ORAL ARGUMENT — 09/08/98
97-1027
OSTERBERG V. PECA

ZINN: The issues here concern the constitutionality and scope of the restrictions in the Texas Election Code on independent expenditures, which are core political speech under the First Amendment. I would like to focus on these constitutional issues, but before I do, I would like to say a word about the structure and issues of this appeal. There are basically 4 groups of issues that are before the court: they involve the constitutionality issues; they involve those of knowledge; those of expressed advocacy; and those of substantial compliance. Any of those issues alone independently we believe are sufficient to strike down this judgment.

BAKER: On your substantial compliance argument, your opponent says you didn't preserve that in the TC. What's your answer to that? Did you raise it for the first time on appeal?

ZINN: In our motion for judgment to modify it on post-judgment motions, we did challenge the finding of the jury. On sufficiency grounds, we did not mention the substantial compliance. But we did bring a sufficiency challenge to the jury's answers to those issues.

BAKER: So you raised a factual and legal sufficiency to compliance? In other words, no evidence or insufficient evidence to show failure to comply. Was that your point?

ZINN: No. Our point was that the jury's answers to the issues that would speak to those issues was legally or factually insufficient. We did not mention the word "substantial compliance."

BAKER: So there was no question submitted to the jury in the context, "Do you find that the Osterbergs substantially complied with the election laws?

ZINN: No. I will concede this, that the court's recent opinion in *Coaster v. City of El Paso*, is the same grounds that the CA ruled to hold that we waived the issue. I do not concede the point. I think that the evidence should be determined by the law and not by how it's submitted.

BAKER: But there's a lot of law that says, "We look at the evidence based on the charge not on what you thought the charge should be, but not you didn't object to it."

ZINN: Yes, I agree that there is that law.

BAKER: So it's a little stronger on the, "You didn't preserve it side, than it is on your side of the argument?"

ZINN: Okay.

ENOCH: The statute requires a knowing violation, is that correct?

ZINN: Yes.

ENOCH: What evidence would be required to show knowing violation of a statute?

ZINN: It could be familiarity with the election code. Perhaps a deep experience in political activities where you may have come in contact with these laws. We agree that when we're dealing with state of minds such as that, it could be proven circumstantially. Yet there must be some evidence that...

HECHT: A lot of candidates don't known the election code.

ZINN: Well in this case there were several lawyers that wanted to help Judge Peca after these ads came out. They formed a committee, "Concerned Citizens for a Fair Judiciary," and they didn't know how to fill out the forms and they had to ask Judge Peca, and that's how they did it.

HECHT: I thought ignorance of the law was no excuse?

ZINN: Well sometimes. But sometimes it is. And in certain areas, particularly those touched by the First Amendment, we do not want to punish people for their unsophisticated exercise of their free speech rights.

BAKER: But that argument goes to whether the state can pass a law that says you have to disclose and you have to do it in a certain manner, isn't that right?

ZINN: It goes partly to that. But the statute also says, "It must be done knowingly, that you must knowingly make the expenditure in violation of ch. 253." So the actual words themselves actually speak to knowingly, actually speaks to the issue of in violation.

ABBOTT: Are you sure it's that clear. It says that you must knowingly make the contribution, but it does not say that it must be knowingly in violation of the statute?

ZINN: Well the private cause of action statute, 253.131, I believe the specific language is, "That you must knowingly make the expenditure in violation of this chapter." So the question is whether knowingly just modifies making the expenditure, or whether it modifies that whole phrase.

ABBOTT: Under that scenario why couldn't we have a political operative amass millions of dollars in funds with the intended purpose to influence elections in the State of Texas, and be able to forever avoid having to disclose the contribution as being made as direct expenditures merely by

avoiding ever learning anything about the election code?

ZINN: I would distinguish between bringing a private cause of action and punishing someone in a private cause of action as happened here. For example, the A.G. bringing civil penalties against someone for failing to comply with the election code.

ABBOTT: Would the knowing violation be different? The knowing violation for you is the same regardless of who's bringing the cause of action.

ZINN: No, it's not.

ABBOTT: My point is, under your scenario it's pretty senseless to even have a law on this whole topic, because if there is a law that _____ requires a knowledge of the law, then my golly, my main goal would be to never read the law.

ZINN: There must be deliberate ignorance, is never a defense. Unwilling influence ignorance is.

HECHT: Negligent ignorance?

ZINN: Negligence is not enough to punish people for knowing and willful violations.

ENOCH: But the argument would be: If this does impact his First Amendment rights there might be a reason the legislature tags on a knowingly element as opposed to other statutes with violations that don't require a knowing violation of the statute?

ZINN: That's right, that the legislature did not want to punish the unweary who exercised their First Amendment rights. Because these rights are so important that we don't want to punish people for just negligently or unintentionally for violating the Texas Election Code.

ENOCH: Maybe the legislature really wanted to put the bar at the point where the only people we want to punish with a private action are those who intentionally violate the election code?

ZINN: That's right. That the private cause of action, which is an erroneous punishment when it comes, because it's liquidated damages and possibly including attorney's fees, is a very rare cause of action and it's rare in American jurisprudence. And so, to focus a private cause of action and to only allow it under certain circumstances they wrote it that way so that knowingly actually goes not only to the making of the expenditure but to the knowledge of that it's in violation of this chapter.

ABBOTT: You're saying that that's the reason they wrote it that way but you haven't provided us any information indicating that that is indeed why they did that, that's just your

conclusion?

ZINN: Yes. I have researched the bill history of all these cases. I have not listened to the tapes. I do not know if the tapes were in existence at the time these laws were passed. And I'm not sure, I could be wrong, that a legislative history search will be very helpful because these - particular the private cause of action law goes back a long ways, and I don't know that you are going to find much in terms of legislative history.

ENOCH: But in any event, the statute does require a knowing violation as one of the elements of the private cause of action?

ZINN: Yes.

ENOCH: And the plaintiff would have the burden of proof on that element?

ZINN: Yes.

ENOCH: And your argument is, there is no evidence of this?

ZINN: Yes.

ENOCH: And if the court decided on that basis, they wouldn't reach the constitutionality of the statute?

ZINN: That's true. That would be an independent ground to strike down the judgment.

GONZALEZ: Help me understand your argument that this is a First Amendment case. Nobody is barring Mr. Osterberg from saying anything. He's not prohibited from saying anything. All the statute requires is that he report what he spent. If this is not so, help me understand that argument of how is his speech being curtailed somewhat?

ZINN: The Texas statutes are somewhat unique in that they don't make the forbidden conduct the failure to report. It says, "that if you fail to report, then you may not make the expenditure."

HECHT: So you mean if we just wrote it the other way it would be okay? It sounds kind of semantic.

ZINN: Well it's semantic, but when you think about it, the judgment reads and the statute says, that my clients were assessed damages two times the amount of the illegal expenditures. These are independent expenditures. This is core first amendment activity. It's constitutionally

protected. The state legislature cannot make illegal, but the constitution protects. And, yes, they could have wrote this. And in fact, most every other state in the union has done that, including the federal election code itself. But Texas chose this other way and they never changed these laws. These laws are pre *Buckley*. They never changed these laws after *Buckley*, because *Buckley* made a very significant change in campaign finance law. It said that, "independent expenditures are not merely incidental conduct, the First Amendment Rights, that they are in fact core first amendment activity and the expenditures themselves are protected constitutionally _____."

BAKER: How does *Buckley* help your claim, that this case has an unconstitutional law in it?

ZINN: Because in Ch. 253, in the general rule 253.002 says, "that a person may not knowingly make or authorize a direct campaign expenditure." Under the Texas Election Code, a direct campaign expenditure are independent expenditures. And that is a crime. It's a Class A misdemeanor punishable by up to 1 year. It creates this general rule as to individuals. And it only creates two exceptions: 1) if you're not acting in concert; and 2) if you report it, assuming it's over $100, as you would a political action committee.

BAKER: And so, what's the violation?

ZINN: The violation is that it ultimately makes the expenditure itself legal as opposed to the forbidden conduct of failing to report. Or if you believe acting in concert is constitutional, that kind of activity.

ENOCH: If we interpret knowingly, if we define knowingly to include in essence, "I know what the law is, but I'm going to violate it," that means "I am going to spend this money without reporting it," doesn't that fit within the *Buckley* standard?

ZINN: Not directly, but it speaks to the scope and importance of independent expenditures in our First Amendment jurisprudence. Because they said in that case for the first time that, "these independent expenditures are for political speech." It's not merely incidental conduct that you can restrict as you would time, place and manner.

BAKER: So your theory is that it's not the requirement that it's reported that's the problem. It's because the statute says, "if you don't report it, but then you knowingly make it it's now illegal." And therefore, that's what protects it as opposed to where *Buckley* held that the disclosure requirements are all constitutional at least in that case, in that context.

ZINN: That's correct. Chapter 253 ultimately makes the expenditure itself illegal. And in fact, that's what their private cause of action says.

BAKER: But it's illegal only if it's in violation of the statute, and the only violation here

was the failure to report it before you made it?

ZINN: Yes. But the State cannot take away your right to engage in that core political speech.

BAKER: Well they haven't.

ZINN: Well they have. They have made it illegal.

HECHT: There are exceptions. In fact, Section B has a whole bunch of exceptions.

ZINN: It does. But as to individuals it has very narrow exceptions. Some of the exceptions swallow the rule.

ABBOTT: Let's look at this way. Let's assume Osterberg had reported. Would you agree there are no limitations on his ability to spend money to influence this election provided he report it?

ZINN: Well no, then they would have held that he was libel because he was acting in concert with his wife or others. There were two independent grounds for this judgment: 1) that he failed to report; and 2) that he was acting in concert with others.

BAKER: But under your theory, under the judgment, Mrs. Osterberg was not found libel because she didn't knowingly do anything as far as the jury was concerned?

ZINN: Well the jury found she was libel and a judgment was entered against her. It was the El Paso CA that found...

BAKER: Well, and that's who we're looking at here is what the El Paso court did.

ZINN: Yes.

ABBOTT: Let's go back to fundamentals. Let's assume Mr. Osterberg was operating by himself and he reported it. Do you agree that there is no infringement whatsoever on his ability to speak to the tune of $100, $38,000, or $100 million?

ZINN: That's true. He would not have liability under Ch. 253.

ABBOTT: I'm not talking about liability. Do you agree he has total freedom to speak as long as he reports?

ZINN: Yes, under independent expenditures. But in the end, the State cannot punish.

They've taken it one step though. Instead of punishing the failure to report, they have said because they are conditioning his right of free speech on the idea of reporting, and they cannot condition the spending of independent expenditures, that's core political speech for any reason - legitimate or not.

OWEN: You're not challenging the statute's requirement that you report? You're not saying there's a constitutional impediment in that are you?

ZINN: That's right. They can require independent expenditures to be reported. But they cannot say, "If you don't report it, we're taking away your right of core political speech." And that's what these statutes say.

BAKER: They just tell you you're going to pay for it twice to the other side?

ZINN: Yes, that's what the private cause of action requires.

PHILLIPS: Are you challenging the constitutionality of that penalty? Essentially only Texas and California have set up this _____ of actions?

ZINN: No so much the penalty, but the idea of the private cause of action limited only to an opposing candidate.

PHILLIPS: You're saying that's unconstitutional?

ZINN: Yes, because it is not narrowly tailored to serve a compelling state interest, that there are other ways to do this without infringing on the rights in this way.

OWEN: What if the statute had been drafted to say that you have the right to make the expenditures, but if you do, you have to report, and if you don't report there is a private cause of action on behalf of the candidate that you opposed. Would you challenge that?

ZINN: Yes. Because it doesn't serve that state compelling interest in a narrow way, because it's really serving the personal interest of that candidate. It's using this idea of a private cause of action. But in fact, instead of serving the compelling state interest which is to prevent corruption, it is allowing the candidate to use these state laws to serve a personal interest, which is exactly to punish a political opponent. That's why they have the incentive to bring these actions.

ABBOTT: How can you punish your opponent if you report?

ZINN: Putting aside the acting in concert language, and putting aside the other issues that the jury did not find, then that's right. He would not have been able to succeed on his private cause of action in finding that these expenditures were illegal and against the code.

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RESPONDENT

PHILLIPS: You're not claiming that the provision that you cannot act in concert to spend over $100 is constitutional after *Buckley* are you?

MILLIGAN: Yes.

PHILLIPS: Why?

MILLIGAN: What I tried to get into in the TC was the aspect of political committee. Whether you are going to have a committee or one person and if you can regulate political committees, you can regulate two or more persons. I felt that this statute was poorly drafted from the standpoint it does not define how many people it takes for a committee. The statute talks about an individual. It talks about a political committee. But it doesn't say what that requires.

PHILLIPS: If I decide that I am going to put a TV ad on to speak my mind in some electoral race this year, I have to act in concert with somebody to do that, don't I? If I film it, tape it, edit it, gave it a voice over, then run down to the TV station, to do all that myself, I still have to act in concert with the people who put it on the air, don't I?

MILLIGAN: I think that would be a fact issue as to whether you're acting in concert with them or hiring people to do jobs. Whether I act in concert at my office with others, or I have people that I pay to do things, I find there's a distinction.

PHILLIPS: In any event, this is not necessary for the judgment if there's a knowing - whatever the language is - be the second part of the...

MILLIGAN: The knowing violation. And the question, whether it means a knowing political contribution, or political expenditure, or a knowing violation of the law. To me an important part of this case is whether ignorance of the law is now going to be a defense. That's what the CA has in effect ruled, because they say that we did not prove that the Osterbergs knew what they were doing.

HECHT: How could knowing ever be at issue if all the question was, was whether you were making a political expenditure? How could you ever unknowingly make a political expenditure?

MILLIGAN: I think you could give money to someone and not recognize that that's going to be a campaign contribution.

HECHT: How? You didn't think he was not a candidate?

MILLIGAN: Well it might be the candidate could write it down as a political contribution if you gave him money. I suppose someone could give someone money who they didn't know was a candidate - loaned him $1,000 and the candidate writes it down on his form - they would not have known.

ENOCH: So what do you say is the proof in this case of knowing? What do you say is the proof that the Osterbergs knew about this expenditure?

MILLIGAN: Mrs. Osterberg didn't show up at trial. She wasn't sick like the CA said. There is no evidence at all as to why she didn't show up. She didn't ask for a contingency, but she signed all these checks - $28,600 on this TV ad, and another $34,000 that the opposing candidate received.

ENOCH: But your argument was it's possible for somebody to make a contribution to pay the check without knowing that it's a violation. So what is your proof that this was a knowing conduct in violation?

MILLIGAN: Our proof was the facts at trial and the jury's finding.

ENOCH: And that was, Judge Peca was talking to a bar association meeting accusing Mr. Osterberg of violating the election code?

MILLIGAN: There was also testimony. The Osterbergs had a restaurant as a hobby, and the group of people that they participate with were all meeting at the restaurant and there was conversations about this race. That was in the evidence, too. That's where Mr. Beall was one of the group at the restaurant and this went on day-after-day and Mrs. Osterberg, the evidence showed was also present at and during those discussions about this race. And both of them had previously had a case in Peca's court, and that's how this all started.

ENOCH: You say there were some meetings. What evidence is in the record that you say supports the jury finding that Mr. Osterberg made an expenditure with knowledge that it was violation of the statute, or maybe with knowledge he made an expenditure in violation of the statute?

MILLIGAN: The only evidence we had was that the opposing candidate Beall testified that he heard Peca say a month before the election at a bar luncheon that Osterberg was violating the campaign laws, and he testified he went back and told Osterberg.

ENOCH: And if all Osterberg needed to do was to make a filing, then there would have been no violation? Is there any evidence in the record that Peca's comment to Beall and Beall's comment to Osterberg was made at any point in time where the filings still were yet to be made or the period of time had already been past?

MILLIGAN: I think the bar luncheon meeting is dated approximately 1 month before the election, and there was a filing I believe 8 days before the election.

ENOCH: And Beall's testimony is that he talked with Osterberg, gave Osterberg this information before that 8th day?

MILLIGAN: I don't believe it's pen pointed as to when he communicated with Osterberg.

ENOCH: Does the plaintiff though have the burden of at least showing - having some evidence that Osterberg knew or had knowledge that his expenditure was in violation of the election code?

MILLIGAN: I don't believe so. My whole view of this statute is, if that is our requirement, there will be no recovery under this Act. We cannot prove someone's thoughts that they knew or didn't know whether they were violating the law. And so, have we met that burden of proving that Mr. Osterberg said, "Well I know I ought to be reporting but I'm not going to," no we haven't. And I have from the very beginning felt that if that's the requirement, this statute has no teeth, and it's not going to work.

PHILLIPS: You do agree at least as the SC has held in *Buckley* there is a core element of speech here that you _____.

MILLIGAN: Yes, it's speech, but as was pointed out there is no limit on what they can spend. They can spend any amount.

PHILLIPS: If it is free speech and at the core of the First Amendment, then every part of a statute that regulates that has to be narrowly tailored to meet a compelling state interest does it not? I mean we have to look at each one of these requirements that are necessary to sustain your judgment. With that same standard we can't say, well there's a high bar here but there's a low bar over here, so it's alright?

MILLIGAN: *Buckley* also said that the reporting of independent expenditures was okay. They said it. And that states have a right to do that.

PHILLIPS: Well I was really getting into the penalty part of this. Whether or not it's appropriate regulation of core free speech to say if you slip up and don't follow one of these requirements, you can pay double the total amount you've expended to a private candidate plus attorney's fees?

MILLIGAN: Well that's the penalty. If you're asking me whether the acting in concert is a constitutional violation, I don't think so.

PHILLIPS: But we don't have to get to that. Under the cases that now come to us, we don't have to pass on whether if I try to get a friend to go along with me, we're both in violation of the statute. We might have to do that in some cases. We don't have to do it in this one. But we do have to pass on whether or not it's an appropriate regulation to try to discourage failure to report to have the violator pay double the amount of the total expenditure to an individual.

MILLIGAN: *Ragsdale* is the only other reported case on this matter, and clearly this court affirmed their opinion on the damages and said whether if the penalty is too high or too low is a legislative matter. So this court affirmed.

HECHT: Well it's not. In *Buckley* if you made this a capital offense, you probably violate the constitution. But you can make it some kind of an offense not to report, that's what *Buckley* says. But you have to look and see what kind of an offense is it. It may be a misdemeanor is appropriate. That's kind of like what *Buckley* had. But is a cause of action for civil damages appropriate? Does it serve a state interest?

MILLIGAN: I feel it does because of the reasons given in *Ragsdale,* in that Tennessee case that I cited. We don't have to have a state agency to do this. With appropriate state expenditures that that would take, there are thousands of elections in this state every election time. This statute says, let the private parties do it. And to me, that is a wonderful state interest to eliminate a huge bureaucracy that would be necessary to monitor.

HECHT: So the state's interest is in promoting enforcement without encumbering the law enforcement?

MILLIGAN: Without making the taxpayer pay and let the parties duke it out individually, and therefore, he who violates pays.

ENOCH: You argue that if knowingly bar was sufficiently high, the statute would be meaningless. But if Judge Peca had simply written a letter to the Osterbergs, he apparently knew who they were, he apparently knew what they were doing, and demanded that they follow the election code, then the Osterbergs would have a difficult time defending the fact that they had knowledge that their expenditure was in violation of the election code. But so far all you have is Judge Peca in front of a bar association making a general statement of violation of the election code, and a statement from Beall that "I mentioned to Osterberg at some point later in time" as your only evidence. It would not be hard to establish direct knowledge on the part of the violator if a candidate was serious about the allegation?

MILLIGAN: Having participated in this trial, and the unique personalities involved, had Judge Peca written a letter, I could see a response that it wasn't specific enough to point out the precise violation, or a response that we didn't understand it. Does he have to give them a letter? Should he have given him a brief and cited the statutes and the cases? Should he then have to

explain the brief? To me, once you get on the ignorance of the law as a defense, all of those questions come into play. How much is enough? Was it a letter? Did we have to cite each provision? Did we have to tell him why?

ENOCH: But if your point is that Judge Peca is saying, "this is a violation of the election code," when the date for filing had not yet come, how can that be knowledge of a violation of the code?

MILLIGAN: It can't.

ENOCH: So the violation doesn't occur until there has been a filing period and there's been no filing?

MILLIGAN: One of the things that they have said was that you've got to have knowledge at the moment of the expenditures. And of course, clearly on reporting, that's impossible. You spend the money and then the reporting deadline doesn't fall for days or weeks later. So to me, that's a reason for why knowingly applies to whether it was a political expenditure, not whether it violated the reporting statute, because it's impossible to violate reporting on the day you spend it.

ENOCH: *Buckley* would say you can't regulate the expenditure, you can only regulate the reporting. So the knowledge has to be it seems to me only in the failure to report, not the expenditure. The knowledge has to apply to the failure to report in order to be consistent with *Buckley*. *Buckley* would say, "you can't touch the speech issue out here, but you can require a filing." So to make this statute constitutional the knowingly would have to apply to the filing.

MILLIGAN: I think I looked at *Buckley* differently. I cannot accept that the US SC - in effect we have this situation then where we have ignorance of the law. And what struck me at the very beginning of this case is our children - everyone knows that our society is built on the concept that ignorance of the law is not a defense. And once that is removed, I see no end to it. And to me ignorance of the law has to be a defense for any ruling that says, "Peca cannot recover against the Osterbergs." It comes down to that: Did the Osterbergs know they were violating this statute and what did they know? How much did they know? We get into infinitesimal arguments over whether we've proved it. I see no end to it. And so, I don't think that this case violates *Buckley*. *Buckley* says, "We're not limiting anything. We're simply saying you've got to follow this statute on reporting," and you can act in concert with another person because if you do, you have become a committee, I think. It doesn't say two people. I think the statute has in good faith tried to regulate as best it can. It says, "individuals, political committees." Well what's a political committee? In *Vemus*(?), that Tennessee case, they said two or more. I think Texas should be, but that hasn't been addressed by the courts.

If knowing is going to be part of it, I don't think it will work.

ENOCH: Knowing is in the statute?

MILLIGAN: That's true. Knowing as to, you know you're violating the law. You can't know when you actually pay the money. Certainly we are confronted with current events on the federal scene. Campaign finances is the big issue. Red Chinese government and all sorts of people apparently in what we hear are making contributions, expenditures, whatever they are this statute would get to the bottom of that. This statutes says: You've got to report it. But you don't have to report it if you don't know that the statute requires that. That means, as this court has previously said, somebody is not going to be reporting because they didn't know.

I don't see how it can work. I see we are going to have chaos if that is to be an out.

ENOCH: Is the private cause of action the only remedy for a failure to report by the Osterbergs?

MILLIGAN: The A.G. can bring the criminal charges in this statute.

ENOCH: So the only issue is whether or not a private cause of action - if you're going to have a private cause of action what does it mean?

MILLIGAN: To me, the way I look at it it's better than having a huge state bureaucracy to monitor the elections in every city and every county of the state. I don't know what that would take. It would take a lot of people. So to me, this is capitalism at its best. If someone involved or a candidate believes there has been a violation, he files his lawsuit. After all the statute says, "If he doesn't win, the defendant can sue him for his fees and expenses." So to me it's _____, and that's what *Ragsdale* in their discussion were talking about, that it does serve a compelling state interest because we don't have to have a state organization to look over it and to check every - I mean I can't imagine how many elections - I didn't go look it up there are in this state on city, county, state level. There must be thousands.

One of the points we have asked for is our attorneys' fees . We had an unusual trial. It was on a Saturday when we got the verdict. The jury did not come back with fees. They came back with twice the amount. We all got there at 8:00. Finally at 10:30, the jury said we cannot go on. The attorney's fees were at the end of the charge. And no, I didn't send them back in and say, "No Judge, we've got to send them back in," because each one of them said, "That's it. We can't do anymore. It's 10:30, everyone was exhausted." I filed a motion for entry, a judgement asking for my fees because they had not been controverted by anyone. And that amount is in my brief. So I believe it's about $28,000 in fees. And I believe, and I understand the regular law is the *Fleet* case, that there are times when you've got to either not accept their verdict, or send the jury back. Here they said "they couldn't go on because there were those political committee questions and the charge and they got hung up on that." And so, I filed my motion for fees. And my basis is under *Ragsdale* since the

court said that when the fees are reasonable and uncontroverted as a matter of law they can be assessed. And so that's where I am coming from. From there. And I believe it's unique with this particular case.

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REBUTTAL

ZINN: The only compelling state interest that the US SC has recognized in the restriction of independent expenditures is a prevention of corruption or the appearance of corruption and have recognized none other. In analyzing these statutes, including whether knowledge involves violation of the statute it just applies to the _____ expenditure, you must keep that in mind. Because if the statute doesn't serve that purpose and is narrowly tailored to serve that purpose, then that statute violates the First Amendment.

HECHT: *Buckley* says there are two other purposes: informing the electorate on where money comes from; and getting data necessary to prosecute violations.

ZINN: As to independent expenditures, the only recognized compelling state interest - and they said this in the *N.C. Pact* case, in CJ Rehnquist opinion in 1985 citing *Buckley.* I feel pretty confident about that. I could be wrong. But as to independent expenditures, there is difference as to campaign contributions. But as to independent expenditures, the only compelling state interest is the prevention of corruption or the appearance of corruption. And that is why they struck down any limitations on expenditures because they said, "independent expenditures do not involve corruption in the sense that the possibility that campaign contributions do."

OWEN: Can the state compel disclosure of who was making the expenditures?

ZINN: Only if it's express advocacy. If it is not express advocacy, they cannot. And there's also going to be a limitation in the *McIntyre* case on anonymous _____ and things like that. They have to be very careful when they require people _____ speech when it's done anonymously. In the *McIntyre* case they held the State could not do that.

SPECTOR: Did this TV ad have any disclaimer about who paid for it?

ZINN: Yes, it did. It said, "Ad paid for Bob Osterberg." And anyone who saw the ad saw the disclaimer. There was no secret pact. It was just Bob Osterberg. The guy paid for the ad, and this is it.

BAKER: So he knew he had to do the disclaimer on the actual ad that he spent the money for?

ZINN: If you saw the ad, you saw it was paid for by Bob Osterberg.

BAKER: That's what I mean. He knew that was required by the election law?

ZINN: No, he didn't know that. He was helped by a friend who worked with the TV station, and the TV station worked with the friend and I guess they required that. It didn't say "political ad paid for by Bob Osterberg." It said, "Paid for by Bob Osterberg."

BAKER: But you've already told us that in your mind it's clearly political speech, the ad?

ZINN: Absolutely. But it wasn't express advocacy. There's a difference.

BAKER: It wasn't?

ZINN: It was not express advocacy.

PHILLIPS: Why doesn't "Vote Against Him" express advocacy?

ZINN: Because earlier in the message it says "Vote for Him."

PHILLIPS: If you want to _____ in election?

ZINN: It says if you want a judge who is intelligent, hardworking and well respected by his piers, vote for him. But it said if you want to return the courthouse to the people vote against him.

BAKER: And vote for the plaintiff in this case?

ZINN: No, it didn't mention the name of the opponent. It only mentioned the name of Judge Peca when it said, "Vote For Judge Peca." And then later on in the ad it said, "But if you want somebody who is going to bring the courthouse back to the people - Vote for his opponent." It contained two messages to the people. And the SC has created a bright line test for express advocacy. If it's ambiguous in anyway it's not express advocacy. If it contains conflicting messages it is not express advocacy. And the First Amendment requires that.

ABBOTT: Can I get you to refocus on the knowing issue once again. And can I get you to reference §253.002, and 253.131. Section 253.002 is the initial provision that says that direct campaign expenditures are unlawful. And it says, "A person may not knowingly make or authorize a direct campaign expenditure, period." So in other words it talks about it is a violation if a campaign expenditure is made knowingly. It doesn't say anything about knowingly in violation of this act. Then if you go to 253.131 this concerns the civil enforcement provision. Where it says a person who knowingly makes or accepts a campaign contribution or makes a campaign expenditure. So that part reads the same way that 252.002 does, but it adds in violation of this chapter is libel for

damages as provided in this section. Now is this some passive writing by the legislature. If the legislature had said something that says exactly the same: A person who knowingly makes or accepts a campaign contribution, or makes a campaign expenditure that violates this chapter, is liable for damages nowhere. It just says that if that knowing contribution that's referenced in 253.002 violates what is provided in this chapter, then you are going to be liable for these damages. Why does all that taken together not mean that the knowing that's referenced in the civil enforcement provision is the same as the knowing in 253.002, and that is knowing that the contribution was made as opposed to knowing that it was done in violation of the chapter?

ZINN: Because the language "In violation of this chapter" - first of all it only occurs in 253.131. That distinguishes it from .002. Second, where it's placed in the state is right after making the expenditure. Knowingly makes the expenditure in violation of this chapter. So knowingly could either modify just make the expenditure, which doesn't make much sense, because making the expenditure is core political speech. The legislature certainly is not trying to tie the mens rea to something that's constitutionally protected. They want to tie the mens rea to the forbidden conduct. That's what they are punishing in that statute.

ABBOTT: But they did tie the mens rea to merely making the contribution in 253.002?

ZINN: Yes, the language in .002, the language of "in violation of the chapter," is not in that particular statute. But we were found libel under 253.131, the private cause of action. That was the basis for the damages against us. And then it referenced back to the violation in .002. But it is 253.131 that Judge Peca must prove to get his damages. And that statute says, "In violation of this chapter in a particular way." They could have written it differently so that it was clear that the knowingly only applied to making the expenditure. But I would say if they did that, that would probably be unconstitutional. But they could have written it differently so it only said that, but they didn't.