445, 449 (Tex.App.-Houston [1st Dist.] 1994, no pet.); *Thorn*, 961 S.W.2d at 18 ("if a jury believes that a perjury defendant thought his statement was *true*, they would be unable to find that he intended to deceive,' and acquittal would be required"); *see also Hardy v. State*, 246 S.W.3d 290, 295-96 (Tex.App.-Houston [14th Dist.] 2008, pet. ref'd) ("A person who willfully swears falsely to a belief in the existence of a fact which he knows does not exist is as guilty of perjury as if he had sworn directly to the existence of a fact which he knew did not exist.") (internal quotations omitted).

A person commits tampering with physical evidence if, knowing that an investigation or official proceeding is pending or in progress, he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding. Thus, knowledge that the statement is false is an element of both crimes-indirectly in aggravated perjury, and directly in tampering with physical evidence.

TEX. PENAL CODE § 37.09.

B. Admission to Rebut Appellant's Defensive Theory that the State's Star Witness Fabricated His Version of the "Buy-Bust" Drug Deal.
As we recently noted in *Bass v. State*, a defense opening statement may open the door to the admission of extraneous-offense evidence to rebut defensive theories presented in that opening statement. Bass was a pastor accused of sexually assaulting a teenager on church property. In his opening statement, he claimed the teenager's allegations were "pure fantasy" and "pure fabrication." He, "as a pastor and minister," was "the real deal and the genuine article." After the teenager testified, the trial court permitted the State to present the extraneous-offense evidence during its case-in-chief, which showed that appellant had sexually assaulted two other girls in his church office.

270 S.W.3d 557 (Tex.Crim.App. 2008).

Id. at 563.

Id. at 558.

We held that it was "at least subject to reasonable disagreement whether the extraneous-offense evidence was admissible for the noncharacter-conformity purpose of rebutting appellant's defensive theory that the complainant fabricated her allegations against him and of rebutting the defensive theory clearly suggesting that

appellant, as a `real deal' and `genuine' pastor, would not engage in the type of conduct alleged in the indictment."

Id. at 563.

In this case, appellant likewise attacked one of the State's star witnesses in opening argument:

When you look at all this and, specifically, Mr. Herrera's testimony, we'll show you he has an incentive, that he had an incentive to go to the prosecutors and say, hey, I'll tell you whatever you want to hear. And his incentive is he's trying to keep himself out of prison because we'll show you when he testified the first time in the grand jury he was given immunity.

Appellant did not have to wait his turn to show that Mr. Herrera had a motive to cooperate with the State: Herrera testified on direct examination for the State that he had been granted immunity, and that he was cooperating with the State, in part, because he was expecting some sort of offer-ranging from probation to dismissal-for his own pending criminal charges. On cross-examination, defense counsel asked Herrera about his prior lies to the grand jury and suggested that Herrera was cooperating now only because he wanted to "get rid of his pending felony cases and get his police job back. Appellant also implied, during his cross-examination of Vega, that Vega also had a strong motive to lie: He was paid $480,000 by the City of Dallas in a civil suit stemming from his wrongful arrest and imprisonment. Appellant also expressed incredulousness that Vega never noticed Alonso walk into the garage. The defense's basic attack was that both Herrera and Vega were lying or fabricating their present testimony concerning the drug deal for ulterior motives.

But it was not until the State cross-examined appellant that he expressly accused these witnesses of being liars. First he attacked Vega.

Q. You're telling this jury that you saw Daniel Alonso face to face with Jose Vega?

A. Yes, I am.

Q. So one of you has to be lying.

A. Yes, sir.

Then Herrera.

Q. And — well, you've heard Eddie Herrera tell his story. It's different from you, isn't that right?

A. Yes, sir.

Q. You're denying that y'all talked about coming up with a different version or getting your story straight on what could have been seen?

A. That did not happen.

Q. None of that happened?

A. No, sir.

Q. He's making that up?

A. He's making that up, and he's lying.

The parties argued, at trial and on appeal, about whether the defensive theory that Herrera (and Vega) were lying was raised by appellant or was elicited by "prompting or maneuvering" by the State. The court of appeals decided it was the latter, but that court did not have the benefit of our decision in *Bass*, which was decided six months after the court of appeal's decision in this case. The State now relies on *Bass ("Bass* is directly on point," because appellant raised a fabrication defense in opening statement), and appellant distinguishes it (" *Bass* is not analogous," because appellant raised a general defense that he saw the contact).

Delapaz, **2007 WL 4442990, at *3**-*4, 2007 Tex.App. LEXIS 9928, at *8-9.

There is an element of truth in both characterizations. Appellant's defense was that he could see contact between Alonso and Vega because he had a better angle. And his attack on Herrera-in opening, on cross-examination, and in his own testimony on direct-was not as strong, direct, or sustained as Bass's was on his teenage complainant. But appellant did, in his opening statement, suggest that Herrera would say whatever the State wanted to hear, and he did, in his own direct testimony, inferentially accuse Herrera of lying because he denied telling Herrera to "stick with" his story.

Thus, appellant's position was that the contact did occur, and he saw it. Herrera and Vega's position was that the contact did not occur, therefore no one could have seen it. One of these two versions cannot be true. All three of these witnesses were positive about their diametrically different versions; therefore someone committed perjury-knowingly made a false statement under oath with the intent to deceive. But no one suggested that any of these three witnesses is generally a liar, generally untruthful, or generally not worthy of belief. These were not attacks

upon the witnesses or appellant for having a bad character for truthfulness; these were accusations of lying about a specific type of event-the occurrence of a drug delivery — under a specific set of circumstances.

The court of appeals mistakenly analogized this situation to that in *Webb v. State*, 36 S.W.3d 164, 180-81 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd) (*en banc*), in concluding that "general attacks on credibility may call into question the State's proof, but do not negate any element of the crime. Thus, it is not the type of defensive `issue' that can be rebutted with extraneous offense evidence." *Delapaz*, **2007 WL 4442990, at *4,** 2007 Tex. App. LEXIS 9928, at * 9-11.

In these circumstances, it is at least subject to reasonable disagreement whether the extraneous-offense evidence was admissible for the noncharacter-conformity purpose of rebutting appellant's defensive theory that Herrera and Vega were lying about these specific events and had fabricated their testimony to please the prosecution. Evidence of two other nearly identical acts of purported fabrication by appellant concerning "buy-bust" deals was admissible to rebut the defense position that it was the State's witnesses who were lying about the Vega drug deal.

See Bass, 270 S.W.3d at 563.

But appellant's primary defense was that he saw "the contact" between Alonso and Vega even though no one else who was there saw it. Therefore, what he wrote in his offense report was true, and what he testified to in the former trial was true. He had no intent to deceive and he did not deceive. Period. And that raised a clear basis, rejected by the court of appeals in its denial of the State's motion for rehearing, to admit the extraneous offense evidence under the "doctrine of chances."

C. The Extraneous Evidence Was Admissible under Wigmore's "Doctrine of Chances."

The "doctrine of chances" tells us that highly unusual events are unlikely to repeat themselves inadvertently or by happenstance. That is,

2 JOHN WIGMORE, EVIDENCE § 302 at 241 (Chadbourn rev. 1979).

if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i.e., as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small.

Similarly, the chance that a man innocently collects on his murdered business partner's insurance policy decreases significantly when it is learned that he collected on his murdered wife's insurance policy just three years earlier.

See United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991):

It is not every day that one's wife is murdered; it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision. That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance. . . . This inference is purely objective, and has nothing to do with a subjective assessment of [appellant's] character.

The fact that York's defense included innocent explanations for having insurance on [his business partner's] life and for some of his activities after [her] death underscores the relevance of [his first wife's] murder evidence to York's intent during the [instant] episode. When the defendant affirmatively denies having the requisite intent by proffering an innocent explanation for his actions, the government is entitled to rebut that argument. "Evidence of another crime which tends to undermine defendant's innocent explanations for his act will be admitted."

Id.

Here, the "I saw what no one else saw" defense becomes considerably less probable when one hears that appellant saw two other fake drug deals that no one else saw and others denied that they occurred. The unusual or abnormal element-that appellant saw something no one else present saw (not the videographer Ledbetter, not Vega himself, not appellant's partner Herrera, nor Alonso's confederate

Gonzalez)-could be innocently explained once. Maybe appellant, as he said in his report, really did have the better view. Or maybe everyone else saw it, too, and they were just lying. But this unusual ability to see what no one else does becomes "curiouser and curiouser" the more it happens. And it happened twice more.

See, e.g., Fox v. State, 115 S.W.3d 550, 559-60 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd).

In each case, appellant's confidential informant planted fake drugs to frame an innocent person. In each case, appellant stated in his police report that he witnessed the contact or delivery. The extraordinary coincidence that appellant saw drug deals that no one else did three different times flies in the face of common sense. Under the "doctrine of chances," evidence of such a highly unlikely event being repeated three different times would allow jurors to conclude that it is objectively unlikely that appellant was correct in his Vega offense report or that he was truthful in his testimony that he saw contact between Alonso and Vega. Whether the extraneous-offense evidence was admissible under Rule 404(b) to rebut the assertion of innocent intent is at least subject to reasonable disagreement. As Auric Goldfinger, the infamous James Bond villain, said, "Once is happenstance. Twice is coincidence. The third time it's enemy action." Under the "doctrine of chances," no inference about appellant's general character for truthfulness is required. The fact that appellant reported three separate "I saw what no one else saw" drug deals decreases the likelihood that appellant saw any such drug deal, and therefore increases the likelihood that he knew that his statement about seeing one between Vega and Alonso was false.

See United States v. Bowie, 232 F.3d 923, 930 (D.C. Cir. 2000) (district court properly admitted evidence defendant possessed and passed counterfeit notes on a prior occasion to show intent and knowledge; government had to prove three elements: possession of counterfeit notes, intent to defraud, and knowledge the notes were counterfeit; intent and knowledge were therefore facts of consequence to the case, and evidence that defendant had previously possessed and passed counterfeit notes was relevant because it decreased the likelihood that he accidentally or innocently possessed the counterfeit notes here).

See United States v. Barron, 707 F.2d 125, 128 (5th Cir. 1983) (in perjury trial stemming from testimony at a grand-jury investigation for criminal tax fraud, associate's testimony that he committed other acts at defendant's direction on behalf of the taxpayer was relevant to show defendant's motive or intent behind the charged perjury); *United States v. Watson*, 623 F.2d 1198, 1203 (7th Cir. 1980) ("Evidence that Watson asked for complementary bids was necessary to demonstrate that he was aware of the falsity of his testimony before the grand jury."); *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975) (testimony as to defendant's connections with prior transactions in counterfeit notes was admissible to show his knowledge that the bill he passed was counterfeit).

Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L.Rev. 419 (2006) (quoting Ian Fleming, GOLDFINGER (Berkeley Publ'g Group 1982) (1959)).

See id. at 432-40.

Finally, we also agree with the trial court's ruling on appellant's Rule 403 objection.

D. The extraneous evidence did not run afoul of Rule 403
A Rule 403 balancing test includes the following factors:

(1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable-a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;

(2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way;"

(3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and

(4) the force of the proponent's need for this evidence to prove a fact of consequence, *i.e.*, does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

Appellant does not dispute that the extraneous offenses were probative in assessing Herrera's truthfulness about this event; rather, he asserts that this evidence was not admissible for that or any other reason. But, as we have noted, the extraneous offense evidence made facts of consequence — the falsity of appellant's statements and his knowledge that those statements were false — more likely. Furthermore, the evidence that appellant committed the extraneous acts was strong; in each instance, both the confidential informant and the set-up "dealer" testified that there was no contact or delivery. And the extraneous offenses occurred close in time to this offense: one just before, and one just after. The accuracy of appellant's

statement and his knowledge of its accuracy were the two hotly contested issues at trial, and the extraneous acts had high probative value in showing that appellant repeatedly put false statements of what he purportedly saw during these "buy-bust" deals in his reports.

Rule 404(b) is directed toward any "other" crimes, wrongs, or acts. Therefore, the evidence offered under the rule might be an act that occurred either before or after the charged offense. *See Powell v. State*, 5 S.W.3d 369, 383 (Tex.App.-Texarkana 1999, pet. ref'd).

On the other hand, we recognize that evidence that appellant orchestrated a series of fake "buy-bust" deals could potentially affect the jury in an emotional way. And, as recognized by appellant and the court of appeals, a significant amount of time was devoted to presentation of the extraneous offenses during rebuttal. Appellant argues that there was no need for the extraneous evidence — to prove intent or knowledge — because the State had its witnesses' testimony and the videotape of the alleged deal. But this is not like the case where the "State's direct evidence clearly establishes the intent element and that evidence is not contradicted by appellant nor undermined by appellant's cross-examination of the State's witnesses." Here appellant stoutly denied any criminal intent and provided a plausible defense that he was in a unique position to see what no one else could or did see. Although the intent to kill is easily inferred from pointing a gun and shooting, the intent to defraud or to affect the course of an investigation cannot necessarily be inferred from the mere making of a statement or proof of its inaccuracy.

Hernandez v. State, 203 S.W.3d 477, 479 (Tex.App.-Waco 2006, pet. ref'd).

The videographer testified that his camera could not capture the inside of the bay bet cause of the angle at which it had to be set up at. Thus, according to appellant, the contact between Alonso and Vega wasn't on the video, because the camera was not capable of capturing it, not because it didn't happen.

As we noted in *Parks v. State*, 746 S.W.2d 738 (Tex.Crim.App. 1987),

In cases of forgery and fraud, it is difficult to prove intent. This Court has wisely held that intent or guilty knowledge cannot be inferred from the mere passing of a forged instrument. Indeed, to hold otherwise would create the danger that the unknowing and accidental passing of a forged instrument could effectively become a strict liability offense. The issue of intent is of such overriding importance in a case of forgery that it effectively becomes the focus of the State's case. Establishing intent in such cases is so crucial and so difficult to do that, as a practical matter, evidence of extraneous offenses is nearly always admissible. While it is hypothetically possible that a case of forgery could be established by direct evidence, such as eyewitness testimony, most cases of forgery rest on circumstantial evidence. In the vast majority of such cases, the probative value of evidence of extraneous offenses will inevitably outweigh its prejudicial effect.

Id. at 740 (cites omitted).

In light of these facts, we hold that the trial court's ruling that the danger of unfair prejudice did not substantially outweigh the probative value of the extraneous offenses was not an abuse of discretion. We therefore reverse the judgment of the court of appeals and remand this case to that court to address appellant's remaining issues.

See, e.g., Springer v. State, 721 S.W.2d 510, 512-13 (Tex.App.-Houston [14th Dist.] 1986, pet. ref'd) (in aggravated perjury prosecution of police officer for testifying that he never physically abused or mistreated prisoners, evidence of extraneous offenses that he had, in fact, done so on other occasions was admissible to prove (1) falsity of his statement and (2) his intent to deceive); *see also United States v. Burke*, 425 F.3d 400, 409-10 (Cir. 2005) (in prosecution for perjury, evidence of defendant's prior bad acts was admissible under Rules 404(b) and 403 when offered to prove the falsity of defendant's testimony to grand jury); *United States v. Ruhbayan*, 388 F.Supp.2d 652, 660-61 (E.D.Va. 2004) (in perjury prosecution, testimony of government witnesses rebutting defendant's answers to questions about specific instances of drug dealing or firearm use, although it reflected on defendant's credibility, also served as proof of defendant's motive to lie in his prior trial and as proof that his false testimony in that trial was not a mistake or accident); *United States v. Watt*, 911 F.Supp. 538, 557-58 (D.D.C. 1995) (in prosecution of former Secretary of the Interior for perjury, government could introduce evidence of extraneous acts of misconduct to show defendant's intent to deceive and to show a pattern of conduct consistent with or similar to the conduct alleged in indictment, especially as there was a "clear and logical connection between the alleged earlier offenses or misconduct and the case being tried."); *People v. Ellsworth*, 15 P.3d 1111, 1114-15 (Colo.Ct.App. 2000) (in perjury prosecution of police officer, trial court did not abuse its discretion in admitting evidence of similar acts of misconduct offered to show defendant's motive and culpable mental state in using a falsified receipt at a driver's license revocation hearing).

KELLER, P.J., not participating

Robbins v. State

88 S.W.3d 256 (2002)

Neal Hampton ROBBINS, Appellant, v. The STATE of Texas.

No. 1939-00.

Court of Criminal Appeals of Texas.

October 23, 2002.

*257 Brian W. Wice, Houston, for Appellant.

Gail Kikawa McConnell, Asst. DA, Houston, Matthew Paul, State's Atty., Austin, for State.

OPINION

HERVEY, J., delivered the opinion of the Court in which MEYERS, PRICE, KEASLER and HOLCOMB, JJ., joined.

In this capital murder case the prosecution did not seek the death penalty against appellant, who was convicted and sentenced to life for killing the seventeen-month-old *258 daughter of his live-in girlfriend. The issue in this case is whether during the guilt/innocence phase of appellant's trial, the trial court abused its discretion to admit evidence of previous injuries the victim suffered while she was in appellant's care. We will refer to this evidence as "relationship evidence."

The prosecution presented evidence that the victim received the injuries that caused her death while she was alone with, and in the care of, the appellant in their home. Appellant and the victim lived with appellant's mother and the victim's mother. The victim's mother left the victim alone with appellant at home. When the victim's mother returned, appellant told her that the victim was taking a nap; appellant left soon thereafter. About an hour later, when the victim's mother attempted to wake the victim up from her nap, she noticed that the victim was cold and not breathing. The prosecution presented medical evidence that the victim was dead at this time.

Appellant suggested through vigorous cross-examination of prosecution witnesses that the victim's death was not the result of an intentional act by appellant. Through his cross-examination of one prosecution witness, appellant presented the defensive theory that the victim could have died from Sudden Infant Death Syndrome (SIDS) and not from an intentional act by appellant. Through his cross-examination of his parole officer who saw appellant and the victim on the day of the victim's death, appellant presented the defensive theory that he was treating the victim "kindly" with the obvious inference being that appellant would not have intentionally harmed the victim. And through his cross-examination of another prosecution witness, appellant presented the defensive theory that bruises on the victim's body could have been caused by incorrectly performed CPR efforts to save her life rather than from an intentional act by appellant. For example,

Q. Now, I'll give you another situation. An E.M.T. comes up to the location where the adults are trying to do CPR and they are putting a lot of pressure on that kid and blowing a lot harder than they should, and she says, "If she's not already dead, you're going to kill her; stop that," and proceeded to show them the proper way. Would you say that some of that could have led to injuries to the child, adults putting their full weight down and trying to revive that child? A. You should see it more anteriorly than posteriorly. Q. Pardon? A. You should see it more the front to the back, the injuries. Q. If you've got your palms on the front and you've got little rocks and sticks on the back, you'll see it on the back, you'll see it on the back, won't you? A. Yes. You'd see bruises on the back. Q. But you wouldn't necessarily see them on the front if they're pushing with their palms, would you? A. No. Q. And they could be misfiring and hitting down in the area of the eleventh and twelfth ribs and cause that sort of damage without any noticeable trauma from looking at the skin, couldn't they? A. If they're pushing down lower, yes. Q. Pass the witness.

The victim's mother and other witnesses later testified over appellant's objection about the relationship evidence. They testified that on three separate occasions the victim received injuries while she was in appellant's care. For example, the victim's mother testified that on one occasion *259 while in appellant's care, the victim received a black eye. On another occasion while in appellant's care, the victim's "leg was so badly injured she couldn't stand up." And, on another occasion while in appellant's care, the victim "appeared with bruises in her ear and on the side of her face."

Appellant testified that he loved the victim and would not have harmed her. Appellant presented seemingly innocent explanations for how the victim suffered the injuries described in the relationship evidence. Appellant also presented medical expert testimony that the victim's cause of death was "undeterminable" and that the victim's death-causing injuries could have occurred at a time when appellant did not have access to her.

During closing jury arguments, appellant argued that if "anything, he is guilty of the offense of loving a child." He also pointed to the testimony of the two medical examiners who came to "two diametrically-opposed conclusions" about the victim's death: one that "this is a death of undeterminant cause" and the other that it is "a homicide." Appellant put forth the SIDS scenario, and he also emphasized that the bruises on the victim's body could have been caused by incorrectly performed CPR efforts to save the victim's life. Finally, appellant argued:

[Appellant] loved the [victim]. The [victim's] own mother said she never saw him yell at the [victim], discipline the [victim]. And everybody else, save for [two witnesses], said they had a loving relationship, got along well; and told how much he loved [the victim] and spent time caring for her. And I don't think there is any doubt about the relationship they had up to [the day of the victim's death]; and there is nothing, nothing that would explain [appellant] doing this terrible thing.

Our reading of the record indicates that the trial court admitted the relationship evidence under Article 38.36(a), V.A.C.C.P., and also overruled appellant's objections that this evidence was inadmissible under Rules 404(b) and 403 of the Texas Rules of Evidence.[1] The Court of Appeals decided that this evidence was "probative of intent and lack of accident" under Rule 404(b) and that it was not "unfairly prejudicial" under Rule 403 because "the prejudicial effect lies in its probative value rather than an unrelated matter." Robbins v. State, 27 S.W.3d 245, 250-51 (Tex.App.-Beaumont 2000, pet. granted). We exercised our discretionary authority to review the Rule 404(b) and Rule 403 decisions of the Court of Appeals.

RULE 404(b)

Relevant evidence of a person's bad character is generally not admissible for the purpose of showing that he acted in conformity therewith. See Montgomery v. State, 810 S.W.2d 372, 386-88 (Tex.Cr.App. 1990) (op. on reh'g); accord Rankin v. State, 974 S.W.2d 707, 709-10 (Tex.Cr.App. 1996) (orig.op.), and at 717-20 (op. on reh'g). This evidence, however, may be admissible when it is relevant to a noncharacter conformity issue of consequence in the case such as establishing intent or rebutting a defensive theory. See id.; Montgomery, 810 S.W.2d at 387-88.

Because trial courts are in the best position to decide these admissibility *260 questions, an appellate court must review a trial court's admissibility decision under an abuse of discretion standard. See Montgomery, 810 S.W.2d at 391 (trial court "has the best vantage from which to decide" admissibility questions). This standard requires an appellate court to uphold a trial court's admissibility decision when that decision is within the zone of reasonable disagreement. See id. An appellate court would misapply the appellate abuse of discretion standard of review to reverse a trial court's admissibility decision solely because the appellate court disagreed with it. See id.

Appellant claims the Court of Appeals' holding that the relationship evidence "was admissible to show intent and absence of accident is clearly wrong as neither intent nor accident was a material issue given Appellant's denial that he committed this offense." Appellant argues that, because he merely "denied committing the offense," his "intent" or "absence of accident" was "wholly irrelevant." The State urges this Court to decide that appellant's simple plea of not guilty made appellant's intent a material issue in the case and that the relationship evidence was probative of that intent as well as other relevant issues of consequence in the case such as absence of accident.

The State relies primarily on the United States Supreme Court's decision in Estelle v. McGuire which held that relationship evidence was "clearly probative" of the defendant's intent in the defendant's murder prosecution for killing his infant daughter, even though at trial the defendant simply pled not guilty and made no claim that the child died accidentally. See Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 480-81, 116 L. Ed. 2d 385 (1991). The Supreme Court rejected a claim like the one appellant makes here on the rationale that "a simple plea of not guilty" still "puts the prosecution to its proof as to all elements of the crime charged" and that this burden is not relieved by a defendant's tactical decision not to contest an essential element of the offense. See Estelle, 112 S. Ct. at 481.

The State candidly admits that adopting its position would probably require this Court to overrule or disavow prior case law and we agree. A fair reading of this case law indicates that in Texas a simple plea of not guilty usually does not make issues such as intent a relevant issue of consequence for purposes of determining the admissibility of relationship evidence under Rule 404(b). See, e.g., Vernon v. State, 841 S.W.2d 407, 411 (Tex.Cr. App.1992) (in defendant's prosecution for aggravated sexual assault of his minor stepdaughter, relationship evidence of prior sexual assaults by the defendant against the same victim not relevant to a noncharacter conformity material issue under Rule 404(b) primarily because the not-guilty pleading defendant did not present any witnesses of his own or do anything to impeach the complainant); Fielder v. State, 756 S.W.2d 309, 318 (Tex.Cr.App. 1988) (theory of the prosecution and the defensive theory or theories determine the material issues in a homicide case); Turner v. State, 754 S.W.2d 668, 673-74 (Tex. Cr.App.1988) (considering it

relevant that not-guilty pleading defendant did not testify and personally deny committing the offense in deciding that it was error to admit extraneous transaction between defendant and a third party); Clark v. State, 726 S.W.2d 120, 122-23 (Tex.Cr.App.1986) (extraneous offense evidence involving defendant and third party erroneously admitted on issue of defendant's intent in part because the not-guilty pleading defendant did not vigorously enough undermine the prosecution's "case on the issue of intent").

*261 Current law, therefore, creates a "catch 22." It says that a simple plea of not guilty does not make issues such as intent relevant issues of consequence for relationship evidence Rule 404(b) purposes while at the same time it also says that these are material issues that the prosecution must prove beyond a reasonable doubt. Some might agree that this current case law is "wrong."

But this standing alone is not sufficient for us to disregard principles of stare decisis. See generally Awadelkariem v. State, 974 S.W.2d 721, 725-26 (Tex.Cr.App.1998). One consideration here is that this Court's 8-0 (with one judge concurring in the result) decision in Vernon disavowed a prior "small plurality" decision in Boutwell v. State which would have supported the State's position in this case. See Vernon, 841 S.W.2d at 410-11, disavowing Boutwell v. State, 719 S.W.2d 164, 173-79 (Tex. Cr.App.1985) (op. on reh'g) (plurality op.) (discussion of why relationship evidence of prior unlawful sexual acts between defendant and the victim were admissible in prosecution of defendant for committing unlawful sex acts against the same victim).

Other than demonstrating that our current case law might be "wrong," the State advances no reasons for disregarding principles of stare decisis. With these considerations in mind, this case presents a scenario where it is probably "better to be consistent than right." See Awadelkariem, 974 S.W.2d at 725. Any changes in current law should come via amendment to the Texas Rules of Evidence or by legislative enactment.

Under current law, therefore, the issue is whether appellant went beyond a simple plea of not guilty and put his intent at issue through vigorous cross-examination or other means (such as the presentation of various defensive theories), thereby making it subject to reasonable debate whether the relationship evidence was relevant to this noncharacter conformity purpose of establishing appellant's intent. Appellant argues that he did not put his intent at issue. While Vernon suggests that a defendant's simple plea of not guilty does not put intent at issue for Rule 404(b) purposes, it does not address the situation where a defendant puts intent at issue through vigorous cross-examination and the presentation of defensive theories.

Of crucial import here is the fact that this is not a case where appellant simply pled not guilty. He went beyond simply pleading not guilty through vigorous cross-examination of the prosecution witnesses suggesting that the victim's death was caused by some means other than an intentional act by appellant. As a matter of logic and common sense it is at least debatable whether this is sufficient to put appellant's intent at issue. See Montgomery, 810 S.W.2d at 387, 394. Keeping in mind that the deferential appellate standard of review does not permit the appellate court to conduct a de novo review with a view to making a wholly independent judgment of the trial court's admissibility decision, we cannot say that the trial court would have been outside the zone of reasonable disagreement to have decided that the relationship evidence was relevant to appellant's intent. Cf. Montgomery, 810 S.W.2d at 392.

Our decision in Montgomery also does not support appellant's position. Montgomery decided that in an indecency with a child prosecution it was "at least subject to reasonable debate whether the testimony that [the defendant] frequently walked around in front of his daughters naked and with an erection, in combination with other evidence of inappropriate behavior toward them, did have a tendency to show a generalized `intent to arouse and gratify' his own sexual desire vis-a-vis his children." *262 Montgomery, 810 S.W.2d at 394 (emphasis supplied). Similarly, it is subject to reasonable debate in this case whether the relationship evidence tended to show appellant's intent to hurt the victim.

Notwithstanding the foregoing, the trial court would not have abused its discretion to have decided that the relationship evidence was relevant for the noncharacter conformity purpose of rebutting appellant's various defensive theories including the defensive theory that the victim's death resulted from an accident due to improperly performed CPR efforts to save her life. See Montgomery, 810 S.W.2d at 387-88 (extraneous offense evidence relevant to noncharacter conformity fact of consequence in the case when it is offered to rebut a defensive theory); see also Romero v. State, 800 S.W.2d 539, 543 (Tex. Cr.App.1990) (appellate court should uphold trial court's decision if it is correct on any theory of law applicable to the case and this principle holds true "even when the trial [court] gives the wrong reason for his decision" and "is especially true with regard to admission of evidence"). It too is subject to reasonable debate whether the relationship evidence made these defensive theories less probable. See Montgomery, 810 S.W.2d at 387 (extraneous offense evidence has noncharacter conformity relevance where it logically serves to make less probable defensive evidence that undermines an elemental fact).

RULE 403

An appellate court also reviews a trial court's Rule 403 decision under the above-mentioned abuse of discretion standard. See Montgomery, 810 S.W.2d at 391-93. The Rule 403 appellate issue is usually whether the trial court abused its discretion to decide that the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice." See Montgomery, 810 S.W.2d at 391-93.

In making this determination, it is important to remember that each word in Rule 403 is significant. For example, it appears that appellant misquoted Rule 403 in the Court of Appeals by arguing "the probative value of the [relationship] evidence was outweighed by its prejudicial effect." See Robbins, 27 S.W.3d at 250. This is a misstatement of Rule 403 which, in relevant part, actually reads "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." (Emphasis Supplied).

The Rule 403 analysis advances the "overriding policy" of excluding what most agree is relevant and probative character evidence when it is offered solely for the purpose of showing that a defendant acted in conformity therewith. See generally Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 218-19, 93 L. Ed. 168 (1948).

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. (Footnote Omitted). Not that the law invests the defendant with a presumption of good character, (citation omitted), but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. (Footnote Omitted). The inquiry is not rejected because character is irrelevant; (footnote omitted) it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny *263 him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. (Footnote Omitted).

Id.

This "overriding policy" of preventing "undue prejudice" is meant primarily to prevent a jury, with a reasonable doubt of a defendant's guilt of the charged offense, from nevertheless convicting the defendant of the charged offense based solely on the defendant's "wicked or criminal disposition" or solely because the defendant is a bad person generally. See Crank v. State, 761 S.W.2d 328, 341 (Tex.Cr.App. 1988); Michelson, 69 S. Ct. at 219, and at 225 (Rutledge, J., dissenting) (rule designed to "prevent conviction for one offense because perhaps others, or misconduct not amounting to crime at all, have been perpetrated or are reputed generally to lie at the defendant's door"); 1 Wigmore, Evidence (3d ed., 1940), Section 57 ("tendency of human nature to punish, not because our [defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury"); 2 Ray and Young, Texas Law of Evidence (2d ed., 1956), Section 1492 (purpose of rule is to protect defendant from the "undue prejudice" that "when evidence is received that accused is of a wicked or criminal disposition, juries are likely to find him guilty of the offense charged regardless of whether it is proved by the evidence"). It also has been stated that this "overriding policy" is to prevent digression "from evidence as to the offense to hear a contest as to the standing of the accused" and to prevent "converting an individual litigation into a community contest and a trial into a spectacle." See Michelson, 69 S. Ct. at 220.

With these considerations in mind, we cannot say that the Court of Appeals wrongly decided that the trial court was within its discretion to decide that the probative value of the relationship evidence was not substantially outweighed by the danger of unfair prejudice especially in light of the defensive theories that appellant presented. Though "prejudicial," the evidence was not "unfairly prejudicial." And, any "unfair prejudice" did not "substantially" outweigh the probative value of the evidence even if it could be said that it "outweighed" its probative value. On this record, there was no reason to believe that the jury had a reasonable doubt for appellant's guilt of the charged offense but convicted appellant based on the relationship evidence.

The judgment of the Court of Appeals is affirmed.

United States v. Beechum

J. Waddy Bullion (Court-appointed), G. Luke Ashley, Dallas, Tex., for defendant-appellant.

Kenneth J. Mighell, U. S. Atty., Fort Worth, Tex., Judith A. Shepherd, Asst. U. S. Atty., Dallas, Tex., Mervyn Hamburg, Atty., U. S. Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, SIMPSON, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.[*]

TJOFLAT, Circuit Judge:

This case comes before the court en banc for reconsideration of this circuit's doctrine on the admissibility of offenses extrinsic to a defendant's indictment to prove his criminal intent.[1] That doctrine, deriving in part from the case of United States v. Broadway, 477 F.2d 991 (5th Cir. 1973), requires that the essential physical elements of the extrinsic offense include those of the offense charged and that each of these elements be proved by plain, clear, and convincing evidence. We are here called upon to determine the effect of the recently enacted Federal Rules of Evidence on this doctrine, an issue expressly reserved in a number of our cases decided prior to the panel opinion in this case.[2] The panel hearing this case was of the opinion, Judge Gee dissenting, that Broadway and its progeny survived intact the enactment of the rules. United States v. Beechum, 555 F.2d 487, 504-08 (5th Cir. 1977). With deference to the panel, we must disagree.

A jury convicted Orange Jell Beechum, a substitute letter carrier for the United States Postal Service, of unlawfully possessing an 1890 silver dollar that he knew to be stolen from the mails, in violation of 18 U.S.C. § 1708 (1976). To establish that Beechum intentionally and unlawfully possessed the silver dollar, the Government introduced into evidence two Sears, Roebuck & Co. credit cards found in Beechum's wallet when he was arrested. Neither card was issued to Beechum, and neither was signed. The Government also introduced evidence indicating that the cards had been mailed some ten months prior to Beechum's arrest to two different addresses on routes he had serviced. The propriety of the admission of this evidence is the primary issue in this appeal. Before we reach this issue, however, we must round out the facts and note several additional issues.

Orange Jell Beechum had been a substitute letter carrier in South Dallas, Texas for approximately two and one-half years prior to his arrest on September 16, 1975. Because Beechum had been suspected of rifling the mail on several occasions, postal inspectors planted in a mailbox on Beechum's route a letter containing the silver dollar, a greeting card, and sixteen dollars in currency. According to the testimony of one of the inspectors, the currency had been dusted with a powder visible only under ultraviolet light. A postal inspector observed Beechum retrieving the mail from the mailbox in which the letter had been planted and noted that Beechum stopped at a record shop for approximately one hour before returning to the South Dallas Postal Station. At the station, Beechum turned in the raw mail containing the test letter, and it was discovered that the letter had been opened and resealed. The silver dollar and the currency were missing.

Approximately thirty minutes after having arrived at the station, Beechum was apprehended as he walked toward his automobile, whose engine was running. The arresting inspector informed Beechum that a letter had been planted in the mailbox Beechum had emptied earlier and that the letter had been opened and its contents were missing. Before any questioning, the inspector read Beechum the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and Beechum indicated that he understood his rights. The inspector then asked Beechum to empty his pockets. Standing with his front pockets everted, Beechum professed to have relinquished all, but a frisk revealed the silver dollar in his hip pocket. At this time, the inspector discovered in Beechum's wallet the two Sears credit cards, which, as we have noted, were not issued to Beechum and had not been signed.

The arresting inspector questioned Beechum about the credit cards, and Beechum responded first that the only credit cards he possessed were his own. Later, when confronted with the Sears cards, he stated that he had never used them. The inspector testified that in response to further questioning concerning the cards, Beechum said, "Since you have all the answers, you tell me." Record, vol. 2, at 31, 201. The inspector inquired no further.

The Government indicted Beechum on one count for unlawfully possessing the silver dollar. Argument at the preliminary hearing indicated that the primary issue in the case would be whether Beechum harbored the requisite intent to possess the silver dollar unlawfully. Defense counsel, by motion in limine heard in the absence of the jury, sought to exclude the credit cards as irrelevant and prejudicial. The court overruled the motion, in part on the basis that the cards were relevant to the issue of intent.[3] Id. at 36-37.

In its case in chief, the Government introduced the credit cards and explained the circumstances surrounding their

obtention. By stipulation, the Government introduced Sears documents indicating that the two cards had been issued to the parties named on those cards. It was also stipulated that the regular business practice of Sears was to mail such cards within ten days after their issuance. The Government also elicited testimony that the addresses to which the credit cards had been mailed were on routes that Beechum had serviced during the ten month period between the date the cards were issued and the date of Beechum's arrest.

In anticipation that Beechum would claim that he sought to turn in the silver dollar, the Government called to the stand Beechum's supervisor, Mr. Cox. Cox testified that he was in the view of Beechum on several occasions, and, indeed, that he had taken mail directly from Beechum. Id. at 101-09.

At the close of the Government's case in chief, the defense moved for a directed verdict of acquittal, alleging that the Government had failed to come forward with sufficient evidence "to establish that Mr. Bonner (Sic) possessed the silver dollar with a requisite specific intent that the government is required to establish in this case." Id. at 138. The defense argued that the Government had failed to demonstrate that the credit cards were unlawfully taken from the mail or that Beechum possessed the cards without authorization. The motion was overruled.

At this time defense counsel indicated to the court that Beechum would take the stand and would testify "as to matters concerning the offense for which he is charged," but that he would invoke the fifth amendment as to any questions concerning the credit cards. Id. at 140-41. The defense sought a ruling that the Government be precluded from asking Beechum any question about the cards; the rationale was that the defendant should not be required to invoke his fifth amendment privilege in the presence of the jury. The court declined so to limit the prosecution and indicated that Beechum would have to invoke the amendment in response to the questions he did not wish to answer.

On direct examination Beechum testified that the silver dollar fell out of the mailbox as he was raking out the mail and that he picked it up and placed it first in his shirt pocket, and later (after it had fallen out) in his hip pocket, where he claimed to keep his change. Beechum also testified that, upon return to the postal station, he intended to turn in the silver dollar to Cox but that he could not find Cox.[4] Beechum also stated that he was not leaving the station when he was arrested.[5] No mention was made of the credit cards.

On cross-examination the Government asked Beechum if the credit cards were in his wallet when he was arrested. Defense counsel objected on the basis that inquiry about the cards was outside the scope of cross-examination, and the court overruled the objection. On reassertion of the question, Beechum invoked his fifth amendment rights, but the prosecutor continued questioning on the subject of the cards. This occasioned repeated invocation of the fifth amendment by Beechum and vehement objection by defense counsel. Eventually, Beechum did admit to stating shortly after his arrest that the inspector could "answer his own questions" when the inspector quizzed him about the cards and that the only credit cards he had were his own. Id. at 201.

As we have noted, the central issue in this case is whether the district court properly allowed the credit cards to be admitted as extrinsic offense evidence going to the issue of Beechum's intent to possess the silver dollar unlawfully. We hold that the credit cards were properly admissible. The case, however, presents several additional and substantial issues that we must address.

First, the defense contends that the Government was improperly allowed to question Beechum concerning the credit cards because the issue of the cards was without the scope of cross-examination. Since Beechum took the stand to establish the innocence of his intent by testifying that he intended to turn in the coin and since Beechum's possession of the cards was relevant to the issue of his intent, we hold that the Government's questions were within the scope of proper cross-examination.

Second, the defense asserts that the court below impermissibly allowed the Government repeatedly to question Beechum concerning the cards, knowing that he would invoke the fifth amendment in response. That Beechum was forced repeatedly to assert the amendment, the defense claims, created undue prejudice before the jury. We find this contention meritless. When Beechum took the stand to establish that his intent was blameless, he waived his fifth amendment privilege with respect to cross-examination relevant to that issue. Therefore the district court incorrectly allowed Beechum to rely on the fifth amendment and to refuse to answer the Government's inquiries. The defense can hardly argue undue prejudice when the Government was entitled to responses that undoubtedly would have been more damaging than the assertion of the fifth amendment.

We think it profitable to address first the contention that the Government's inquiries concerning the cards were outside the scope of cross-examination. A discussion of the propriety of the prosecutor's repeated evocation of Beechum's claim of fifth amendment privilege will follow naturally. Our discourse on these issues will provide a valuable prologue to our disposition of the extrinsic offense problem; many of the policies undergirding the implication of fifth amendment waiver as to matters within the scope of proper cross-examination when the defendant takes the stand are present when he testifies to assert the lack of criminal intent. We conclude that the credit cards were highly probative of Beechum's intent

and therefore properly admissible to attack the plausibility of his exculpatory testimony.

Before we move to the analysis of these issues, we must briefly address an issue noted, but not passed upon, by the panel. On direct examination, the Government elicited from the arresting inspector testimony indicating that Beechum gave no explanation for his possession of the silver dollar at the time of his arrest. In closing argument, the prosecutor made the following remarks concerning Beechum's conduct after his arrest. "Mr. Beechum gave no explanation for his possession of the silver dollar. In fact, he told (the inspector), 'You have all the answers, and I don't have any for you.' " 1st Supp. Record at 5.

The issue, apparently raised for the first time by the panel, is whether the witness's testimony and the prosecutor's remark constituted impermissible comments on Beechum's right to remain silent. See United States v. Warren, 578 F.2d 1058, 1064, 1072-74 (5th Cir. 1978) (en banc). Had Beechum in fact remained silent at the time of his arrest, we might entertain doubts as to the propriety of the testimony and comment. See Doyle v. Ohio,426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); See also Chapman v. United States, 547 F.2d 1240, 1247-50 (5th Cir.), Cert. denied, 431 U.S. 908, 97 S. Ct. 1705, 52 L. Ed. 2d 393 (1977). Beechum, however, chose to speak. After the inspector had informed him about the test letter and after Beechum had been read his rights, he chose to reply to the inspector's initial inquiry with the remark that the only credit cards he possessed were his own. When confronted with the Sears cards found in his wallet, he explained that they had never been used. His final response to the questioning was that the inspector could answer any other questions himself because he had all the answers. In context, the latter two of these remarks are tantamount to admissions of guilt. Beechum knew that he was the subject of an investigation for rifling the mails because the inspectors had told him that they had planted a test letter. He was caught red-handed with the coin and the credit cards. All that he could say was, "You have all the answers."

The prosecutor's statement, therefore, is not a comment on Beechum's silence but rather an appraisal of what Beechum said. In effect, the prosecutor was saying, "Beechum did not explain his possession of the silver dollar. In fact, he admitted that he had no explanation for it, because they already had all the answers." Under these circumstances, neither the witness's testimony nor the prosecutor's remarks were improper. United States v. Mireles, 570 F.2d 1287, 1291-93 (5th Cir. 1978); United States v. Berdick, 555 F.2d 1329 (1977), Cert. denied, 434 U.S. 1010, 98 S. Ct. 721, 54 L. Ed. 2d 753 (1978).

Beechum took the stand at trial to explain his possession of the silver dollar. He claimed that he came upon it innocently when he collected the mail from the box in which the test letter was placed. He testified that he placed the coin in his hip pocket, with the rest of his change, after it fell out of his shirt pocket. Beechum explained that he searched for his supervisor, Cox, so that he could properly relinquish the coin but that Cox was nowhere to be found. Clearly, Beechum was saying that he did not intend to possess the coin unlawfully because he obtained it innocently and intended to give it to the proper authority.

At the time of his arrest, however, Beechum was carrying in his wallet the credit cards of two other persons. If Beechum wrongfully possessed these cards, the plausibility of his story about the coin is appreciably diminished. Therefore, assuming that it could be established that the cards were wrongfully possessed by Beechum, they were relevant to the issue of Beechum's intent to commit the crime for which he was charged. Fed.R.Evid. 401[6] ; see Part III. C. Infra.

The scope of proper cross-examination is set forth in Fed.R.Evid. 611(b), which provides as follows:

Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Implicit in the rule is that all evidence relevant to the subject matter of direct examination is within the scope of cross-examination. See McCormick, Evidence § 30, at 57-58 (2d ed. 1972). Of course, this is not to say that all such relevant evidence is admissible, for the rules themselves embody policies that exclude evidence even though relevant. E. g., Fed.R.Evid. 403, 404(b). Unless, however, one of these exclusionary policies acts to prohibit the introduction of the credit cards, they are admissible as within the scope of cross-examination because they are relevant to the issue of intent,[7] an issue placed squarely in contention by Beechum's testimony. See United States v. Pena, 542 F.2d 292, 294-95 (5th Cir. 1976); United States v. Gray, 507 F.2d 1013, 1018-19 (5th Cir.), Cert. denied, 423 U.S. 824, 96 S. Ct. 38, 46 L. Ed. 2d 40 (1975). Moreover, that Beechum did not refer to the cards on direct examination does not render inquiry about them irrelevant and therefore does not preclude the Government's inquiries about them.

B. Repeated Invocation of the Fifth Amendment

At the close of the Government's case in chief, defense counsel sought a ruling that the prosecutor be prohibited from questioning Beechum about the credit cards because Beechum intended to assert the fifth amendment as to any such questions. The court denied the motion, but Beechum took the stand to profess his

innocence despite the court's ruling. As promised, when the prosecutor asked Beechum about the cards, he invoked the fifth amendment. The prosecutor continued to question Beechum concerning the cards, and Beechum continued to assert the privilege. The defense claims this to have created undue prejudice before the jury. We cannot agree.

It is an inveterate principle that a defendant who takes the stand waives his fifth amendment privilege against self-incrimination at least to the extent of cross-examination relevant to issues raised by his testimony. E. g., Brown v. United States, 356 U.S. 148, 155-56, 78 S. Ct. 622, 627, 2 L. Ed. 2d 589 (1958); Powers v. United States, 223 U.S. 303, 32 S. Ct. 281, 56 L. Ed. 448 (1912); United States v. Pate, 357 F.2d 911, 915 (7th Cir. 1966). Whether a defendant waives the privilege to the full scope of cross-examination permissible under the Federal Rules is an issue we need not determine.[8] As we shall show, however, the cross-examination in this case comes well within the scope of matters that a defendant is deemed to waive when he takes the stand. The rationale behind this waiver rule is of equal pertinence to the extrinsic offense issue in this case; therefore, we briefly explicate that rationale below.

Truth is the essential objective of our adversary system of justice. Of course, the search for truth is in certain instances subordinated to higher values. Indeed, the privilege against self-incrimination ordinarily represents such a value.[9] But where the defendant takes the stand to offer his version of the facts, "the interests of the (Government) and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." Brown v. United States, 356 U.S. 148, 156, 78 S. Ct. 622, 627, 2 L. Ed. 2d 589 (1958). To allow a defendant to testify with impunity on matters he chooses and in a manner he chooses is a "positive invitation to mutilate the truth a party offers to tell." Id.; accord, Fitzpatrick v. United States, 178 U.S. 304, 316, 20 S. Ct. 944, 948-49, 44 L. Ed. 1078 (1900). The defendant therefore is deemed to waive the privilege, at least with respect to matters about which he testifies, and the Government is entitled to subject his testimony to the acid test of adverse cross-examination.

Here, Beechum sought to attain precisely what the waiver rule seeks to prohibit. His objective was to testify that he intended to give the silver dollar to his supervisor without having to explain the possession of two credit cards not belonging to him. In this, he was largely successful. Had the Government been allowed to ask Beechum about the credit cards, he would have had to explain why he would turn in the coin but keep the cards. Any answer would have borne directly on the issue of intent, and the jury was entitled to consider such highly probative testimony.

The questions the Government sought to ask Beechum concerned matters within the letter and the spirit of the waiver rule. The court below erroneously permitted Beechum to invoke the fifth amendment and avoid response. Not satisfied with this, Beechum contends that he was unduly prejudiced by having to assert the amendment repeatedly. He claims that the prejudice was aggravated because the Government knew that the questions would evoke the assertion of the privilege. We find these contentions without merit.

It is impermissibly prejudicial for the Government to attempt to influence the jury by calling a witness it knows will invoke the fifth amendment. United States v. Ritz, 548 F.2d 510 (5th Cir. 1977); United States v. Maloney, 262 F.2d 535 (2d Cir. 1959). Moreover, where the government witness indicates beforehand that he will invoke the privilege, the court may properly refuse to allow him to testify before the jury. United States v. Lacouture, 495 F.2d 1237 (5th Cir.), Cert. denied,419 U.S. 1053, 95 S. Ct. 631, 42 L. Ed. 2d 648 (1974). But this is not such a case. Here the Defendant took the stand, knowing full well that the Government would inquire about the cards because the court had refused to prohibit that inquiry.[10] Any prejudice deriving from the invocation of the privilege is therefore attributable to Beechum's decision to testify. Indeed, Beechum can hardly complain; if the court had ruled correctly and not allowed him to invoke the fifth amendment, he could have refused to respond only on peril of contempt. See United States v. Brannon, 546 F.2d 1242, 1247 (5th Cir. 1977). Moreover, in that instance the Government would have been entitled to comment on Beechum's refusal to answer, See Caminetti v. United States, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917), notwithstanding the prohibition on such comment where the privilege is properly invoked, Griffin v. California,380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Beechum achieved essentially what he desired, refusal to testify concerning the cards, without subjection to contempt or comment. He surely cannot successfully claim undue prejudice on this basis.[11]

At the time of his arrest, Beechum possessed a silver dollar and two credit cards, none of which belonged to him. The only contested issue concerning the silver dollar was whether Beechum intended to turn it in, as he claimed, or to keep it for himself. Apparently, he had possessed the credit cards for some time, perhaps ten months, prior to his arrest. The obvious question is why would Beechum give up the silver dollar if he kept the credit cards. In this case, the Government was entitled to an answer.

It is derogative of the search for truth to allow a defendant to tell his story of innocence without facing him with evidence impeaching that story. A basic premise of our adversary system of justice is that the truth is best attained by requiring a witness to explain contrary

evidence if he can. As we have seen, for this reason the defendant who chooses to testify waives his fifth amendment privilege with respect to relevant cross-examination. This is not to say that merely by taking the stand a defendant opens himself to the introduction of evidence that is relevant solely to his propensity to commit bad acts or crimes. But where the defendant testifies to controvert an element of the Government's case, such as intent, to which the extrinsic offense is highly relevant, the integrity of the judicial process commands that the defendant be faced with that offense.

In this case, the jury was entitled to assess the credibility of Beechum's explanation but was deprived of the most effective vehicle for determining the veracity of Beechum's story when the judge erroneously allowed Beechum to invoke the fifth amendment and avoid the critical question on cross-examination. The Government was relegated to the inferences the jury might draw from the credit cards themselves and the additional evidence relating to them. The panel held that the cards and this evidence were insufficient to satisfy the strict standards for admissibility of extrinsic offense evidence established by United States v. Broadway, 477 F.2d 991 (5th Cir. 1973). We agree that Broadway dictates that the credit cards should not have been admitted; because this is so, we must reject the Broadway standards.

Broadway established two prerequisites to the admissibility of extrinsic offense evidence. First, it required that the physical elements of the extrinsic offense include the essential physical elements of the offense for which the defendant was indicted. Second, the case mandated that each of the physical elements of the extrinsic offense be established by plain, clear, and convincing evidence.[12] The elements of the offense for which Beechum was convicted, violation of 18 U.S.C. § 1708 (1976), include the following: (1) that the defendant possessed the item, (2) that the item was stolen from the mail, (3) that the defendant knew that the item was stolen, and (4) that the defendant specifically intended to possess the item unlawfully. See United States v. Ellison, 494 F.2d 43 (5th Cir. 1974); United States v. Kimbrell, 487 F.2d 219 (5th Cir. 1973); United States v. Martinez, 466 F.2d 679 (5th Cir. 1972), Cert. denied, 414 U.S. 1065, 94 S. Ct. 571, 38 L. Ed. 2d 469 (1973). The first three elements were not disputed, except to the extent that a denial of the fourth renders the item not stolen for the purposes of the second and third elements. The physical elements of the crime are the first two. The panel held that the Government's proof as to the credit cards failed to establish the second element, that the cards were stolen from the mail, by the plain, clear, and convincing evidence required by the second prong of the Broadway test. For the purposes of the following analysis, we accept this conclusion as valid.

We must overrule Broadway because a straightforward application of the Federal Rules of Evidence calls for admission of the cards. The directly applicable rule is Fed.R.Evid. 404(b), which provides as follows:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule follows the venerable principle that evidence of extrinsic offenses should not be admitted solely to demonstrate the defendant's bad character. Even though such evidence is relevant, because a man of bad character is more likely to commit a crime than one not, the principle prohibits such evidence because it is inherently prejudicial. See, e. g., Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 218, 93 L. Ed. 168 (1948). Without an issue other than mere character to which the extrinsic offenses are relevant, the probative value of those offenses is deemed insufficient in all cases to outweigh the inherent prejudice. Where, however, the extrinsic offense evidence is relevant to an issue such as intent, it may well be that the evidence has probative force that is not substantially outweighed by its inherent prejudice. If this is so, the evidence may be admissible.[13]

What the rule calls for is essentially a two-step test. First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.[14] See Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis, 71 Nw.U.L.Rev. 636 (1976). The test for relevancy under the first step is identical to the one we have already encountered. The standards are established by rule 401, which deems evidence relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Where the evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged. In this regard, however, similarity means more than that the extrinsic and charged offense have a common characteristic. For the purposes of determining relevancy, "a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand." Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 Harv. L. Rev. 954, 955 (1933). Therefore, similarity, and hence relevancy, is determined by the inquiry or issue to which the extrinsic offense is addressed.

Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the

extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense.[15] See Weiss v. United States, 122 F.2d 675, 683 (5th Cir.), Cert. denied, 314 U.S. 687, 62 S. Ct. 300, 86 L. Ed. 550 (1941); 2 Wigmore, Evidence § 302 (3d ed. 1940). Under Broadway, that the defendant had unlawful intent in the commission of the extrinsic offense is established by requiring the Government to prove each physical element of that offense by plain, clear, and convincing evidence. And the extrinsic offense is deemed admissible only if its physical elements include those of the offense charged. We think that Broadway runs afoul of the Federal Rules of Evidence by imposing on the Government too strict a standard of proof and by requiring too close an identity of elements.

Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the defendant in fact committed it. Therefore, as a predicate to a determination that the extrinsic offense is relevant, the Government must offer proof demonstrating that the defendant committed the offense. If the proof is insufficient, the judge must exclude the evidence because it is irrelevant. The issue we must decide is by what standard the trial court is to determine whether the Government has come forward with sufficient proof.

The standard of proof for ruling upon factual conditions to relevancy is supplied by Fed.R.Evid. 104(b), which states as follows:

Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

As the rule provides, the task for the trial judge is to determine whether there is sufficient evidence for the jury to find that the defendant in fact committed the extrinsic offense. See Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1927). The judge need not be convinced beyond a reasonable doubt that the defendant committed the extrinsic offense, nor need he require the Government to come forward with clear and convincing proof.[16] The standard for the admissibility of extrinsic offense evidence is that of rule 104(b): "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist." 21 Wright & Graham, Federal Practice and Procedure: Evidence § 5054, at 269 (1977).

Once it is determined that the extrinsic offense requires the same intent as the charged offense and that the jury could find that the defendant committed the extrinsic offense, the evidence satisfies the first step under rule 404(b). The extrinsic offense is relevant (assuming the jury finds the defendant to have committed it) to an issue other than propensity because it lessens the likelihood that the defendant committed the charged offense with innocent intent. See text accompanying note 15 Supra. It is not necessary that the physical elements of the charged and extrinsic offenses concur for this inference to be drawn and relevancy established. If the elements do match, the extrinsic offense may have greater probative value, but this is not an issue of relevancy. Evidence is relevant once it appears "to alter the probabilities of a consequential fact." Weinstein & Berger, Weinstein's Evidence P 401(06), at 401-18 (1976). The probative value of the evidence is a matter to be weighed against its potential for undue prejudice, and the similarity of the physical elements of the charged and extrinsic offenses figures in at this stage. Therefore, we turn to the second step of the analysis required by rule 404(b), whether the evidence satisfies rule 403.

As we have stated, the central concern of rule 403 is whether the probative value of the evidence sought to be introduced is "substantially outweighed by the danger of unfair prejudice." Broadway would reverse this standard by requiring a high degree of similarity between the extrinsic and charged offenses and a stringent standard of proof. In effect, the case attempts to establish a threshold requirement that the evidence possess great probative value before it can be admitted. This requirement not only contravenes rule 403 but also fails to meet its own declared ends. Demanding that the Government prove by excessive evidence each physical element of the extrinsic offense does not necessarily enhance its probative value and may in fact increase its unfair prejudice. One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense.[17] See Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.Rev. 763, 773 (1961). This danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged. Moreover, "(e)ven if the jury is no more disposed to punish the accused for his unpunished past crimes, 'over-persuasion' may lead them to conclude that, having committed a crime of the type charged, he is likely to repeat it." Id. It is for fear that the jury would draw just this inference that extrinsic offense evidence is excluded when it is relevant solely to the issue of the defendant's character. The touchstone of the trial judge's analysis in this context should be whether the Government has proved the extrinsic offense sufficiently to allow the jury to determine that the defendant possessed the same state of mind at the time he committed the extrinsic offense as he allegedly

possessed when he committed the charged offense. Forcing the Government to "overpersuade" the jury that the defendant committed an offense of substantial similarity engenders excessive and unnecessary prejudice.

The task for the court in its ascertainment of probative value and unfair prejudice under rule 403 calls for a commonsense assessment of all the circumstances surrounding the extrinsic offense. As the Advisory Committee Notes to rule 404(b) state: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403." 28 U.S.C.A. Rules of Evidence at 109 (1975).

Probity in this context is not an absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference.[18] It is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice. Dolan, Rule 403: The Prejudice Rule in Evidence, 49 S.Cal. L. Rev. 220, 234-35 & n. 52 (1976); See United States v. Baldarrama, 566 F.2d 560, 568 (5th Cir. 1978). Thus, if the Government has a strong case on the intent issue, the extrinsic offense may add little and consequently will be excluded more readily. See, e. g., United States v. Lawrance, 480 F.2d 688, 691-92 n. 6 (5th Cir. 1973). If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded.[19] E. g., United States v. Kirk, 528 F.2d 1057, 1060-61 (5th Cir. 1976); United States v. Goodwin, 492 F.2d 1141, 1151 (5th Cir. 1974). In measuring the probative value of the evidence, the judge should consider the overall similarity of the extrinsic and charged offenses. If they are dissimilar except for the common element of intent, the extrinsic offense may have little probative value to counterbalance the inherent prejudice of this type of evidence. Of course, equivalence of the elements of the charged and extrinsic offenses is not required. But the probative value of the extrinsic offense correlates positively with its likeness to the offense charged.[20] Whether the extrinsic offense is sufficiently similar in its physical elements so that its probative value is not substantially outweighed by its undue prejudice is a matter within the sound discretion of the trial judge. The judge should also consider how much time separates the extrinsic and charged offenses: temporal remoteness depreciates the probity of the extrinsic offense. E. g., United States v. Carter, 516 F.2d 431, 434-35 (5th Cir. 1975).

As this case demonstrates, a significant consideration in determining the probative value of extrinsic offense evidence is the posture of the case. If at the commencement of trial it is not certain that the defendant will contest the issue of intent, the judge is in a poor position to weigh the probative value against the prejudice of the evidence because he cannot foresee the nature or extent of either the Government's case or the defendant's response. Whether a mere plea of not guilty justifies the Government in introducing extrinsic offense evidence in its case in chief is an open question in this circuit. United States v. Adderly, 529 F.2d 1178, 1181-82 (5th Cir. 1976); United States v. Urdiales, 523 F.2d 1245, 1247 (5th Cir. 1975), Cert. denied, 426 U.S. 920, 96 S. Ct. 2625, 49 L. Ed. 2d 373 (1976); Cf. United States v. Ring, 513 F.2d 1001 (6th Cir. 1975) (holding extrinsic offense evidence inadmissible in case in chief where innocent intent not pleaded). We need not now answer it. Although the credit cards in this case were introduced by the Government in its case in chief, it was clear before the case went to trial that the crucial issue would be Beechum's intent. In effect all the other elements of the crime for which Beechum was indicted were conceded. See text following note 12 Supra. Where it is evident that intent will be an issue at trial, we have held the admission of the extrinsic offense as part of the Government's case in chief not to be grounds for reversal. United States v. Adderly, 529 F.2d at 1182. In any event, Beechum waived any objection he might have had to the Government's order of proof when he took the stand and professed the innocence of his intent.

We shall now apply the precepts we have set forth to the facts of this case. As we have demonstrated above, the credit card evidence is relevant to Beechum's intent with respect to the silver dollar. That Beechum possessed the credit cards with illicit intent diminishes the likelihood that at the same moment he intended to turn in the silver dollar. If there is sufficient evidence to establish that Beechum wrongfully possessed the credit cards, the requirement of the first step under rule 404(b), that the evidence be relevant to an issue other than propensity, is met. This is so even if the evidence were insufficient for a finding that the cards were stolen from the mail. As we have said, relevancy is established once the identity of the significant state of mind is established. The similarity of the physical elements of the extrinsic and charged offenses is a measure of probity.

The standard for determining whether the evidence is sufficient for a finding that Beechum wrongfully possessed the credit cards is provided by rule 104(b): whether the evidence would support such a finding by the jury. We think the evidence in the record clearly supports a finding that Beechum possessed the credit cards with the intent not to relinquish them to their rightful owners. Beechum possessed the credit cards of two different individuals. Neither card had been signed by the person to whom it was issued. When asked about the cards, Beechum answered first that the only cards he had were his own. When confronted with the credit cards,

which were obviously not his own, Beechum responded that they had never been used. He refused to respond further because the inspector "had all the answers." The logical inference from this statement is that Beechum was attempting to mitigate his culpability, having been caught red-handed. The undisputed evidence indicated that he could have possessed the cards for some ten months. The jury would have been wholly justified in finding that Beechum possessed these cards with the intent permanently to deprive the owners of them. This is all the rules require the court to determine to establish the relevancy of the extrinsic offense evidence.

We move now to the second step of the rule 404(b) analysis, the application of rule 403. The incremental probity of the extrinsic offense evidence in this case approaches its intrinsic value. Indeed, the posture of this case and the nature of the Government's proof with respect to the intent issue present perhaps the most compelling circumstance for the admission of extrinsic offense evidence. From the very inception of trial, it was clear that the crucial issue in the case would be Beechum's intent in possessing the silver dollar. He took the stand to proclaim that he intended to surrender the coin to his supervisor. The issue of intent was therefore clearly drawn, and the policies of justice that require a defendant to explain evidence that impugns his exculpatory testimony were in full force.[21] As we have seen, these policies dictate that a defendant waive his fifth amendment privilege against self-incrimination as to cross-examination relevant to his testimony. Where a privilege so central to our notions of fairness and justice yields to the search for truth, we should not lightly obstruct that quest. The credit card evidence bore directly on the plausibility of Beechum's story; justice called for its admission.[22]

That the posture of this case demanded the admission of the credit card evidence is reinforced by the nature of the Government's proof on the issue of intent apart from that evidence. This proof consisted of the following. The Government called Cox, Beechum's supervisor, who testified that Beechum had had several opportunities to surrender the coin to him. Beechum denied this, and called two fellow employees who testified that Beechum had asked them if they had seen Cox. Absent the credit card evidence, the issue would have been decided wholly by the jury's assessment of the credibility of these witnesses. The Government, therefore, did not make out such a strong case of criminal intent that the credit card evidence would have been of little incremental probity. In fact, the credit card evidence may have been determinative.

The overall similarity of the extrinsic and charged offenses in this case generates sufficient probity to meet the rule 403 test that the probative value of the evidence not be substantially outweighed by its unfair prejudice. We think this to be true even if it could not be established that the credit cards were stolen from the mail. At the least, there was sufficient evidence for the jury to find that Beechum possessed property belonging to others, with the specific intent to deprive the owners of their rightful possession permanently. That Beechum entertained such intent with respect to the credit cards renders less believable the story that he intended to turn in the coin in this instance. The force of this inference is not appreciably diminished by the failure of the Government to prove that the cards actually were stolen from the mail.

The probity of the credit card evidence in this case is augmented by the lack of temporal remoteness. Although Beechum may have obtained the cards as much as ten months prior to his arrest for the possession of the silver dollar, he kept the cards in his wallet where they would constantly remind him of the wrongfulness of their possession. In effect, Beechum's state of mind with respect to the credit cards continued through his arrest. He maintained contemporaneously the wrongful intent with respect to the cards and the intent as regards the coin. The force of the probity of this circumstance is illustrated by what Beechum would have had to convince the jury in order to avoid it. He would have been forced to argue that his state of mind was schizoid that he intended at the same time to relinquish the coin but to keep the cards. This situation does not differ significantly from one in which a thief is caught with a bag of loot, is charged with the larceny as to one of the items, but claims that he intended to return that item. Would any reasonable jury believe this story when it is established that he had stolen the rest of the loot?

The remaining considerations under rule 403 do not alter our conclusion as to the admissibility of the extrinsic offense evidence in this case. The extrinsic offense here is not of a heinous nature; it would hardly incite the jury to irrational decision by its force on human emotion. The credit card evidence was no more likely to confuse the issues, mislead the jury, cause undue delay, or waste time than any other type of extrinsic offense evidence. Since the need for the evidence in this case was great, it can hardly be said that the admission of the cards constituted "needless presentation of cumulative evidence."

It is significant that the court was careful to allay, as much as limiting instructions can, the undue prejudice engendered by the credit card evidence. It gave extensive instructions to the jury on the limited use of extrinsic offense evidence employed to prove unlawful intent.[23]

Having examined at length the circumstances of this case, we conclude that the credit card evidence meets the requirements of rule 403. Therefore, the conditions imposed by the second step of the analysis under rule

404(b) have been met, and the extrinsic offense evidence in this case was properly admitted at trial.

For the reasons stated above, we AFFIRM Beechum's conviction. The opinion of the panel in this case, reported at 555 F.2d 487, is hereby VACATED.

Moses v. State

OPINION

MEYERS, J., delivered the opinion of the Court, in which KELLER, P.J., and PRICE, WOMACK, JOHNSON, HERVEY, HOLCOMB, and COCHRAN, J.J., joined.

Appellant was charged with the offense of bribery. Texas Penal Code § 36.02(a)(1). A jury found him guilty and punishment was assessed at five years imprisonment, probated, and a fine of $800. Appellant appealed the trial court's admission of extraneous offense evidence. The Court of Appeals held that the testimony regarding extraneous offenses was improperly admitted and reversed the judgment of the trial court. Moses v. State, No. 14-99-00377-CR, 2001 WL 931179, 2001 Tex. App. LEXIS 5604 (Houston [14th Dist.] August 16, 2001) (not designated for publication). We granted review to determine whether the Court of Appeals erred in holding that an extraneous offense was not admissible to rebut the defensive theory that police officers fabricated the existence of the charged offense in order to retaliate against appellant for his role in a controversy involving other police officers. We hold that the ruling of the trial court was within the zone of reasonable disagreement and the Court of Appeals erred in holding that the trial court abused its discretion in admitting the extraneous offense evidence.

Facts

Appellant was a self-employed tow truck driver. According to the procedure of the Harris County Sheriff's Department, when a car needs to be towed from the scene of an accident or arrest and the owner of the vehicle does not request a particular wrecker company, a general call is sent out over the police radio, which is monitored by the tow truck drivers. The first wrecker to arrive gets the job. If two or more wreckers arrive at the same time, then each driver puts his wrecker license in a hat and they draw lots to determine who gets the job. According to Deputy J. Blackledge, who is a peace officer with Harris County Constable Precinct Four, on April 7, 1998, appellant offered to give him ten percent of the towing fee if he would falsely broadcast over the police radio that appellant had been specifically requested by the owner of the car to be towed. Blackledge refused the offer and reported the incident to his supervisor, but did not submit a written report at that time due to a scheduling conflict.[1]

Appellant again approached Blackledge on May 12, 1998 and offered to purchase him a cellular telephone and pay the monthly fee if he would use the cellular telephone to call appellant before sending out a general broadcast over the radio. This would allow appellant to be the first to arrive and thus he would get the towing job. Blackledge reported this incident to his supervisor and subsequently submitted a written report documenting both the April 7 and May 12 incidents. No charges were filed against appellant at that time.

Later that month,[2] appellant's wife, Dawn Moses, who was previously employed *625 as a deputy, complained that the calls for tow trucks were being handled improperly by some members of Precinct Four. Specifically, she stated that one deputy called his son, who was a tow truck driver, and gave him the location of a car to be towed rather than sending out a general call over the police radio. Mrs. Moses did not file a formal complaint, but she discussed the incident with a lieutenant.

Then, on June 9, 1998, charges were filed against appellant for the May 12 bribery of Deputy Blackledge. Appellant denied the allegations and claimed that the offense was fabricated and charges were filed in retaliation for his wife's complaint against other members of the constable's office.

At trial, the State offered evidence of two extraneous offenses under Rule 404(b)[3] to rebut the defense theory of retaliation. Appellant objected to the testimony, stating that: the testimony was not relevant to the charged offense, the extraneous offenses were not sufficiently similar to the charged offense, and the prejudice outweighed the probative value and may confuse or mislead the jury. The State argued that the extraneous offenses rebut the defense contention that the State created the charges relating to the May 12 offense. The trial court overruled appellant's objection, finding that the two extraneous offenses proffered by the State were relevant to rebut the defensive theory of retaliation and that any prejudice was substantially outweighed by their probative value. Deputy Blackledge then testified regarding the April 7 incident, when appellant offered him ten percent of the towing fee if he would specifically request appellant's wrecker service. Deputy Steve Spoon also offered testimony regarding a similar conversation with appellant which occurred on March 6. The court gave the proper limiting instruction to the jury both at the time of the testimony and in the jury

charge. Appellant appealed the admission of the extraneous offenses.

Court of Appeals

The Court of Appeals held that the trial court abused its discretion in admitting the extraneous offense evidence. It reasoned that the testimony regarding two prior bribery attempts did not rebut the defense contention that the charges were fabricated and filed in retaliation for complaints made by appellant's wife. Moses, 2001 WL 931179 at *4, 2001 Tex.App. LEXIS 5604 at *11. The court rejected the State's argument that the extraneous offenses explained the delay in filing the charges and held that the evidence of prior bribery attempts was not relevant apart from showing character conformity. Id. at *3, 2001 Tex.App. LEXIS 5604 at *9. Additionally, the court stated that the probative value of the extraneous offense evidence was outweighed by its prejudicial effect. Id. at *3, 2001 Tex.App. LEXIS 5604 at *10-11.

The State argues that the Court of Appeals erred in reversing the judgment of the trial court. The State contends that the extraneous offenses rebut the defense theory that Blackledge fabricated the charged offense in order to retaliate against appellant for his role in a separate controversy. The investigation into the extraneous bribery offenses began before appellant's wife's complaint, which was the supposed motive for the retaliation. According to the State, testimony regarding the previous bribery attempts and the ongoing investigation indicated that the charged offense was not contrived. Finally, because the extraneous offenses were *626 reported by two different officers, neither of whom were involved in the incident complained of by appellant's wife, the State asserts that it is unlikely that one of the officers fabricated the charged offense. The extraneous offense evidence thus had probative value other than to show that appellant acted in conformity with his character for committing bribery.

Appellant responds that the Court of Appeals correctly held that the extraneous offense evidence had no relevance apart from character conformity. The testimony regarding previous acts of bribery did not rebut the defensive theory that the offense was fabricated because, according to appellant, if the deputies fabricated the charged offense, then they could have also fabricated the extraneous offenses. Finally, appellant contends that the Court of Appeals reviewed the record and determined that the extraneous offenses had no probative value beyond character conformity. Thus, the Court of Appeals properly found that it was an abuse of discretion for the trial court to admit the extraneous offense evidence.

Rules of Evidence

Under Rule 401, evidence is relevant if it makes the existence of a fact that is of consequence to the determination of the action more probable than it would be without the evidence. However, even relevant evidence may not be admissible for every purpose. Because our system of justice recognizes that a defendant should be tried only for the charged crime and not for his criminal propensities, evidence of extraneous offenses is normally inadmissible. See Robles v. State, 85 S.W.3d 211, 213 (Tex.Crim.App.2002). However, Rule 404(b) allows evidence of other crimes, wrongs, or acts if the evidence has relevance apart from character conformity. For example, evidence of other crimes, wrongs or acts may be admissible to prove identity or intent, to establish motive, or to show opportunity or preparation. Rankin v. State, 974 S.W.2d 707, 718 (Tex.Crim. App.1998), citing Montgomery v. State, 810 S.W.2d 372, 387-88 (Tex.Crim.App.1991) (opinion on rehearing). Rebuttal of a defensive theory such as mistake or accident is also one of the permissible purposes for which relevant evidence may be admitted under Rule 404(b).[4] And, under Rule 402, there is a presumption of admissibility of relevant evidence. However, even if the evidence is relevant, and the purpose for which it is being offered is permissible under Rule 404(b), it may still be excluded by the trial court under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Montgomery, 810 S.W.2d at 387. In Mozon v. State, 991 S.W.2d 841 (Tex.Crim.App. 1999), this Court explained the interaction between Rule 404 and Rule 403. We held that while evidence may be admissible under Rule 404, the trial court may exercise its discretion to exclude the evidence under Rule 403 if it determines that the probative value is substantially outweighed by the danger of unfair prejudice. Id. at 846. The trial court in this case determined that the extraneous offense evidence was relevant to rebut a defensive theory. The court then conducted a balancing test under Rule 403 and found "that the probative value substantially outweighs any prejudicial value."

*627 Standard of Review

The admissibility of evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion. That is to say, as long as the trial court's ruling was within the zone of reasonable disagreement, the appellate court should affirm. Montgomery, 810 S.W.2d at 391. Whether extraneous offense evidence has relevance apart from character conformity, as required by Rule 404(b), is a question for the trial court. An appellate court owes no less deference to the trial judge in making this decision than it affords him in making any other relevancy determination. Id. When a trial court further decides not to exclude the evidence, finding that the probative value of the evidence is not outweighed by

the danger of unfair prejudice, this decision too shall be given deference. Thus, the Court of Appeals cannot simply substitute its own decision for the trial court's.

The appellate court should not conduct a de novo review of the record with a view to making a wholly independent judgment whether the probative value of evidence of "other crimes, wrongs, or acts" is substantially outweighed by the danger of unfair prejudice. It should reverse the judgment of the trial court "rarely and only after a clear abuse of discretion."

Id. at 392, citing United States v. Maggitt, 784 F.2d 590, 597 (5th Cir.1986).

Discussion

There appear to be two different theories regarding the retaliation defense. One is that the charges against appellant were false, made up, or fabricated in retaliation for his wife's complaint. The other is based on the timing of the chargethat the charge was retaliatory because no charges were filed against appellant until after his wife accused some members of the precinct of mishandling the wrecker call procedure. The trial court found that the extraneous offenses were admissible to rebut appellant's claim that "they retaliated because we got some deputies in trouble." The Court of Appeals found that the prior offenses did not explain the delay in filing the charges until after appellant's wife's complaint. In other words, the fact that appellant had committed two prior uncharged acts of bribery did not rebut the defense contention that the timing of the bribery charge indicated that it was brought due to appellant's wife's complaint against members of the precinct. The trial court, however, allowed the extraneous offenses under the theory that the charges for the May 12 incident may have been brought because it was appellant's "third time to do a similar thing," which explains why charges were not filed for the two prior offenses. Evidence at trial indicated that on May 13, after Deputy Blackledge filed the report documenting the April 7 and May 12 incidents, the Internal Affairs Division began a general investigation of the bribery attempts. The March 6 incident between appellant and Deputy Spoon was also part of the Internal Affairs investigation. Thus, the delay in filing may also be explained by the ongoing investigation. The trial court's reasoning explains why charges were not filed for the two previous extraneous offenses but were filed for the May 12 offense, thus rebutting the defense theory that the charges were retaliatory. As a result, the trial court found that the extraneous offenses had relevance apart from showing character conformity.

Because the trial court's decision to admit the extraneous offense evidence is within the zone of reasonable disagreement, there was no abuse of discretion. The judgment of the Court of Appeals is reversed, and the cause remanded to that *628 court so that it may consider appellant's remaining points of error.

KEASLER, J., concurred.

Huddleston v. United States, 485 U.S. 681, 686 (1988)

Federal Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs, or acts" is not admissible to prove a person's character, but may be admissible for other purposes, such as proof of knowledge. Petitioner was charged under federal law with the knowing possession and sale of stolen videocassette tapes. At his trial, the District Court allowed the Government to introduce as evidence of "similar acts" under Rule 404(b) evidence of petitioner's involvement in a series of sales of allegedly stolen televisions and appliances from the same suspicious source as the tapes, concluding that such evidence had clear relevance as to petitioner's knowledge that the tapes were stolen. The jury convicted petitioner on the possession count only, and the Court of Appeals ultimately affirmed, declaring that it could not say that the District Court had abused its discretion in admitting the "similar acts" evidence under *United States* v. *Ebens*, 800 F.2d 1422 (CA6), which authorized courts to admit such evidence if the proof showed by a preponderance of the evidence that the defendant did in fact commit the prior bad act.

Held: The district court need not itself make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits "similar acts" and other Rule 404(b) evidence to the jury. The requirement of such a preliminary finding would be inconsistent with the structure of Article IV of the Rules, which allows the admission of relevant evidence for a proper purpose subject only to general strictures, with Rule 404(b)'s plain language, and with the legislative history behind that Rule. Rather, "similar" acts evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act. Here, petitioner does not dispute that the evidence of the appliance sales was properly admitted. Moreover, the trial court properly allowed the evidence of the television sales to go to the jury, since the jury reasonably could have concluded that the televisions were stolen in light of the low price sought by petitioner, the

large quantity of televisions he offered for sale, his inability to produce a bill of sale, and his involvement in the sales of the stolen tapes and appliances. Pp. 685-692.

811 F.2d 974, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Federal Rule of Evidence 404(b) provides:

"Other crimes, wrongs, or acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

This case presents the question whether the district court must itself make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits the evidence to the jury. We hold that it need not do so.

Petitioner, Guy Rufus Huddleston, was charged with one count of selling stolen goods in interstate commerce, 18 U.S.C. § 2315, and one count of possessing stolen property in interstate commerce, 18 U.S.C. § 659. The two counts related to two portions of a shipment of stolen Memorex videocassette tapes that petitioner was alleged to have possessed and sold, knowing that they were stolen.

The evidence at trial showed that a trailer containing over 32,000 blank Memorex videocassette tapes with a manufacturing cost of $4.53 per tape was stolen from the Overnight Express yard in South Holland, Illinois, sometime between April 11 and 15, 1985. On April 17, 1985, petitioner contacted Karen Curry, the manager of the Magic Rent-to-Own in Ypsilanti, Michigan, seeking her assistance in selling a large number of blank Memorex videocassette tapes. After assuring Curry that the tapes were not stolen, he told her he wished to sell them in lots of at least 500 at $2.75 to $3 per tape. Curry subsequently arranged for the sale of a total of 5,000 tapes, which petitioner delivered to the various purchasers — who apparently believed the sales were legitimate.

There was no dispute that the tapes which petitioner sold were stolen; the only material issue at trial was whether petitioner knew they were stolen. The District Court allowed the Government to introduce evidence of "similar acts" under Rule 404(b), concluding that such evidence had "clear relevance as to [petitioner's knowledge]." App. 11. The first piece of similar act evidence offered by the Government was the testimony of Paul Toney, a record store owner. He testified that in February 1985, petitioner offered to sell new 12" black and white televisions for $28 apiece. According to Toney, petitioner indicated that he could obtain several thousand of these televisions. Petitioner and Toney eventually traveled to the Magic Rent-to-Own, where Toney purchased 20 of the televisions. Several days later, Toney purchased 18 more televisions.

The second piece of similar act evidence was the testimony of Robert Nelson, an undercover FBI agent posing as a buyer for an appliance store. Nelson testified that in May 1985, petitioner offered to sell him a large quantity of Amana appliances — 28 refrigerators, 2 ranges, and 40 icemakers. Nelson agreed to pay $8,000 for the appliances. Petitioner was arrested shortly after he arrived at the parking lot where he and Nelson had agreed to transfer the appliances. A truck containing the appliances was stopped a short distance from the parking lot, and Leroy Wesby, who was driving the truck, was also arrested. It was determined that the appliances had a value of approximately $20,000 and were part of a shipment that had been stolen.

Petitioner testified that the Memorex tapes, the televisions, and the appliances had all been provided by Leroy Wesby, who had represented that all of the merchandise was obtained legitimately. Petitioner stated that he had sold 6,500 Memorex tapes for Wesby on a commission basis. Petitioner maintained that all of the sales for Wesby had been on a commission basis and that he had no knowledge that any of the goods were stolen.

In closing, the prosecution explained that petitioner was not on trial for his dealings with the appliances or the televisions. The District Court instructed the jury that the similar acts evidence was to be used only to establish petitioner's knowledge, and not to prove his character. The jury convicted petitioner on the possession count only.

A divided panel of the United States Court of Appeals for the Sixth Circuit initially reversed the conviction, concluding that because the Government had failed to prove by clear and convincing evidence that the televisions were stolen, the District Court erred in admitting the testimony concerning the televisions. 802 F.2d 874 (1986). The panel subsequently granted rehearing to address the decision in *United States* v. *Ebens*, 800 F.2d 1422 (CA6 1986), in which a different panel had held: "Courts may admit evidence of prior bad acts if the proof shows by a preponderance of the evidence that the defendant did in fact commit the act." *Id.*, at 1432. On rehearing, the court affirmed the conviction. "Applying the preponderance of the evidence standard adopted in *Ebens*,

we cannot say that the district court abused its discretion in admitting evidence of the similar acts in question here." 811 F.2d 974, 975 (1987) *(per curiam)*. The court noted that the evidence concerning the televisions was admitted for a proper purpose and that the probative value of this evidence was not outweighed by its potential prejudicial effect.

"[T]he government's only support for the assertion that the televisions were stolen was [petitioner's] failure to produce a bill of sale at trial and the fact that the televisions were sold at a low price." 802 F.2d, at 876, n. 5.

We granted certiorari, **484 U.S. 894** (1987), to resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary finding before "similar act" and other Rule 404(b) evidence is submitted to the jury. We conclude that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.

The First, Fourth, Fifth, and Eleventh Circuits allow the admission of similar act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. *United States* v. *Ingraham*, 832 F.2d 229, 235 (CA1 1987); *United States* v. *Martin*, 773 F.2d 579, 582 (CA4 1985); *United States* v. *Beechum*, 582 F.2d 898, 914 (CA5 1978) (en banc), cert. denied, **440 U.S. 920** (1979); *United States* v. *Dothard*, 666 F.2d 498, 502 (CA11 1982). Consistent with the Sixth Circuit, the Second Circuit prohibits the introduction of similar act evidence unless the trial court finds by a preponderance of the evidence that the defendant committed the act. *United States* v. *Leonard*, 524 F.2d 1076, 1090-1091 (CA2 1975). The Seventh, Eighth, Ninth, and District of Columbia Circuits require the Government to prove to the court by clear and convincing evidence that the defendant committed the similar act. *United States* v. *Leight*, 818 F.2d 1297, 1302 (CA7), cert. denied, **484 U.S. 958** (1987); *United States* v. *Weber*, 818 F.2d 14 (CA8 1987); *United States* v. *Vaccaro*, 816 F.2d 443, 452 (CA9), cert denied *sub nom. Alvis* v. *United States*, 484 U.S. 914 (1987); *United States* v. *Lavelle*, 243 U.S.App.D.C. 47, 57, 751 F.2d 1266, 1276, cert. denied, 474 U.S. 817 (1985).

Federal Rule of Evidence 404(b) — which applies in both civil and criminal cases — generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct. The actor in the instant case was a criminal defendant, and the act in question was "similar" to the one with which he was charged. Our use of these terms is not meant to suggest that our analysis is limited to such circumstances.

Before this Court, petitioner argues that the District Court erred in admitting Toney's testimony as to petitioner's sale of the televisions. The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character. The Government's theory of relevance was that the televisions were stolen, and proof that petitioner had engaged in a series of sales of stolen merchandise from the same suspicious source would be strong evidence that he was aware that each of these items, including the Memorex tapes, was stolen. As such, the sale of the televisions was a "similar act" only if the televisions were stolen. Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his knowledge that the Memorex tapes were stolen. He asserts, however, that the evidence should not have been admitted because the Government failed to prove to the District Court that the televisions were in fact stolen.

Petitioner does not dispute that Nelson's testimony concerning the Amana appliances was properly admitted under Rule 404(b).

The Government also argues before this Court that the evidence concerning the televisions is relevant even if the jury could not conclude that the sets were stolen. We have found nothing in the record indicating that this theory was suggested to or relied upon by the courts below, and in light of our ruling, we need not address this alternative theory.

Petitioner argues from the premise that evidence of similar acts has a grave potential for causing improper prejudice. For instance, the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law. Because of this danger, petitioner maintains, the jury ought not to be exposed to similar act evidence until the trial court has heard the evidence and made a determination under Federal Rule of Evidence 104(a) that the defendant committed the similar act. Rule 104(a) provides that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." According to petitioner, the trial court must make this preliminary finding by at least a preponderance of the evidence.

In his brief, petitioner argued that the Government was

required to prove to the trial court the commission of the similar act by clear and convincing proof. At oral argument, his counsel conceded that such a position is untenable in light of our decision last Term in *Bourjaily* v. *United States*, 483 U.S. 171 (1987), in which we concluded that preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard. Tr. of Oral Arg. 12. Petitioner now asserts that although the Sixth Circuit correctly held that the Government must prove the similar act by preponderant evidence before it is admitted, the court erred in applying that test to these facts. We consider first what preliminary finding, if any, the trial court must make before letting similar acts evidence go to the jury.

We reject petitioner's position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b). Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence — evidence that makes the existence of any fact at issue more or less probable — is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character. The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.

Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of that provision, but it is simply inconsistent with the legislative history behind Rule 404(b). The Advisory Committee specifically declined to offer any "mechanical solution" to the admission of evidence under 404(b). Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U.S.C. App., p. 691. Rather, the Committee indicated that the trial court should assess such evidence under the usual rules for admissibility: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Ibid.;* see also S. Rep. No. 93-1277, p. 25 (1974) ("[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, *i. e*. prejudice, confusion or waste of time").

Petitioner's suggestion that a preliminary finding is necessary to protect the defendant from the potential for unfair prejudice is also belied by the Reports of the House of Representatives and the Senate. The House made clear that the version of Rule 404(b) which became law was intended to "plac[e] greater emphasis on admissibility than did the final Court version." H.R. Rep. No. 93-650, p. 7 (1973). The Senate echoed this theme: "[T]he use of the discretionary word `may' with respect to the admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge." S. Rep. No. 93-1277, *supra*, at 24. Thus, Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence.

We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C. App., p. 688. In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. See *United States* v. *Beechum*, 582 F.2d 898, 912-913 (CA5 1978) (en banc). In the instant case, the evidence that petitioner was selling the televisions was relevant under the Government's theory only if the jury could reasonably find that the televisions were stolen.

Petitioner also suggests that in performing the balancing prescribed by Federal Rule of Evidence 403, the trial court must find that the prejudicial potential of similar acts evidence substantially outweighs its probative value unless the court concludes by a preponderance of the evidence that the defendant committed the similar act. We reject this suggestion because Rule 403 admits of no such gloss and because such a holding would be erroneous for the same reasons that a preliminary finding under Rule 104(a) is inappropriate. We do, however, agree with the Government's concession at oral argument that the strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing. Tr. of Oral Arg. 26.

Such questions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). *Beechum, supra*, at 912-913; see also E. Imwinkelried, Uncharged Misconduct Evidence § 2.06 (1984). Rule 104(b) provides:

"When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact — here, that the televisions were stolen — by a preponderance of the evidence. See 21 C. Wright K. Graham, Federal Practice and Procedure § 5054, p. 269 (1977). The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice. Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. If the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence.

"When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and `connect it up' later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence `subject to' proof of the preliminary fact. It is, of course, not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition." 21 C. Wright K. Graham, Federal Practice and Procedure § 5054, pp. 269-270 (1977) (footnotes omitted).

We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily* v. *United States*, 483 U.S. 171, 179-180 (1987). In assessing whether the evidence was sufficient to support a finding that the televisions were stolen, the court here was required to consider not only the direct evidence on that point — the low price of the televisions, the large quantity offered for sale, and petitioner's inability to produce a bill of sale — but also the evidence concerning petitioner's involvement in the sales of other stolen merchandise obtained from Wesby, such as the Memorex tapes and the Amana appliances. Given this evidence, the jury reasonably could have concluded that the televisions were stolen, and the trial court therefore properly allowed the evidence to go to the jury.

We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson* v. *United States*, 335 U.S. 469, 475-476 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 — as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, see Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U.S.C. App., p. 691; S. Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. See *United States* v. *Ingraham*, 832 F.2d 229, 235 (CA1 1987).

As petitioner's counsel conceded at oral argument, petitioner did not seek review of the Rule 403 balancing performed by the courts below. Tr. of Oral Arg. 14. We therefore do not address that issue.

Affirmed.

***Old Chief v. United States*, 519 U.S. 172, 180 (1997)**

No. 95–6556. Argued October 16, 1996—Decided January 7, 1997 After a fracas involving at least one gunshot, petitioner, Old Chief, was charged with, inter alia, violating 18 U. S. C. §922(g)(1), which prohibits possession of a firearm by anyone with a prior felony conviction. He offered to stipulate to §922(g)(1)'s prior-conviction element, arguing that his offer rendered evidence of the name and nature of his prior offense—assault causing serious bodily injury—inadmissible because its "probative value [was] substantially

outweighed by the danger of unfair prejudice . . . ,"Fed.RuleEvid. 403. The Government refused to join the stipulation, however, insisting on its right to present its own evidence of the prior conviction, and the District Court agreed. At trial, the Government introduced the judgment record for the prior conviction, and a jury convicted Old Chief. In affirming the conviction, the Court of Appeals found that the Government was entitled to introduce probative evidence to prove the prior offense regardless of the stipulation offer. Held: A district court abuses its discretion under Rule 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. Pp. 178–192. (a) Contrary to Old Chief's position, the name of his prior offense as contained in the official record is relevant to the prior-conviction element. That record made his §922(g)(1) status "more probable . . . than it [would have been] without the evidence," Fed. Rule Evid. 401; and the availability of alternative proofs, such as his admission, did not affect its evidentiary relevance, see Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U. S. C. App., p. 859. Pp. 178–179. (b) As to a criminal defendant, Rule 403's term "unfair prejudice" speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the offense charged. Such improper grounds certainly include generalizing from a past bad act that a defendant is by propensity the probable perpetrator of the current crime. Thus, Rule 403 requires that the relative probative value of prior-conviction evidence be bal519US1$13Z 06-02-99 18:45:27 PAGES OPINPGT Cite as: 519 U. S. 172 (1997) Syllabus 173 anced against its prejudicial risk of misuse. A judge should balance these factors not only for the item in question but also for any actually available substitutes. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. Pp. 180–185. (c) In dealing with the specific problem raised by §922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice whenever the official record would be arresting enough to lure a juror into a sequence of bad character reasoning. Old Chief sensibly worried about the prejudicial effect of his prior offense. His proffered admission also presented the District Court with alternative, relevant, admissible, and seemingly conclusive evidence of the prior conviction. Thus, while the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission. Pp. 185–186. (d) Old Chief's offer supplied evidentiary value at least equivalent to what the Government's own evidence carried. The accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away has virtually no application when the point at issue is a defendant's legal status. Here, the most the jury needed to know was that the conviction admitted fell within the class of crimes that Congress thought should bar a convict from possessing a gun. More obviously, the proof of status went to an element entirely outside the natural sequence of what Old Chief was charged with thinking and doing to commit the current offense. Since there was no cognizable difference between the evidentiary significance of the admission and the official record's legitimately probative component, and since the functions of the competing evidence were distinguishable only by the risk inherent in the one and wholly absent from the other, the only reasonable conclusion was that the risk of unfair prejudice substantially outweighed the conviction record's discounted probative value. Thus, it was an abuse of discretion to admit the conviction record when the defendant's admission was available. Pp. 186–192. 56 F. 3d 75, reversed and remanded. Souter, J., delivered the opinion of the Court, in which Stevens, Kennedy, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia and Thomas, JJ., joined, post, p. 192.

Connick v. Myers, 461 U.S. 138, 145 (1983)

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

Syllabus

Respondent was employed as an Assistant District Attorney in New Orleans with the responsibility of trying criminal cases. When petitioner District Attorney proposed to transfer respondent to prosecute cases in a different section of the criminal court, she strongly opposed the transfer, expressing her view to several of her supervisors, including petitioner. Shortly thereafter, she prepared a questionnaire that she distributed to the other Assistant District Attorneys in the office concerning office transfer policy, office morale, the need

for a grievance committee, the level ,of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Petitioner then informed respondent that she was being terminated for refusal to accept the transfer, and also told her that her distribution of the questionnaire was considered an act of insubordination. Respondent filed suit in Federal District Court under 42 U.S.C. § 1983 (1976 ed., Supp. V), alleging that she was wrongfully discharged because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered her reinstated, and awarded backpay, damages, and attorney's fees. Finding that the questionnaire, not the refusal to accept the transfer, was the real reason for respondent's termination, the court held that the questionnaire involved matters of public concern and that the State had not "clearly demonstrated" that the questionnaire interfered with the operation of the District Attorney's office. The Court of Appeals affirmed.

Held: Respondent's discharge did not offend the First Amendment. Pp. 461 U. S. 142-154.

(a) In determining a public employee's rights of free speech, the problem is to arrive

"at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Pickering v. Board of Education, 391 U. S. 563, 391 U. S. 568. P. 461 U. S. 142.

(b) When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not

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the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Here, except for the question in respondent's questionnaire regarding pressure upon employees to work in political campaigns, the questions posed do not fall under the rubric of matters of "public concern." Pp. 461 U. S. 143-149.

(c) The District Court erred in imposing an unduly onerous burden on the State to justify respondent's discharge by requiring it to "clearly demonstrate" that the speech involved "substantially interfered" with the operation of the office. The State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Pp. 461 U. S. 149-150.

(d) The limited First Amendment interest involved here did not require petitioner to tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy the close working relationships within the office. The question on the questionnaire regarding the level of confidence in supervisors was a statement that carried the clear potential for undermining office relations. Also, the fact that respondent exercised her rights to speech at the office supports petitioner's fears that the function of his office was endangered. And the fact that the questionnaire emerged immediately after a dispute between respondent and petitioner and his deputies requires that additional weight be given to petitioner's view that respondent threatened his authority to run the office. Pp. 461 U. S. 150-154.

654 F.2d 719, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J. filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS JJ., joined, post, p. 461 U. S. 156.

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JUSTICE WHITE delivered the opinion of the Court.

In Pickering v. Board of Education, 391 U. S. 563 (1968), we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Id. at 391 U. S. 568. The problem, we thought, was arriving

"at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Ibid. We return to this problem today and consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.

I

The respondent, Sheila Myers, was employed as an Assistant District Attorney in New Orleans for five and a half years. She served at the pleasure of petitioner Harry Connick, the District Attorney for Orleans Parish. During this period, Myers competently performed her responsibilities of trying criminal cases.

In the early part of October, 1980, Myers was informed that she would be transferred to prosecute

cases in a different section of the criminal court. Myers was strongly opposed to the proposed transfer [Footnote 1] and expressed her view to several of her supervisors, including Connick. Despite her objections, on October 6, Myers was notified that she was being transferred.

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Myers again spoke with Dennis Waldron, one of the First Assistant District Attorneys, expressing her reluctance to accept the transfer. A number of other office matters were discussed, and Myers later testified that, in response to Waldron's suggestion that her concerns were not shared by others in the office, she informed him that she would do some research on the matter.

That night, Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. [Footnote 2] Early the following morning, Myers typed and copied the questionnaire. She also met with Connick, who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 Assistant District Attorneys. Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a "mini-insurrection" within the office. Connick returned to the office and told Myers that she was being terminated because of her refusal to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination. Connick particularly objected to the question which inquired whether employees "had confidence in and would rely on the word" of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.

Myers filed suit under 42 U.S.C. § 1983 (1976 ed., Supp. V), contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered Myers reinstated, and awarded backpay, damages, and

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attorney's fees. 507 F. Supp. 752 (ED La.1981). [Footnote 3] The District Court found that, although Connick informed Myers that she was being fired because of her refusal to accept a transfer, the facts showed that the questionnaire was the real reason for her termination. The court then proceeded to hold that Myers' questionnaire involved matters of public concern, and that the State had not "clearly demonstrated" that the survey "substantially interfered" with the operations of the District Attorney's office.

Connick appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed on the basis of the District Court's opinion. 654 F.2d 719 (1981). Connick then sought review in this Court by way of certiorari, which we granted. 455 U.S. 999 (1982).

II

For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Keyishian v. Board of Regents, 385 U. S. 589, 385 U. S. 605-606 (1967); Pickering v. Board of Education, 391 U. S. 563 (1968); Perry v. Sindermann, 408 U. S. 593, 408 U. S. 597 (1972); Branti v. Finkel, 445 U. S. 507, 445 U. S. 515-516 (1980). Our task, as we defined it in Pickering, is to seek

"a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

391 U.S. at 391 U. S. 568. The District Court, and thus the Court of Appeals as well, misapplied our decision in Pickering, and consequently, in our view, erred in striking the balance for respondent.

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A

The District Court got off on the wrong foot in this case by initially finding that,

"[t]aken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern."

507 F. Supp. at 758. Connick contends at the outset that no balancing of interests is required in this case, because Myers' questionnaire concerned only internal office matters, and that such speech is not upon a matter of "public concern," as the term was used in Pickering. Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. The repeated emphasis in Pickering on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of Pickering's progeny, [Footnote 4] reflects both the historical evolvement of the rights of public employees and the common-sense

realization that government offices could not function if every employment decision became a constitutional matter. [Footnote 5]

For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment -- including those which restricted the exercise of constitutional rights. The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "[A policeman] may have a constitutional

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right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). For many years, Holmes' epigram expressed this Court's law. Adler v. Board of Education, 342 U. S. 485 (1952); Garner v. Los Angeles Bd. of Public Works, 341 U. S. 716 (1951); Public Workers v. Mitchell, 330 U. S. 75 (1947); United States v. Wurzbach, 280 U. S. 396 (1930); Ex parte Curtis, 106 U. S. 371 (1882).

The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950's and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated. In Wiemann v. Updegraff, 344 U. S. 183 (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In Cafeteria Workers v. McElroy, 367 U. S. 886 (1961), the Court recognized that the government could not deny employment because of previous membership in a particular party. See also Shelton v. Tucker, 364 U. S. 479, 364 U. S. 490 (1960); Torcaso v. Watkins, 367 U. S. 488 (1961); Cramp v. Board of Public Instruction, 368 U. S. 278 (1961). By the time Sherbert v. Verner, 374 U. S. 398 (1963), was decided, it was already

"too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

Id. at 374 U. S. 404. It was therefore no surprise when, in Keyishian v. Board of Regents, supra, the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected. Id. at 385 U. S. 605-606.

In all of these cases, the precedents in which Pickering is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public

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affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U. S. 476, 354 U. S. 484 (1957); New York Times Co. v. Sullivan, 376 U. S. 254, 376 U. S. 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U. S. 64, 379 U. S. 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the heirarchy of First Amendment values,'" and is entitled to special protection. NAACP v. Claiborne Hardware Co., 458 U. S. 886, 458 U. S. 913 (1982); Carey v. Brown, 447 U. S. 455, 447 U. S. 467 (1980).

Pickering v. Board of Education, supra, followed from this understanding of the First Amendment. In Pickering, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decisionmaking by the electorate." 391 U.S. at 391 U. S. 571-572.

Our cases following Pickering also involved safeguarding speech on matters of public concern. The controversy in Perry v. Sindermann, 408 U. S. 593 (1972), arose from the failure to rehire a teacher in the state college system who had testified before committees of the Texas Legislature and had become involved in public disagreement over whether the college should be elevated to 4-year status -- a change opposed by the Regents. In Mt. Healthy City Board of Ed. v.

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Doyle, 429 U. S. 274 (1977), a public school teacher was not rehired because, allegedly, he had relayed to a radio .station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of the dress code as a news item. Most recently, in Givhan v. Western Line Consolidated School District, 439 U. S. 410 (1979), we

held that First Amendment protection applies when a public employee arranges to communicate privately with his employer, rather than to express his views publicly. Although the subject matter of Mrs. Givhan's statements were not the issue before the Court, it is clear that her statements concerning the School District's allegedly racially discriminatory policies involved a matter of public concern.

Pickering, its antecedents, and its progeny lead us to conclude that, if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. [Footnote 6] When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

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Board of Regents v. Roth, 408 U. S. 564 (1972); Perry v. Sindermann, supra; Bishop v. Wood, 426 U. S. 341, 426 U. S. 349-350 (1976).

We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.

"[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'"

Mine Workers v. Illinois Bar Assn., 389 U. S. 217, 389 U. S. 223 (1967), quoting Thomas v. Collins, 323 U. S. 516, 323 U. S. 531 (1945). We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. See Chaplinsky v. New Hampshire, 315 U. S. 568 (1942); Roth v. United States, supra; New York v. Ferber, 458 U. S. 747 (1982). For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge, but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that, when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Cf. Bishop v. Wood, supra, at 426 U. S. 349-350. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context

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of a given statement, as revealed by the whole record. [Footnote 7] In this case, with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, post at 461 U. S. 163, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office, but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre. [Footnote 8]

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To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While, as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. Branti v. Finkel, 445 U.S. at 445 U. S. 515-516; Elrod v. Burns, 427 U. S. 347 (1976). In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance, rather than political service. CSC v. Letter Carriers, 413 U. S. 548 (1973); Public Workers v. Mitchell, 330 U. S. 75 (1947). Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.

B

Because one of the questions in Myers' survey touched upon a matter of public concern and contributed to her discharge, we must determine whether Connick was justified in discharging Myers. Here the District Court again erred in imposing an unduly onerous burden on the State to justify

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Myers' discharge. The District Court viewed the issue of whether Myers' speech was upon a matter of "public concern" as a threshold inquiry, after which it became the government's burden to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities. Yet Pickering unmistakably states, and respondent agrees, [Footnote 9] that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests. [Footnote 10]

C

The Pickering balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in

"promot[ing]

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efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service."

Ex parte Curtis, 106 U.S. at 106 U. S. 373. As JUSTICE POWELL explained in his separate opinion in Arnett v. Kennedy, 416 U. S. 134, 416 U. S. 168 (1974):

"To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation, and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that

"it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors."

507 F. Supp. at 759. Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myers' questionnaire was an act of insubordination which interfered with working relationships. [Footnote 11] When close working relationships are essential to fulfilling public

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responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. [Footnote 12] We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

The District Court rejected Connick's position because,

"[u]nlike a statement of fact which might be deemed critical of one's superiors, [Myers'] questionnaire was not a statement of fact, but the presentation and solicitation of ideas and opinions,"

which are entitled to greater constitutional protection because, "under the First Amendment, there is no such thing as a false idea.'" Ibid. This approach, while perhaps relevant in weighing the value of Myers' speech, bears no logical relationship to the issue of whether the questionnaire undermined office relationships. Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors. Thus, Question 10, which asked whether or

not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations.

Also relevant is the manner, time, and place in which the questionnaire was distributed. As noted in Givhan v. Western Line Consolidated School District, 439 U.S. at 439 U. S. 415, n. 4:

"Private expression . . . may in some situations bring additional

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factors to the Pickering calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered."

Here the questionnaire was prepared and distributed at the office; the manner of distribution required not only Myers to leave her work, but others to do the same in order that the questionnaire be completed. [Footnote 13] Although some latitude in when official work is performed is to be allowed when professional employees are involved, and Myers did not violate announced office policy, [Footnote 14] the fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered.

Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. Although we accept the District Court's factual finding that Myers' reluctance to accede to the transfer order was not a sufficient cause in itself for her dismissal, and thus does not constitute a sufficient defense under Mt. Healthy

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City Board of Ed. v. Doyle, 429 U. S. 274 (1977), this does not render irrelevant the fact that the questionnaire emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy.

III

Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment. We reiterate, however, the caveat we expressed in Pickering, 391 U.S. at 391 U. S. 569:

"Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."

Our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here. The judgment of the Court of Appeals is

Reversed.

Carey v. Brown

APPEAL FROM THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Syllabus

An Illinois statute generally prohibits picketing of residences or dwellings, but exempts from its prohibition peaceful picketing of a place of employment involved in a labor dispute. Appellees were convicted in state court of violating this statute when they picketed the Mayor of Chicago's home in protest against his alleged failure to support the busing of schoolchildren to achieve racial integration. Thereafter, appellees brought suit in Federal District Court, seeking a declaratory judgment that the statute is unconstitutional on its face and as applied, and

an injunction prohibiting appellant and other state and local officials from enforcing the statute. The District Court denied all relief, but the Court of Appeals reversed, holding that the statute, both on its face and as applied to appellees, violated the Equal Protection Clause of the Fourteenth Amendment.

Held: The Illinois statute is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. Police Department of Chicago v. Mosley, 408 U. S. 92. Pp. 447 U. S. 459-471.

(a) In prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the statute regulates expressive conduct that falls within the First Amendment's preserve, and, in exempting peaceful labor picketing from its general prohibition, the statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication. On its face, the statute accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated but discussion of all other issues is restricted. The permissibility of residential picketing is thus dependent solely on the nature of the message being conveyed. Pp. 447 U. S. 459-463.

(b) Standing alone, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute. The statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. More fundamentally, the exclusion of labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that

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nothing in the content-based labor-nonlabor distinction has any bearing on privacy. Pp. 447 U. S. 464-465.

(c) Similarly, the State's interest in providing special protection for labor protests cannot, without more, justify the labor picketing exemption. Labor picketing is no more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which appellees wished to demonstrate. Pp. 447 U. S. 466-467.

(d) Nor can the statute be justified as an attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes, since such an attempt hinges on the validity of both of these goals, the latter of which -- the desire to favor one form of speech over all others -- is illegitimate. Likewise, the statute cannot be justified as an attempt to prohibit picketing that would impinge on residential privacy while permitting picketing that would not. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, and numerous other actions of a homeowner might constitute "nonresidential" uses of his property, and would thus serve to vitiate the right to residential privacy. Pp. 447 U. S. 467-469.

(e) While the State's interest in protecting the wellbeing, tranquility, and privacy of the home is of the highest order, the crucial question is whether the statute advances that objective in a manner consistent with the Equal Protection Clause. Because the statute discriminates among pickets based on the subject matter of their expression, the answer to that question must be "No." Pp. 447 U. S. 470-471.

602 F.2d 791, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. STEWART, J., filed a concurring opinion, post p. 447 U. S. 471. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., and BLACKMUN, J., joined, post, p. 447 U. S. 472

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MR. JUSTICE BRENNAN delivered the opinion of the Court.

At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that generally bars picketing of residences or dwellings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."

I

On September 6, 1977, several of the appellees, all of whom are members of a civil rights organization entitled the Committee Against Racism, participated in a peaceful demonstration on the public sidewalk in front of the home of Michael Bilandic, then Mayor of Chicago, protesting his alleged failure to support the busing of schoolchildren to achieve racial integration. They were arrested and charged with unlawful residential picketing in violation of Ill.Rev.Stat., ch. 38, § 21.1-2 (1977), which provides:

"It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling, and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest. [Footnote 1] "

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Appellees pleaded guilty to the charge, and were sentenced to periods of supervision ranging from six months to a year.

In April, 1978, appellees commenced this lawsuit in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois residential picketing statute is unconstitutional on its face and as applied, and an injunction prohibiting defendants -- various state, county, and city officials -- from enforcing the statute. Appellees did not attempt to attack collaterally their earlier state court convictions, but requested only prospective relief. Alleging that they wished to renew their picketing in residential neighborhoods but were inhibited from doing so by the threat of criminal prosecution under the residential picketing statute, appellees challenged the Act under the First and Fourteenth Amendments as an overbroad, vague, and, in light of the exception for labor picketing, impermissible content-based restriction on protected expression. The District Court, ruling on cross-motions for summary judgment, denied all relief. Brown v. Scott, 462 F. Supp. 518 (1978).

The Court of Appeals for the Seventh Circuit reversed. Brown v Scott, 602 F.2d 791 (1979). Discerning "no principled basis" for distinguishing the Illinois statute from a similar picketing prohibition invalidated in Police Department of Chicago v. Mosley, 408 U. S. 92 (1972), the court concluded that the Act's differential treatment of labor and nonlabor picketing could not be justified either by the important state

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interest in protecting the peace and privacy of the home or by the special character of a residence that is also used as a "place of employment." Accordingly, the court held that the statute, both on its face and as applied to appellees, violated the Equal Protection Clause of the Fourteenth Amendment. [Footnote 2] We noted probable jurisdiction. 444 U.S. 1011 (1980). We affirm

II

As the Court of Appeals observed, this is not the first instance in which this Court has had occasion to consider the constitutionality of an enactment selectively proscribing peaceful picketing on the basis of the placard's message. Police Department of Chicago v. Mosley, supra, arose out of a challenge to a Chicago ordinance that prohibited picketing in front of any school other than one "involved in a labor dispute." [Footnote 3] We held that the ordinance violated the Equal Protection Clause because it impermissibly distinguished between labor picketing and all other peaceful picketing without

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any showing that the latter was "clearly more disruptive" than the former. 408 U.S. at 408 U. S. 100. Like the Court of Appeals, we find the Illinois residential picketing statute at issue in the present case constitutionally indistinguishable from the ordinance invalidated in Mosley.

There can be no doubt that, in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve. See, e.g., Thornhill v. Alabama, 310 U. S. 88 (1940); Gregory v. Chicago, 394 U. S. 111, 394 U. S. 112 (1969); Shuttlesworth v. Birmingham, 394 U. S. 147, 394 U. S. 152 (1969).

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Hague v. CIO, 307 U. S. 496, 307 U. S. 515 (1939) (opinion of Roberts, J.).

"[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."

Hudgens v. NLRB, 424 U. S. 507, 424 U. S. 515 (1976) (quoting Food Employees v. Logan Valley Plaza, 391 U. S. 308, 391 U. S. 315 (1968)).

Nor can it be seriously disputed that, in exempting from its general prohibition only the "peaceful picketing of a place of employment involved in a labor dispute," the Illinois statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication. [Footnote 4] On

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its face, the Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the Illinois statute is thus dependent solely on the nature of the message being conveyed. [Footnote 5]

In these critical respects, then, the Illinois statute is identical to the ordinance in Mosley, and it suffers from the same constitutional infirmities. When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications

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offered for any distinctions it draws must be carefully scrutinized. Police Department of Chicago v. Mosley, 408 U.S. at 408 U. S. 98-99, 408 U. S. 101; see United States v. O'Brien, 391 U. S. 367, 391 U. S. 376-377 (1968); Williams v. Rhodes, 393 U. S. 23, 393 U. S. 30-31 (1968); Dunn v. Blumstein, 405 U. S. 330, 405 U. S. 342-343 (1972); San Antonio Independent School Dist.

v. Rodriguez, 411 U. S. 1, 411 U. S. 34, n. 75 (1973). As we explained in Mosley:

"Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses 'can be controlled by narrowly drawn statutes,' Saia v. New York, 334 U.S. at 334 U. S. 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter."

408 U.S. at 408 U. S. 101-102. Yet here, under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home.

Moreover, it is the content of the speech that determines whether it is within or without the statute's blunt prohibition. [Footnote 6] What we said in Mosley has equal force in the present case:

"The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. . . Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to

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the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, [376 U.S. 254], 376 U. S. 270."

"Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."

Id. at 408 U. S. 95-96 (citations and footnote omitted). [Footnote 7]

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III

Appellant nonetheless contends that this case is distinguishable from Mosley. He argues that the state interests here are especially compelling and particularly well served by a statute that accords differential treatment to labor and nonlabor picketing. We explore in turn each of these interests, and the manner in which they are said to be furthered by this statute.

A

Appellant explains that, whereas the Chicago ordinance sought to prevent disruption of the schools, concededly a "substantial" and "legitimate" governmental concern, see id. at 408 U. S. 99, 408 U. S. 100, the Illinois statute was enacted to ensure privacy in the home, a right which appellant views as paramount in our constitutional scheme. [Footnote 8] For this reason, he contends that the same content-based distinctions held invalid in the Mosley context may be upheld in the present case.

We find it unnecessary, however, to consider whether the State's interest in residential privacy outranks its interest in quiet schools in the hierarchy of societal values. For even

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the most legitimate goal may not be advanced in a constitutionally impermissible manner. And though we might agree that certain state interests may be so compelling that, where no adequate alternatives exist, a content-based distinction -- if narrowly drawn -- would be a permissible way of furthering those objectives, cf. Schenck v. United States, 249 U. S. 47 (1919), this is not such a case.

First, the generalized classification which the statute draws suggests that Illinois itself has determined that residential privacy is not a transcendent objective: while broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility. [Footnote 9]

More fundamentally, the exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellant can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern. Standing alone, then, the State's asserted

interest in promoting the privacy of the home is not sufficient to save the statute.

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B

The second important objective advanced by appellant in support of the statute is the State's interest in providing special protection for labor protests. He maintains that federal [Footnote 10] and state [Footnote 11] law has long exhibited an unusual concern for such activities, and he contends that this solicitude may be furthered by a narrowly drawn exemption for labor picketing

The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which these appellees wish to demonstrate. We reject that proposition. Cf. T. Emerson, The System of Freedom of Expression 444-449 (1970) (suggesting that nonlabor picketing is more akin to pure expression than labor picketing, and thus should be subject to fewer restrictions). Public issue picketing, "an exercise of . . . basic constitutional rights in their most pristine and classic form,"

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Edwards v. South Carolina, 372 U. S. 229, 372 U. S. 235 (1963), has always rested on the highest rung of the hierarchy of First Amendment values:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U. S. 359, 283 U. S. 369 (1931). See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). While the State's motivation in protecting the First Amendment rights of employees involved in labor disputes is commendable, that factor, without more, cannot justify the labor picketing exemption.

C

Appellant's final contention is that the statute can be justified by some combination of the preceding objectives. This argument is fashioned on two different levels. In its elemental formulation, it posits simply that a distinction between labor and nonlabor picketing is uniquely suited to furthering the legislative judgment that residential privacy should be preserved to the greatest extent possible without also compromising the special protection owing to labor picketing. In short, the statute is viewed as a reasonable attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes. [Footnote 12]

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But this attempt to justify the statute hinges on the validity of both of these goals, and we have already concluded that the latter -- the desire to favor one form of speech over all others -- is illegitimate.

The second and more complex formulation of appellant's position characterizes the statute as a carefully drafted attempt to prohibit that picketing which would impinge on residential privacy, while permitting that picketing which would not. In essence, appellant asserts that the exception for labor picketing does not contravene the State's interest in preserving residential tranquility because of the unique character of a residence that is a "place of employment." By "inviting" a worker into his home and converting that dwelling into a place of employment, the argument goes, the resident has diluted his entitlement to total privacy. In other words, he has "waived" his right to be free from picketing with respect to disputes arising out of the employment relationship, thereby justifying the statute's narrow labor exception at those locations. [Footnote 13]

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The flaw in this argument is that it proves too little. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, [Footnote 14] and numerous other actions of a homeowner might constitute "nonresidential" uses of his property, and would thus serve to vitiate the right to residential privacy. For example, the resident who prominently decorates his windows and front yard with posters promoting the qualifications of one candidate for political office might be said to "invite" a counterdemonstration from supporters of an opposing candidate. Similarly, a county chairman who uses his home to meet with his district captains and to discuss some controversial issue might well expect that those who are deeply concerned about the decision the chairman will ultimately reach would want to make their views known by demonstrating outside his home during the meeting. And, with particular regard to the facts of the instant case, it borders on the frivolous to suggest that a resident who invites a repairman into his home to fix his television set has "waived" his right to privacy with respect to a dispute between the repairman and the local union, [Footnote 15] but that the official who has voluntarily chosen to enter the public arena has not likewise "waived" his right to privacy with respect to a challenge to his views on significant issues of social and economic policy. [Footnote 16]

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IV

We therefore conclude that appellant has not successfully distinguished Mosley. We are not to be understood to imply, however, that residential picketing is beyond the reach of uniform and nondiscriminatory regulation. For the right to communicate is not limitless. E.g., Cox v. Louisiana, 379 U. S. 536, 379 U. S. 554 555 (1965); Cox v. Louisiana, 379 U. S. 559, 379 U. S. 563-564 (1965). [Footnote 17] Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities, see, e.g., ibid. (picketing or parading prohibited near courthouses); Adderley v. Florida, 385 U. S. 39 (1966) (demonstrations prohibited on jailhouse grounds), or when it is directed toward an illegal purpose, see, e.g., Teamsters v. Vogt, Inc., 354 U. S. 284 (1957) (prohibition of picketing directed toward achieving "union shop" in violation of state law) .

Moreover, we have often declared that

"[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content."

Erznoznik v. City of Jacksonville, 422 U. S. 205, 422 U. S. 209 (1975) (emphasis supplied). See, e.g., Cox v. New Hampshire, 312 U. S. 569 (1941); Kovacs v. Cooper, 336 U. S. 77 (1949); Poulos v. New Hampshire, 345 U. S. 395 (1953); Cox v. Louisiana, 379 U.S. at 554; Grayned v. City of Rockford, 408 U. S. 104 (1972). In sum,

"no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes,

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wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals."

Gregory v. Chicago, 394 U. S. 111, 394 U. S. 118 (1969) (Black, J., concurring).

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." Id. at 394 U. S. 125 (Black, J., concurring). See generally Stanley v. Georgia, 394 U. S. 557 (1969); Rowan v. United States Post Office Dept., 397 U. S. 728 (1970); FCC v. Pacifica Foundation, 438 U. S. 726 (1978); Payton v. New York, 445 U. S. 573 (1980). The State's interest in protecting the wellbeing, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

"'The crucial question, however, is whether [the Illinois' statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.' Reed v. Reed, 404 U.S. [71], 404 U. S. 76 [(1971)]."

Police Department of Chicago v. Mosley, 408 U.S. at 408 U. S. 99. And because the statute discriminates among pickets based on the subject matter of their expression, the answer must be "No."

The judgment of the Court of Appeals is

Affirmed.

***Brown v. Hartlage*, 456 U.S. 45, 52–53 (1982)**

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY
Syllabus
Petitioner, the challenger, in a general election, for respondent's office as a Commissioner of Jefferson County, Ky., committed himself, at a televised press conference, to lowering Commissioners' salaries if elected. Upon learning that such commitment arguably violated a provision of the Kentucky Corrupt Practices Act (§ 121.055), petitioner retracted his pledge. On its face, § 121.055 prohibits a candidate from offering material benefits to voters in consideration for their votes. After petitioner won the election, respondent filed suit in a Kentucky state court, alleging that petitioner had violated § 121.055 and seeking to have the election declared void. Although finding that, under the reasoning of an earlier decision of the Kentucky Court of Appeals construing § 121.055, petitioner had violated the statute by promising to reduce his salary to less than that "fixed by law," the trial court concluded that petitioner had been "fairly elected," and refused to order a new election. The Kentucky Court of Appeals reversed.
Held: Section 121.055 was applied in this case to limit speech in violation of the First Amendment. Pp. 456 U. S. 522.
(a) Although the States have a legitimate interest in preserving the integrity of their electoral processes, when a State seeks to restrict directly a candidate's offer of ideas to the voters, the First Amendment requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression. Pp. 456 U. S. 52-54.

(b) The application of § 121.055 in this case cannot be justified as a prohibition on buying votes. Petitioner's statements, which were made openly and were subject to the criticism of his political opponent and to the scrutiny of the voters, were very different in character from corrupting private agreements and solicitations historically recognized as unprotected by the First Amendment. There is no constitutional basis upon which his pledge to reduce his salary may be equated with a candidate's promise to pay voters privately for their support from his own pocketbook. A candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection. Pp. 456 U. S. 559.

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(c) If § 121.055 was designed to further the State's interest in ensuring that the willingness of some persons to serve in public office without remuneration does not make gratuitous service the *sine qua non* of plausible candidacy -- resulting in persons of independent wealth but less ability being chosen over those who, though better qualified, cannot afford to serve at a reduced salary -- it chose a means unacceptable under the First Amendment. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is not the government's function to select which issues are worth discussing in the course of a political campaign. Pp. 456 U. S. 59-60.

(d) Nor can application of § 121.055 here be justified on the basis of the State's interests and prerogatives with respect to factual misstatements, on the asserted ground that the statute bars promises to serve at a reduced salary only when the salary of the official has been "fixed by law" and the promise cannot, therefore, be delivered. Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the "breathing space" that they need to survive. Nullifying petitioner's election victory would be inconsistent with the atmosphere of robust political debate required by the First Amendment. There was no showing that he made the disputed statement other than in good faith and without knowledge of its falsity, or with reckless disregard of whether it was false or not. Moreover, he retracted the statement promptly after determining that it might have been false. Pp. 456 U. S. 60-62.

618 S.W.2d 603, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C.J., concurred in the judgment. REHNQUIST J., filed an opinion concurring in the result,*post,* p. 456 U. S. 62.

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether the First Amendment, as applied to the States through the Fourteenth Amendment,

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prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law."

I

This case involves a challenge to an application of the Kentucky Corrupt Practices Act. The parties were opposing candidates in the 1979 general election for the office of Jefferson County Commissioner, "C" District. Petitioner, Carl Brown, was the challenger; respondent, Earl Hartlage, was the incumbent. [Footnote 1] On August 15, 1979, in the course of the campaign, Brown held a televised press conference together with Bill Creech, the "B" District candidate on the same party ticket. Brown charged his opponent with complicity in a form of fiscal abuse:

"There are . . . three part-time county commissioners. With state law limiting their authority and responsibility to legislation . . . , it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that the part-time commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time county judge. The mere fact that state law allows such outrageous levels of remuneration does not, in itself, justify those payments. . . . At a fiscal court meeting in 1976, Hartlage led a surprise move to . . . more than double the salaries of the county commissioners! His actions demonstrated his unmistakable disrespect for the office of the chief executive of this county, and his utter disdain for the spirit of laws that govern our county system. . . . [U]sing the gray fringes of the law for his

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own personal gain, Hartlage led the move to funnel county tax dollars into commissioners' pockets."

App. 1-2.

On behalf of himself and his running mate, Creech pledged the taxpayers some relief:

"We abhor the commissioners' outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each year."

Id. at 2. [Footnote 2]

Shortly after the press conference, Brown and Creech learned that their commitment to lower their salaries arguably violated the Kentucky Corrupt Practices Act. On August 19, 1979, they issued a joint statement retracting their earlier pledge:

"We are men enough to admit when we've made a mistake."

"We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal."

"* * * *"
". . . [W]e do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected, and instead
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pledge to seek corrective legislation in the next session of the General Assembly to correct this silly provision of State Law."
Id. at 5. In the November 6, 1979, election, Brown defeated Hartlage by 10,151 votes. [Footnote 3] Creech was defeated.
Hartlage then filed this action in the Jefferson Circuit Court, alleging that Brown had violated the Corrupt Practices Act and seeking to have the election declared void and the office of Jefferson County Commissioner, "C" District, vacated by Brown. Section 121.055, upon which Hartlage based his claim, provides:
"Candidates prohibited from making expenditure, loan, promise, agreement, or contract as to action when elected, in consideration for vote. -- No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract."
Ky.Rev.Stat. § 121.055 (1982). [Footnote 4]
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In *Sparks v. Boggs,* 339 S.W.2d 480 (1960), the Kentucky Court of Appeals held that candidates' promises to serve at yearly salaries of $1, and to vote to distribute the salary savings to specified charitable organizations, violated the Corrupt Practices Act where the salaries had been "fixed by law." In the instant case, the trial court found that Brown's prospective salary had been fixed by law, and that, under the reasoning of *Sparks,* Brown's promise violated the Act. Nevertheless, the court concluded that, in light of Brown's retraction, the defeat of his running mate, who had joined in the pledge, and the presumption that the will of the people had been revealed through the election process, Brown had been "fairly elected." App. 25. It thus declined to order a new election. *Id.* at 26.
The Kentucky Court of Appeals reversed. 618 S.W.2d 603. That court agreed with the Circuit Court that the salary of County Commissioners was fixed by law, [Footnote 5] and that Brown's statement was proscribed by § 121.055 as construed in *Spark v. Boggs, supra.* [Footnote 6] The Court of Appeals also held, however, that the trial court had erred in failing to order a new election. App. 34-35. It held that retraction of the offending
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statement was "of no consequence under the law of this state," *id.* at 35, and that the trial court was mistaken in believing that it possessed the discretionary authority to balance the gravity of the violation against the disenfranchisement of the electorate that would result from declaring the election void, *ibid.* With respect to Brown's First Amendment claims, the court was of the view that
"[t]o hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression."
Id. at 36. The court quoted approvingly the maxims that
"[a] state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace,"
and that
"[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was, in part, initiated, evidenced, or carried out by means of language."
Id. at 36-37, quoting 16A Am.Jur.2d Constitutional Law §§ 409, 507 (1979). The court then concluded that Brown's "statement was not constitutionally protected." App. 37.
In an opinion denying petitioner's motion for rehearing, the court more pointedly addressed petitioner's First Amendment arguments. The court found that the State's interest in the fairness and integrity of its elections was compelling,
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and that the State could insist that elections be conducted free of corruption and bribery. *Id.* at 39. The court restated its view that, under the laws of the State, a promise such as Brown's was considered an attempt to buy votes or to bribe the voters. *Ibid.* Finally, the court rejected petitioner's argument that § 121.055, as construed by *Sparks, supra,* was "unconstitutionally broad." Although the court found some appeal in Brown's argument that,
"[i]f carried to its logical extreme . . . any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes,"
the court was of the view that *Sparks* controlled its disposition, and suggested to petitioner that he seek reconsideration of that decision in the Supreme Court of Kentucky. App. 39-40. The Supreme Court of Kentucky denied review. *Id.* at 41. We granted the petition for certiorari. 450 U.S. 1029 (1981).

II

We begin our analysis of § 121.055 by acknowledging that the States have a legitimate interest in preserving the integrity of their electoral processes. Just as a State may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated.

At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed. As we noted in *Mills v. Alabama,* 384 U. S. 214, 384 U. S. 218-219 (1966):

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.

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This, of course, includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."

The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy -- the political campaign.

"[I]f it be conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Monitor Patriot Co. v. Roy, 401 U. S. 265, 401 U. S. 271-272 (1971) (citation omitted). The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary:

"The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country 'public discussion is a political duty,' *Whitney v. California,* 274 U. S. 357, 274 U. S. 375 (1927) (concurring opinion), applies with special force to candidates for public office."

Buckley v. Valeo, 424 U. S. 1, 424 U. S. 52-53 (1976) (per curiam).

When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not

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only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.

III

On its face, § 121.055 prohibits a candidate from offering material benefits to voters in consideration for their votes, and, conversely, prohibits candidates from accepting payments in consideration for the manner in which they serve their public function. *Sparks v. Boggs,* 339 S.W.2d 480 (1960), placed a not entirely obvious gloss on that provision with respect to candidate utterances concerning the salaries of the office for which they were running, by barring the candidate from promising to reduce his salary when that salary was already "fixed by law." We thus consider the constitutionality of § 121.055 with respect to the proscription evident on the face of the statute, and in light of the more particularized concerns suggested by the *Sparks* gloss. We discern three bases upon which the application of the statute to Brown's promise might conceivably be justified: first, as a prohibition on buying votes; second, as facilitating the candidacy of persons lacking independent wealth; and third, as an application of the State's interests and prerogatives with respect to factual misstatements. We consider these possible justifications in turn.

A

The first sentence of § 121.055 prohibits a political candidate from giving, or promising to give, anything of value to a voter in exchange for his vote or support. In many of its possible applications, this provision would appear to present little constitutional difficulty, for a State may surely prohibit a candidate from buying votes. No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter. And as a State may prohibit the giving of money or other things of value to a voter in exchange for his support, it may also declare unlawful an agreement

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embodying the intention to make such an exchange. Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. Finally, while a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains, in

essence, an invitation to engage in an illegal exchange for private profit, and may properly be prohibited. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U. S. 489, 455 U. S. 496 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U. S. 557, 447 U. S. 563-564 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U. S. 376, 413 U. S. 388 (1973).

It is thus plain that some kinds of promises made by a candidate to voters, and some kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty. But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed, "indispensable to decisionmaking in a democracy," *First National Bank of Boston v. Bellotti,* 435 U. S. 765, 435 U. S. 777 (1978); and the

"maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U. S. 359, 283 U. S. 369 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect

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of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare. [Footnote 7] So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.

It remains to determine the standards by which we might distinguish between those "private arrangements" that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system. We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment. But acknowledging the difficulty of rendering a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border.

It is clear that the statements of petitioner Brown in the course of the August 15 press conference were very different

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in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment. Notably, Brown's commitment to serve at a reduced salary was made openly, subject to the comment and criticism of his political opponent and to the scrutiny of the voters. We think the fact that the statement was made in full view of the electorate offers a strong indication that the statement contained nothing fundamentally at odds with our shared political ethic.

The Kentucky Court of Appeals analogized Brown's promise to a bribe. But however persuasive that analogy might be as a matter of state law, there is no constitutional basis upon which Brown's pledge to reduce his salary might be equated with a candidate's promise to pay voters for their support from his own pocketbook. Although, upon election, Brown would undoubtedly have had a valid claim to the salary that had been "fixed by law," Brown did not offer the voters a payment from his personal funds. His was a declaration of intention to exercise the fiscal powers of government office within what he believed (albeit erroneously) to be the recognized framework of office. At least to outward appearances, the commitment was fully in accord with our basic understanding of legitimate activity by a government body. Before any implicit monetary benefit to the individual taxpayer might have been realized, public officials -- among them, of course, Brown himself -- would have had to approve that benefit in accordance with the good faith exercise of their public duties. Although Brown may have been incorrect in suggesting that his salary could have been lawfully reduced, this cannot, in itself, transform his promise into an invitation to engage in a private and politically corrupting arrangement.

In addition, despite the Kentucky courts' characterization of the promise to serve at a reduced salary as an offer "to reduce *pro tanto* the amount of taxes each individual taxpayer must pay, and thus . . . an offer to the voter of pecuniary gain," App. 33, it is impossible to discern in Brown's generalized

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commitment any invitation to enter into an agreement that might place the statement outside the realm of unequivocal protection that the Constitution affords to political speech. Not only was the source of the promised benefit the public fisc, but that benefit was to extend beyond those voters who cast their ballots for Brown, to all taxpayers and citizens. Even if Brown's commitment could, in some sense, have been deemed an "offer," it scarcely contemplated a particularized acceptance or a *quid pro quo* arrangement. It was to be honored, "if elected"; it was conditioned not on any particular vote or

votes, but entirely on the *majority's* vote.
In sum, Brown did not offer some private payment or donation in exchange for voter support; Brown's statement can only be construed as an expression of his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens. If Brown's expressed intention had an individualized appeal to some taxpayers who felt themselves the likely beneficiaries of his form of fiscal restraint, that fact is of little constitutional significance. The benefits of most public policy changes accrue not only to the undifferentiated "public," but more directly to particular individuals or groups. Like a promise to lower taxes, to increase efficiency in government, or indeed to increase taxes in order to provide some group with a desired public benefit or public service, Brown's promise to reduce his salary cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding. *See Buckley v. Valeo,* 424 U.S. at 424 U. S. 27.
A State may insist that candidates seeking the approval of the electorate work within the framework of our democratic institutions, and base their appeal on assertions of fitness for office and statements respecting the means by which they intend to further the public welfare. But a candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayer,
Page 456 U. S. 59
citizen, or member of the general public, does not lie beyond the pale of First Amendment protection.
B
Sparks v. Boggs, 339 S.W.2d 480 (1960), relied in part on the interest a State may have in ensuring that the willingness of some persons to serve in public office without remuneration does not make gratuitous service the *sine qua non* of plausible candidacy. [Footnote 8] The State might legitimately fear that such emphasis on free public service might result in persons of independent wealth, but less ability, being chosen over those who, though better qualified, could not afford to serve
Page 456 U. S. 60
at a reduced salary. But if § 121.055 was designed to further this interest, it chooses a means unacceptable under the First Amendment. [Footnote 9] In barring certain public statements with respect to this issue, the State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to "select which issues are worth discussing or debating," *Police Department of Chicago v. Mosley,* 408 U. S. 92, 408 U. S. 96 (1972), in the course of a political campaign.
C
Amicus points out that § 121.055, as applied through *Sparks v. Boggs, supra,* bars promises to serve at a reduced salary only when the salary of the official has been "fixed by law," and where the promise cannot, therefore, be delivered. Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. *Gertz v. Robert Welch, Inc.,* 418 U. S. 323, 418 U. S. 340 (1974). But "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'"
New York Times Co. v. Sullivan, 376 U. S. 254,
Page 456 U. S. 61
376 U. S. 271-272 (1964), quoting *NAACP v. Button,* 371 U. S. 415, 371 U. S. 433 (1963). Section 121.055, as applied in this case, has not afforded the requisite "breathing space."
The Commonwealth of Kentucky has provided that a candidate for public office forfeits his electoral victory if he errs in announcing that he will, if elected, serve at a reduced salary. As the Kentucky courts have made clear in this case, a candidate's liability under § 121.055 for such an error is absolute: his election victory must be voided even if the offending statement was made in good faith and was quickly repudiated. The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. *See Monitor Patriot Co. v. Roy,* 401 U. S. 265 (1971); *Ocala Star-Banner Co. v. Damron,* 401 U. S. 295 (1971). Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment, "we depend for . . . correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz v. Robert Welch, Inc., supra,* at 418 U. S. 339-340. In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced silence," *Whitney v. California,* 274 U. S. 357, 274 U. S. 377 (1927) (Brandeis, J., concurring), thus has special force. *Cf. Gertz v. Robert Welch, Inc., supra,* at 418 U. S. 344. There has been no showing in this case that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not. Moreover, petitioner retracted
Page 456 U. S. 62

the statement promptly after discovering that it might have been false. Under these circumstances, nullifying petitioner's election victory was inconsistent with the atmosphere of robust political debate protected by the First Amendment.

IV

Because we conclude that § 121.055 has been applied in this case to limit speech in violation of the First Amendment, we reverse the judgment of the Kentucky Court of Appeals and remand for proceedings not inconsistent with this opinion.
It is so ordered.
THE CHIEF JUSTICE concurs in the judgment.

McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 (1995)

OCTOBER TERM, 1994

Syllabus

McINTYRE, EXECUTOR OF ESTATE OF McINTYRE, DECEASED *v.* OHIO ELECTIONS COMMISSION

CERTIORARI TO THE SUPREME COURT OF OHIO No. 93-986. Argued October 12, 1994-Decided April 19, 1995

After petitioner's decedent distributed leaflets purporting to express the views of "CONCERNED PARENTS AND TAX PAYERS" opposing a proposed school tax levy, she was fined by respondent for violating § 3599.09(A) of the Ohio Code, which prohibits the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature. The Court of Common Pleas reversed, but the Ohio Court of Appeals reinstated the fine. In affirming, the State Supreme Court held that the burdens § 3599.09(A) imposed on voters' First Amendment rights were "reasonable" and "nondiscriminatory" and therefore valid. Declaring that § 3599.09(A) is intended to identify persons who distribute campaign materials containing fraud, libel, or false advertising and to provide voters with a mechanism for evaluating such materials, the court distinguished *Talley* v. *California,* 362 U. S. 60, in which this Court invalidated an ordinance prohibiting all anonymous leafletting.

Held: Section 3599.09(A)'s prohibition of the distribution of anonymous campaign literature abridges the freedom of speech in violation of the First Amendment. Pp.341-357.

(a) The freedom to publish anonymously is protected by the First Amendment, and, as *Talley* indicates, extends beyond the literary realm to the advocacy of political causes. Pp.341-343.

(b) This Court's precedents make abundantly clear that the Ohio Supreme Court's reasonableness standard is significantly more lenient than is appropriate in a case of this kind. Although *Talley* concerned a different limitation than § 3599.09(A) and thus does not necessarily control here, the First Amendment's protection of anonymity nevertheless applies. Section 3599.09(A) is not simply an election code provision subject to the "ordinary litigation" test set forth in *Anderson* v. *Celebrezze,* 460 U. S. 780, and similar cases. Rather, it is a regulation of core political speech. Moreover, the category of documents it covers is defined by their content-only those publications containing speech designed to influence the voters in an election need bear the required information. See, *e. g., First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765,776-777. When a law burdens such speech, the Court applies "exacting scrutiny,"

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upholding the restriction only if it is narrowly tailored to serve an overriding state interest. See, *e. g.,* id., at 786. Pp.343-347.

(c) Section 3599.09(A)'s anonymous speech ban is not justified by Ohio's asserted interests in preventing fraudulent and libelous statements and in providing the electorate with relevant information. The claimed informational interest is plainly insufficient to support the statute's disclosure requirement, since the speaker's identity is no different from other components of a document's contents that the author is free to include or exclude, and the author's name and address add little to the reader's ability to evaluate the document in the case of a handbill written by a private citizen unknown to the reader. Moreover, the state interest in preventing fraud

and libel (which Ohio vindicates by means of other, more direct prohibitions) does not justify § 3599.09(A)'s extremely broad prohibition of anonymous leaflets. The statute encompasses all documents, regardless of whether they are arguably false or misleading. Although a State might somehow demonstrate that its enforcement interests justify a more limited identification requirement, Ohio has not met that burden here. Pp. 348-353.

(d) This Court's opinions in *Bellotti,* 435 U. S., at 792, n. 32-which commented in dicta on the prophylactic effect of requiring identification of the source of corporate campaign advertising-and *Buckley* v. *Valeo,* 424 U. S. 1, 75-76-which approved mandatory disclosure of campaign-related expenditures-do not establish the constitutionality of § 3599.09(A), since neither case involved a prohibition of anonymous campaign literature. Pp. 353-356.

67 Ohio St. 3d 391, 618 N. E. 2d 152, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, *post,* p. 358. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 358. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post,* p. 371.

David Goldberger argued the cause for petitioner. With him on the briefs were George *Q.* Vaile, Steven R. Shapiro, Joel M. Gora, Barbara P. O'Toole, and Louis A. Jacobs.

Andrew 1. *Sutter,* Assistant Attorney General of Ohio, argued the cause for respondent. With him on the briefs were *Lee Fisher,* Attorney General, *Andrew* S. *Bergman, Robert A. Zimmerman,* and *James M. Harrison,* Assistant At-

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reader. Moreover, the state interest in preventing fraud and libel (which Ohio vindicates by means of other, more direct prohibitions) does not justify § 3599.09(A)'s extremely broad prohibition of anonymous leaflets. The statute encompasses all documents, regardless of whether they are arguably false or misleading. Although a State might somehow demonstrate that its enforcement interests justify a more limited identification requirement, Ohio has not met that burden here. Pp. 348-353.

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torneys General, *Richard A. Cordray,* State Solicitor, and *Simon B. Karas.* *

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a "law ... abridging the freedom of speech" within the meaning of the First Amendment.1

*Briefs of *amici curiae* urging affirmance were filed for the State of Tennessee et al. by *Charles W Burson,* Attorney General of Tennessee, *Michael E. Moore,* Solicitor General, and *Michael W Catalano,* and by the Attorneys General for their respective States as follows: *Jimmy Evans* of Alabama, *Bruce M. Botelho* of Alaska, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Larry EchoHawk* of Idaho, *Roland W Burris* of Illinois, *Pamela Fanning Carter* of Indiana, *Chris Gorman* of Kentucky, *Richard P. I eyoub* of Louisiana, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Deborah T. Poritz* of New Jersey, *Michael* F. *Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Susan B. Loving* of Oklahoma, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, and *Jeffrey L. Amestoy* of Vermont; and for the Council of State Governments et al. by *Richard Ruda* and *Lee Fennell.*

Charles H. Bell, Jr., and *Robert E. Leidigh* filed a brief for the California Political Attorneys Association as *amicus curiae.*

1 The term "liberty" in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States. The Fourteenth Amendment reads, in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law .... " u. S. Const., Arndt. 14, § 1. Referring to that Clause in his separate opinion in *Whitney* v. *California,* 274 U. S. 357 (1927), Justice Brandeis stated that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights." *Id.,* at 373 (concurring opinion). Although the text of the First Amendment provides only that *"Congress* shall make no law ... abridging the freedom of speech ... ," Justice Brandeis' view has been embedded in our law ever since. See *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 779-780 (1978); see also Stevens, The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 20, 25-26 (1992).

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I

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. At this meeting, the superintendent of schools planned to discuss an imminent referendum on a proposed school tax levy. The leaflets expressed Mrs. McIntyre's opposition to the levy.2 There is no suggestion that the text of her message was false, misleading, or libelous. She had composed and printed it on her home computer and had paid a professional printer to make additional copies. Some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS." Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.

2 The following is one of Mrs. McIntyre's leaflets, in its original typeface:

THANt; YOU.

CONCEI
TAX Po:IYERS

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While Mrs. McIntyre distributed her handbills, an official of the school district, who supported the tax proposal, advised her that the unsigned leaflets did not conform to the Ohio election laws. Undeterred, Mrs. McIntyre appeared at another meeting on the next evening and handed out more of the handbills.

The proposed school levy was defeated at the next two elections, but it finally passed on its third try in November 1988. Five months later, the same school official filed a complaint with the Ohio Elections Commission charging that Mrs. McIntyre's distribution of unsigned leaflets violated § 3599.09(A) of the Ohio Code.3 The commission agreed and imposed a fine of $100.

3 Ohio Rev. Code Ann. § 3599.09(A) (1988) provides:

"No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. The disclaimer 'paid political advertisement' is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

"The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size

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The Franklin County Court of Common Pleas reversed. Finding that Mrs. McIntyre did not "mislead the public nor act in a surreptitious manner," the court concluded that the statute was unconstitutional as applied to her conduct. App. to Pet. for Cert. A-34 to A-35. The Ohio Court of Appeals, by a divided vote, reinstated the fine. Notwithstanding doubts about the continuing validity of a 1922 decision of the Ohio Supreme Court upholding the statutory predecessor of § 3599.09(A), the majority considered itself bound by that precedent. *Id.,* at A-20 to A-21, citing *State* v. *Babst,* 104 Ohio St. 167, 135 N. E. 525 (1922). The dissenting judge thought that our intervening decision in *Talley* v. *California,* 362 U. S. 60 (1960), in which we invalidated a city ordinance prohibiting all anonymous leafletting, compelled the Ohio court to adopt a narrowing construction of the statute to save its constitutionality. App. to Pet. for Cert. A-30 to A-31.

The Ohio Supreme Court affirmed by a divided vote. The majority distinguished Mrs. McIntyre's case from *Talley* on the ground that § 3599.09(A) "has as its purpose the identification of persons who distribute materials containing false statements." 67 Ohio St. 3d 391, 394, 618 N. E. 2d 152, 154

or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words 'paid for by' followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title."

Section 3599.09(B) contains a comparable prohibition against unidentified communications uttered over the broadcasting facilities of any radio or television station. No question concerning that provision is raised in this case. Our opinion, therefore, discusses only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed. Cf. *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 637-638 (1994) (discussing application of First Amendment principles to regulation of television and radio).

The complaint against Mrs. McIntyre also alleged violations of two other provisions of the Ohio Code, but those charges were dismissed and are not before this Court.

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(1993). The Ohio court believed that such a law should be upheld if the burdens imposed on the First Amendment rights of voters are *"'reasonable'"* and *"'nondiscriminatory.'" Id.,* at 396, 618 N. E. 2d, at 155, quoting *Anderson* v. *Celebrezze,* 460 U. S. 780, 788 (1983). Under that standard, the majority concluded that the statute was plainly valid:

"The minor requirement imposed by R.C. 3599.09 that those persons producing campaign literature identify themselves as the source thereof neither impacts the content of their message nor significantly burdens their ability to have it disseminated. This burden is more than counterbalanced by the state interest in providing the voters to whom the message is directed with a

mechanism by which they may better evaluate its validity. Moreover, the law serves to identify those who engage in fraud, libel or false advertising. Not only are such interests sufficient to overcome the minor burden placed upon such persons, these interests were specifically acknowledged in *[First Nat. Bank of Boston* v.] *Bellotti[,* 435 U. S. 765 (1978),] to be regulations of the sort which would survive constitutional scrutiny." 67 Ohio St. 3d, at 396, 618 N. E. 2d, at 155-156.

In dissent, Justice Wright argued that the statute should be tested under a more severe standard because of its significant effect "on the ability of individual citizens to freely express their views in writing on political issues." *Id.,* at 398, 618 N. E. 2d, at 156-157. He concluded that § 3599.09(A) "is not narrowly tailored to serve a compelling state interest and is, therefore, unconstitutional as applied to McIntyre." *Id.,* at 401, 618 N. E. 2d, at 159.

Mrs. McIntyre passed away during the pendency of this litigation. Even though the amount in controversy is only $100, petitioner, as the executor of her estate, has pursued her claim in this Court. Our grant of certiorari, 510 U. S.

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1108 (1994), reflects our agreement with his appraisal of the importance of the question presented.

II

Ohio maintains that the statute under review is a reasonable regulation of the electoral process. The State does not suggest that all anonymous publications are pernicious or that a statute totally excluding them from the marketplace of ideas would be valid. This is a wise (albeit implicit) concession, for the anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley* v. *California,* 362 U. S., at 64. Great works of literature have frequently been produced by authors writing under assumed names.4 Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official re-

4 American names such as Mark Twain (Samuel Langhorne Clemens) and O. Henry (William Sydney Porter) come readily to mind. Benjamin Franklin employed numerous different pseudonyms. See 2 W. Bruce, Benjamin Franklin Self-Revealed: A Biographical and Critical Study Based Mainly on His Own Writings, ch. 5 (2d ed. 1923). Distinguished French authors such as Voltaire (Francois Marie Arouet) and George Sand (Amandine Aurore Lucie Dupin), and British authors such as George Eliot (Mary Ann Evans), Charles Lamb (sometimes wrote as "Elia"), and Charles Dickens (sometimes wrote as "Boz"), also published under assumed names. Indeed, some believe the works of Shakespeare were actually written by the Earl of Oxford rather than by William Shaksper of Stratford-on-Avon. See C. Ogburn, The Mysterious William Shakespeare: The Myth & the Reality (2d ed. 1992); but see S. Schoenbaum, Shakespeare's Lives (2d ed. 1991) (adhering to the traditional view that Shaksper was in fact the author). See also Stevens, The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1373 (1992) (commenting on the competing theories).

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taliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. 5 Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

The freedom to publish anonymously extends beyond the literary realm. In *Talley,* the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U. S. 60. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.,* at 64. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. *Id.,* at 64-65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of

5 Though such a requirement might provide assistance to critics in evaluating the quality and significance of the writing, it is not indispensable. To draw an analogy from a nonliterary context, the now-pervasive practice of grading law school examination papers "blindly" (i. *e.,* under a system in which the professor does not know whose paper she is grading) indicates that such evaluations are possible-indeed, perhaps more reliable-when any bias associated with the author's identity is prescinded.

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political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue* v. *Gilleo,* 512 U. S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes.6 This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

III

California had defended the Los Angeles ordinance at issue in *Talley* as a law "aimed at providing a way to identify those responsible for fraud, false advertising and libel." 362 U. S., at 64. We rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those evils.7 *Ibid.* We then made clear that

6 That tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms: prominent among them were "Cato," believed to be New York Governor George Clinton; "Centinel," probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; "The Federal Farmer," who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and "Brutus," who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., The Complete Anti-Federalist (1981). A forerunner of all of these writers was the pre-Revolutionary War English pamphleteer "Junius," whose true identity remains a mystery. See Encyclopedia of Colonial and Revolutionary America 220 (J. Faragher ed. 1990) (positing that "Junius" may have been Sir Phillip Francis). The "Letters of Junius" were "widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause." *Powell* v. *McCormack, 395*

7 In his concurring opinion, Justice Harlan added these words:

"Here the State says that this ordinance is aimed at the prevention of 'fraud, deceit, false advertising, negligent use of words, obscenity, and libel,' in that it will aid in the detection of those responsible for spreading

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we did "not pass on the validity of an ordinance limited to prevent these or any other supposed evils." *Ibid.* The Ohio statute likewise contains no language limiting its application to fraudulent, false, or libelous statements; to the extent, therefore, that Ohio seeks to justify § 3599.09(A) as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in *Talley.* As the facts of this case demonstrate, the ordinance plainly applies even when there is no hint of falsity or libel.

Ohio's statute does, however, contain a different limitation:

It applies only to unsigned documents designed to influence voters in an election. In contrast, the Los Angeles ordinance prohibited all anonymous handbilling "in any place under any circumstances." *Id.,* at 60-61. For that reason, Ohio correctly argues that *Talley* does not necessarily control the disposition of this case. We must, therefore, decide whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process.

Ohio places its principal reliance on cases such as *Anderson* v. *Celebrezze,* 460 U. S. 780 (1983); *Storer* v. *Brown,* 415 U. S. 724 (1974); and *Burdick* v. *Takushi,* 504 U. S. 428 (1992), in which we reviewed election code provisions governing the voting process itself. See *Anderson, supra* (filing deadlines); *Storer, supra* (ballot access); *Burdick, supra* (write-in voting); see also *Tashjian* v. *Republican Party of Conn.,* 479 U. S. 208 (1986) (eligibility of independent voters to vote in party primaries). In those cases we refused to adopt "any material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have." 362 U. S., at 66-67 (footnote omitted).

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'litmus-paper test' that will separate valid from invalid restrictions." *Anderson,* 460 U. S., at 789, quoting *Storer,* 415 U. S., at 730. Instead, we pursued an analytical process comparable to that used by courts "in ordinary litigation":

We considered the relative interests of the State and the injured voters, and we evaluated the extent to which the State's interests necessitated the contested restrictions. *Anderson,* 460 U. S., at 789. Applying similar reasoning in this case, the Ohio Supreme Court upheld § 3599.09(A) as a *"reasonable"* and *"nondiscriminatory"* burden on the rights of voters. 67 Ohio St. 3d, at 396, 618 N. E. 2d, at 155, quoting *Anderson,* 460 U. S., at 788.

The "ordinary litigation" test does not apply here. Unlike the statutory provisions challenged in *Storer* and *Anderson,* § 3599.09(A) of the Ohio Code does not control the mechanics of the electoral process. It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints,S it is a direct regulation of the content of

speech. Every written document covered by the statute must contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." Ohio Rev. Code Ann. § 3599.09(A) (1988). Furthermore, the category of covered documents is defined by their content-only those publications containing speech designed to influence the voters in an election need bear the required markings.9 *Ibid.* Consequently, we are not faced with an ordinary election restric-

8 Arguably, the disclosure requirement places a more significant burden on advocates of unpopular causes than on defenders of the status quo. For purposes of our analysis, however, we assume the statute evenhandedly burdens all speakers who have a legitimate interest in remaining anonymous.

9 Covered documents are those "designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election .... " §3599.09(A).

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tion; this case "involves a limitation on political expression subject to exacting scrutiny." *Meyer* v. *Grant,* 486 U. S. 414, 420 (1988).10

Indeed, as we have explained on many prior occasions, the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment:

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States,* 354 U. S. 476, 484 (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' *Winters* v. *New York, 333* U. S. 507, 510 (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, ... of course includ[ing] discussions of candidates ... .' *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citi-

10 In *Meyer,* we unanimously applied strict scrutiny to invalidate an election-related law making it illegal to pay petition circulators for obtaining signatures to place an initiative on the state ballot. Similarly, in *Burson* v. *Freeman,* 504 U. S. 191 (1992), although the law at issueforbidding campaign-related speech within 100 feet of the entrance to a polling place-was an election-related restriction, both the plurality and dissent applied strict scrutiny because the law was "a facially contentbased restriction on political speech in a public forum." *Id.,* at 198; see also *id.,* at 212-213 (KENNEDY, J., concurring); *id.,* at 217 (STEVENS, J., dissenting).

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zenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley* v. *Valeo,* 424 U. S. 1, 14-15 (1976) *(per curiam).*

Of course, core political speech need not center on a candidate for office. The principles enunciated in *Buckley* extend equally to issue-based elections such as the school tax referendum that Mrs. McIntyre sought to influence through her handbills. See *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 776-777 (1978) (speech on income tax referendum "is at the heart of the First Amendment's protection"). Indeed, the speech in which Mrs. McIntyre engaged-handing out leaflets in the advocacy of a politically controversial viewpoint-is the essence of First Amendment expression. See *International Soc. for Krishna Consciousness, Inc.* v. *Lee,* 505 U. S. 672 (1992); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938). That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. See *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949). No form of speech is entitled to greater constitutional protection than Mrs. McIntyre~.

When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. See, *e. g., Bellotti,* 435 U. S., at 786. Our precedents thus make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate in a case of this kind.

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IV

Nevertheless, the State argues that, even under the strictest standard of review, the disclosure requirement in § 3599.09(A) is justified by two important and legitimate state interests. Ohio judges its interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information to be sufficiently compelling to justify the anonymous speech ban. These two interests necessarily overlap to some extent, but it is useful to discuss them separately.

Insofar as the interest in informing the electorate means nothing more than the provision of additional information

that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or excludeY We have already held that the State may not compel a newspaper that prints editorials critical of a particular candidate to provide space for a reply by the candidate. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974). The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the
11 "Of course, the identity of the source is helpful in evaluating ideas.
But 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' *(Abrams* v. *United States,* [250 U. S. 616, 630 (1919) (Holmes, J., dissenting)]). Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth." *New York* v. *Duryea,* 76 Misc. 2d 948, 966-967,351 N. Y. S. 2d 978, 996 (1974) (striking down similar New York statute as overbroad).

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document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.
The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. Ohio does not, however, rely solely on § 3599.09(A) to protect that interest. Its Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns. Ohio Rev. Code Ann. §§ 3599.09.1(B), 3599.09.2(B) (1988). These regulations apply both to candidate elections and to issue-driven ballot measures.12 Thus,
12 Section 3599.09.1(B) provides:
"No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:
"(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term 're-elect' when the candidate has never been elected at a primary, general, or special election to the office for which he is a candidate;
"(2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate; a degree, diploma, certificate, scholarship, grant, award, prize, or honor received, earned, or held by a candidate; or the period of time during which a candidate attended any school, college, community technical school, or institution;
"(3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate, or concerning any position the candidate held for which he received a salary or wages;
"(4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude;
"(5) Make a statement that a candidate has been indicted for any crime or has been the subject of a finding by the Ohio elections commission without disclosing the outcome of any legal proceedings resulting from the indictment or finding;

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Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud.13 Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent
"(6) Make a false statement that a candidate or official has a record of treatment or confinement for mental disorder;
"(7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;
"(8) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a candidate by a person or publication;
"(9) Make a false statement concerning the voting record of a candidate or public official;
"(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate. As used in this section, 'voting record' means the recorded 'yes' or 'no' vote on a bill, ordinance, resolution, motion, amendment, or confirmation."
Section 3599.09.2(B) provides:
"No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public

speech, a press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:
"(1) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a ballot proposition or issue by a person or publication;
"(2) Post, publish, circulate, distribute, or otherwise disseminate, a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue." §3599.09.2(B).
We need not, of course, evaluate the constitutionality of these provisions. We quote them merely to emphasize that Ohio has addressed directly the problem of election fraud. To the extent the anonymity ban indirectly seeks to vindicate the same goals, it is merely a supplement to the above provisions.
13 The same can be said with regard to "libel," as many of the above-quoted Election Code provisions prohibit false statements about candidates. To the extent those provisions may be underinclusive, Ohio courts also

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to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify § 3599.09(A)'s extremely broad prohibition.
As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources.14 It applies not only to elections of public officers, but also to
enforce the common-law tort of defamation. See, *e. g., Varanese* v. *Gall,* 35 Ohio St. 3d 78, 518 N. E. 2d 1177 (1988) (applying the standard of *New* York Times Co. v. *Sullivan,* 376 U. S. 254 (1964), to an Ohio public official's state-law libel claim arising from an election-related advertisement). Like other forms of election fraud, then, Ohio directly attacks the problem of election-related libel; to the extent that the anonymity ban serves the same interest, it is merely a supplement.
14 We stressed the importance of this distinction in *Buckley* v. *Valeo,* 424 U. S. 1, 37 (1976):
"Treating these expenses [the expenses incurred by campaign volunteers] as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." (Footnote omitted.)
Again, in striking down the independent expenditure limitations of the Federal Election Campaign Act of 1971, 18 U. S. C. § 608(e)(I) (1970 ed., Supp. IV) (repealed 1976), we distinguished another section of the statute (§ 608(b), which we upheld) that placed a ceiling on contributions to a political campaign.
"By contrast, § 608(e)(I) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(I) severely restricts all independent advocacy despite its substantially diminished potential for abuse." 424 U. S., at 47.

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ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage.15 It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance.16 It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code. Nor has the State explained why it can
15 "The risk of corruption perceived in cases involving candidate elections, *e. g., United States* v. *Automobile Workers,* [352 U. S. 567 (1957)]; *United States* v. *eIO,* [335 U. S. 106 (1948)], simply is not present in a popular vote on a public issue." *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 790 (1978) (footnote omitted).
16 As the Illinois Supreme Court explained in *People* v. *White,* 116 Ill. 2d 171, 180,506 N. E. 2d 1284, 1288 (Ill. 1987), which struck down a similar statute:
"Implicit in the State's ... justification is the concern that the public could be misinformed and an election swayed on the strength of an eleventhhour anonymous smear campaign to which the candidate could not meaningfully respond. The statute cannot be upheld on this ground, however, because it sweeps within its net a great deal of anonymous speech completely unrelated to this concern. In the first place, the statute has no time limit and applies to literature circulated two months prior to an election as well as that distributed two days before. The statute also prohibits anonymous literature supporting or opposing not only candidates, but also referenda. A public question clearly cannot be the victim of character assassination."
The temporal breadth of the Ohio statute also distinguishes it from the Tennessee law that we upheld in *Burson* v. *Freeman,* 504 U. S. 191 (1992). The Tennessee statute forbade electioneering within 100 feet

of the entrance to a polling place. It applied only on election day. The State's interest in preventing voter intimidation and election fraud was therefore enhanced by the need to prevent last-minute misinformation to which there is no time to respond. Moreover, Tennessee geographically confined the reach of its law to a 100-foot no-solicitation zone. By contrast, the Ohio law forbids anonymous campaign speech wherever it occurs.

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more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection. We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here.

V

Finally, Ohio vigorously argues that our opinions in *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978), and *Buckley* v. *Valeo,* 424 U. S. 1 (1976) *(per curiam),* amply support the constitutionality of its disclosure requirement. N either case is controlling: The former concerned the scope of First Amendment protection afforded to corporations; the relevant portion of the latter concerned mandatory disclosure of campaign-related expenditures. Neither case involved a prohibition of anonymous campaign literature.

In *Bellotti,* we reversed a judgment of the Supreme Judicial Court of Massachusetts sustaining a state law that prohibited corporate expenditures designed to influence the vote on referendum proposals. 435 U. S. 765. The Massachusetts court had held that the First Amendment protects corporate speech only if its message pertains directly to the business interests of the corporation. *Id.,* at 771-772. Consistently with our holding today, we noted that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.,* at 777. We also made it perfectly clear that we were not deciding whether the First Amendment's protection of corporate speech is coextensive with the protection it affords to individualsP Accordingly, although we commented in dicta

17"In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not survey the outer boundaries of the Amendment's pro-

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on the prophylactic effect of requiring identification of the source of corporate advertising,18 that footnote did not necessarily apply to independent communications by an individual like Mrs. McIntyre.

Our reference in the *Bellotti* footnote to the "prophylactic effect" of disclosure requirements cited a portion of our earlier opinion in *Buckley,* in which we stressed the importance of providing "the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate.'" 424 U. S., at 66. We observed that the "sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.,* at 67. Those comments concerned contributions to the candidate or expenditures authorized by the candidate or his responsible agent. They had no reference to the kind of independent activity pursued by Mrs. McIntyre. Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.

tectian of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Bellotti,* 435 U. S., at 777-778.

In a footnote to that passage, we continued:

"Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." *Id.,* at 777-778, n. 13.

18 "Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. See *Buckley,* 424 U. S., at 66-67; *United States* v. *Harriss,* 347 U. S. 612, 625-626 (1954). In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed. 424 U. S., at 67." *Id.,* at 792, n. 32.

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True, in another portion of the *Buckley* opinion we expressed approval of a requirement that even "independent expenditures" in excess of a threshold level be reported to the Federal Election Commission. *Id.,* at 75-76. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate. See *id.,* at 157-159,160 (reproducing relevant portions of the statute 19). Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled selfidentification on all election-related writings. A written election-related document-particularly a leaflet-is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be

information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill-and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

19 One of those provisions, addressing contributions by campaign committees, required:

"the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made." 2 U. S. C. § 434(b)(9) (1970 ed., Supp. IV) (reprinted in *Buckley,* 424 U. S., at 158).

A separate provision, 2 U. S. C. § 434(e) (1970 ed., Supp. IV) (reprinted in *Buckley,* 424 U. S., at 160), required individuals making contributions or expenditures to file statements containing the same information.

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Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests. The Federal Election Campaign Act of 1971, at issue in *Buckley,* regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed "independent expenditures" to mean only those expenditures that "expressly advocate the election or defeat of a clearly identified candidate." *Id.,* at 80. In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. Curriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for just this sort of abuse.20 Moreover, the federal Act contains numerous legitimate disclosure requirements for campaign organizations; the similar requirements for independent expenditures serve to ensure that a campaign organization will not seek to evade disclosure by routing its expenditures through individual supporters. See *Buckley,* 424 U. S., at 76. In short, although *Buckley* may permit a more narrowly drawn statute, it surely is not authority for upholding Ohio's open-ended provision.21

20 This interest also serves to distinguish *United States* v. *Harriss, 347* U. S. 612 (1954), in which we upheld limited disclosure requirements for lobbyists. The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.

21 We note here also that the federal Act, while constitutional on its face, may not be constitutional in all its applications. Cf. *Brown* v. *Socialist Workers* '74 *Campaign Comm. (Ohio),* 459 U. S. 87,88 (1982) (holding Ohio disclosure requirements unconstitutional as applied to "a minor political

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VI

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. Mill, On Liberty and Considerations on Representative Government 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See *Abrams* v. *United States,* 250 U. S. 616, 630-631 (1919) (Holmes, J., dissenting). Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.

The judgment of the Ohio Supreme Court is reversed.

It is so ordered.

United States v. Alvarez, 567 U.S. 709, 718 (2012)

No. 11–210

UNITED STATES, PETITIONER *v.* XAVIER ALVAREZ
on writ of certiorari to the united states court of appeals for the ninth circuit
[June 28, 2012]

Justice Kennedy announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Ginsburg, and Justice Sotomayor join.

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Con-gressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U. S. C. §704.

In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board. The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." 617 F.3d 1198, 1201–1202 (CA9 2010). None of this was true. For all the record shows, respondent's statements were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.

Respondent was indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor at the meeting. The United States District Court for the Central District of California rejected his claim that the statute is invalid under the First Amendment. Respondent pleaded guilty to one count, reserving the right to appeal on his First Amendment claim. The United States Court of Appeals for the Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed the conviction. *Id.*, at 1218. With further opinions on the issue, and over a dissent by seven judges, rehearing en banc was denied. 638 F.3d 666 (2011). This Court granted certiorari. 565 U. S. ___ (2011).

After certiorari was granted, and in an unrelated case, the United States Court of Appeals for the Tenth Circuit, also in a decision by a divided panel, found the Act constitutional. *United States* v. *Strandlof*, 667 F.3d 1146 (2012). So there is now a conflict in the Courts of Appeals on the question of the Act's validity.

This is the second case in two Terms requiring the Court to consider speech that can disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle. See *Snyder* v. *Phelps*, 562 U. S. ___ (2011) (hateful protests directed at the funeral of a serviceman who died in Iraq). Here the statement that the speaker held the Medal was an intended, undoubted lie.

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its high- est respect and esteem those who, in the course of carrying out the "supreme and noble duty of contributing to the defense of the rights and honor of the nation," *Selective Draft Law Cases,* 245 U.S. 366, 390 (1918), have acted with extraordinary honor. And it should be uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

I

Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about in-terpretation or shades of meaning. On this premise, respondent violated §704(b); and, because the lie concerned the Congressional Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are as follows:

"(b) False Claims About Receipt of Military Decorations or Medals.––Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both.

"(c) Enhanced Penalty for Offenses Involving Congressional Medal of Honor.––

"(1) In General.––If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both."

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal, an integrity and purpose it contends are compromised and frustrated by the false statements the statute prohibits. It argues that false statements "have no First Amendment value in themselves," and thus "are protected only to the extent needed to avoid chilling fully

protected speech." Brief for United States 18, 20. Al-though the statute covers respondent's speech, the Government argues that it leaves breathing room for pro-tected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute.

II

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 660 (2004). In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits." *United States* v. *Stevens*, 559 U. S. ___, ___ (2010) (slip op., at 7). Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few " 'historic and traditional categories [of expression] long familiar to the bar,' " *Id.,* at ___ (slip op., at 5) (quoting *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)). Among these categories are advocacy intended, and likely, to incite imminent lawless action, see *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) *(per curiam);* obscenity, see, *e.g., Miller* v. *California*, 413 U.S. 15 (1973); defamation, see, *e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (providing substantial protection for speech about public figures); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (imposing some limits on liability for defaming a private figure); speech integral to criminal conduct, see, *e.g., Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949); so-called "fighting words," see *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); child pornography, see *New York* v. *Ferber*, 458 U.S. 747 (1982); fraud, see *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); true threats, see *Watts* v. *United States*, 394 U.S. 705 (1969) *(per curiam);* and speech presenting some grave and imminent threat the government has the power to prevent, see *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), although a restriction under the last category is most difficult to sustain, see *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) *(per curiam)*. These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private con-versation, expression the First Amendment seeks to guarantee. See *Sullivan, supra,* at 271 ("Th[e] erroneous statement is inevitable in free debate").

The Government disagrees with this proposition. It cites language from some of this Court's precedents to support its contention that false statements have no value and hence no First Amendment protection. See also Brief for Eugene Volokh et al. as *Amici Curiae* 2–11. These isolated statements in some earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection. That conclusion would take the quoted language far from its proper context. For instance, the Court has stated "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas," *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988), and that false statements "are not protected by the First Amendment in the same manner as truthful statements," *Brown* v. *Hartlage*, 456 U.S. 45, 60–61 (1982). See also, *e.g., Virginia Bd. of Pharmacy*, *supra*, at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake"); *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials"); *Gertz*, *supra*, at 340 ("[T]here is no constitutional value in false statements of fact"); *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

These quotations all derive from cases discussing def-amation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. See Brief for United States 18–19. In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood. See *Sullivan*, *supra*, at 280 (prohibiting recovery of damages for a defamatory falsehood made about a public official unless the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"); see also *Garrison*, *supra*, at 73 ("[E]ven when the utterance is false, the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood"); *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600, 620 (2003) ("False statement alone does not subject a fundraiser to fraud liability").

The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.

The Government then gives three examples of regulations on false speech that courts generally have found per-missible: first, the criminal prohibition of a false statement made to a Government official, 18 U. S. C. §1001; second, laws punishing perjury; and third, prohibi-tions on the false representation that one is speaking as a Government official or on behalf of the Government, see, *e.g.,* §912; §709. These restrictions, however, do not establish a principle that all proscriptions of false statements are exempt from exacting First Amendment scrutiny.

The federal statute prohibiting false statements to Government officials punishes "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government . . . makes any mate-rially false, fictitious, or fraudulent statement or repre-sentation." §1001. Section 1001's prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.

The same point can be made about what the Court has confirmed is the "unquestioned constitutionality of perjury statutes," both the federal statute, §1623, and its state-law equivalents. *United States* v. *Grayson*, 438 U.S. 41, 54 (1978). See also *Konigsberg* v. *State Bar of Cal.*, 366 U.S. 36, 51, n. 10 (1961). It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony "is at war with justice" because it can cause a court to render a "judgment not resting on truth." *In re Michael*, 326 U.S. 224, 227 (1945). Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system. See *United States* v. *Dunnigan*, 507 U.S. 87, 97 (1993) ("To uphold the integrity of our trial system . . . the constitutionality of perjury statutes is unquestioned"). Unlike speech in other contexts, testi-mony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others. Sworn testimony is quite distinct from lies not spoken under oath and sim-ply intended to puff up oneself.

Statutes that prohibit falsely representing that one is speaking on behalf of the Government, or that prohibit im-personating a Government officer, also protect the integrity of Government processes, quite apart from merely restricting false speech. Title 18 U. S. C. §912, for ex-ample, prohibits impersonating an officer or employee of the United States. Even if that statute may not require proving an "actual financial or property loss" resulting from the deception, the statute is itself confined to "maintain[ing] the general good repute and dignity of . . . government . . . service itself." *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943) (internal quotation marks omitted). The same can be said for prohibitions on the unauthorized use of the names of federal agencies such as the Federal Bureau of Investigation in a manner calculated to convey that the communication is approved, see §709, or using words such as "Federal" or "United States" in the collection of private debts in order to convey that the communication has official authorization, see §712. These examples, to the extent that they implicate fraud or speech integral to criminal conduct, are inapplicable here.

As our law and tradition show, then, there are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected.

Although the First Amendment stands against any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," *Stevens*, 559 U. S., at ___ (slip op., at 9), the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law." *Ibid*. Before exempting a category of speech from the normal prohibition on content-based re-strictions, however, the Court must be presented with "per-suasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription," *Brown* v. *Entertainment Merchants Assn.,* 564 U. S. ___, ___ (2011) (slip op., at 4). The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.

III

The probable, and adverse, effect of the Act on free- dom of expression illustrates, in a fundamental way, the reasons for the Law's distrust of content-based speech prohibitions. The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. See *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (recognizing that some statements nominally purporting to contain false facts in reality "cannot reasonably be interpreted as stating actual facts about an individual" (internal quotation marks and brackets omitted)). Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and

settings. And it does so en-tirely without regard to whether the lie was made for the purpose of material gain. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 539–540 (1987) (prohibiting a nonprofit corporation from exploiting the "commercial magnetism" of the word "Olym-pic" when organizing an athletic competition (internal quotation marks omitted)). Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, Nineteen Eighty-Four (1949) (Centennial ed. 2003). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. See, *e.g., Virginia Bd. of Pharmacy*, 425 U. S., at 771 (noting that fraudulent speech generally falls outside the protections of the First Amendment). But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

IV

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, see *Stevens*, 559 U. S., at ___ (slip op., at 7) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"), but rather has applied the "most exacting scrutiny." *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 642 (1994). Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals "serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and also " 'foste[r] morale, mission accomplishment and esprit de corps' among service members." Brief for United States 37, 38. General George Washington observed that an award for valor would "cherish a virtuous ambition in . . . soldiers, as well as foster and encourage every species of military merit." General Orders of George Washington Issued at Newburgh on the Hudson, 1782–1783 (Aug. 7, 1782), p. 30 (E. Boynton ed. 1883). Time has not diminished this idea. In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission. These interests are related to the integrity of the military honors system in general, and the Congressional Medal of Honor in particular. Although millions have served with brave resolve, the Medal, which is the highest military award for valor against an enemy force, has been given just 3,476 times. Established in 1861, the Medal is reserved for those who have distinguished themselves "conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty." 10 U. S. C. §§3741 (Army), 6241 (Navy and Marine Corps), 8741 (Air Force), 14 U. S. C. §491 (Coast Guard). The stories of those who earned the Medal inspire and fascinate, from Dakota Meyer who in 2009 drove five times into the midst of a Taliban ambush to save 36 lives, see Curtis, President Obama Awards Medal of Honor to Dakota Meyer, The White House Blog (Sept. 15, 2011) (all Internet materials as visited June 25, 2012, and available in Clerk of Court's case file); to Desmond Doss who served as an army medic on Okinawa and on June 5, 1945, rescued 75 fellow soldiers, and who, after being wounded, gave up his own place on a stretcher so others could be taken to safety, see America's Heroes 88–90 (J. Willbanks ed. 2011); to William Carney who sustained multiple gunshot wounds to the head, chest, legs, and arm, and yet carried the flag to ensure it did not touch the ground during the Union army's assault on Fort Wagner in July 1863, *id.,* at 44–45. The rare acts of courage the Medal celebrates led President Truman to say he would "rather have that medal round my neck than . . . be president of the United States." Truman Gives No. 1 Army Medal to 15 Heroes, Washington *Post,* Oct. 13, 1945, p. 5. The Government's interest in protecting the integrity of the Medal of Honor is beyond question.

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. *En-tertainment Merchants Assn.*, 564 U. S., at ___ (slip op., at 12). There must be a direct causal link between the restriction imposed and the injury to be prevented. See *ibid*. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. Although appearing to concede that "an isolated misrepresentation by itself would not tarnish the meaning of military honors," the Government asserts it is "common sense that false representations have the tendency to dilute the value and meaning of military awards," Brief for United States 49, 54. It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may

offend the true holders of the Medal. From one perspective it in-sults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Yet these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. Cf. *Entertainment Merchants Assn., supra,* at ____–____ (slip op., at 12–13) (analyzing and rejecting the findings of research psychologists demonstrating the causal link between violent video games and harmful effects on children). As one of the Government's *amici* notes "there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal winners'] honor." Brief for Veterans of Foreign Wars of the United States et al. as *Amici Curiae* 1. This general proposition is sound, even if true holders of the Medal might experience anger and frustration.

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements "Alvarez was perceived as a phony," 617 F. 3d, at 1211. Once the lie was made public, he was ridiculed online, see Brief for Respondent 3, his actions were reported in the press, see Ortega, Alvarez Again Denies Claim, Ontario, CA, Inland Valley Daily Bulletin (Sept. 27, 2007), and a fellow board member called for his resignation, see, *e.g.,* Bigham, Water District Rep Requests Alvarez Resign in Wake of False Medal Claim, San Bernardino Cty., CA, The Sun (May 21, 2008). There is good reason to believe that a similar fate would befall other false claimants. See Brief for Reporters Committee for Freedom of the Press et al. as *Amici Curiae* 30–33 (listing numerous examples of public exposure of false claimants). Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right. See, *e.g.,* Well Done, Washington *Post,* Feb. 5, 1943, p. 8 (reporting on Pres-ident Roosevelt's awarding the Congressional Medal of Honor to Maj. Gen. Alexander Vandegrift); Devroy, Medal of Honor Given to 2 Killed in Somalia, Washington *Post,* May 24, 1994, p. A6 (reporting on President Clinton's awarding the Congressional Medal of Honor to two special forces soldiers killed during operations in Somalia).

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. See *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be ap-plied is more speech, not enforced silence"). The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Expressing its concern that counterspeech is insuf- ficient, the Government responds that because "some military records have been lost . . . some claims [are] un-verifiable," Brief for United States 50. This proves little, however; for without verifiable records, successful criminal prosecution under the Act would be more difficult in any event. So, in cases where public refutation will not serve the Government's interest, the Act will not either. In addition, the Government claims that "many [false claims] will remain unchallenged." *Id.,* at 55. The Government provides no support for the contention. And in any event, in order to show that public refutation is not an adequate alternative, the Government must demonstrate that unchallenged claims undermine the public's perception of the military and the integrity of its awards system. This showing has not been made.

It is a fair assumption that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal. The same can be said for the Government's interest. The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradi-tion. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." *Ashcroft*, 542 U. S., at 666. There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this, see Brief for Respondent 25, and at least one data- base of past winners is online and fully searchable, see Congressional Medal of

Honor Society, Full Archive, http://www.cmohs.org/recipient-archive.php. The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government "concluded that such a database would be impracticable and insuf-ficiently comprehensive." Brief for United States 55. Without more explanation, it is difficult to assess the Gov-ernment's claim, especially when at least one database of Congressional Medal of Honor winners already exists. The Government may have responses to some of these criticisms, but there has been no clear showing of the necessity of the statute, the necessity required by exacting scrutiny.

* * *

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered

United States v. Stevens

UNITED STATES, PETITIONER *v.* ROBERT J. STEVENS

on writ of certiorari to the united states court of appeals for the third circuit

[April 20, 2010]

Chief Justice Roberts delivered the opinion of the Court.

Congress enacted 18 U. S. C. §48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

I

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. §48(a).[Footnote 1] A depiction of "animal cruelty" is defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." §48(c)(1). In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." §48(b).

The legislative background of §48 focused primarily on the interstate market for "crush videos." According to the House Committee Report on the bill, such videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. H. R. Rep. No. 106–397, p. 2 (1999) (hereinafter H. R. Rep.). Crush videos often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes," sometimes while "talking to the animals in a kind of dominatrix patter" over "[t]he cries and squeals of the animals, obviously in great pain." *Ibid.* Apparently these depictions "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *Id.,* at 2–3. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. See Brief for United States 25, n. 7 (listing statutes). But crush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct. See H. R. Rep., at 3; accord, Brief for State of Florida et al. as *Amici Curiae* 11.

This case, however, involves an application of §48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, see Brief for United States 26, n. 8 (listing statutes), and has been restricted by federal law since 1976. Animal Welfare Act Amendments of 1976, §17, 90 Stat. 421, 7 U. S. C. §2156. Respondent Robert J. Stevens ran a business, "Dogs of Velvet and Steel," and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960's and 1970's.[Footnote 2] A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a "gruesome" scene of a pit bull attacking a domestic farm pig. 533 F. 3d 218, 221 (CA3 2008) (en banc). On the basis of these videos, Stevens was indicted on three counts of violating §48.

Stevens moved to dismiss the indictment, arguing that §48 is facially invalid under the First Amendment. The District Court denied the motion. It held that the depictions subject to §48, like obscenity or child pornography, are categorically unprotected by the First Amendment. 2:04–cr–00051–ANB (WD Pa., Nov. 10, 2004), App. to Pet. for Cert. 65a–71a. It went on to hold that §48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications. *Id.,* at 71a–75a. The jury

convicted Stevens on all counts, and the District Court sentenced him to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release. App. 37.

The en banc Third Circuit, over a three-judge dissent, declared §48 facially unconstitutional and vacated Stevens's conviction. 533 F. 3d 218. The Court of Appeals first held that §48 regulates speech that is protected by the First Amendment. The Court declined to recognize a new category of unprotected speech for depictions of animal cruelty, *id.,* at 224, and n. 6, and rejected the Government's analogy between animal cruelty depictions and child pornography, *id.,* at 224–232.

The Court of Appeals then held that §48 could not survive strict scrutiny as a content-based regulation of protected speech. *Id.,* at 232. It found that the statute lacked a compelling government interest and was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. *Id.,* at 232–235. It therefore held §48 facially invalid.

In an extended footnote, the Third Circuit noted that §48 "might also be unconstitutionally overbroad," because it "potentially covers a great deal of constitutionally protected speech" and "sweeps [too] widely" to be limited only by prosecutorial discretion. *Id.,* at 235, n. 16. But the Court of Appeals declined to rest its analysis on this ground.

We granted certiorari. 556 U. S. ___ (2009).

II

The Government's primary submission is that §48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). Section 48 explicitly regulates expression based on content: The statute restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, §48 is " 'presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817 (2000) (quoting *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); citation omitted).

"From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *Id.,* at 382–383. These "historic and traditional categories long familiar to the bar," *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (Kennedy, J., concurring in judgment)—including obscenity, *Roth* v. *United States*, 354 U. S. 476, 483 (1957), defamation, *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952), fraud, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976), incitement, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449 (1969) (*per curiam*), and speech integral to criminal conduct, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949)—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942).

The Government argues that "depictions of animal cruelty" should be added to the list. It contends that depictions of "illegal acts of animal cruelty" that are "made, sold, or possessed for commercial gain" necessarily "lack expressive value," and may accordingly "be regulated as *unprotected* speech." Brief for United States 10 (emphasis added). The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a " 'First Amendment Free Zone.' " *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574 (1987).

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. Reply Brief 12, n. 8; see, *e.g.,* The Body of Liberties §92 (Mass. Bay Colony 1641), reprinted in American Historical Documents 1000–1904, 43 Harvard Classics 66, 79 (C. Eliot ed. 1910) ("No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use"). But we are unaware of any similar tradition excluding *depictions* of animal cruelty from "the freedom of speech" codified in the First Amendment, and the Government points us to none.

The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," Reply Brief 12, n. 8, and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's " 'legislative judgment that … depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,' " Brief for United States 23 (quoting 533 F. 3d, at 243 (Cowen, J., dissenting)), and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Brief for United States 8; see also *id.,* at 12.

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being " 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *R. A. V.*, *supra*, at 383 (quoting *Chaplinsky*, *supra*, at 572). In *New York* v. *Ferber*, 458 U. S. 747 (1982), we noted that within these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because "the balance of competing interests is clearly struck," *id.,* at 763–764. The Government derives its proposed test from these descriptions in our precedents. See Brief for United States 12–13.

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, 458 U. S., at 763. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. *Id.,* at 756–757, 762. But our decision did not rest on this "balance of competing interests" alone. *Id.*, at 764. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.,* at 759, 761. As we noted, " '[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' " *Id.,* at 761–762 (quoting *Giboney*, *supra*, at 498). *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding. See *Osborne* v. *Ohio*, 495 U. S. 103, 110 (1990) (describing *Ferber* as finding "persuasive" the argument that the advertising and sale of child pornography was "an integral part" of its unlawful production (internal quotation marks omitted)); *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 249–250 (2002) (noting that distribution and sale "were intrinsically related to the sexual abuse of children," giving the speech at issue "a proximate link to the crime from which it came" (internal quotation marks omitted)).

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

III

Because we decline to carve out from the First Amendment any novel exception for §48, we review Stevens's First Amendment challenge under our existing doctrine.

A

Stevens challenged §48 on its face, arguing that any conviction secured under the statute would be unconstitutional. The court below decided the case on that basis, 533 F. 3d, at 231, n. 13, and we granted the Solicitor General's petition for certiorari to determine "whether 18 U. S. C. 48 is facially invalid under the Free Speech Clause of the First Amendment," Pet. for Cert. i.

To succeed in a typical facial attack, Stevens would have to establish "that no set of circumstances exists under which [§48] would be valid," *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep," *Washington* v. *Glucksberg*, 521 U. S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted). Which standard applies in a typical case is a matter of dispute that we need not and do not address, and neither *Salerno* nor *Glucksberg* is a speech case. Here the Government asserts that Stevens cannot prevail because §48 is plainly legitimate as applied to crush videos and animal fighting depictions. Deciding this case through a traditional facial analysis would require us to resolve whether these applications of §48 are in fact consistent with the Constitution.

In the First Amendment context, however, this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008) (internal quotation

marks omitted). Stevens argues that §48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. Brief for Respondent 22–25. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of §48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. Brief for United States 8. As the parties have presented the issue, therefore, the constitutionality of §48 hinges on how broadly it is construed. It is to that question that we now turn.[Footnote 3]

B

As we explained two Terms ago, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 553 U. S. 285, 293 (2008). Because §48 is a federal statute, there is no need to defer to a state court's authority to interpret its own law.

We read §48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any … depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." §48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

The Government contends that the terms in the definition should be read to require the additional element of "accompanying acts of cruelty." Reply Brief 6; see also Tr. of Oral Arg. 17–19. (The dissent hinges on the same assumption. See *post,* at 6, 9.) The Government bases this argument on the definiendum, "depiction of animal cruelty," cf. *Leocal* v. *Ashcroft*, 543 U. S. 1, 11 (2004), and on " 'the commonsense canon of *noscitur a sociis*.' " Reply Brief 7 (quoting *Williams*, 553 U. S., at 294). As that canon recognizes, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." *Ibid*. Likewise, an unclear definitional phrase may take meaning from the term to be defined, see *Leocal*, *supra,* at 11 (interpreting a " 'substantial risk' " of the "us[e]" of "physical force" as part of the definition of " 'crime of violence' ").

But the phrase "wounded … or killed" at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to " 'kill' is 'to deprive of life.' " Brief for United States 14 (quoting Webster's Third New International Dictionary 1242 (1993)). We agree that "wounded" and "killed" should be read according to their ordinary meaning. Cf. *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U. S. 246, 252 (2004). Nothing about that meaning requires cruelty.

While not requiring cruelty, §48 does require that the depicted conduct be "illegal." But this requirement does not limit §48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." §48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of §48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.[Footnote 4]

What is more, the application of §48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the … wounding … or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of §48, because although there may be "a broad societal consensus" against cruelty to animals, Brief for United States 2, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. D. C. Munic. Regs., tit. 19, §1560 (2009). Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, see Mediaweek, Sept. 29, 2008, p. 28, and hunting television programs, videos, and Web sites are equally popular, see Brief for Professional Outdoor Media Association et al. as *Amici Curiae* 9–10. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Compare *ibid.* and Brief for National Rifle Association of America, Inc., as *Amicus Curiae* 12 (hereinafter NRA Brief) (estimating that hunting magazines alone account for $135 million in annual retail sales) with Brief for United States 43–44, 46 (suggesting $1 million in crush video sales per year, and noting that Stevens earned $57,000 from his videos). Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, §48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions. Some States permit hunting with crossbows, Ga. Code Ann. §27–3–4(1) (2007); Va. Code Ann. §29.1–519(A)(6) (Lexis 2008 Cum. Supp.), while others forbid it,

Ore. Admin. Reg. 635–065–0725 (2009), or restrict it only to the disabled, N. Y. Envir. Conserv. Law Ann. §11–0901(16) (West 2005). Missouri allows the "canned" hunting of ungulates held in captivity, Mo. Code Regs. Ann., tit. 3, 10–9.560(1), but Montana restricts such hunting to certain bird species, Mont. Admin. Rule 12.6.1202(1) (2007). The sharp-tailed grouse may be hunted in Idaho, but not in Washington. Compare Idaho Admin. Code §13.01.09.606 (2009) with Wash. Admin. Code §232–28–342 (2009).

The disagreements among the States—and the "commonwealth[s], territor[ies], or possession[s] of the United States," 18 U. S. C. §48(c)(2)—extend well beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. Compare, *e.g.,* Fla. Stat. §828.23(5) (2007) (excluding poultry from humane slaughter requirements) with Cal. Food & Agric. Code Ann. §19501(b) (West 2001) (including some poultry). California has recently banned cutting or "docking" the tails of dairy cattle, which other States permit. 2009 Cal. Legis. Serv. Ch. 344 (S. B. 135) (West). Even cockfighting, long considered immoral in much of America, see *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 575 (1991) (Scalia, J., concurring in judgment), is legal in Puerto Rico, see 15 Laws P. R. Ann. §301 (Supp. 2008); *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 342 (1986), and was legal in Louisiana until 2008, see La. Stat. Ann. §14:102.23 (West) (effective Aug. 15, 2008). An otherwise-lawful image of any of these practices, if sold or possessed for commercial gain within a State that happens to forbid the practice, falls within the prohibition of §48(a).

C

The only thing standing between defendants who sell such depictions and five years in federal prison—other than the mercy of a prosecutor—is the statute's exceptions clause. Subsection (b) exempts from prohibition "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have "journalistic" value; pictures of bullfights in Spain have "historical" value; and instructional hunting videos have "educational" value. Reply Brief 6. Thus, the Government argues, §48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting, see Brief for United States 47–48), and perhaps other depictions of "extreme acts of animal cruelty." *Id.,* at 41.

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with "redeeming societal value," *id.*, at 9, 16, 23, " 'at least some minimal value,' " Reply Brief 6 (quoting H. R. Rep., at 4), or anything more than "scant social value," Reply Brief 11, is excluded under §48(b). But the text says "serious" value, and "serious" should be taken seriously. We decline the Government's invitation—advanced for the first time in this Court—to regard as "serious" anything that is not "scant." (Or, as the dissent puts it, " 'trifling.' " *Post*, at 6.) As the Government recognized below, "serious" ordinarily means a good bit more. The District Court's jury instructions required value that is "significant and of great import," App. 132, and the Government defended these instructions as properly relying on "a commonly accepted meaning of the word 'serious,' " Brief for United States in No. 05–2497 (CA3), p. 50.

Quite apart from the requirement of "serious" value in §48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen's Foundation, many popular videos "have primarily entertainment value" and are designed to "entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community." Brief for Safari Club International et al. as *Amici Curiae* 12. The National Rifle Association agrees that "much of the content of hunting media … is merely *recreational* in nature." NRA Brief 28. The Government offers no principled explanation why these depictions of hunting or depictions of Spanish bullfights would be *inherently* valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. *Post,* at 6–8. But §48(b) addresses the value of the *depictions*, not of the underlying activity. There is simply no adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.

The Government explains that the language of §48(b) was largely drawn from our opinion in *Miller* v. *California*, 413 U. S. 15 (1973), which excepted from its definition of obscenity any material with "serious literary, artistic, political, or scientific value," *id.,* at 24. See Reply Brief 8, 9, and n. 5. According to the Government, this incorporation of the *Miller* standard into §48 is therefore surely enough to answer any First Amendment objection. Reply Brief 8–9.

In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. 413 U. S., at 24–25. Limiting *Miller*'s exception to "serious" value ensured that " '[a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication.' " *Id.,* at 25, n. 7 (quoting *Kois* v. *Wisconsin*, 408 U. S. 229, 231 (1972) (*per curiam*)). We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even " '[w]holly neutral futilities … come

under the protection of free speech as fully as do Keats' poems or Donne's sermons.' " *Cohen* v. *California*, 403 U. S. 15, 25 (1971) (quoting *Winters* v. *New York*, 333 U. S. 507, 528 (1948) (Frankfurter, J., dissenting); alteration in original).

Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of §48(b), but nonetheless fall within the broad reach of §48(c).

D

Not to worry, the Government says: The Executive Branch construes §48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6–7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id.,* at 6–7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. Cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 473 (2001).

This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret §48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." See Statement by President William J. Clinton upon Signing H. R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999). No one suggests that the videos in this case fit that description. The Government's assurance that it will apply §48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. ___, ___ (2009) (slip op., at 12). "[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 884 (1997). We " 'will not rewrite a … law to conform it to constitutional requirements,' " *id.,* at 884–885 (quoting *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988); omission in original), for doing so would constitute a "serious invasion of the legislative domain," *United States* v. *Treasury Employees*, 513 U. S. 454, 479, n. 26 (1995), and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place," *Osborne,* 495 U. S., at 121. To read §48 as the Government desires requires rewriting, not just reinterpretation.

* * *

Our construction of §48 decides the constitutional question; the Government makes no effort to defend the constitutionality of §48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of §48.

Nor does the Government seriously contest that the presumptively impermissible applications of §48 (properly construed) far outnumber any permissible ones. However "growing" and "lucrative" the markets for crush videos and dogfighting depictions might be, see Brief for United States 43, 46 (internal quotation marks omitted), they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of §48. See *supra*, at 13–14. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that §48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

Burson v. Freeman, 504 U.S. 191, 199 (1992)

OCTOBER TERM, 1991

Syllabus

BURSON, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE *v.* FREEMAN

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 90-1056. Argued October 8, 1991-Decided May 26,1992

Respondent Freeman, while the treasurer for a political campaign in Tennessee, filed an action in the Chancery Court, alleging, among other things, that §2-7-111(b) of the Tennessee Code-which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place-limited her ability to communicate with voters in violation of, *inter alia,* the First and Fourteenth Amendments. The court dismissed her suit, but the State

Supreme Court reversed, ruling that the State had a compelling interest in banning such activities within the polling place itself but not on the premises around the polling place. Thus, it concluded, the 100-foot limit was not narrowly tailored to protect, and was not the least restrictive means to serve, the State's interests.
Held: The judgment is reversed, and the case is remanded. 802 S. W. 2d 210, reversed and remanded.
JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded that §2-7-111(b) does not violate the First and Fourteenth Amendments. Pp. 196-211.
(a) The section is a facially content-based restriction on political speech in a public forum and, thus, must be subjected to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. This case presents a particularly difficult reconciliation, since it involves a conflict between the exercise of the right to engage in political discourse and the fundamental right to vote, which is at the heart of this country's democracy. Pp. 196-198.
(b) Section 2-7-111(b) advances Tennessee's compelling interests in preventing voter intimidation and election fraud. There is a substantial and long-lived consensus among the 50 States that *some* restricted zone around polling places is necessary to serve the interest in protecting the right to vote freely and effectively. The real question then is *how large* a restricted zone is permissible or sufficiently tailored. A State is not required to prove empirically that an election regulation is perfectly tailored to secure such a compelling interest. Rather, legislatures should be permitted to respond to potential deficiencies in the electoral process with foresight, provided that the response is reasonable and

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does not significantly impinge on constitutionally protected rights. *Munro* v. *Socialist Workers Party,* 479 U. S. 189,195-196. Section 2-7111(b)'s minor geographical limitation does not constitute such a significant impingement. While it is possible that at some measurable distance from the polls governmental regulation of vote solicitation could effectively become an impermissible burden on the First Amendment, Tennessee, in establishing its 100-foot boundary, is on the constitutional side of the line. Pp. 198-211.
JUSTICE SCALIA concluded that §2-7-111 is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum. The environs of a polling place, including adjacent streets and sidewalks, have traditionally not been devoted to assembly and debate and therefore do not constitute a traditional public forum. Cf. *Greer* v. *Spock,* 424 U. S. 828. Thus, speech restrictions such as those in §2-7-111 need not be subjected to "exacting scrutiny" analysis. Pp. 214-216.
BLACKMUN, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 211. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. 214. STEVENS, J., filed a dissenting opinion, in which O'CONNOR and SOUTER, JJ., joined, *post,* p. 217. THOMAS, J., took no part in the consideration or decision of the case.
Charles W Burson, Attorney General of Tennessee, petitioner, argued the cause, *pro se.* With him on the briefs were *John Knox Walkup,* Solicitor General, and *Andy D. Bennett* and *Michael W Catalano,* Deputy Attorneys General.
John E. Herbison argued the cause for respondent. With him on the brief was *Alan B. Morrison.* *
*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Kenneth* O. *Eikenberry,* Attorney General of Washington, and *James M. Johnson,* Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Gail Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Warren Price III* of Hawaii, *Roland W Burris* of Illinois, *Linley E. Pearson* of Indiana, *Bonnie J. Campbell* of Iowa, *Frederic J. Cowan* of Kentucky, *Michael E. Carpenter* of Maine, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of

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JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JusTICE WHITE, and JUSTICE KENNEDY join.
Twenty-six years ago, this Court, in a majority opinion written by Justice Hugo L. Black, struck down a state law that made it a crime for a newspaper editor to publish an editorial on election day urging readers to vote in a particular way. *Mills* v. *Alabama,* 384 U. S. 214 (1966). While the Court did not hesitate to denounce the statute as an "obvious and flagrant abridgment" of First Amendment rights, *id.,* at 219, it was quick to point out that its holding "in no way involve[d] the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there," *id.,* at 218.
Today, we confront the issue carefully left open in *Mills.* The question presented is whether a provision of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place, violates the First and Fourteenth Amendments.
I
The State of Tennessee has carved out an election-day "campaign-free zone" through § 2-7-111(b) of its

election code. That section reads in pertinent part: "Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or posi-

Nevada, *Nicholas J. Spaeth* of North Dakota, *Mark Barnett* of South Dakota, *Paul Van Dam* of Utah, *Mary Sue Terry* of Virginia, and *Mario J. Palumbo* of West Virginia; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *Frederick* C. *Schafrick.*

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tion on a question are prohibited." Tenn. Code Ann. §2-7-111(b) (Supp. 1991).1

Violation of §2-7-111(b) is a Class C misdemeanor punishable by a term of imprisonment not greater than 30 days or a fine not to exceed $50, or both. Tenn. Code Ann. §§2-19119 and 40-35-111(e)(3) (1990).

II

Respondent Mary Rebecca Freeman has been a candidate for office in Tennessee, has managed local campaigns, and has worked actively in statewide elections. In 1987, she was the treasurer for the campaign of a city-council candidate in Metropolitan Nashville-Davidson County. Asserting that §§ 2-7-111(b) and 2-19-119 limited her ability to communicate with voters, respondent brought a facial challenge to these statutes in Davidson County Chancery Court. She sought a declaratory judgment that the provisions were unconstitutional under both the United States and the Tennessee Constitutions. She also sought a permanent injunction against their enforcement. The Chancellor ruled that the statutes did not violate the United States or Tennessee Constitutions and dismissed respondent's suit. App.50. He determined that § 2-7-111(b) was a content-neutral and reasonable time, place, and manner restriction; that the 100-foot boundary served a compelling state interest in protecting voters from interference, ha-

1 Section 2-7-111(a) also provides for boundaries of 300 feet for counties within specified population ranges. Petitioner's predecessor Attorney General (an original defendant) opined that this distinction was unconstitutional under Art. XI, § 8, of the Tennessee Constitution. Tenn. Op. Atty. Gen. No. 87-185 (1987). While this issue was raised in the pleadings, the District Court held that respondent did not have standing to challenge the 300-foot boundaries because she was not a resident of any of those counties. The Tennessee Supreme Court did not reach the issue. Accordingly, the constitutionality of the 100-foot boundary is the only restriction before us.

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rassment, and intimidation during the voting process; and that there was an alternative channel for respondent to exercise her free speech rights outside the 100-foot boundary. App. to Pet. for Cert. 1a.

The Tennessee Supreme Court, by a 4-to-1 vote, reversed. 802 S. W. 2d 210 (1990). The court first held that § 2-7111(b) was content based "because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers." *Id.,* at 213. The court then held that such a content-based statute could not be upheld unless (i) the burden placed on free speech rights is justified by a compelling state interest and (ii) the means chosen bear a substantial relation to that interest and are the least intrusive to achieve the State's goals. While the Tennessee Supreme Court found that the State unquestionably had shown a compelling interest in banning solicitation of voters and distribution of campaign materials within the polling place itself, it concluded that the State had not shown a compelling interest in regulating the premises around the polling place. Accordingly, the court held that the 100-foot limit was not narrowly tailored to protect the demonstrated interest. The court also held that the statute was not the least restrictive means to serve the State's interests. The court found less restrictive the current Tennessee statutes prohibiting interference with an election or the use of violence or intimidation to prevent voting. See Tenn. Code Ann. §§2-19-101 and 2-19-115 (Supp. 1991). Finally, the court noted that if the State were able to show a compelling interest in preventing congestion and disruption at the entrances to polling places, a shorter radius "might perhaps pass constitutional muster." 802 S. W. 2d, at 214.

Because of the importance of the issue, we granted certiorari. 499 U. S. 958 (1991). We now reverse the Tennessee Supreme Court's judgment that the statute violates the First Amendment of the United States Constitution.

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III

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech .... " This Court in *Thornhill* v. *Alabama,* 310 U. S. 88, 95 (1940), said:

"The freedom of speech ... which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."

The Tennessee statute implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech. The

speech restricted by § 2-7-111(b) obviously is political speech. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U. S., at 218. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Gar*rison v. *Louisiana,* 379 U. S. 64, 74-75 (1964). Accordingly, this Court has recognized that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco Cty. Democratic Central Comm.,* 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 272 (1971)).

The second important feature of §2-7-111(b) is that it bars speech in quintessential public forums. These forums include those places "which by long tradition or by government fiat have been devoted to assembly and debate," such as parks, streets, and sidewalks. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.,* 460 U. S. 37, 45 (1983).2 "Such use

2 Testimony at trial established that at some Tennessee polling locations the campaign-free zone included sidewalks and streets adjacent to the polling places. See App. 23-24, 42. See also 802 S. W. 2d 210, 213 (1990).

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of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague* v. *CIO,* 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used. Accordingly, this Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. *United States* v. *Grace,* 461 U. S. 171, 177 (1983). See also *Ward* v. *Rock Against Racism,* 491 U. S. 781, 791 (1989).

The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic. See, *e. g., Consolidated Edison Co. of* N. *Y.* v. *Public Service Comm'n of* N. *Y.,* 447 U. S. 530, 537 (1980). Accord, *Simon* & *Schuster, Inc.* v. *Members of* N. *Y. State Crime Victims Bd.,* 502 U. S. 105, 116 (1991) (statute restricting speech about crime is content based).3

3 Content-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech. See *Po*lice Dept. of Chicago v. *Mosley,* 408 U. S. 92 (1972) (exemption of labor picketing from ban on picketing near schools violates Fourteenth Amendment right to equal protection). See also *City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U. S. 789, 816 (1984) (suggesting that exception for political campaign signs from general ordinance prohibiting posting of signs might entail constitutionally forbidden content discrimina-

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As a facially content-based restriction on political speech in a public forum, § 2-7-111(b) must be subjected to exacting scrutiny: The State must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.,* 460 U. S., at 45. Accord, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc., 482* U. S. 569, 573 (1987); *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.,* 473 U. S. 788, 800 (1985); *United States* v. *Grace,* 461 U. S., at 177.

Despite the ritualistic ease with which we state this nowfamiliar standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings. See, *e. g., Sheppard* v. *Maxwell,* 384 U. S. 333, 361-363 (1966) (outlining restrictions on speech of trial participants that courts may impose to protect an accused's right to a fair trial). This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote-a right at the heart of our democracy.

IV

Tennessee asserts that its campaign-free zone serves two compelling interests. First, the State argues that its regulation serves its compelling interest in protecting the right of its citizens to vote freely for the candidates of their choice.4

tion). Under either a free speech or equal protection theory, a contentbased regulation of political speech in a public forum is valid only if it can survive strict scrutiny. *Carey* v. *Brown,* 447 U. S. 455, 461-462 (1980).

4 See *Piper* v. *Swan,* 319 F. Supp. 908, 911 (ED Tenn. 1970) (purpose of regulation is to prevent intimidation of voters entering the polling place by political workers), writ of mandamus denied *sub nom. Piper* v. *United States District Court,* 401 U. S. 971 (1971).

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Second, Tennessee argues that its restriction protects the right to vote in an election conducted with integrity and reliability. 5
The interests advanced by Tennessee obviously are compelling ones. This Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds* v. *Sims,* 377 U. S. 533, 555 (1964). Indeed,
"[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."
Wesberry v. *Sanders,* 376 U. S. 1, 17 (1964).
Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence. See *Eu,* 489 U. S., at 228-229.
The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." *Id.,* at 231. The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson* v. *Celebrezze,* 460 U. S. 780, 788, n. 9 (1983) (collecting cases). In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.
To survive strict scrutiny, however, a State must do more than assert a compelling state interest-it must demonstrate that its law is necessary to serve the asserted interest.
5 See Tennessee Law Revision Commission, Special Report of the Law Revision Commission to Eighty-Seventh General Assembly of Tennessee Concerning a Bill to Adopt an Elections Act Containing a Unified and Coherent Treatment of All Elections 13 (1972) (provision is one of numerous safeguards included to preserve "purity of elections").

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While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.
During the colonial period, many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some. The opportunities that the *viva voce* system gave for bribery and intimidation gradually led to its repeal. See generally E. Evans, A History of the Australian Ballot System in the United States 1-6 (1917) (Evans); J. Harris, Election Administration in the United States 15-16 (1934) (Harris); J. Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908, pp. 8-11 (1968) (Rusk).
Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system. Initially, this paper ballot was a vast improvement. Individual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting. But the effort of making out such a ballot became increasingly more complex and cumbersome. See generally S. Albright, The American Ballot 14-19 (1942) (Albright); Evans 5; Rusk 9-14.
Wishing to gain influence, political parties began to produce their own ballots for voters. These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance. State attempts to standardize the ballots were easily thwarted-the vote buyer could simply place a ballot in the hands of the bribed voter and watch until he placed it in the polling box. Thus, the evils associated with the earlier *viva voce* system reinfected the election process; the failure of

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the law to secure secrecy opened the door to bribery 6 and intimidation.7 See generally Albright 19-20; Evans 7, 11; Harris 17, 151-152; V. Key, Politics, Parties, and Pressure Groups 649 (1952); J. Reynolds, Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920, p. 36 (1988); Rusk 14-23.
6 One writer described the conditions as follows:
"This sounds like exaggeration, but it is truth; and these are facts so notorious that no one acquainted with the conduct of recent elections now attempts a denial-that the raising of colossal sums for the purpose of bribery has been rewarded by promotion to the highest offices in the Government; that systematic organization for the purchase of votes, individually and in blocks, at the polls, has become a recognized factor in the machinery of the parties; that the number of voters who demand money compensation for their ballots has grown greater with each recurring election." J. Gordon, The Protection of Suffrage 13 (1891) (quoted in Evans 11).
Evans reports that the bribery of voters in Indiana in 1880 and 1888 was sufficient to determine the results of the election and that "[m]any electors, aware that the corrupt element was large enough to be able to turn the election, held aloof altogether." *Ibid.*
7 According to a report of a committee of the 46th Congress, men were frequently marched or carried to the polls in their employers' carriages. They were then furnished with ballots and compelled to hold their hands up with their ballots in them so they could easily be watched until the ballots were dropped into the box. S. Rep. No. 497, 46th Cong., 2d Sess., 9-10 (1880).

Evans recounted that intimidation, particularly by employers, was "extensively practiced":
"Many labor men were afraid to vote and remained away from the polls.
Others who voted against their employers' wishes frequently lost their jobs. If the employee lived in a factory town, he probably lived in a tenement owned by the company, and possibly his wife and children worked in the mill. If he voted against the wishes of the mill-owners, he and his family were thrown out of the mill, out of the tenement, and out of the means of earning a livelihood. Frequently the owner and the manager of the mill stood at the entrance of the polling-place and closely observed the employees while they voted. In this condition, it cannot be said that the workingmen exercised any real choice." Evans 12-13 (footnote omitted).

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Approaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers "who were only too anxious to supply him with their party tickets." Evans 9. Often the competition became heated when several such peddlers found an uncommitted or wavering voter. See L. Fredman, The Australian Ballot: The Story of an American Reform 24 (1968) (Fredman); Rusk 17. Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. See Fredman 24,26-27; 143 North American Review 628-629 (1886) (cited in Evans 16). In short, these early elections "were not a very pleasant spectacle for those who believed in democratic government." *Id.,* at 10.
The problems with voter intimidation and election fraud that the United States was experiencing were not unique. Several other countries were attempting to work out satisfactory solutions to these same problems. Some Australian provinces adopted a series of reforms intended to secure the secrecy of an elector's vote. The most famous feature of the Australian system was its provision for an official ballot, encompassing all candidates of all parties on the same ticket. But this was not the only measure adopted to preserve the secrecy of the ballot. The Australian system also provided for the erection of polling booths (containing several voting compartments) open only to election officials, two "scrutinees" for each candidate, and electors about to vote. See J. Wigmore, The Australian Ballot System as Embodied in the Legislation of Various Countries 69, 71, 78, 79 (1889) (Wigmore) (excerpting provisions adopted by South Australia and Queensland). See generally Albright 23; Evans 17; Rusk 23-24.
The Australian system was enacted in England in 1872 after a study by the committee of election practices identified Australia's ballot as the best possible remedy for the existing situation. See Wigmore 14-16. Belgium followed Eng-

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land's example in 1877. Like the Australian provinces, both England and Belgium excluded the general public from the entire polling room. See Wigmore 94, 105. See generally Albright 23-24; Evans 17-18; Rusk 24-25.
One of the earliest indications of the reform movement in this country came in 1882 when the Philadelphia Civil Service Reform Association urged its adoption in a pamphlet entitled "English Elections." Many articles were written praising its usefulness in preventing bribery, intimidation, disorder, and inefficiency at the polls. Commentators argued that it would diminish the growing evil of bribery by removing the knowledge of whether it had been successful. Another argument strongly urged in favor of the reform was that it would protect the weak and dependent against intimidation and coercion by employers and creditors. The inability to determine the effectiveness of bribery and intimidation accordingly would create order and decency at the polls. See generally Albright 24-26; Evans 21-23; Rusk 25-29, 42-43.
After several failed attempts to adopt the Australian system in Michigan and Wisconsin, the Louisville, Kentucky, municipal government, the Commonwealth of Massachusetts, and the State of New York adopted the Australian system in 1888. The Louisville law prohibited all but voters, candidates or their agents, and electors from coming within 50 feet of the voting room inclosure. The Louisville law also provided that candidates' agents within the restricted area "were not allowed to persuade, influence, or intimidate any one in the choice of his candidate, or to attempt doing so .... " Wigmore 120. The Massachusetts and New York laws differed somewhat from the previous Acts in that they excluded the general public only from the area encompassed within a guardrail constructed six feet from the voting compartments. See *id.,* at 47, 128. This modification was considered an improvement because it provided additional monitoring by members of the general public and independent

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candidates, who in most States were not allowed to be represented by separate inspectors. Otherwise, "in order to perpetrate almost every election fraud it would only be necessary to buy up the election officers of the other party." *Id.,* at 52. Finally, New York also prohibited any person from "electioneering on election day within any polling-place, or within one hundred feet of any polling place." *Id.,* at 131. See generally Evans 18-21; Rusk 26.
The success achieved through these reforms was immediately noticed and widely praised. See generally Evans 21-24; Rusk 26-31, 42-43. One commentator remarked of the New York law of 1888:

"We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end. "In earlier times our polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death.' This also has come to an end, and until nightfall, when the jubilation begins, our election days are now as peaceful as our Sabbaths.
"The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls." W. Ivins, The Electoral System of the State of New York, Proceedings of the 29th Annual Meeting of the New York State Bar Association 316 (1906).8
The triumphs of 1888 set off a rapid and widespread adoption of the Australian system in the United States. By 1896,

8 Similar results were achieved with the Massachusetts law:
"Quiet, order, and cleanliness reign in and about the polling-places. I have visited precincts where, under the old system, coats were torn off the backs of voters, where ballots of one kind have been snatched from voters' hands and others put in their places, with threats against using any but the substituted ballots; and under the new system all was orderly and peaceable." 2 Annals of the American Academy of Political and Social Science 738 (1892).

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almost 90 percent of the States had adopted the Australian system. This accounted for 92 percent of the national electorate. See Rusk 30-31. See also Albright 26-28; Evans *27; post,* at 215, n. 1 (SCALIA, J., concurring in judgment) (citations to statutes passed before 1900).
The roots of Tennessee's regulation can be traced back to two provisions passed during this period of rapid reform. Tennessee passed the first relevant provision in 1890 as part of its switch to an Australian system. In its effort to "secur[e] the purity of elections," Tennessee provided that only voters and certain election officials were permitted within the room where the election was held or within 50 feet of the entrance. The Act did not provide any penalty for violation and applied only in the more highly populated counties and cities. 1890 Tenn. Pub. Acts, ch. 24, §§ 12 and 13.
The second relevant provision was passed in 1901 as an amendment to Tennessee's "Act to preserve the purity of elections, and define and punish offenses against the elective franchise." The original Act, passed in 1897, made it a misdemeanor to commit various election offenses, including the use of bribery, violence, or intimidation in order to induce a person to vote or refrain from voting for any particular person or measure. 1897 Tenn. Pub. Acts, ch. 14. The 1901 amendment made it a misdemeanor for any person, except the officers holding the elections, to approach nearer than 30 feet to any voter or ballot box. This provision applied to all Tennessee elections. 1901 Tenn. Pub. Acts, ch. 142.
These two laws remained relatively unchanged until 1967, when Tennessee added yet another proscription to its secret ballot law. This amendment prohibited the distribution of campaign literature "on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress." 1967 Tenn. Pub. Acts, ch. 85.
In 1972, the State enacted a comprehensive code to regulate the conduct of elections. The code included a section that proscribed the display and the distribution of campaign

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material and the solicitation of votes within 100 feet of the entrance to a polling place. The 1972 "campaign-free zone" is the direct precursor of the restriction challenged in the present litigation.
Today, all 50 States limit access to the areas in or around polling places. See App. to Pet. for Cert. 26a-50a; Note, Defoliating the Grassroots: Election Day Restrictions on Political Speech, 77 Geo. L. J. 2137 (1989) (summarizing statutes as of 1989). The National Labor Relations Board also limits activities at or near polling places in union-representation elections.9
In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.
Respondent and the dissent advance three principal challenges to this conclusion. First, respondent argues that restricted zones are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting. See, *e. g.,* Tenn. Code Ann. §§2-19-101 and 2-19-115 (Supp. 1991). We are not persuaded.
Intimidation and interference laws fall short of serving a State's compelling interests because they "deal

9 See, e. g., Season-All Industries, Inc. v. NLRB, 654 F.2d 932 (CA3 1981); NLRB v. Carroll Contracting and Ready-Mix, Inc., 636 F.2d 111 (CA5 1981); Midwest Stock Exchange, Inc. v. NLRB, 620 F.2d 629 (CA7), cert. denied, 449 U. S. 873 (1980); Michem, Inc., 170 N. L. R. B. 362 (1968); Claussen Baking Co., 134 N. L. R. B. 111 (1961).

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with only the most blatant and specific attempts" to impede elections. Cf. *Buckley* v. *Valeo,* 424 U. S. 1,28 (1976) (existence of bribery statute does not preclude need for limits on contributions to political campaigns). Moreover, because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, see Tenn. Code Ann. § 2-7-103 (1985), many acts of interference would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken.
Second, respondent and the dissent argue that Tennessee's statute is underinclusive because it does not restrict other types of speech, such as charitable and commercial solicitation or exit polling, within the 100-foot zone. We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny. We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive. In fact, as one early commentator pointed out, allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all the monitors. See Wigmore 52. But regardless of the need for such additional monitoring, there is, as summarized above, ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.
Finally, the dissent argues that we confuse history with necessity. Yet the dissent concedes that a secret ballot was necessary to cure electoral abuses. Contrary to the dissent's contention, the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing-it is common sense. The only way to preserve the

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secrecy of the ballot is to limit access to the area around the voter.10 Accordingly, we hold that *some* restricted zone around the voting area is necessary to secure the State's compelling interest.
The real question then is *how large* a restricted zone is permissible or sufficiently tailored. Respondent and the dissent argue that Tennessee's 100-foot boundary is not narrowly drawn to achieve the State's compelling interest in protecting the right to vote. We disagree.
As a preliminary matter, the long, uninterrupted, and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof the dissent wishes to require. The majority of these laws were adopted originally in the 1890's, long before States engaged in extensive legislative hearings on election regulations. The prevalence of these laws, both here and abroad, then encouraged their reenactment without much comment. The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them. Finally, it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud. Voter intimidation and election fraud are successful precisely because they are difficult to detect.
Furthermore, because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State "to the burden of demonstrating empirically the objective effects on political stability that [are] produced" by the voting regulation in question.
10 The logical connection between ballot secrecy and restricted zones distinguishes this case from those cited by the dissent in which the Court struck down longstanding election regulations. In those cases, there was no rational connection between the asserted interest and the regulation. See, *e. g., Harper* v. *Virginia Ed. of Elections,* 383 U. S. 663, 666 (1966) ("Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax").

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Munro v. *Socialist Workers Party,* 479 U. S. 189, 195 *(1986).11* Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout.12 Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud
"would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.,* at 195-196 (emphasis added).
11 This modified "burden of proof" does not apply to all cases in which there is a conflict between First Amendment rights and a State's election process-instead, it applies only when the First Amendment right threatens to interfere with the act of voting itself, i. *e.,* cases involving voter confusion from overcrowded ballots, like *Munro,* or cases such as this one, in which the challenged activity physically interferes with electors attempting to

cast their ballots. Thus, for example, States must come forward with more specific findings to support regulations directed at intangible "influence," such as the ban on election-day editorials struck down in *Mills* v. *Alabama,* 384 U. S. 214 (1966).

12 The dissent argues that our unwillingness to require more specific findings is in tension with *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), another case in which there was conflict between two constitutional rights. Trials do not, however, present the same evidentiary or remedial problems. Because the judge is concerned only with the trial before him, it is much easier to make specific findings. And while the remedy of rerunning a trial is an onerous one, it does not suffer from the imperfections of a rescheduled election. Nonetheless, even in the fair trial context, we reaffirmed that, given the importance of the countervailing right, "'our system of law has always endeavored to prevent even the *probability* of unfairness.'" *Id.,* at 352 (quoting *In re Murchison,* 349 U. S. 133, 136 (1955)) (emphasis added).

employed any" 'litmus-paper test'

13 Respondent also raises two more specific challenges to the tailoring of the Tennessee statute. First, she contends that there may be some polling places so situated that the 100-foot boundary falls in or on the other side of a highway. Second, respondent argues that the inclusion of quintessential public forums in some campaign-free zones could result in the prosecution of an individual for driving by in an automobile with a campaign bumper sticker. At oral argument, petitioner denied that the statute would reach this latter, inadvertent conduct, since this would not constitute "display" of campaign material. Tr. of Oral Arg. 33-35. In any event, these arguments are "as applied" challenges that should be made by an individual prosecuted for such conduct. If successful, these challenges would call for a limiting construction rather than a facial invalidation. In the absence of any factual record to support respondent's contention that the statute has been applied to reach such circumstances, we do not entertain the challenges in this case.

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Opinion of BLACKMUN, J.

We do not think that the minor geographic limitation prescribed by § 2-7-111(b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension." *Id.,* at 197. Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court, 802 S. W. 2d, at 214, is a difference only in degree, not a less restrictive alternative in kind. *Buckley* v. *Valeo,* 424 U. S., at 30. As was pointed out in the dissenting opinion in the Tennessee Supreme Court, it "takes approximately 15 seconds to walk 75 feet." 802 S. W. 2d, at 215. The State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choiceP

At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills* v. *Alabama,* 384 U. S. 214 (1966). See also *Meyer* v. *Grant,* 486 U. S. 414 (1988) (invalidating absolute bar against the use of paid circulators). In reviewing challenges to specific provisions of a State's election laws, however, this Court has not

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that will separate valid from invalid restrictions." *Anderson* v. *Celebrezze,* 460 U. S., at 789 (quoting *Storer* v. *Brown,* 415 U. S. 724, 730 (1974)). Accordingly, it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line.

In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case. Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.

The judgment of the Tennessee Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 231 (1989)

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT
Syllabus

Section 11702 of the California Elections Code (Code) forbids the official governing bodies of political parties to endorse or oppose candidates in primary elections, while § 29430 makes it a misdemeanor for any candidate in a

primary to claim official party endorsement. Other Code sections dictate the organization and composition of parties' governing bodies, limit the term of office for a party's state central committee chair, and require that the chair rotate between residents of northern and southern California. Various party governing bodies, members of such bodies, and other politically active groups and individuals brought suit in the District Court, claiming, *inter alia,* that these Code provisions deprived parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the Court of Appeals affirmed.

Held: The challenged California election laws are invalid, since they burden the First Amendment rights of political parties and their members without serving a compelling state interest. Pp. 489 U. S. 222-233.

(a) The ban on primary endorsements in §§ 11702 and 29430 violates the First and Fourteenth Amendments. By preventing a party's governing body from stating whether a candidate adheres to the party's tenets or whether party officials believe that the candidate is qualified for the position sought, the ban directly hampers the party's ability to spread its message and hamstrings voters seeking to inform themselves about the candidates and issues, and thereby burdens the core right to free political speech of the party and its members. The ban also infringes a party's protected freedom of association rights to identify the people who constitute the association and to select a standard-bearer who best represents the party's ideology and preferences, by preventing the party from promoting candidates at the crucial primary election juncture. Moreover, the ban does not serve a compelling governmental interest. The State has not adequately explained how the ban advances its claimed interest in a stable political system or what makes California so peculiar that it is virtually the only State to determine that such a ban

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is necessary. The explanation that the State's compelling interest in stable government embraces a similar interest in party stability is untenable, since a State may enact laws to prevent disruption of political parties from without, but not from within. The claim that a party that issues primary endorsements risks intraparty friction which may endanger its general election prospects is insufficient, since the goal of protecting the party against itself would not justify a State's substituting its judgment for that of the party. The State's claim that the ban is necessary to protect primary voters from confusion and undue influence must be viewed with skepticism, since the ban restricts the flow of information to the citizenry without any evidence of the existence of fraud or corruption that would justify such a restriction. Pp. 489 U. S. 222-229.

(b) The restrictions on the organization and composition of the official governing bodies of political parties, the limits on the term of office for state central committee chairs, and the requirement that such chairs rotate between residents of northern and southern California cannot be upheld. These laws directly burden the associational rights of a party and its members by limiting the party's discretion in how to organize itself, conduct its affairs, and select its leaders. Moreover, the laws do not serve a compelling state interest. A State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure that elections are orderly, fair, and honest, and California has made no such showing. The State's claim that it has a compelling interest in the democratic management of internal party affairs is without merit, since this is not a case where intervention is necessary to prevent the derogation of party adherents' civil rights, and since the State has no interest in protecting the party's integrity against the party itself. Nor are the restrictions justified by the State's claim that limiting the term of the state central committee chair and requiring that the chair rotate between northern and southern California help to prevent regional friction from reaching a critical mass, since a State cannot substitute its judgment for that of the party as to the desirability of a particular party structure. Pp. 489 U. S. 229-233.

826 F.2d 814, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C.J., who took no part in the consideration or decision of the case. STEVENS, J., filed a concurring opinion, *post,* p. 489 U. S. 233.

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JUSTICE MARSHALL delivered the opinion of the Court.

The California Elections Code forbids the official governing bodies of political parties from endorsing candidates in party primaries. It also dictates the organization and composition of those bodies, limits the term of office of a party chair, and requires that the chair rotate between residents of northern and southern California. The Court of Appeals for the Ninth Circuit held that these provisions violate the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments. 826 F.2d 814 (1987). We noted probable jurisdiction, 485 U.S. 1004 (1988), and now affirm.

I

A

The State of California heavily regulates its political parties. Although the laws vary in extent and detail from party to party, certain requirements apply to all "ballot-qualified" parties. [Footnote 1] The California Elections Code (Code) provides that the "official governing bodies" for such a party are its "state convention," "state central committee," and "county central committees," Cal.Elec.Code Ann. § 11702 (West

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1977), and that these bodies are responsible for conducting the party's campaigns. [Footnote 2] At the same time, the Code provides that the official governing bodies "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." *Ibid.* It is a misdemeanor for any primary candidate, or a person on her behalf, to claim that she is the officially endorsed candidate of the party. § 29430.

Although the official governing bodies of political parties are barred from issuing endorsements, other groups are not. Political clubs affiliated with a party, labor organizations, political action committees, other politically active associations, and newspapers frequently endorse primary candidates. [Footnote 3] With the official party organizations silenced by the ban, it has been possible for a candidate with views antithetical to those of her party nevertheless to win its primary. [Footnote 4]

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In addition to restricting the primary activities of the official governing bodies of political parties, California also regulates their internal affairs. Separate statutory provisions dictate the size and composition of the state central committees; [Footnote 5] set forth rules governing the selection and removal of committee members; [Footnote 6] fix the maximum term of office for the chair of the state central committee; [Footnote 7] require that the chair rotate between residents of northern and southern California; [Footnote 8] specify the time and place of committee meetings; [Footnote 9] and

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limit the dues parties may impose on members. [Footnote 10] Violations of these provisions are criminal offenses punishable by fine and imprisonment.

B

Various county central committees of the Democratic and Republican Parties, the state central committee of the Libertarian Party, members of various state and county central committees, and other groups and individuals active in partisan politics in California brought this action in federal court against state officials responsible for enforcing the Code (State or California). [Footnote 11] They contended that the ban on primary endorsements and the restrictions on internal party governance deprive political parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments of the United States Constitution. [Footnote 12] The first count of the complaint challenged the ban on endorsements in partisan primary elections; the second count challenged the ban on endorsements in nonpartisan school, county, and municipal elections; and the third count challenged the provisions that prescribe the composition of state central committees, the term of office and eligibility criteria for state central committee chairs, the time and place of state and county central committee meetings, and the dues county committee members must pay.

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The plaintiffs moved for summary judgment, in support of which they filed 28 declarations from the chairs of each plaintiff central committee, prominent political scientists, and elected officials from California and other States. The State moved to dismiss, and filed a cross-motion for summary judgment supported by one declaration from a former state senator.

The District Court granted summary judgment for the plaintiffs on the first count, ruling that the ban on primary endorsements in §§ 11702 and 29430 violated the First Amendment as applied to the States through the Fourteenth Amendment. The court stayed all proceedings on the second count under the abstention doctrine of *Railroad Comm'n of Texas v. Pullman Co.,* 312 U. S. 496 (1941). [Footnote 13] On the third count, the court ruled that the laws prescribing the composition of state central committees, limiting the committee chairs' terms of office, and designating that the chair rotate between residents of northern and southern California violate the First Amendment. [Footnote 14] The court denied summary judgment with respect to the statutory provisions establishing

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the time and place of committee meetings and the amount of dues. Civ. No. C-83-5599 MHP (ND Cal., May 3, 1984).

The Court of Appeals for the Ninth Circuit affirmed. 792 F.2d 802 (1986). This Court vacated that decision, 479 U.S. 1024 (1987), and remanded for further consideration in light of *Tashijian v. Republican Party of Connecticut,* 479 U. S. 208 (1986).

After supplemental briefing, the Court of Appeals again affirmed. 826 F.2d 814 (1987). The court first rejected the State's arguments based on nonjusticiability, lack of standing, Eleventh Amendment immunity, and *Pullman* abstention. 826 F.2d at 821-825. Turning to the merits, the court characterized the prohibition on primary endorsements as an "outright ban" on political speech. *Id.* at 833.

Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information.

Id. at 835. The court rejected the State's argument that the ban served a compelling state interest in preventing internal party dissension and factionalism: "The government simply has no legitimate interest in protecting political parties from disruptions of their own making." *Id.* at 834. The court noted, moreover, that the State had not shown that banning primary endorsements protects parties from factionalism. *Ibid.* The court concluded that the ban was not necessary to protect voters from confusion, stating, "California's ban on preprimary endorsements is a form of paternalism that is inconsistent with the First Amendment." *Id.* at 836.

The Court of Appeals also found that California's regulation of internal party affairs "burdens the parties' right to govern themselves as they think best." *Id.* at 827. This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest, for a State has a legitimate interest "in orderly elections,
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not orderly parties." *Id.* at 831. In any event, the court noted, the State had failed to submit "*a shred of evidence,'" id. at 833 (quoting Civ. No. C-83-5599 (ND Cal. May 3, 1984)), that the regulations of party internal affairs helped minimize party factionalism. Accordingly, the court held that the challenged provisions were unconstitutional under the First and Fourteenth Amendments.*

II

A State's broad power to regulate the time, place, and manner of elections
"does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens."
Tashijian v. Republican Party of Connecticut, 479 U.S. at 479 U. S. 217. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. *Id.* at 479 U. S. 214; *Anderson v. Celebrezze,* 460 U. S. 780, 460 U. S. 789 (1983). If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, *Tashijian, supra,* at 479 U. S. 217, 479 U. S. 222; *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U. S. 173, 440 U. S. 184 (1979); *American Party of Texas v. White,* 415 U. S. 767, 415 U. S. 780, and n. 11 (1974); *Williams v. Rhodes,* 393 U. S. 23, 393 U. S. 31 (1968), and is narrowly tailored to serve that interest, *Illinois Bd. of Elections, supra,* at 440 U. S. 185; *Kusper v. Pontikiss,* 414 U. S. 51, 414 U. S. 58-59 (1973); *Dunn v. Blumstein,* 405 U. S. 330, 405 U. S. 343 (1972).

A

We first consider California's prohibition on primary endorsements by the official governing bodies of political parties. California concedes that its ban implicates the First Amendment, Tr. of Oral Arg. 17, but contends that the burden is "miniscule." *Id.* at 7. We disagree. The ban directly affects speech, which "is at the core of our electoral
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process and of the First Amendment freedoms." *Williams v. Rhodes, supra,* at 393 U. S. 32. We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo,* 424 U. S. 1, 424 U. S. 14 (1976) (per curiam); *see also NAACP v. Claiborne Hardware Co.,* 458 U. S. 886, 458 U. S. 913 (1982); *Carey v. Brown,* 447 U. S. 455, 447 U. S. 467 (1980); *Garrison v. Louisiana,* 379 U. S. 64, 379 U. S. 74-75 (1964). Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office. *Monitor Patriot Co. v. Roy,* 401 U. S. 265, 401 U. S. 272 (1971); *see also Mills v. Alabama,* 384 U. S. 214, 384 U. S. 218 (1966). Free discussion about candidates for public office is no less critical before a primary than before a general election. *Cf. Storer v. Brown,* 415 U. S. 724, 415 U. S. 735 (1974); *Smith v. Allwright,* 321 U. S. 649, 321 U. S. 666 (1944); *United States v. Classic,* 313 U. S. 299, 313 U. S. 314 (1941). In both instances, the "election campaign is a means of disseminating ideas as well as attaining political office." *Illinois Bd. of Elections, supra,* at 440 U. S. 186.

California's ban on primary endorsements, however, prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message, and hamstrings voters seeking to inform themselves about the candidates and the campaign issues. *See Tashijian, supra,* at 479 U. S. 220-222; *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California,* 475 U. S. 1, 475 U. S. 8 (1986); *Brown v. Hartlage,* 456 U. S. 45, 456 U. S. 60 (1982); *First National Bank of Boston v. Bellotti,* 435 U. S. 765, 435 U. S. 791-792 (1978). A "highly paternalistic approach" limiting what people may hear is generally suspect, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425
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U.S. 748, 425 U. S. 770 (1976); *see also First National Bank of Boston, supra,* at 435 U. S. 790-792, but it is particularly egregious where the State censors the political speech a political party shares with its members. *See Roberts v. United States Jaycees,* 468 U. S. 609, 468 U. S. 634 (1984) (O'CONNOR, J., concurring).

Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech, but also infringes upon their freedom of association. It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. *Tashijian, supra,* at 479 U. S. 214; *see also Elrod v. Burns,* 427 U. S. 347, 427 U. S. 357 (1976) (plurality opinion). Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, *Tashijian, supra,* at 479 U. S. 214 (quoting *Kusper, supra,* at 414 U. S. 57), but also that a political party has a right to "*identify the people who constitute the association,'" Tashijian, supra, at 479 U. S. 214 (quoting Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U. S. 107, 450 U. S. 122 (1981)); cf. NAACP v. Alabama ex rel. Patterson, 357 U. S. 449, 357 U. S. 460-462 (1958), and to select a "standardbearer who best represents the party's ideologies and preferences." Ripon Society, Inc. v.*

National Republican Party, 173 U.S.App.D.C. 350, 384, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933 (1976).
Depriving a political party of the power to endorse suffocates this right. The endorsement ban prevents parties from promoting candidates
"at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."
Tashijian, supra, at 479 U. S. 216. Even though individual members of the state central committees and county central committees are free to issue endorsements, imposing limitation
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"on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."
Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U. S. 290, 454 U. S. 296 (1981).
Because the ban burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest. [Footnote 15] The
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State offers two: stable government and protecting voters from confusion and undue influence. [Footnote 16] Maintaining a stable political system is, unquestionably, a compelling state interest. *See Storer v. Brown,* 415 U.S. at 415 U. S. 736. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest. There is no showing, for example, that California's political system is any more stable now than it was in 1963, when the legislature enacted the ban. Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary. [Footnote 17]
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The only explanation the State offers is that its compelling interest in stable government embraces a similar interest in party stability. Brief for Appellants 47. The State relies heavily on *Storer v. Brown, supra,* where we stated that, because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," 415 U.S. at 415 U. S. 736, States may regulate elections to ensure that "some sort of order, rather than chaos . . . accompan[ies] the democratic processes," *id.* at 415 U. S. 730. Our decision in *Storer,* however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign. To the contrary, *Storer* recognized that "contending forces within the party employ the primary campaign and the primary election to finally settle their differences." *Id.* at 415 U. S. 735. A primary is not hostile to intraparty feuds; rather, it is an ideal forum in which to resolve them. *Ibid.; American Party of Texas v. White,* 415 U.S. at 415 U. S. 781. *Tashijian* recognizes precisely this distinction. In that case, we noted that a State may enact laws to "prevent the disruption of the political parties from without" but not, as in this case, laws "to prevent the parties from taking internal steps affecting their own process for the selection of candidates." 479 U.S. at 479 U. S. 224.
It is no answer to argue, as does the State, that a party that issues primary endorsements risks intraparty friction which may endanger the party's general election prospects. Presumably a party will be motivated by self-interest, and not engage in acts or speech that run counter to its political success. However, even if a ban on endorsements saves a political party from pursuing self-destructive acts, that would
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not justify a State substituting its judgment for that of the party. *See ibid.; Democratic Party of United States,* 450 U.S. at 450 U. S. 124. Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.
The State's second justification for the ban on party endorsements and statements of opposition is that it is necessary to protect primary voters from confusion and undue influence. Certainly the State has a legitimate interest in fostering an informed electorate. *Tashijian, supra,* at 479 U. S. 220; *Anderson v. Celebrezze,* 460 U.S. at 460 U. S. 796; *American Party of Texas v. White, supra,* at 415 U. S. 782, n. 14; *Bullock v. Carter,* 405 U. S. 134, 405 U. S. 145 (1972); *Jenness v. Fortson,* 403 U. S. 431, 403 U. S. 442 (1971). However,
"'[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'"
Tashijian, supra, at 479 U. S. 221 (quoting *Anderson v. Celebrezze, supra,* at 798). [Footnote 18] While a State may regulate the
Page 489 U. S. 229
flow of information between political associations and their members when necessary to prevent fraud and corruption, *see Buckley v. Valeo,* 424 U.S. at 424 U. S. 26-27; *Jenness v. Fortson, supra,* at 403 U. S. 442, there is no evidence that California's ban on party primary endorsements serves that purpose. [Footnote 19]
Because the ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest, we hold that §§ 11702 and 29430 violate the First and Fourteenth Amendment.
B
We turn next to California's restrictions on the organization and composition of official governing bodies, the limits on the term of office for state central committee chair, and the requirement that the chair rotate between residents of northern and southern California. These laws directly implicate the associational rights of political parties and their members. As we noted in *Tashijian,* a political party's "determination . . . of the structure which best allows it to pursue its political goals

is protected by the Constitution." 479 U.S. at 479 U. S. 224. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. *See Democratic Party of United States, supra,* (State cannot dictate process of selecting state delegates to Democratic National Convention);
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Cousins v. Wigoda, 419 U. S. 477 (1975) (State cannot dictate who may sit as state delegates to Democratic National Convention); *cf. Tashijian, supra,* at 479 U. S. 235-236 (SCALIA, J., dissenting) ("The ability of the members of [a political p]arty to select their own candidate . . . unquestionably implicates an associational freedom").

The laws at issue burden these rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best. [Footnote 20] And by specifying who shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists, rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the State.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in *Tashijian.* There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to
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associate with nonparty members, but only with one another in freely choosing their party leaders. [Footnote 21]

Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest. A State indisputably has a compelling interest in preserving the integrity of its election process. *Rosario v. Rockefeller,* 410 U. S. 752, 410 U. S. 761 (1973). Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Storer v. Brown,* 415 U.S. at 415 U. S. 730. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. *See, e.g., Dunn v. Blumstein,* 405 U.S. at 405 U. S. 343-344 (residence requirement); *Oregon v. Mitchell,* 400 U. S. 112, 400 U. S. 118 (1970) (age minimum); *Kramer v. Union Free School Dist. No. 15,* 395 U. S. 621, 395 U. S. 625 (1969) (citizenship requirement). We have also recognized that a State may impose restrictions that promote the integrity of primary elections. *See, e.g., American Party of Texas v. White,* 415 U.S. at 415 U. S. 779-780 (requirement that major political parties nominate candidates through a primary and that minor parties nominate candidates through conventions); *id.* at 415 U. S. 785-786 (limitation on voters' participation to one primary and bar on voters both voting in a party primary and signing a petition supporting an independent candidate); *Rosario v. Rockefeller, supra,* (waiting periods before voters may change party registration and participate in another party's primary); *Bullock v. Carter,* 405 U.S. at 405 U. S. 145 (reasonable filing fees as a condition of placement on the ballot). None of these restrictions, however, involved direct regulation of
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a party's leaders. [Footnote 22] Rather, the infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.

In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process. Instead, it contends that the challenged laws serve a compelling "interest in the *democratic management of the political party's internal affairs.'" Brief for Appellants 43 (quoting 415 U.S. at 415 U. S. 781, n. 15). This, however, is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents. Cf. Smith v. Allwright, 321 U. S. 649 (1944). Moreover, as we have observed, the State has no interest in "protect[ing] the integrity of the Party against the Party itself." Tashijian, 479 U.S. at 479 U. S. 224. The State further claims that limiting the term of the state central committee chair and requiring that the chair rotate between residents of northern and southern California helps "prevent regional friction from reaching a `critical mass.'" Brief for Appellants 48. However,*
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a State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure any more than it can tell a party that its proposed communication to party members is unwise. *Tashijian, supra,* at 479 U. S. 224.

In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair. Because California has made no such showing here, the challenged laws cannot be upheld. [Footnote 23]

III
For the reasons stated above, we hold that the challenged California election laws burden the First Amendment rights of political parties and their members without serving a compelling state interest. Accordingly, the judgment of the Court of Appeals is
Affirmed.
CHIEF JUSTICE REHNQUIST took no part in the consideration or decision of this case.

Ex Parte Stafford

DENNISE GARCIA JUSTICE

On Appeal from the County Court at Law No. 1 Collin County, Texas Trial Court Cause No. 001-00466-2022

Before Justices Pedersen, III, Garcia, and Breedlove

OPINION

DENNISE GARCIA JUSTICE

This case involves a pretrial habeas challenge to the facial validity of a statute criminalizing certain speech concerning "campaign communications." *See* Tex. Elec. Code § 255.004(b). The trial court concluded that the statute passes constitutional muster and denied habeas relief.

Stafford argues the trial court's determination is erroneous and the statute abridges the First Amendment right to free speech because: (i) it is not narrowly tailored to serve compelling state interests, (ii) it is unconstitutionally vague, and (iii) it places an undue burden on the right to anonymous speech.

We conclude the statute does not survive strict scrutiny and is unconstitutional on its face because the restrictions on protected speech are not narrowly tailored to achieve the compelling interests advanced by the State. The statutory restrictions are not narrowly tailored to remedy false statements, nor are they limited to false statements; the restrictions also encompass anonymous speech, speech that is true, and speech made consensually on behalf of another. And the determination of what constitutes a "true source" of that speech (and hence a statutory violation) is left to prosecutorial discretion. Although the State's interest in promoting fair and honest elections by preventing false and misleading political speech is compelling, the expansive reach of the statute beyond that purpose demonstrates the statute is not narrowly tailored and is therefore constitutionally infirm.

We reverse the trial court's order denying Stafford's application for writ of habeas corpus and remand the case to the trial court with instructions to dismiss the prosecution of charges against Stafford for alleged violation of Tex. Elec. Code §255.004(b). *See Long v. State*, 931 S.W.2d 285, 297 (Tex. Crim. App. 1996) (remanding case to trial court to enter order dismissing prosecution).

I. Background

Stafford was indicted under Tex. Elec. Code §255.004(b). The indictment alleged that Stafford:

The indictment is not included in the record. A copy is attached to Stafford's brief and an excerpt is included in Stafford's habeas application. The State acknowledges the accuracy of the excerpt.

on or about the 15th day of April, 2021 through the 16th day of April, 2021 . . . did then and there, with intent to injure a candidate or inuence [sic] the result of an election, namely candidates Lily Bao, and Anthony Ricciardelli, and Justin Adcock, and Howard Smith, and Lynn Walling,

and Joyce Loughrayi, the defendant knowingly represents in a campaign communication that the communication emanates from a source other than its true source, to wit, sending text messages with the appearance of coming from a Republican or conservative campaign.

Stafford challenged the constitutionality of the statute in an application for a pretrial writ of habeas corpus under Tex. Code Crim. Proc. Ann. art. 11.09. The trial court conducted a hearing and by subsequent order, denied Stafford's habeas application.

II. Analysis

A. Constitutional Habeas Challenge

A defendant may file a pretrial application for a writ of habeas corpus to raise a facial challenge to the constitutionality of a statute that defines the offense charged. *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014). A facial challenge attacks the statute itself rather than the statute's application to the defendant. *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015).

Whether a statute is facially unconstitutional is a question of law subject to de novo review. *Salinas v. State,* 464 S.W.3d 363, 366 (Tex. Crim. App. 2015*)*; *Ex parte Paxton*,

493 S.W.3d 292, 304 (Tex. App.-Dallas 2016, pet. ref'd). We make every reasonable presumption in favor of the statute's constitutionality unless the contrary is clearly shown. *Peraza*, 467 S.W.3d at 514.

B. Constitutional Standard of Review

The First Amendment instructs "Congress shall make no law . . . abridging the freedom of speech . . . ." *See* U.S. Const. amend. I. The Amendment is applicable to the states through the Fourteenth Amendment due process clause. *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975) (citing *Schneider v. State*, 308 U.S. 147, 160 (1939)).

We begin by considering whether the targeted speech is protected. The statute at issue here targets political speech.

Political expression is crucial to self-government and is afforded broad latitude to safeguard "the ability of the citizenry to make informed choices among candidates for office" and "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957) Political speech is "the lifeblood of a self-governing people" *McCutcheon v FEC*, 572 U.S. 185, 228 (2014) (plurality op) (Thomas, J, concurring). Consequently, regulation of political speech or expression has always been at the core of First Amendment protections. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 346 (1995); *Morse v. Frederick*, 551 U.S. 393, 403 (2007). This is particularly true when the speech relates to campaigns for political office. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (speech concerning campaigns for office receive the First Amendment's "fullest and most urgent application."). Thus, there is no dispute that First Amendment protections are implicated here.

Having determined that the speech at issue is protected speech, we next determine the applicable level of constitutional scrutiny. In the First Amendment context, the level of scrutiny depends on the "content neutrality" of the statute. *See Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015). Content-based regulations are subject to the highest level of scrutiny because the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). A restriction is content-based if it (1) "applies to particular speech because of the topic discussed or the idea or message expressed," or (2) even if "facially content-neutral," cannot be "justified without reference to the context of the regulated speech," or was "adopted by the government because of disagreement with the message [the speech] conveyed." *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S.Ct. 1464, 1471 (2022) (citation omitted). If it is necessary to look at the content of the speech to decide if the speaker violated the law, the regulation is content based. *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014).

Typically, a person challenging a statute has the burden to establish its unconstitutionality. *See Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). But when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. *Ex parte Nyabwa*, 366 S.W.3d 719, 724 (Tex. App.-Houston [14th Dist.] 2011, pet ref'd) (citing *United States v. Playboy Ent. Grp., Inc*., 529 U.S. 803, 817 (1999)). "Content-based regulations (those laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption." *Ashcroft*, 542 U.S. at 660. This is because "content-based prohibitions enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Id.*

The challenged statute is a content-based restriction on political speech. The statute provides:

A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person knowingly represents in a campaign communication that the communication emanates from a source other than its true source.

Tex. Elec. Code §255.004(b). A "campaign communication" is defined as "a written or oral communication relating to a campaign for nomination or election to public office or office of a political party or to a campaign on a measure." Tex. Elec. Code § 252.001(17). The statute does not define "true source."

We apply strict scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content, and such regulations may be upheld only if the regulation is justified by a compelling state interest and is narrowly tailored, using the least restrictive means to achieve the asserted interest. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011); *Barr v. Am. Ass'n of Political Consultants, Inc*., 140 S.Ct. 2335, 2346 (2020) (content-based laws subject to strict scrutiny); *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (laws that burden political speech subject to strict scrutiny); *see also generally*, *Ex parte Nuncio*, No. PD-0478-19, 2022 WL 1021276, at *8 (Tex. Crim. App. 2022) (reciting strict scrutiny standard for content-based regulations but noting that the issue raised was overbreadth, which differs from strict scrutiny). Because the statute is a content-based restriction on core political speech, we apply the strict scrutiny standard here.

Appellant generally argues that we apply the "exacting scrutiny" standard. The State argues that strict scrutiny applies but quotes case law describing such scrutiny as "exacting." Neither party distinguishes the two standards. The confusion is not entirely unfounded but merits some attention because exacting scrutiny and strict scrutiny are different standards of review. The phrase "exacting scrutiny" appeared in dictum in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), where the court observed that some constitutional prohibitions might "be subject to more exacting judicial scrutiny." *Id*. The phrase appeared again in *Buckley v. Valeo*, 424 U.S.1, 74 (1976) (per curiam), where the court stated that compelled disclosure requirements "must survive exacting scrutiny." *Id*. The phrase has transformed through the years, with varying, and inconsistent applications. In election finance cases, it seemed analogous to strict scrutiny. *See McCutcheon*, 572 U.S. at 197. The term has also been used interchangeably with strict scrutiny in the same opinion. *See Williams-Yulee v. Florida Bar*, 573 U.S. 433, 443 (2015). Other cases have used the term "exacting scrutiny" without specifying whether it was a distinct standard of review or a synonym for one of the three traditionally recognized standards of First Amendment review. *See United States. v. Alvarez*, 567 U.S. 709, 724 (2012) (plurality op.); *McIntyre*, 518 U.S. at 347 (using term "exacting scrutiny" but applying traditional strict scrutiny standard). When applied as a distinct standard of review, "exacting scrutiny" has typically connoted a standard of constitutional review a level below, and less rigorous than strict scrutiny. *See Washington Post v. McManus*, 355 F.Supp.3d 272, 289 n.14 (D. Md. 2019), *aff'd*, 944 F.3d 506 (4th Cir. 2019). *But see Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (applying exacting scrutiny to disclosure requirements by requiring a "substantial relation between the disclosure requirement and a sufficiently important government interest"). Consequently, courts have recognized that use of the phrase '"exacting scrutiny' has not always been exacting in its own right, leading to considerable confusion." *McManus*, 355 F.Supp.3d 272, 289 n.14. In a recent decision involving a disclosure mandate, the court applied "exacting scrutiny" as a discrete tier of constitutional scrutiny. *See Ams. for Prosperity v. Bonta*, 141 S.Ct. 2373, 2389 (2021). Nonetheless, the court could not agree on which categories of speech should be reviewed under this standard. *See id.* at 2381 (Alito, J., concurring in part), 2390 (Thomas, J., concurring in part). Exacting scrutiny differs from strict scrutiny in that it does not require a "least restrictive means" analysis. *See e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989). But both standards typically require that the speech restricting regulation be narrowly tailored to achieve the government's interest. *See Brown,* 564 U.S. at 799 (applying strict scrutiny); *Bonta*, 141 S.Ct. at 2383 (applying exacting scrutiny requiring (1) a substantial relation . . . and a sufficiently important government interest and (2) narrow tailoring). Significantly for our purposes, the Supreme Court has yet to direct that a standard less than strict scrutiny applies in First Amendment cases involving regulation of the content of political speech. *See Buckley v. Am. Const. Law Found., Inc*., 525 U.S. 182, 207 (1999) (Thomas, J., concurring) (observing that strict scrutiny is applied to regulations burdening core political speech and noting that the severe/lesser burden framework has only been applied when a challenged law regulates the mechanics of the election process) (citing *McIntyre*, 514 U.S. at 345). Likewise, the Texas Court of Criminal Appeals applies strict scrutiny to content-based speech regulations. *See Nuncio*, 2022 WL 1021276, at *8. Moreover, neither party argues that the lower court applied an incorrect standard, and application of the exacting scrutiny standard would not alter our conclusion that the statute is not narrowly tailored. Accordingly, we need not further parse these distinctions. *See McCutcheon*, 572 U.S. at 199 (because statute fails even under less demanding test, the court "need not parse the differences between the two standards in this case.").

C. Do the Content-Based Restrictions Survive Strict Scrutiny?

Having concluded that the statute targets content-based protected speech, we apply the strict scrutiny standard to determine whether the statute is unconstitutionally restrictive. *See Bennett*, 564 U.S. at 734.

1. Are the State's Interests Compelling?

The State argues that § 255.004(b) supports "fair, honest, and orderly elections by deterring fraud and diminishing corruption in elections." Specifically, it contends the statute "deters fraud by ensuring votes are cast free from misinformation, thus, protecting voters from confusion and undue influence."

Stafford does not, and reasonably could not, dispute that promoting honest discourse and preventing misinformation in the political arena are compelling state interests. But as the Supreme Court has observed "our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Alvarez*, 567 U.S. at 723 (quoting G. Orwell, Nineteen Eighty Four 1949) (Centennial ed. 2003)). To hold that "the interest in truthful discourse alone is sufficient to sustain a ban on speech" would give the government unprecedented censorial power. *Id*.

Despite the strong protection for political speech under the First Amendment, the Supreme Court has acknowledged that a state interest in preventing fraud "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for

the public at large." *McIntyre*, 514 U.S. at 349. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231-32 (1989); *see also*, *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (protecting elections conducted with integrity and reliability are "obviously" compelling interests); *Doe v. State*, 112 S.W.3d 532, 535 (Tex. Crim. App. 2003) (there must be substantial regulation of elections if they are to be fair, honest, and orderly). Nonetheless, when these preservation goals are achieved at the expense of public discourse, they become problematic. Therefore, "a State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu*, 489 U.S. at 228.

But we need not belabor this prong of the analysis. While we agree that fair and honest elections and preventing fraud on the electorate comprise compelling state interests, the narrow tailoring that must juxtapose those interests is absent here. We therefore turn to the "narrow tailoring" prong of the analysis.

2. Is the Statute Narrowly Tailored Using the Least Restrictive Means?

Having concluded that the state's interests are compelling, we consider whether the statute is narrowly tailored to achieve those interests. *See Brown*, 56 U.S. at 799; *Nuncio*, 2022 WL 1021276, at *8. "To survive strict scrutiny . . . the State must do more than assert a compelling state interest-it must demonstrate that its law is necessary to serve the asserted interest." *Burson,* 504 U.S. at 199. "With respect to narrow tailoring, [courts] require the government to prove that no 'less restrictive alternative' would serve its purpose." *Playboy*, 529 U.S. at 813 "'[I]t is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee*, 575 U.S. at 444, (quoting *Burson*, 504 U.S. at 211).

It is well-established that "when free speech values are at stake, states must supply rationales that are 'far stronger than mere speculation about serious harms.'" *McManus*, 944 F.3d at 522 (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 531 (2001)). Expressed differently, "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S. at 799. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)).

The State argues the Texas Court of Criminal Appeals has concluded that the statute at issue here serves "the State's interest in ensuring that political advertising is attributed to its originating and actual source." *See Doe*, 112 S.W.3d at 536. The State's argument, however, lacks context. *Doe* did not conclude that § 255.004 survives strict scrutiny.

In addition, the State's asserted interest here is "deterring fraud and diminishing corruption in elections," not attributing political advertising to its actual source.

Doe involved the constitutionality of a different section of the election code, § 255.001. *Id*. at 534. That section required persons entering into contracts or agreements for print, publication, or broadcasting of a political advertisement to identify, within the advertisement, the person who made the contract or the person he represented. *Id*. The court concluded that the statute was not narrowly tailored and violated the First Amendment. *Id*. at 537. When analyzing whether the statute was narrowly tailored, the court considered whether there were other statutes in place to achieve the state's asserted interests. *Id.* at 536-37. Although § 255.004(b) was among the statutes the court identified, the court did not examine the statute beyond its identification or analyze whether it was narrowly tailored to achieve the state interests asserted in the present case. *See id*. Accordingly, *Doe* does not control the constitutional inquiry here.

Moreover, the question is not whether § 255.004(b) serves the state's interests. Instead, we are tasked with determining whether the statute is narrowly tailored to serve those interests using the least restrictive means. *See Brown*, 564 U.S. at 799.

Statutory Language

Statutory construction begins with the language of the statute. *See Timmins v. State*, 601 S.W.3d 345, 348 (Tex. Crim. App. 2020). Section 255.004(b) criminalizes knowingly representing in a campaign communication that the "communication emanates from a source other than its true source." Tex. Elec. Code § 255.004(b). The statute does not define "true source."

Although the State argues that the statute requires a "true source" to prevent communications that mislead the public, it admits the statute does not expressly address misleading communications. Instead, the State posits that "inherent in the concept of 'true source'" is the common-sense notion that "a source that is not true is a lie." In other words, if a source is not true it is false.

We construe a statute by giving effect to the plain meaning of its language unless the language is ambiguous or the plain meaning leads to absurd results. *Ex parte Perry*, 483

S.W.3d 884, 902 (Tex. Crim. App. 2016). Words and phrases are read in context according to the rules of grammar and common usage. Tex. Gov't Code Ann. § 311.011(a). "Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991).

Applying these principles here, the plain language of the statute clearly prohibits representations, not misrepresentations. *See* Tex. Elec. Code §255.004(b). Thus, the statutory restrictions are not limited to communications that are false. By use of the word "representation," the statute captures communications of any kind or character from any source other than a "true source." This includes anonymous speech, speech that is true, and speech on behalf of another made with consent. This expansive reach is problematic because it demonstrates less than precise tailoring to achieve the state's objectives. Moreover, the statute is not narrowly tailored to prevent false speech or misrepresentations, the very interests the State seeks to advance.

False Speech and Misrepresentations

The State argues that the purpose of the statute is to protect voters from confusion and undue influence by preventing misleading communications. We view the State's efforts to protect voters from confusion by restricting speech with skepticism. *See Eu*, 489 U.S. at 228.

To the extent that § 255.004 is aimed at misleading statements in political campaigns, the State's interests are already served by a more specific section of the election code which provides:

A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person **misrepresents** the person's identity or, if acting or purporting to act as an agent, **misrepresents** the identity of the agent's principal, in political advertising or a campaign communication.

Tex. Elec. Code Ann. § 255.005 (emphasis added). Other sections of the election code address representations and misrepresentations in the election process. *See, e.g.,* Tex. Elec. Code Ann. § 255.006 (misleading use of office title), § 255.008 (disclosures on political advertising for judicial office). The penal code addresses online impersonation. *See* Tex. Penal Code Ann. § 33.07. The Texas Ethics Commission also exists "for the express purpose of regulating elections and eliminating opportunities for undue influence over elections and governmental actions." *See* Tex. Gov't Code Ann. § 571.001. And other state laws deter false statements through tort claims. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 73.001 (libel).

The primary distinction between § 255.005 and § 255.004 is that .005 prohibits misrepresentations, while .004 prohibits representations of all types. The State offers no explanation as to why, in light of § 255.005, the challenged statute is also necessary to prevent misrepresentations.

The State argues that the statutes differ because .005 uses the word "identity," and .004 uses the word "source." But the State offers no insight into how the commonly understood meanings of those words clarifies the distinction between representations and misrepresentations. Further, the State does not argue that .005 misrepresentation of "identity," which is not statutorily defined, is not sufficiently broad to include the types of campaign communications at issue here.

Moreover, the State offers no empirical evidence that § 255.004 is necessary. Rather, the State relies on "common sense" to establish that false statements are antithetical to fair and honest elections. Although the general premise is inarguable, merely relying on common sense does not satisfy the heavy burden when protected speech is regulated. *See Alvarez*, 567 U.S. at 726. "Conjecture" is inadequate to carry a First Amendment burden. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 379 (2000).

There is nothing to establish that identifying the source of a communication prevents misrepresentations and false statements. *See Brown*, 564 U.S. at 799 (curtailment of free speech must be necessary to the solution). Indeed, the statute allows fraudulent and untrue statements. Of course, the identity of a source can be helpful in evaluating ideas. But the State cannot reasonably argue that providing this additional information makes a fraudulent or untrue statement any less so. A false statement is still false even if the source is disclosed. And it is well-established that "if authority is to be reconciled with freedom," the remedy for speech that is false is speech that is true. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

The State also fails to dispel the generally accepted proposition that counter speech may provide a less restrictive means of advancing the state's interests. *See Alvarez*, 567 U.S. at 726-28 (discussing counter speech as more effective remedy for false speech). Our constitutional tradition is deeply rooted in the notion that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). There is nothing to suggest that counter speech is an inadequate remedy here.

The Supreme Court's decision in *McIntyre* further informs our analysis. *See McIntyre*, 514 U.S. at 345; *see also Doe*,

112 S.W.3d at 538 (Keller, J., concurring) (concluding that *McIntyre* would be determinative if the Texas statute was sufficiently comparable to the statute in *McIntyre*). In *McIntyre*, the court held that an Ohio statute prohibiting distribution of anonymous campaign literature directly regulated the content of "pure speech" in violation of the First Amendment. *Id.* Applying strict scrutiny, the court concluded that the statute was not narrowly tailored to achieve the interests advanced by the state. *Id*. at 347.

Although the court used the phrase "exacting scrutiny," the reference was followed by a citation to *Meyer v. Grant*, 486 U.S. 414, 420 (1988), which the opinion identified as "unanimously [applying] strict scrutiny." *Id*. at 345 n.10. The court also distinguished between cases involving pure speech and those controlling the mechanics of the election process and referenced the "strictest standard of review." *See id.* at 347-348.

The state interests advanced in *McIntyre* were much like those at issue here; namely, informing the electorate and preventing fraud. *Id.* The court concluded that the state failed to show that its interest in "preventing the misuse of anonymous election-related speech justifie[d] a prohibition on all uses of that speech." *Id*. at 357.

The Ohio statute required that an individual's name and address be included on campaign literature intended to influence the election process. *Id.* at 344. The court rejected the necessity of this information, concluding that, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.* at 347.

The state's argument that the statute served its interest in preventing fraud and libel was similarly unavailing. *Id*. at 343-44, 349-53. The court acknowledged that preventing election fraud "carries special weight." *Id*. at 349. But, recalling its rejection of a similar argument involving a California ordinance, the court observed that like the California ordinance, the Ohio statute "likewise contain[ed] no language limiting its application to fraudulent, false or libelous statements." *Id.* at 343-44 (citing *Talley v. California*, 362 U.S. 60, 80 (1960)). And the state's interest did not justify the "extremely broad prohibition" because the prohibition included "documents that [were] not even arguably false or misleading." *Id*. at 350. Moreover, because there were other state laws to protect the state's asserted interest, the statute under consideration was not the state's "principal weapon against fraud." *Id*. at 349- 50.

The court noted that *Talley* was distinct because that case involved a complete ban on anonymous documents, while *McIntyr*e involved a ban on anonymity in documents intended to influence the election process. *Id.* at 344.

In conclusion, the court held:

The State may, and does, punish fraud directly. But it cannot seek to punish fraud by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.

Id. at 356.

As in *McIntyre*, the statute here restricts pure speech intended to influence an election. *See* § 255.004(b) ("with the intent to injure a candidate or influence the result of an election"). It encompasses communications that are not arguably false or misleading and it is not narrowly tailored to achieve the interests advanced by the State. Further, § 255.004(b) is not the State's "principal weapon against fraud." *See McIntyre*, 514 U.S. at 349-50. And like the statute in *McIntyre*, § 255.004(b) imposes an impermissible restriction on anonymous speech.

Anonymous Speech

The State concedes, as it must, that the prosecution of anonymous speech is unconstitutional. *See McIntyre,* 514 U.S at 342. Indeed, this country has "a respected tradition of anonymity in the advocacy of political causes." *Id*. at 343.

The State also acknowledges that an individual can be prosecuted under the statute if he fails to identify the source of the communication and that determination of the source is based on the listener's perception. This constitutes prosecution of anonymous speech.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley*, 362 U.S. at 64; *McIntyre,* 514 U.S. at 341 n.4. "Because '[a]nonymity is a shield from the tyranny of the majority' [it] thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357 (quotation omitted).

The Federalist Papers, written by Alexander Hamilton, James Madison, and John Jay, but published under the pseudonym "Publius" are one of the best examples of anonymous political speech. *See id*. at 343, n.6. The opponents of the Federalists, the anti-Federalists, also used pseudonyms to express their views anonymously. *Id.* In addition, many political figures use an alter-ego account to post on social media. Section 255.004(b) would criminalize these writings for failure to identify their "true

source."

Mark Twain, O'Henry, Voltaire, and others have also produced great works of literature writing under assumed names. *Id.* at 343, n.4.

For example, Mitt Romney has posted under the alter-ego account "Pierre Delecto."

Although *McIntyre* involved an express prohibition on anonymous speech, cloaking such a restriction under a "true source" requirement is no less pernicious. The "true source" requirement here is tantamount to a ban on anonymous speech and such a ban is constitutionally impermissible. *See id.* at 356.

True Speech and Communications by an Agent

The absence of narrow tailoring is further illustrated by the additional categories of protected speech captured by the statute: true speech and speech made by an agent.

It is well-established that the First Amendment imposes no litmus test for truth in applying its protections. *See, e.g., N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964) (no recognized exception for any test of truth); *Nat'l Ass'n for the Advancement of Colored People v. Button,* 371 U.S. 415, 445 (1963) (constitution shelters speech without regard to truth, popularity, or social utility).

Nonetheless, in light of the State's argument that the statute targets falsity, it is important to note that a communication need not be false to run afoul of the statute-the statute also restricts communications that are true. *See* Tex. Elec. Code § 255.004(b).

The State offers no guidance as to how the dissemination of true information dispels voter ignorance. Yet true communications are punishable under the statute. Imagine, for example, a candidate who is a registered Democrat but does not want to be so identified because the voting demographic is largely Republican. Fred posts on social media that the candidate is a Democrat, a truthful statement that arguably informs the voters. But if Fred fails to identify the "true source" of that communication, he is subject to prosecution under the statute. This restriction on true speech further undermines the State's assertion that the statute is narrowly tailored to protect against false information.

The statute also criminalizes communications made on behalf of another with consent. Unlike § 255.005 (the statute restricting misrepresentations), which clearly delineates the circumstances in which agent communications are actionable, § 255.004(b) leaves the matter open to interpretation.

For example, if an intern posts on social media or sends a group text on behalf of a candidate stating that "Candidate X opposes this law," the post violates the statute if the post does not identify the candidate or the intern as the "true source" of the information, regardless of whether the intern was acting on behalf of the candidate with his permission, and regardless of whether the information is true. In this age of electronic communication, the problem compounds exponentially as people post and re-post the original content. The "true source" of the communication becomes an abyss, the interpretation of which is left to prosecutorial discretion.

The statute was enacted in 1987, before the wide use of the internet and social media. Since that time, there is only one reported case involving an indictment under the statute, and that case involved issues other than the constitutionality of the statute. *See Ex parte Charette*, Nos. 14-19-00855-CR,14-00856-CR, 00857-CR, 14-00858-CR, 2021 WL 1538197, at *1 (Tex. App.-Houston [14th Dist.] Apr. 20, 2021, pet. filed) (mem. op.).

In this scenario, each individual reposting or repeating the initial communication would arguably be subject to prosecution. Although each individual's culpability would turn on whether that individual knew that the communication did not emanate from its true source, the volume of potential charges stemming from a single communication highlights the dilemma posed by the statutory imprecision.

Similarly, suppose the Republican party recruits volunteers to get out the vote through a text messaging campaign. Volunteers are given access to a computer program that allows volunteers to use their personal phones to send messages to the target audience, but the program conceals the actual phone number of the volunteer. If the volunteer knows that a dummy number shows as the source of the texts he sends, the volunteer could be charged under the statute.

Because the statute captures true speech and communications made by an agent with the speaker's consent, communications which have no arguable nexus to the state's asserted interests, the statute eliminates far more than "the exact source of the evil it seeks to remedy." *See Frisby*, 487 U.S. at 485.

Additional Narrow Tailoring Concerns

The statute is also not narrowly tailored because the absence of a statutory definition for "true source" leaves the determination to prosecutorial discretion. Is a "true

source" the original source? Is it an accurate communication made by one other than the original source that is in accord with facts and reality? According to the State, the determination of a true source is a fact-specific inquiry. But relying on ad hoc factual inquiry to determine whether speech is prohibited simply underscores the extent to which the expansive scope of the statute captures significant amounts of protected speech far beyond the interests the state seeks to advance.

The State's factual development argument is of particular concern. The issue is not whether the State can ultimately prove its case, but whether an ordinary person is informed about the proscribed conduct so that he can conform his conduct accordingly. *See State v. Edmond*, 933 S.W.2d 120, 125 (Tex. Crim. App. 1996) (due process clause requires that penal statutes inform an ordinary person whether their conduct is prohibited and provide minimal guidelines for law enforcement to prevent arbitrary and discriminatory enforcement). Factual development occurs at trial, after an individual has been charged. At that point, however, the damage is done, and the State's subsequent inability to prove a statutory violation does little to mitigate the harm resulting from a charge or the chilling effect the threat of such charges may have on protected speech. If certain types of speech are to be punished, a criminal violation must depend on a person's actions, not how others perceive those actions. The State's interests could be achieved through less problematic means.

The State also argues that the statute's scienter requirements "further, and unambiguously limit its scope." According to the State, the statute leaves no doubt about what communications offend it because it "only encompasses" a communication that is (1) intended to injure a candidate or influence the result of an election and (2) made with the knowledge that it comes from a source other than a true source. This argument is misplaced.

The "true source" criterion is the crux of the problem, and the scienter requirements do little, if anything, to narrow the extensive reach of this statutory element before an individual is charged. As we have noted, a "true source" includes truthful speech, anonymous speech, and speech made on behalf of another, as well as false speech and misrepresentations. The assessment of whether a communication emanates from its true source is left to prosecutorial discretion. Thus, the mens rea requirements do not mitigate or eliminate the risk of chilling protected speech or guard against the danger of arbitrary and discriminatory enforcement.

Under these circumstances, we conclude the State has not met its burden to rebut the presumed invalidity of this content-based speech regulation. *See Playboy*, 529 U.S. at 817. In so concluding, we are cognizant of the damage fraudulent speech inflicts on the political process. But as the Supreme Court has observed, "[p]olitical speech by its nature will sometimes have unpalatable consequences . . . and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357 (citing *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting)).

III. Conclusion

"Neither lies nor [misrepresentations] serve the ends of the First Amendment, and we do not suggest their desirability or further proliferation." *Bentley v. Bunton*, 94 S.W.3d 561, 595-96 (Tex. 2002). But if the government seeks to restrict protected First Amendment speech, the Constitution demands, and our law requires, a narrowly tailored statute. That narrow tailoring is absent here.

Because we conclude the statute is not narrowly tailored to protect the state's interest in fair and orderly elections by deterring fraud and corruption, we need not reach Stafford's remaining issues. *See* **Tex. R. App. P. 47.1**.

We reverse the trial court's order denying Stafford's application for writ of habeas corpus and remand the case to the trial court with instructions to dismiss the prosecution of charges against Stafford for alleged violation of Tex. Elec. Code § 255.004(b).

JUDGMENT

Based on the Court's opinion of this date, the trial court's order denying Stafford's application for writ of habeas corpus is **REVERSED** and the case is **REMANDED** to the trial court with instructions to dismiss the prosecution of charges against Stafford for alleged violation of Tex. Elec. Code Ann. §255.004(b).