No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE,
RESPONDENT.

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

CITIZENS FOR DEMOCRATIC ALTERNATIVES
IN 1980, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Whether committees which advocate the nomination of one individual for election to federal office, and oppose the nomination of others are subject to FECA's contribution limitations.

(2) Whether subpoenas issued by the Commission should be enforced in accordance with established precedent of this Court, not set aside pending judicial resolution of substantive jurisdictional questions.*

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* The only parties to this action are as stated in the caption.

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FEDERAL ELECTION COMMISSION, PETITIONER,

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CITIZENS FOR DEMOCRATIC ALTERNATIVES
IN 1980, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Election Commission ("FEC" or "Commission") respectfully petitions this Court for a writ of certiorari to review and reverse the judgments of the United States Court of Appeals for the District of Columbia Circuit in *Federal Election Commission* v. *Machinists Non-Partisan Political League*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9151 (D.C. Cir. May 19, 1981) and *Federal Election Com-*

mission v. *Citizens for Democratic Alternatives in 1980*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9152 (D.C. Cir. May 19, 1981).

OPINIONS BELOW

The May 19, 1981 opinions of the court of appeals vacating the district court's Orders enforcing the Commission's subpoenas issued to the Machinists Non-Partisan Political League ("MNPL") and Citizens for Democratic Alternatives in 1980 ("CDA") are not yet officially reported and appear at Appendix ("App.") A and B, respectively. The January 30, 1980 Order of the United States District Court for the District of Columbia enforcing the Commission's subpoena issued to MNPL is unreported and appears at App. C. And the February 29, 1980, Order of the United States District Court for the District of Columbia enforcing the Commission's subpoena issued to CDA, also unreported, appears at App. D.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1980).

STATUTES INVOLVED

These cases concern several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. ("FECA" or "the Act");[1] spe-

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977); and by the Federal Election Campaign Act Amend-

cifically 2 U.S.C. §§ 431(d), 437c(b)(1), 437d(a)(3), (4), (9), (10), 437g, 441a(a)(2)(C), 441b (1976) and 2 U.S.C. §§ 431(4), 437c(b)(1), 437d(a)(3), (4), (9), 437g and 441a(a)(2) (1979). For the Court's convenience, these provisions are set forth at App. E to this petition.

STATEMENT OF THE CASE

These cases are subpoena enforcement actions arising out of the FEC's investigation into whether certain groups, including CDA and the International Association of Machinists ("IAM"), through its separate, segregated fund,[2] violated contribution limitations set forth in FECA.[3] The court of appeals

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ments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

[2] Respondent MNPL is the separate, segregated fund of the IAM, 2 U.S.C. § 441b(b)(2)(C), 11 C.F.R. § 100.5(b), registered with the Commission as a multicandidate political committee and subject to FECA. 11 C.F.R. § 100.5(e)(3). Thus MNPL is not only subject to the contribution limitations of 2 U.S.C. § 441a, but also to the restrictions of 2 U.S.C. § 441b as to any of its activities in connection with federal elections. CDA is a political committee registered with the FEC which has made contributions to 5 federal candidates. 2 U.S.C. §§ 432, 441a(a), 11 C.F.R. § 100.5(e).

[3] The Commission had initiated its investigation into these matters after it received a signed, sworn complaint alleging, *inter alia*, that certain political committees were affiliated under FECA, 2 U.S.C. §§ 433, 441a(a)(5), 11 C.F.R. § 110.3(a)(1)(ii)(D) and thus subject to a single $5,000 contribution limitation, 2 U.S.C. § 441a(a)(1)(C), (2)(C); and that MNPL had contributed in excess of $5,000 to the allegedly affiliated committees in violation of 2 U.S.C. § 441a(a)(2)(C). The Commission found reason to believe, 2 U.S.C. § 437g(a), that the Act may have been violated and in furtherance of its investigation, issued the subpoenas challenged below. 2 U.S.C.

(Wald, J.) reversed the district courts' enforcement of the subpoenas in question on the ground that contributions to committees seeking the presidential nomination for an undeclared candidate, Edward M. Kennedy, were not within the coverage and the limitations of FECA.[4] Explicitly ruling that the ordinary standard of review does not apply to cases in which the Commission seeks to enforce its subpoenas, the court held that the Commission erred when it determined, on the basis of a complaint, that there was reason to believe that the committees involved had violated FECA's contribution limitations. The court reversed the district court's enforcement of the subpoenas on the ground that such jurisdictional questions must be decided prior to enforcement and concluded that the Commission would be incorrect if it applied FECA's limits on contributions to such committees.[5] On June 9, 1971, by a vote of 6-0, the Commission determined to seek review of the appellate court's judgments by filing this petition.

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§§ 437g(a)(2), 437d(a)(1), (3). When MNPL and CDA refused to comply with the subpoenas, the Commission filed the petitions which began these actions.

[4] The district court, relying, *inter alia*, on this Court's analysis in *United States* v. *Morton Salt*, 338 U.S. 632 (1950) (*"Morton Salt"*) ordered MNPL and CDA to comply with the Commission's subpoenas and produce the documents requested. Both MNPL and CDA filed applications for stays of the court's orders with the district court and the court of appeals which were denied. MNPL also filed an application for a stay of the order with this Court which was also denied. *MNPL* v. *FEC*, 447 U.S. 918, 100 S.Ct. 3006, 3007 (1980). Subsequently MNPL and CDA produced the documents requested in the Commission's subpoenas.

[5] The Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee filed a joint motion to intervene in *FEC* v. *MNPL* on June 2, 1981. Both the FEC and MNPL filed motions in opposition, and the court of appeals denied the motion on June 22, 1981.

REASONS WHY THE WRIT SHOULD ISSUE

THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS AS TO THE PROPER CONSTRUCTION OF THE FEDERAL ELECTION CAMPAIGN ACT WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court should issue the writ as requested to hear and decide important questions as to the scope of the Federal Election Campaign Act. The substantive issue decided by the court below—that FECA does not limit contributions to committees which advocate the nomination of undeclared candidates for election to federal office—impacts profoundly on campaign financing, placing declared candidates at a clear disadvantage to those who delay candidacy while campaigns without limit occur on their behalf. The procedural question—that subpoenas issued by the Commission will not be enforced by federal courts in accordance with established precedent of this Court, but can be set aside pending judicial resolution of issues relating to jurisdiction—will have a substantial impact upon the Commission's administration and enforcement of FECA. It is imperative that this Court decide these questions prior to the 1982 election so that all participants in that political process can be certain as to their proper and final resolution.

The judgments of the court below have created, for the first time, two classes of political committees and activities which are dependent on the candidacy of the individual they support—one class of committees supporting declared candidates subject to FECA and another class of committees supporting potential candidates operating outside the scope of the Act. Draft committees, not subject to FECA's

contribution limitations, will have the potential of funnelling large aggregations of money, including corporate and union treasury funds, into federal campaigns. Such committees, able to accept unlimited funds, will be in direct competition with those committees supporting candidates. A proliferation of draft committees will severely damage the statutory scheme enacted by Congress and may completely circumvent the provisions of FECA. Such a result was certainly not the intent of Congress when it enacted FECA, and the appellate court's judgments facilitating this result must be reversed.

I. CONGRESS DEFINED THE TERM "POLITICAL COMMITTEE" TO INCLUDE GROUPS ORGANIZED TO DRAFT A CANDIDATE FOR NOMINATION AND ELECTION TO FEDERAL OFFICE AND TO OPPOSE THE NOMINATION OF OTHER CANDIDATES AND THE APPELLATE COURT'S CONCLUSION TO THE CONTRARY MUST BE REVERSED.

The plain meaning of "political committee" as first defined by Congress in the 1971 Act, and as subsequently modified, is not limited to groups organized to support declared candidates.[6] The language of the statute itself clearly includes, as political committees, groups organized to advocate the nomination of an individual for election to federal office without regard to said individual's declaration of candidacy, and groups organized to oppose the nomination of an individual to federal office. Indeed,

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[6] This Court has "often observed that the starting point in every case involving stautory construction is 'the language employed by Congress.'" *CBS, Inc.* v. *Federal Communications Commission,* —— U.S. ——, 101 S.Ct. 2813, 2820, 2821 (July 1, 1981), *quoting Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 337 (1979).

Congress specifically rejected a legislative proposal which would have limited "political committee" to candidate committees. The House of Representatives, in H.R. 11060, defined "political committee" as "any committee, association or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of one or more *candidates* for Federal elective office." H.R. 11060, 92d Cong., 1st Sess. at 3 (1971) (emphasis added); H.R. Rep. No. 92-564, 92d Cong., 1st Sess. at 7 (1971); *see also* 118 Cong. Rec. 320 (1972). However, as passed by Congress, the definition of "political committee" includes "any individual, committee, association or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000," Pub. L. No. 92-225, § 591, 86 Stat. 8 (1972); and includes within the terms "contribution" and "expenditure" a "loan . . . or anything of value . . . made for the purpose of influencing the nomination for election or election of *any person* to Federal office . . . or for the expression of a preference for the *nomination of persons* for election to the office of President." *Id.* (emphasis added). 2 U.S.C. § 431(d), (e)(1), (f)(1) (1976); 2 U.S.C. § 431(4), (8)(A), (9)(A) (1979).

Inasmuch as the activities of the committees herein were undertaken to influence the nomination for election of Senator Kennedy to the office of President, the groups conducting such activities are political committees within the meaning of FECA.[7] It

[7] IAM has admitted that, through its president, William Winpisinger, MNPL and local IAM officers, it encouraged and helped organize groups such as CDA intent on promoting Senator Kennedy's candidacy and on preventing the nomina-

stretches credibility to hold, as did the court of appeals herein, that an organized attempt to influence the nomination of an individual for election to the office of President, by way of encouraging said individual to declare his or her candidacy and by way of opposing the nomination of other individuals, is not an attempt to influence the nomination process itself.[8] Indeed, even the court of appeals recognized that those committees whose "major purpose . . . is the *nomination* or election of a candidate . . . fall within the core area sought to be addressed by Congress" and that "they are, by definition, *campaign related.*" App. A at 24a *citing Buckley* v. *Valeo*, 424 U.S. 1, 79 (1976) ("*Buckley*"). And this Court has specifically held that "dollars given to another person or organization that are *earmarked for political purposes* are contributions under the Act." 424 U.S. at 24 n.24 (emphasis added); *see* 424 U.S.

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tion for reelection of President Carter as president. Appellant's Brief in *MNPL* v. *FEC*, No. 80-1136 at 5-10. CDA has stated that its purpose was to generate "political support within the Democratic party for [an] . . . alternative to the reelection of President Carter . . . the efforts bore fruit when Senator Kennedy formally declared his candidacy." Appellant's Brief in *CDA* v. *FEC*, No. 80-1256 at 5-6. Thus, at a minimum, CDA's activities to defeat the nomination of President Carter, and MNPL's contributions to CDA for such activities come within the scope of FECA.

[8] *See Federal Election Commission* v. *Wisconsin Democrats for Change in 1980*, —— F. Supp. ——, No. 80-C-123, Opinion and Order at 4, (W.D. Wisc. April 24, 1980); *Federal Election Commission* v. *Florida for Kennedy Committee*, 492 F. Supp. 587, 595 (S.D. Fla. 1980) (the court could not "hold that the activities of the various draft committees were efforts solely to convince the Senator to run, rather than to help elect him").

at 80 n.107. Certainly, the committees herein received "contributions" as that term has been defined by Congress and by this Court. These groups are thus political committees under FECA and the holdings of the court of appeals to the contrary must be reversed.

Moreover, the clear error in the judgments rendered by the court of appeals herein is emphasized by the court's failure to distinguish between separate, segregated funds such as MNPL[9] and other political committees organized as draft groups. *See California Medical Association* v. *Federal Election Commission*, 641 F.2d 619, 631 (9th Cir. 1980) (en banc), *aff'd* —— U.S. ——, 101 S.Ct. 2712 (June 26, 1981) ("*CMA* v. *FEC*"). The court's blanket exemption of "draft" activities from the purview of FECA and the Commission, even where such activities are conducted by separate, segregated funds is a serious departure from the statute as legislated. Under the interpretation of FECA rendered by the court of appeals in these cases, separate, segregated funds seem to be free to collect and spend unlimited monies for "draft" activities. Congress has clearly prohibited the expenditure of all general treasury funds in connection with federal elections. 2 U.S.C. § 441b. And this Court has recognized that the exception to this prohibition—contributions to and expenditures by separate, segregated funds—requires strict accounting and separation of voluntary contributions from general treasury funds. *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972). The court of appeals' judgments which substantially re-

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[9] *See* note 2, *supra*.

write the statute enacted by Congress [10] should be reviewed and reversed by this Court.[11]

II. THE APPELLATE COURT ERRED IN REFUSING TO ENFORCE THE COMMISSION'S SUBPOENAS PENDING JUDICIAL RESOLUTION OF SUBSTANTIVE JURISDICTIONAL QUESTIONS.

This Court and federal circuit courts, including the District of Columbia, recognizing the important governmental interest in expeditious investigations of statutory violations, established the principle that the scope of issues to be reviewed in subpoena enforcement actions is narrow, *i.e.*, limited to whether the agency has the statutory authority to issue the

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[10] The power to regulate federal elections rests with the Congress. *United States Constitution*, art. 1, § 4. *Buckley*, 424 U.S. at 13; *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934); *Ex Parte Yarbrough*, 110 U.S. 651, 657-58 (1884).

[11] The court also erred in concluding that the Commission's action in these cases was a "novel" extension of the FEC's authority. While these cases represent the first action by the Commission to investigate violations by draft groups of FECA's limits on contributions, the Commission, through its advisory opinion process, has consistently construed the term "political committee" as not requiring that a group support a particular candidate for federal office. Advisory Opinion ("AO") 1975-81, AO 1979-40, AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5183, 5425, 5427; *see also* AO 1979-26, AO 1979-49, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5408, 5433. The construction by the Commission of the statute it administers is to be accorded great weight by the courts, especially in the context of summary subpoena enforcement proceedings. *National Conservative Political Action Committee, et al.* v. *Federal Election Commission*, 626 F.2d 953, 956 n.7 (D.C. Cir. 1980) *citing National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) and *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

subpoena, whether the demand is not too indefinite and whether the information is reasonably relevant to the inquiry. *Morton Salt*, 338 U.S. at 652. *See Donaldson* v. *United States*, 400 U.S. 517, 526, 527 (1971); *Ryan* v. *United States*, 379 U.S. 61, 62 (1964); *United States* v. *Powell*, 379 U.S. 48, 51 (1964); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214 (1946) ("*Oklahoma Press*"); *Endicott Johnson* v. *Perkins*, 317 U.S. 501, 509 (1943); *Federal Election Commission* v. *Lance*, 617 F.2d 365, 368 (5th Cir. 1980) ("the Supreme Court has clearly indicated that a court's role in a proceeding to enforce an administrative subpoena is a limited one," *citing Endicott Johnson, supra*), *aff'd* 635 F.2d 1132 (5th Cir. January 15, 1981) (en banc), *cert. den.* —— U.S. ——, —— S. Ct. ——, No. 80-1740 (July 2, 1981); *Federal Election Commission* v. *Florida for Kennedy Committee*, 492 F. Supp. 587, 591 (S.D. Fla. 1980), *appeal pending* No. 80-6013 (5th Cir.); *Federal Election Commission* v. *Wisconsin Democrats for Change*, No. 80-C-124 at 2.[12] *But*

[12] *See also Securities and Exchange Commission* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1380 n.28 (D.C. Cir. 1980) (en banc), *cert. den.* —— U.S. ——, 101 S.Ct. 529 (Nov. 17, 1980); *Federal Trade Commission* v. *Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 973, 974 (D.C. Cir. 1980); *Federal Trade Commission* v. *Anderson*, 631 F.2d 741, 744-745 (D.C. Cir. 1979); *Securities and Exchange Commission* v. *Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. den.* 439 U.S. 1071 (1978); *Federal Trade Commission* v. *Texaco, Inc.*, 555 F.2d 862, 873 (D.C. Cir. 1977) (en banc), *cert. den.* 431 U.S. 974 (1977); *Securities and Exchange Commission* v. *Howatt*, 525 F.2d 226, 229, 230 (1st Cir. 1975); *Securities and Exchange Commission* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1052, 1053 (2d Cir. 1973), *cert. den.* 415 U.S. 915 (1974); *Securities and Exchange Commission* v. *Wall Street Transcript Corp.*, 422 F.2d 1371, 1375

see Reader's Digest Association, Inc v. *Federal Election Commission*, 509 F. Supp. 1210, 1217 (S.D.N.Y. March 19, 1981); *Federal Election Commission* v. *Phillips Publishing, Inc.*, —— F. Supp. ——, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9156 (D.D.C. July 16, 1981). Relying on this precise standard, the district court enforced the FEC subpoenas issued to MNPL and CDA.

The court of appeals, however, rejected the *Morton Salt* standard as applicable only to agencies which regulate corporate and commercial matters and adopted a new substantially different "extra-careful scrutiny" standard for enforcement of FEC subpoenas. Thus, the court found it necessary to reach substantial jurisdictional issues at this early stage

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(2d Cir. 1970), *cert. den.* 398 U.S. 958 (1970); *United States* v. *Westinghouse Electric Corp.*, 638 F.2d 570, 574 (3d Cir. 1980); *Interstate Commerce Commission* v. *Gould*, 629 F.2d 847, 851 (3d Cir. 1980), *cert. den.* —— U.S. ——, 101 S.Ct. 856 (1980); *Federal Election Commission* v. *Lance, supra; Federal Trade Commission* v. *Turner*, 609 F.2d 743, 744 (5th Cir. 1980); *Federal Trade Commission* v. *Winters National Bank and Trust Co.*, 601 F.2d 395, 398 (6th Cir. 1979); *United States* v. *DiFonzo*, 603 F.2d 1260, 1265 (7th Cir. 1979), *cert. den.* 444 U.S. 1018 (1980); *Securities and Exchange Commission* v. *Savage*, 513 F.2d 188, 189 (7th Cir. 1975); *Adams* v. *Federal Trade Commission*, 296 F.2d 861, 866 (8th Cir. 1961) *cert. den.* 369 U.S. 864 (1962); *National Labor Relations Board* v. *International Medication Systems, Ltd.*, 640 F.2d 1110, 1114 (9th Cir. April 2, 1981); *Lynn* v. *Biderman*, 536 F.2d 820 (9th Cir. 1976), *cert. den.* 429 U.S. 920 (1976); *Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d 431, 434-435 (9th Cir. 1975); *Crafts* v. *Federal Trade Commission*, 244 F.2d 882 (9th Cir. 1957), *rev'd* 355 U.S. 9 (1957); *Securities and Exchange Commission* v. *Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980), *cert. den.* —— U.S. ——, 101 S.Ct. 362 (Nov. 3, 1980); *Equal Employment Opportunity Commission* v. *University of New Mexico*, 504 F.2d 1296, 1302 (10th Cir. 1974).

because of the delicate nature of the materials subpoenaed,[13] the Commission's narrow investigatory authority,[14] and the Commission's "novel extension" of its jurisdiction. App. A at 13a-15a. Applying this

[13] If the judgments of the court of appeals remain as precedent, the Commission will be required to establish conclusively its jurisdiction and coverage of the Act without benefit of adequate information, and to "answer at the outset of its investigation the possibly doubtful questions of fact and law that the investigation is designed and authorized to illuminate." *Federal Trade Commission* v. *Texaco*, 555 F.2d at 879 *quoting Securities and Exchange Commission* v. *Savage*, 513 F.2d 188, 189 (7th Cir. 1975). *See Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d at 434; B. Schwartz, *Administrative Law*, at 116 (1976). Such a requirement will frustrate the Commission's attempt to investigate expeditiously alleged violations of the Act as mandated by Congress and will unduly delay Commission investigations, in direct violation of 2 U.S.C. § 437d (a) (9). *Oklahoma Press*, 327 U.S. at 213; *Federal Trade Commission* v. *Anderson*, 631 F.2d at 744-745.

[14] The Commission, however, was created by Congress as an agency with "broad investigatory, administrative and supervisory powers," 120 Cong. Rec. 34,397 (1974). Congress determined that the Commission must be authorized to investigate a violation if, "based on information obtained in the normal course of carrying out its duties under the Act", it found reason to believe a violation has occurred. H.R. Rep. No. 94-1057, 94th Cong. 2d Sess. at 1049-50 (1976). Indeed, the Commission has exclusive authority "to administer, seek to obtain compliance with and formulate policy with respect to [FECA]," 2 U.S.C. § 437c(b)(1), and exclusive jurisdiction with respect to civil enforcement of the Act. 2 U.S.C. § 437d(e), 437g(a); *In re Carter-Mondale Reelection Committee*, 642 F.2d 538, 545 n.9 (D.C. Cir. 1980); *Common Cause et al.* v. *Schmitt, et al*, 512 F. Supp. 489, 501, 503 (D.D.C. Sept. 30, 1980), *prob. juris. noted* No. 80-1067 (Feb. 23, 1981); 122 Cong. Rec. 12,203 (1976). *See also Committee to Elect Lyndon LaRouche* v. *Federal Election Commission*, 613 F.2d 834, 853-861 (D.C. Cir. 1979), *cert. den.* 444 U.S. 1074 (1980).

new and dramatically different standard, the appellate court reversed the district court's Orders. The necessary result of the court's judgments will be undue delays in the Commission's investigation of alleged violations of FECA in direct conflict with the statute's mandate for expeditious investigations. 2 U.S.C. §§ 437d, 437g; *CMA* v. *FEC*, 101 S.Ct. at 2726, 2727. The courts, rather than the Commission, will in the first instance and without benefit of the facts,[15] determine whether the FEC has subject matter jurisdiction, whether a violation of the Act has occurred, or whether the FEC, if it is allowed to conduct an investigation, will find a violation of FECA.[16] Every enforcement action in which

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[15] This Court found, more than 30 years ago, that the "very purpose of the subpoena . . . is to discover and procure evidence. . . ." *Oklahoma Press*, 327 U.S. at 201. Indeed, when first amendment challenges were raised as defenses to a subpoena, the Court held that "[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Oklahoma Press*, 327 U.S. at 209. *See Securities and Exchange Commission* v. *Wall Street Transcript Co., supra. See also Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978). Thus, the appellate court's decision to establish a new standard for judicial review of agency subpoenas is a marked departure from the long held rule set forth by this Court and other federal courts that statutory coverage is improperly and prematurely considered at the subpoena enforcement stage of administrative proceedings. *Oklahoma Press, supra; Federal Trade Commission* v. *Texaco*, 555 F.2d at 879.

[16] The district court's recent judgment in *Federal Election Commission* v. *Phillips Publishing Inc., supra,* which relies heavily on *MNPL* v. *FEC,* exemplifies the effect of the judgments on the Commission's attempt to administer and enforce the Act. ¶ 9156 at 51,224-51,226. Concluding that it was unlikely that the Commission would find a violation of FECA if

the FEC finds reason to believe that a violation has occurred, even those which could have been settled through conciliation, will be reviewed and fully litigated in the courts.[17] Indeed, the Commission, if it were allowed to proceed with its investigation, could determine that FECA does not cover the activities in question, closing its file on the matter without requiring judicial resolution of the underlying substantive issues.

By the court's judgments, the enforcement mechanism which serves to facilitate conciliation and to reduce the number of cases reaching litigation, may well be replaced by court action. Congress certainly did not intend such a result when it drafted FECA's enforcement procedures and created the Commission with the exclusive jurisdiction over civil enforcement of the Act. The court of appeals' judgments in *MNPL* v. *FEC* and *CDA* v. *FEC* are contrary to this Court's decisions on the role of the judiciary in administrative subpoena enforcement proceedings and should be reversed. *Hannah* v. *Larche, supra; Oklahoma Press, supra* and *Endicott Johnson, supra.*

In sum, the appellate court's decision will result in undue delays in Commission investigations of alleged violations of FECA and potential circumvention of FECA's contribution limitations found constitutional by this Court in *Buckley, supra* and *CMA*

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it were allowed to proceed with the investigation, the Court enjoined any further investigation and refused to enforce the Commission's subpoena. ¶ 9156 at 51,227.

[17] This Court has held, however, that agency findings of reason to believe are not final agency action to be reviewed by the courts. *Federal Trade Commission* v. *Standard Oil Company of California,* —— U.S. ——, 101 S.Ct. 488 (Dec. 15, 1980).

v. *FEC*, *supra*. Further, the appellate court's approach is a serious deviation from established subpoena enforcement case law which directly contradicts Congressional intent and the Commission's consistent interpretation of the statutory language. The lower court's judgments require review, consideration and reversal by this Court.

CONCLUSION

The judgments of the United States Court of Appeals for the District of Columbia Circuit frustrate the intent of Congress to regulate federal elections, apply a construction of FECA which is inconsistent with Congressional intent and with Commission interpretation, and conflict with precedent established by this Court and by the courts of appeals. A writ of *certiorari* should issue to review and reverse the judgments in these cases.

Respectfully submitted,

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