No. 85-701

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

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QUESTION PRESENTED

Whether Congress reached a permissible balance under the First Amendment to the Constitution of the United States in 2 U.S.C. § 441b, which requires all corporations and labor organizations to finance all of their expenditures in connection with federal elections from separate segregated funds containing contributions voluntarily designated for political purposes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The July 31, 1985 opinion of the United States Court of Appeals for the First Circuit is published at 769 F.2d 13 and appears at J.S. App. 1a.[1] The June 29, 1984 decision of the United States District Court for the District of Massachusetts is published at 589 F. Supp. 649 and appears at J.S. App. 25a-38a.

[1] "J.S. App." references are to the appendix to the jurisdictional statement filed by the Federal Election Commission (hereafter "the Commission" or "the FEC"). "J.A." references are to the Joint Appendix, and "R." references are to the Record certified from the district court.

JURISDICTION

The final judgment of the court of appeals holding 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 *et seq.* (hereafter "the Act")[2] unconstitutional as applied, was entered July 31, 1985. The Commission filed a timely notice of appeal in the United States Court of Appeals for the First Circuit on August 28, 1985 (J.S. App. 40a-42a). On October 25, 1985, the Commission filed its jurisdictional statement, and on January 13, 1986 the Court noted probable jurisdiction. (J.A. 185). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1252 and 2101(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The full text of 2 U.S.C. § 441b is reprinted at J.S. App. 75a-80a.

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[2] 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, by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, by the Social Security Amendments of 1977, Pub. L. No. 95-216, Title V, Sec. 502, 91 Stat. 1509, 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), and by the Trademark Clarification Act of 1984, Pub. L. No. 98-620, Title IV, Sec. 402, 98 Stat. 3335, 3357.

STATEMENT OF THE CASE

A. Background

The Federal Election Campaign Act prohibits "any corporation whatever" or any labor organization from utilizing treasury funds to finance contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b(a). It permits, however, the use of such treasury funds for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes. . . ." 2 U.S.C. § 441b(b)(2)(C). In turn, corporations and labor organizations are restricted to soliciting contributions to those separate segregated funds from a restricted class: for unions, members and their families, and for corporations, stockholders, executive and administrative personnel and their families, and members of membership corporations. 2 U.S.C. § 441b(b)(4). The statutory definition of "political committee" specifically includes separate segregated funds, 2 U.S.C. § 431(4)(B), so that they are governed by the same reporting and disclosure requirements applicable to other political committees. *See* 2 U.S.C. §§ 433 and 434.

On January 26, 1973, Massachusetts Citizens for Life, Inc. (hereafter "MCFL") was incorporated under the laws of the Commonwealth of Massachusetts as a non-stock, non-membership corporation (J.A. 92-96).[3] Since its inception MCFL distributed a newsletter by mail to the 2,000 to 6,000 people who had contributed or paid dues to MCFL during the year of distribution (J.A. 23). Each of these newsletters bore a masthead identifying it as the "Massa-

[3] In 1980, MCFL amended its articles of incorporation in order to become a membership corporation (J.A. 21-22, 109-110).

chusetts Citizen for Life Newsletter," as well as a volume and issue number (R., Vol. I, Pleading 17, Ex. B, pp. 1, 9, 25, 32, 50, 82, 112). They contained articles of interest to MCFL supporters, such as information on relevant legislation, opinions and commentary on pro-life issues, and entertainment information (J.A. 88-89, 98-99).

In September of 1978, MCFL prepared and printed a flyer entitled "Special Election Edition" for distribution prior to the September 19, 1978, primary elections. Unlike the MCFL newsletter, which was never distributed to more than about 6,000 people (J.A. 24-27, 127-128), more than 100,000 copies of the Special Election Edition were printed for distribution (J.A. 172-173).[4] This election flyer was edited by Marianne Rea-Luthin, an officer of MCFL who was never part of the staff that prepared the MCFL newsletters (J.A. 143).[5] The Special Election Edition was mailed free of charge and without request to 5,986 people who had contributed or paid dues to MCFL and to 50,674 other people whom MCFL considered to be sympathetic to its goals (J.A. 18-27, 128). The remaining copies apparently were distributed publicly (J.A. 174).

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[4] The May, 1978, newsletter was Volume 5, Number 6 and concluded a Volume which had begun in January 1977. During discovery in this case, MCFL represented that the Special Election Edition distributed in September, 1978, was "Volume 5, Number 3" of its newsletter (J.A. 163). However, the copy of the Special Election Edition given to the Commission during discovery had "Volume 5, Number 3" written in by hand (R., Vol. I, Pleading 17, Ex. B at 144), and the actual Volume 5, Number 3 newsletter, distributed in May-June, 1977, is also in the Record (R., Vol. I, Pleading 17, Ex. B at 120).

[5] Ms. Rea-Luthin was director of the separate segregated fund MCFL established in 1980 (J.A. 22).

The front page of the flyer was captioned "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE." (R., Vol. I, Pleading 16, Ex. A at p. 1). It warned that "[n]o pro-life candidate can win in November without your vote in September," and requested the reader to join "in voting in the primary and together let us make our votes shout against the continuing killing of the unborn." The back page of the flyer had "VOTE PRO-LIFE" written on it in large bold-faced capital letters. This exhortation was part of a coupon which was to be clipped out and taken to the polls with the name of the pro-life candidates in the reader's district filled in. To facilitate this choice, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL considered the pro-life position on three issues highlighted by the flyer. A "y" meant the candidate supported the pro-life view of the issue and an "n" meant the candidate opposed it. An asterisk was placed next to the names of certain incumbent candidates to indicate their "special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." The flyer also featured the pictures of thirteen candidates out of the more than 400 running for office. Each candidate featured had received a triple "y" rating or was identified either as having a 100% pro-life voting record or as having stated a pro-life position. No candidate was pictured who had received even one "n" rating.

MCFL expended $9,812.76 to prepare, print and distribute the Special Election Edition (J.A. 9). This entire amount was paid from the corporation's general treasury funds (J.A. 9), for MCFL did not

establish a separate segregated fund until 1980 (J.A. 309-310).

B. The Commission Proceedings

On May 1, 1979, a complaint was filed with the Commission alleging that MCFL had violated the Act by utilizing corporate funds to distribute the Special Election Edition to the public. On June 27, 1979, the Commission found reason to believe that MCFL had violated 2 U.S.C. § 441b(a) and initiated an investigation. On October 21, 1980, the Commission found probable cause to believe that MCFL had violated 2 U.S.C. § 441b(a) by using corporate funds to prepare, print and distribute its Special Election Edition to members of the general public. After the Commission's attempt to conciliate failed to produce an acceptable agreement, the Commission authorized the filing of this civil enforcement action pursuant to 2 U.S.C. § 437g(a)(6)(A). (J.S. App. 43a-47a).

C. Proceedings Before the District Court

On February 22, 1982, the Commission filed its complaint in this case, seeking a civil penalty as provided in 2 U.S.C. § 437g(a)(6), and such other relief as the court deemed appropriate (J.S. App. 47a). MCFL admitted that it had expended corporate funds to prepare, print and distribute the Special Election Edition and Complimentary Partial Copy (distributed to correct some errors) as alleged, but claimed that this was not an unlawful "expenditure" under the Act, and that 2 U.S.C. § 441b was unconstitutional if it was (J.A. 8-14). Both parties filed motions for summary judgment and on June 29, 1984, the district court granted summary judgment in favor of MCFL, concluding on several grounds that MCFL's expenditure of corporate funds did not vio-

late section 441b (J.S. App. 30a-34a). The district court also opined that if MCFL's expenditures did violate the Act, application of section 441b to MCFL's expenditures "would violate its rights to freedom of speech, press and association . . . ." (J.S. App. 38a).

D. Proceedings in the Court of Appeals

The court of appeals rejected the district court's conclusion that MCFL's expenditures were not covered by 2 U.S.C. § 441b, and found that those expenditures violated section 441b as alleged by the Commission. First, the court held that both the language and legislative history confirmed that section 441b was intended to prohibit corporations from using treasury funds to make independent election expenditures like those in this case. Second, the court reasoned that since the "Special Election Edition expressly advocated the election of clearly identified candidates within the meaning of *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)]" there was no need to decide whether or not section 441b reached expenditures that do not involve "express advocacy" (J.S. App. 16a). Finally, the court held that the Special Election Edition did not fall within the statutory exemption for certain activities by the communications media.[6] The court found that, whether or not the regular MCFL newsletter was a periodical publication under the exemption, the Special Election Edition was not "be-

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[6] 2 U.S.C. § 431(9)(B)(i) excludes from the definition of "expenditure"

> any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate. . . .

cause the editions were not distributed through the newsletter's facilities, were not published by the newsletter staff, did not contain the newsletter masthead, and were not limited to the usual MCFL newsletter circulation" (J.S. App. 18a-19a).

The court affirmed the district court's judgment in favor of MCFL, however, because it concluded that section 441b is unconstitutional as applied to expenditures by nonprofit, "ideological" corporations like MCFL (J.S. App. 24a). The court recognized that section 441b does not restrict corporate expenditures so long as they are financed through a separate segregated fund, but found that the statute infringed the corporation's first amendment rights by eliminating the "simplest method" of financing such expenditures without a compelling governmental interest for doing so. The court found the compelling interests behind section 441b to be inapplicable because it believed that MCFL's expenditures in this case did not pose the risks to the "integrity of the electoral process" which section 441b was designed to prevent (J.S. App. 21a-22a). For these reasons, the court of appeals found that section 441b was unconstitutional as applied to expenditures by a nonprofit, "ideological" corporation (J.S. App. 24a).

SUMMARY OF ARGUMENT

A. The Court Of Appeals Properly Found That Appellee Violated 2 U.S.C. § 441b

A provision of the Federal Election Campaign Act, 2 U.S.C. § 441b, prohibits "any corporation whatever" from using its corporate treasury funds to make expenditures in connection with a federal election. Appellee Massachusetts Citizens for Life, Inc. is a nonprofit corporation, and it violated section 441b

when it expended $9,812.76 from its corporate treasury to distribute a flyer to the general public which expressly advocated that readers "vote pro-life" and identified by name which candidates in the upcoming primary elections it believed to have taken a "pro-life" position and which candidates it believed had opposed that position.

MCFL's election flyer was not exempt from section 441b as a "periodical publication" under 2 U.S.C. § 431(9)(B)(i) even if MCFL's newsletter was, because it was not prepared or distributed through the facilities of MCFL's newsletter and because it was distributed primarily to members of the public who had never received MCFL's newsletter. The flyer also was not beyond the coverage of section 441b merely because MCFL did not coordinate its distribution with any candidate's campaign. Indeed, this Court recognized in *United States v. UAW*, 352 U.S. 567 (1957), that Congress' primary purpose in extending the statutory prohibition to union and corporate "expenditures" in addition to "contributions" was precisely to reach such election expenditures made independently of a candidate's own campaign. Accordingly, the court of appeals properly found that MCFL's expenditure violated 2 U.S.C. § 441b.

B. Section 441b Is Not Unconstitutional

The court of appeals erred in concluding that application of section 441b to expenditures by nonprofit corporations violates the first amendment. Section 441b does not restrict the amount, content or methods of corporate and union political speech. The Act permits a corporation to utilize its treasury funds to etsablish a separate segregated fund to be used for political purposes, which can be funded by voluntary

contributions for that purpose by the individuals who make up the corporation or union. Such a fund can be completely controlled by the corporation or union, so long as its money is kept in a separate account. The corporation or union can then use the separate segregated fund to make contributions to federal candidates and to make unlimited expenditures to inform the public of its views on federal candidates. Thousands of corporations and unions have successfully utilized separate segregated funds to make millions of dollars in contributions and expenditures in connection with federal elections. Thus, unlike statutes limiting political spending which this Court has found unconstitutional, section 441b has neither the intent nor the effect of limiting corporate and union political speech.

Even if section 441b were found to have an indirect effect on corporate and union political expression, it would not be unconstitutional since it is supported by several governmental purposes which this Court has found to be compelling. In *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), this Court found two purposes underlying this provision to be compelling enough to overcome the first amendment objections of the nonprofit, ideological corporation in that case. First, the Court found section 441b serves to protect the integrity of the electoral process from the undue influence that could be exerted by aggregations of money accumulated through use of the corporate form. Since the Court found the provision to be a prophylactic measure properly aimed at the potential for such influence inherent in the corporate form of organization, the actual effect on an election of MCFL's particular expenditure is irrelevant to the constitutionality

of this application of section 441b. Second, this Court found that section 441b protects individuals whose money goes to make up a corporation's treasury from having that money used to support political candidates to whom they may be opposed. This protection is also applicable to MCFL, for there is no basis for assuming that everyone who supports MCFL's anti-abortion education and lobbying efforts would automatically choose the candidates they support solely on that basis.

Finally, application of section 441b to MCFL is supported by Congress' interest in ensuring that the electorate is fully informed about the sources of campaign financing. In *Buckley v. Valeo*, 424 U.S. at 81, this Court found this interest to be compelling even for independent expenditures, since it helps voters define the candidates' constituencies. Section 441b serves this interest by requiring unions and corporations to make their campaign expenditures from a separate segregated fund which is required to report the names of its contributors just like any other political committee. If nonprofit corporations were permitted to make campaign expenditures from their treasury funds without reporting the sources of those funds, such corporations could be used as vehicles through which commercial corporations and unions could funnel unlimited amounts of their treasury funds into expenditures to influence federal elections, without ever disclosing to the public the true source of the funds.

In sum, over the last 80 years Congress has carefully developed section 441b into a balanced statute which serves important governmental purposes with a minimum of interference with corporate and union political activities. Congress' considered judgment

that this statute represents an appropriate balance between these competing interests is entitled to substantial deference from this Court, and there is nothing in the record of this case that would provide sufficient grounds to reject that judgment.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT MCFL VIOLATED 2 U.S.C. § 441b BY EXPENDING CORPORATE TREASURY FUNDS TO DISTRIBUTE THE SPECIAL ELECTION EDITION TO THE PUBLIC

Section 441b prohibits "any corporation whatever" or any labor organization from making a "contribution or expenditure in connection with any election" for federal office, "or in connection with any primary election . . . held to select candidates" for federal office. In this case, MCFL's violation of that provision is established by uncontested facts. As discussed *supra*, pp. 3-5, MCFL is a corporation organized under the laws of Massachusetts, and it admittedly expended $9,812.76 from its corporate treasury to pay for the printing and distribution of the Special Election Edition in connection with the 1978 primary election.[7] The Special Election Edition expressly

[7] It is uncontested in this case that section 441b applies to nonprofit, issue-oriented corporations like MCFL. The provision explicitly states that it applies to "any corporation whatever," without exception. *See* 89 Cong. Rec. 5781 (1943) (remarks of Cong. Hatch) ("[T]he language further says 'or any corporation whatever.' Mr. President, that language is about as broad as language can be . . . ."). One of the groups studied by a special committee established by the House of Representatives in the 1940's to investigate campaign expenditures was American Action, Inc., which "claim[ed] to be motivated by patriotic purposes and to seek no personal gain. . . ."

urged readers to "vote pro-life" in the upcoming primary elections, and identified by name each candidate who supported what MCFL considered the pro-life position and each candidate who was opposed to that position. As the court of appeals found, whatever else section 441b might apply to, it clearly is applicable to a corporation's expenditure of its treasury funds to distribute this sort of explicit election advocacy to the public.

Report of the Special Committee to Investigate Campaign Expenditures, H.R. Rep. No. 2739, 79th Cong., 2d Sess. 42 (1946). The Committee concluded that "American Action, Inc., is a Delaware corporation and, as such, under the Federal Corrupt Practices Act, is prohibited from making any contributions in connection with any election at which a Representative to Congress is to be chosen." *Id.* at 42-43. Senator Taft confirmed during the Senate debate on the 1947 Amendments to the Corrupt Practices Act (*see* pp. 15-16, *infra*) that the prohibition would apply to a corporation established for religious purposes. 93 Cong. Rec. 6440 (1947), *reprinted in* II NLRB, *Legislative History of The Labor Management Relations Act, 1947,* at 1535 (1948). In proposing the amendments to this statute that were adopted in 1971, Congressman Hansen also noted that the provision would apply to such nonprofit corporations as the National Association of Manufacturers and the American Medical Association. 117 Cong. Rec. 43,380 (1971), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act of 1971,* at 758 (1981) (hereafter "*1971 Leg. Hist.*"). Finally, in 1975 the Commission issued Advisory Opinion 1975-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5111 (Aug. 19, 1985), which concluded that section 441b would apply to nonprofit, issue-oriented corporations such as an incorporated post of the Veterans of Foreign Wars. Congress effectively adopted this interpretation by reenacting the statutory language a year later without material change. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 381 (1982); *Lorillard v. Pons,* 434 U.S. 575, 580-581 (1978).

The fact that MCFL apparently did not coordinate its expenditure with any candidate's campaign organization does not exempt it from the prohibition of section 441b. To the contrary, this Court determined long ago that the prohibition of corporate and union "expenditures" was added to section 441b's predecessor in 1947 for the purpose of reaching expenditures in connection with federal elections that were claimed to be independent of a candidate's campaign. In *United States v. UAW*, 352 U.S. 567 (1957), this Court reviewed a district court's dismissal of an indictment which "charged appellee with having used union dues [contained in its treasury] to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections." *Id.* at 585. The indictment in that case did not allege that the union's expenditures had been approved by or coordinated with any candidate. Nevertheless, this Court reversed the district court's decision and found that the indictment contained all the elements necessary to allege a violation of the statute.

> To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute from the time it was first made applicable to labor organizations.

Id. at 585 (brackets in original).

The history of the statute referred to by the Court consisted primarily of the reports of special committees established by both houses of Congress after World War II to investigate and make recommendations on amendments to the existing campaign finance laws.[8] Among the problems uncovered by these committees was the ability of unions, after they were brought under the prohibition on federal campaign contributions in 1943, to evade the intent of the statute by making expenditures of their own money to advocate the election of their favored candidates, instead of contributing to the candidates' own campaigns. Report of the Special Committee to Investigate Campaign Expenditures, H.R. Rep. No. 2739, 79th Cong., 2d Sess. 39-40 (1946); Investigation of Senatorial Campaign Expenditures, S. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 38-39 (1947). To remedy this problem, the House Committee recommended that the statute "be clarified so as to specifically provide that expenditures . . . by the prohibited organizations in connection with elections, constitute vio-

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[8] Prior to 1943, only corporate contributions to federal candidates of "anything of value" were prohibited by the Federal Corrupt Practices Act of 1925, 43 Stat. 1070. The War Labor Disputes Act of 1943, 57 Stat. 167, extended this prohibition to unions, but this statute was only effective for the duration of the war. Thus, special committees were established because it was clear that postwar legislative action would be necessary in this area. The rest of the long history of section 441b and its predecessors, dating back to 1907, has been reviewed by this Court in a number of cases and need not be repeated here. *See United States v. CIO*, 335 U.S. 106, 112-120 (1948); *United States v. UAW*, 352 U.S. at 570-584; *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 402-432 (1972); *FEC v. National Right to Work Committee*, 459 U.S. at 208-209.

lations of the provisions of said section, *whether or not said expenditures are with or without the knowledge or consent of the candidates.*" H.R. Rep. No. 2739, 79th Cong., 2d Sess. 46 (emphasis added), *quoted in United States v. UAW*, 352 U.S. at 582. The Senate Committee urged a similar amendment. S. Rep. No. 1, Part 2, 80th Cong., 1st Sess. 38-39. Section 304 of the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), 61 Stat. 136, incorporated these recommendations, permanently applying the prohibition to labor organizations as well as corporations and extending it to prohibit "expenditures" as well as contributions. *See United States v. UAW*, 352 U.S. at 583-584. In the *UAW* decision this Court concluded, on the basis of this legislative history, that Congress' primary purpose in adding the prohibition of "expenditures" to the statute in 1947 was to ensure that it reached a corporation's or union's independent expenditure of its own funds to influence the outcome of a federal election.

> As indicated by the reports of the Congressional Committees that investigated campaign expenditures, it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended § 313 to proscribe "expenditures." . . . Because such conduct was claimed to be merely "an expenditure [by the union] of its own funds to state its position to the world," the Senate and House Committees recommended and Congress enacted, as we have seen, the prohibition of "expenditures" as well as "contributions" to "plug the existing loophole."

Id. at 585 (brackets in original).

This Court's conclusion in the *UAW* case remains as valid today as when that case was decided. Although Congress has amended section 441b and its predecessor (former 18 U.S.C. § 610) twice since then, it has never indicated any intent to overrule the *UAW* decision or to narrow the scope of the prohibition of "expenditures" by corporations and unions in connection with federal elections. To the contrary, Congressman Hansen, the author of the 1971 amendment to 18 U.S.C. § 610, expressly affirmed that "section 610 as it stands, and under my proposal, represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking." 117 Cong. Rec. 43,380 (1971), *1971 Leg. Hist.* at 758.[9] Similarly, Senator Cannon, the floor manager of the 1976 bill which transferred the provision prohibiting corporate expenditures, with some modifications, from the criminal code to the Federal Election Campaign Act (codified at 2 U.S.C. § 441b), stated that "if [corporations or unions] are trying to elect or defeat someone for Federal office they are not exempt." 122

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[9] *See also* 117 Cong. Rec. 43,381 (remarks of Rep. Hansen), *1971 Leg. Hist.* at 759, *quoted in Pipefitters v. United States*, 407 U.S. at 431; 117 Cong. Rec. 43,384-385 (remarks of Reps. Thompson and Udall), *1971 Leg. Hist.* at 762-63; 117 Cong. Rec. 43,386 (remarks of Rep. Crane), *1971 Leg. Hist.* at 764; 117 Cong. Rec. 43,389 (remarks of Rep. Steiger) ("the evil" section 610 was intended to correct was the "use of union funds to influence the public at large to vote for a particular candidate or a particular party"), *1971 Leg. Hist.* at 767; 117 Cong. Rec. 43,409 (remarks of Rep. Conte), *1971 Leg. Hist.* at 787; 117 Cong. Rec. 28,814 (remarks of Sen. Prouty), *1971 Leg. Hist.* at 460.

Cong. Rec. S3556 (daily ed. March 16, 1976), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1976*, at 388 (1977).

Finally, MCFL's Special Election Editions are not exempt from the prohibition of section 441b as a periodical publication under 2 U.S.C. § 431(9)(B)(i). As the court of appeals found, even if MCFL's newsletters were considered to be periodical publications under the Act, the evidence in the record shows that the Special Election Edition was neither published nor distributed "through the newsletter's facilities" (J.S. App. 18a-19a). Rather than a periodical publication distributed to the newsletter's normal readers, the Special Election Editions were simply political flyers, most of which were distributed to members of the public who had never received the MCFL newsletter, in order to influence their votes in the upcoming primary election. If flyers like these were within the news media exemption it would virtually eliminate section 441b's prohibition on expenditures, for it would permit any of the many corporations and unions that operate house organs to use their treasury funds to distribute unlimited express election advocacy to the general public.

In sum, it is clear that the court of appeals was entirely correct when it concluded (J.S. App. 15a) that MCFL's expenditure of corporate treasury funds to distribute the Special Election Edition to the public violated 2 U.S.C. § 441b. As we show below, however, the court of appeals erred when it concluded that this application of section 441b is unconstitutional.

II. CONGRESS DID NOT VIOLATE THE FIRST AMENDMENT BY REQUIRING ALL CORPORATIONS AND UNIONS TO SEGREGATE, AND PUBLICLY DISCLOSE THE SOURCES OF, THE FUNDS CONTRIBUTED BY THEIR CONSTITUENTS FOR FEDERAL ELECTORAL ACTIVITY

As we demonstrate *infra*, pp. 30-31, 32-33, the reasoning underlying the court of appeals' determination that section 441b is unconstitutional as applied to election expenditures by nonprofit, ideological corporations rests largely upon the court's view that regulation of such activity is not necessary to protect the integrity of the electoral process. It is well settled, however, that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 469 (1981), *quoting Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963), and that "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because one [group] . . . casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 103 (1973).

> [First Amendment] cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

Dennis v. United States, 341 U.S. 494, 539-540 (1951) (Frankfurter, J., concurring). Accordingly, this Court has long recognized that congressional enactments such as section 441b are entitled to a pre-

sumption of constitutionality, *Flemming v. Nestor*, 363 U.S. 603, 617 (1960), which is enhanced in this case not only because of Congress' special expertise and experience with election campaigns, but also because this Court has already found the bulk of section 441b's scheme for regulating corporate and union campaign spending to be constitutional as applied to a nonprofit, issue-oriented corporation. *FEC v. National Right to Work Committee*, 459 U.S. at 207-211.

As we show below, the court of appeals identified no concern adequate to overcome this presumption of constitutionality in this case, for the application of section 441b to expenditures by nonprofit corporations does not unduly restrict either the amount or manner of their political expression, and it is supported by several governmental interests that this Court has previously found to be compelling enough to overcome similar constitutional objections.

A. Section 441b Does Not Restrict Corporate Political Speech

As stated by the sponsor of the 1971 amendments to the predecessor of section 441b, Congress did not intend for that provision to prevent corporations and unions from publishing their views on federal elections, but only to prohibit "the use of corporate and union *treasury funds* to reach the general public in support of, or opposition to, Federal candidates . . . ." 117 Cong. Rec. 43,381 (1971) (remarks of Rep. Hansen) (emphasis added), *quoted in Pipefitters v. United States*, 407 U.S. at 431. To make this limited purpose clear, Congress in 1971 enacted an explicit exception from the statute's prohibitory language, proposed by Congressman Hansen and currently codified at 2 U.S.C. § 441b(b)(2)(C), which allows cor-

porations and unions to use their treasury funds to operate a voluntary separate segregated fund for political purposes. A "separate segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist." *FEC v. National Right to Work Committee*, 459 U.S. at 200 n.4. *See also Pipefitters v. United States*, 407 U.S. at 414-417. Such separate segregated funds have been aptly described as nothing more than the "political arms of the parent organizations." [10] The corporation or union operating the fund can use its own treasury money to pay the fund's administrative costs and to solicit contributions from the corporation's or union's members, stockholders and executive and administrative personnel, and their families. 2 U.S.C. § 441b(b)(4). Thus, unlike any other political committee, they can turn every dollar of contributions they collect into political contributions or expenditures. *See California Medical Association v. FEC*, 453 U.S. 182, 199 n.19 (1981).

It is, therefore, clear that section 441b has been carefully limited to restricting only the use of a corporation's or union's treasury funds to influence federal elections. Through its separate segregated fund, a corporation or union can contribute up to $5,000 directly to any federal candidate and make unlimited independent expenditures communicating to the public the corporation's or union's support for, or opposition to, any candidate. In fact, section 441b would not prohibit MCFL's distribution of the same election

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[10] *Bread Political Action Committee v. FEC*, 635 F.2d 621, 624 n.3 (7th Cir. 1980) (en banc), *rev'd on other grounds*, 455 U.S. 577 (1982).

flyers to the same people in the same manner it did here, so long as it was financed through a separate account containing contributions voluntarily designated for political purposes.[11]

This statutory balance was not arrived at haphazardly. Over an 80 year period Congress has carefully developed the statutory scheme now contained in section 441b "in a 'cautious advance, step by step. . . .'" *FEC v. National Right to Work Committee*, 459 U.S. at 209, *quoting NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937). In particular, when it added to the statute in 1971 the explicit exceptions permitting the establishment of separate segregated funds, Congress focused upon the problem of balancing the statute's objectives against the constitutional concerns identified in this Court's opinions construing section 441b's predecessors. As summarized by Congressman Hansen when he introduced this amendment on the floor of the House of Representatives,

> [T]here is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy

[11] MCFL has argued (Motion to Affirm at 10) that, even though it has reported making expenditures through its separate segregated fund in every election since 1980, it could not have done so in 1978 because at that time it had no members within the meaning of 2 U.S.C. § 441b(b) (4) (C) from whom it could have solicited contributions. However, 2 U.S.C. § 441b (b) (4) (A) (i) would have permitted MCFL to solicit up to $5,000 for a separate segregated fund from each of its executive and administrative officers and their families. More importantly, MCFL's lack of bona fide members was a self-imposed restriction which MCFL itself chose to include in its articles of incorporation. MCFL apparently had little difficulty in removing this restriction in 1980 when it decided to establish its separate segregated fund.

> and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject . . . and to make political contributions and expenditures financed by voluntary donations which have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language.

117 Cong. Rec. 43,381 (1971), *1971 Leg. Hist.* at 759, *quoted in Pipefitters v. United States*, 407 U.S. at 431. This explicit Congressional determination that the regulations now contained in section 441b are an appropriate way to attain important governmental objectives in light of the constitutional concerns identified by this Court "warrants considerable deference" from the courts. *FEC v. National Right to Work Committee*, 459 U.S. at 209, *citing Rostker v. Goldberg*, 453 U.S. 57, 64, 67 (1981). *See also, e.g., Walters v. National Association of Radiation Survivors*, 105 S. Ct. 3180, 3188-3189, 3193 (1985); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. at 103.

Nothing in the record of this case justifies the court of appeals' decision to override Congress' considered judgment that the financial regulations contained in 2 U.S.C. § 441b represent a permissible constitutional balance. As accurately predicted in *Pipefitters v. United States*, 407 U.S. at 443 (Powell, J., joined by Burger, C.J., dissenting), the explicit authorization of the sort of separate segregated funds described in that decision has "open[ed] the way for major participation in politics by the largest aggrega-

tions of economic power, the great unions and corporations." During the 1983-84 election cycle more than 2900 separate segregated funds established by corporations and unions reported making $169.1 million in contributions and expenditures out of $185.6 million they received in voluntary political contributions. *See FEC Reports on Financial Activity 1983-1984*, Vol. I, p. 78 (May 1985).[12] There is no evidence that any corporation or union has been unable to adequately publicize its political views through a separate segregated fund; even MCFL itself has established a separate segregated fund through which it has made political expenditures in every election since 1980. This graphically demonstrates that, in contrast to the statutes this Court found unconstitutional in such cases as *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 775-795 (1978); *Buckley v. Valeo*, 424 U.S. at 39-59; and *FEC v. National Conservative Political Action Committee*, 105 S. Ct. 1459, 1465-1471 (1985), section 441b has neither the purpose nor the effect of limiting the free flow of political information and opinion from corporations and unions to the public.

The court of appeals nevertheless found the statute unconstitutional because it eliminated what the court considered "the simplest method" (J.S. App. 20a) of financing corporate speech, apparently referring to

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[12] This reflects tremendous growth in both the number and spending of separate segregated funds. As recently as the 1975-76 election cycle there were 853 separate segregated funds which reported expending only $26 million. *See FEC Disclosure Series No. 8: Corporate-Related Political Committees Receipts and Expenditures, 1976 Campaign*, p. 8 (1977), and *FEC Disclosure Series No. 10: Labor-Related Political Committees Receipts and Expenditures, 1976 Campaign*, p. 6 (1978).

the inconvenience involved in establishing and operating a separate segregated fund in accordance with the Act's administrative requirements for political committees, 2 U.S.C. §§ 432-434. Since section 441b leaves the amount and content of a separate segregated fund's expenditures unrestricted, however, these regulations alone do not constitute a first amendment violation, for "it is well settled that '[t]he [First] Amendment does not forbid . . . regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.'" *Lowe v. SEC*, 105 S. Ct. 2557, 2581 n.8 (1985) (White, J., concurring), *quoting Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186, 193 (1946). *See also Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2282 n.14 (1985) ("the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed"). The court of appeals cited no case in which this Court has ever found a statute which did not limit speech to violate the first amendment merely because it regulated the task of financing it.[13]

As noted, the requirements of 2 U.S.C. §§ 432-434 are applicable to *all* political committees as defined in the Act, which includes, in addition to separate

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[13] *Linmark Associates v. Willingboro,* 431 U.S. 85, 93-94 (1977) and *Spence v. Washington,* 418 U.S. 405, 411 n.4 (1974), relied upon by the court of appeals (J.S. App. 20a-21a), are not on point. In those cases the Court concluded that the availability of alternative means of communicating did not save statutes that prohibited a particular method of speech. Section 441b does not affect the method of communication employed by corporations and unions; so long as it is financed out of a separate segregated fund, a corporation or union can utilize any methods of communication it desires.

segregated funds, "any . . . group of persons" which makes more than $1,000 in election expenditures during a calendar year. 2 U.S.C. § 431(4)(A). The court of appeals suggested no reason why, merely because it is a corporation, MCFL has a first amendment right to make group political expenditures on behalf of its supporters without the inconvenience of complying with these regulations, while other groups of individuals who have not incorporated do not. In fact, this Court's decisions indicate that, far from enjoying such a privileged position, "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they enjoy as individuals." *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1468, *citing FEC v. National Right to Work Committee*, 459 U.S. at 209-210. *See also United States v. Morton Salt Company*, 338 U.S. 632, 653 (1950). Thus, in *Regan v. Taxation With Representation*, 461 U.S. 540, 543-546 (1983), this Court found no first amendment violation in Congress' decision to require that a group choosing to incorporate to obtain the tax benefits of 26 U.S.C. § 501(c)(3) must establish a separate affiliated corporation to finance its lobbying activities. As in *Regan*, where the group's expenditures on lobbying remained unrestricted so long as they were financed solely through contributions to the separate affiliated corporation, under section 441b corporate political expenditures remain unrestricted so long as they are financed solely through contributions to a separate segregated fund.

The court of appeals' assertion (J.S. App. 21a n.7) that the first amendment requires a general exemption from section 441b for corporations like

MCFL because of the statute's requirement that the names of large contributors to all political committees, including separate segregated funds, be disclosed to the voting public, was effectively rejected by this Court long ago. In *Buckley v. Valeo*, 424 U.S. at 68, this Court upheld the Act's reporting requirements against first amendment attack as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." The Court then rejected the argument that the first amendment entitles fringe groups to a blanket exemption from the reporting requirement, and ruled that exemption from the Act's reporting requirements is constitutionally mandated only if a group presents specific evidence that its contributors are likely to be subjected to harassment if their names are disclosed. *Id.* at 72-74. *See also Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91-98 (1982). MCFL has never attempted to make such a showing, and the court of appeals did not explain why this Court's holding in *Buckley* would not be as applicable to MCFL as to any other group.[14]

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[14] The court of appeals' further observation (J.S. App. 21a n.7) that some corporations might not find the separate segregated fund option palatable because they have chosen to be nonpartisan, is not relevant to this case. Since MCFL actually established a separate segregated fund in 1980, which has been active in every election since, it is clear that MCFL cannot claim that establishing a separate segregated fund is contrary to its principles. Moreover, as shown *supra*, pp. 5, 7, 12-13, the court of appeals correctly concluded (J.S. App. 16a) that the expenditure in this case was for a flyer that expressly advocated the election or defeat of specified federal candidates. If a case ever arises in which the Commission charges a nonprofit corporation with violating section 441b by making an

In sum, there has been no showing in this case that section 441b has interfered with the freedom of any corporation or union to expend as much as it wants, through a separate segregated fund, to publicize its views on federal candidates. In the absence of such a showing, there is no basis for this Court to overrule the considered judgment of Congress that section 441b is consistent with the requirements of the first amendment.

B. The Compelling Governmental Purposes Which This Court Has Found To Support Section 441b Are Applicable To Expenditures By Nonprofit Corporations

We have shown above that section 441b has neither the intent nor the effect of restricting the amount, content or methods of corporate and union political expression. However, even if the court of appeals were correct in concluding that section 441b indirectly burdens speech by making fundraising less "simple," the statute would still not be unconstitutional.

> [I]t is clear that "[n]either the right to associate nor the right to participate in political activities is absolute." *CSC v.* [*National Ass'n of*] *Letter Carriers*, 413 U.S. 548, 567 (1973). Even a "'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important in-

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expenditure to publish a nonpartisan statement, the applicability of section 441b in such circumstances can be resolved at that time; it is not presented by this case. *See California Medical Association v. FEC*, 453 U.S. at 197 n.17. We note, however, that the Commission has adopted regulations providing that section 441b is inapplicable to the distribution of candidates' voting records in a truly nonpartisan manner. 11 C.F.R. § 114.4(b)(4).

> terest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.

Buckley v. Valeo, 424 U.S. at 25, *quoting Cousins v. Wigoda*, 419 U.S. 477, 488 (1975). *Accord, FEC v. National Right to Work Committee*, 459 U.S. at 207.

In *FEC v. National Right to Work Committee*, this Court discussed two governmental interests behind section 441b which it found to be sufficiently compelling to overcome the first amendment claims of a nonprofit, issue-oriented corporation. First, as the Court described it last Term, "in *NRWC* we held that the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funneled through the corporate form. . . ." *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1471. *See also FEC v. National Right to Work Committee*, 459 U.S. at 207; *United States v. UAW*, 352 U.S. at 579. The *NRWC* case thus "turned on the special treatment historically accorded corporations." *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1468. Corporations are artificial entities whose accumulation of capital is enhanced by such special advantages as limited liability, perpetual life, and special tax treatment. As such, corporations "are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities." *United States v. Morton Salt Co.*, 338 U.S. at 652. Such "[f]avors from government often carry with them an enhanced measure of regulation." *Id. Accord, FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1469.

As the Court has explained,[15] Congress acted to prevent the use of the general assets of corporations and unions to influence federal elections only after it became aware of widespread abuses that were thought to present imminent danger of corruption to the federal election process, resulting in a decline of public confidence in the integrity of elected officials and the fair operation of government. This Court has repeatedly recognized the elimination of such circumstances to be a governmental interest of the highest order,[16] and has found that Congress' "careful legislative adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference . . . [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." *FEC v. National Right to Work Committee*, 459 U.S. at 209.

The court of appeals' conclusion that this interest was inapplicable here rested upon its view that MCFL's expenditures in this case "did not incur any political debts from legislators" (J.S. App. 22a). However, in *National Right to Work Committee*, this Court refused to evaluate the constitutionality of section 441b by focusing narrowly upon either the particular attributes of the corporation or the effects of the particular expenditures before the Court, as the court of appeals had done. Instead, the Court upheld the constitutionality of section 441b as applied to the nonprofit, ideological corporation in that case

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[15] *FEC v. National Right to Work Committee*, 459 U.S. at 207; *United States v. UAW*, 352 U.S. at 570-584.

[16] *See, e.g., FEC v. National Right to Work Committee*, 459 U.S. at 208; *First National Bank of Boston v. Bellotti*, 435 U.S. at 788 n.26; *Buckley v. Valeo*, 424 U.S. at 27; *United States v. UAW*, 352 U.S. at 570, 571, 575.

because it is a "prophylactic measure[]" which is permissibly aimed at "the special characteristics of the corporate structure." *FEC v. National Right to Work Committee*, 459 U.S. at 209.

> While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation.

Id. at 210. MCFL's corporate structure carries the same potential for influencing elections as NRWC's since both are nonprofit, issue-oriented corporations. Plainly, the court of appeals' conclusion that MCFL's status as a "nonprofit, ideological" corporation protects it from application of this prophylactic statute cannot be reconciled with this Court's holding to the contrary in *National Right to Work Committee.*

The second purpose behind section 441b "is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *FEC v. National Right to Work Committee*, 459 U.S. at 208. By ensuring that individuals have the opportunity to make an informed and voluntary choice as to whether their money will be used by others to support political candidates, section 441b serves to safeguard the individual's first amendment interest in not being required to contribute to the support of any political candidates without his or her consent.[17] It also furthers the important governmen-

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[17] *See generally International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956).

tal interest in "'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government'" by guaranteeing each individual the opportunity to make a personal decision about the election options he or she will support. *First National Bank of Boston v. Bellotti*, 435 U.S. at 788-789, *quoting United States v. UAW*, 352 U.S. at 575. The Court's recognition of the validity of this Congressional purpose behind section 441b in *National Right to Work Committee*, a case challenging its applicability to a nonprofit, issue-oriented corporation, demonstrates that the court of appeals here erred when it concluded that this purpose is inapplicable to such corporations.

The court of appeals rejected the Commission's reliance upon this second purpose behind section 441b because it believed that MCFL's contributors do not need this sort of protection. This view was not supported by any evidence; the court itself candidly stated (J.S. App. 22a) that it was merely *assuming* that anyone who supported MCFL's anti-abortion objectives would necessarily be willing to contribute to MCFL's efforts to elect sympathetic candidates (J.S. App. 22a-23a). However, there is no reasonable basis for assuming that every individual who opposes abortion necessarily uses this as the sole criterion for choosing which candidates to support. While many opponents of abortion may also support some of the candidates MCFL considers to be anti-abortion—either because of the candidates' position on abortion or for other unrelated reasons—there is no reason to assume that these individuals are any less interested than other Americans in being able to decide for themselves whether or not their money will be used to assist candidates for federal office at all, and if so,

which candidates it will be used to support. Many of MCFL's contributors may desire only to support the corporation's lobbying or educational activities, and not to participate in electoral politics at all. Others may, rather than passively trusting MCFL to make such decisions for them, prefer to make their electoral choices in other ways. For example, they might choose to follow a tradition of party loyalty or they might favor a candidate that does not oppose abortion because of that candidate's positions on a variety of other issues they consider important.

Most importantly, however, the court of appeals' assumption reflects its view on a question of policy, not law, and its view is directly contravened by the considered policy judgment of Congress in enacting the statute. Thus, during the debates on the 1947 amendments, Senator Taft was specifically asked what effect this amendment would have on a corporation organized for religious purposes which wanted to support a candidate on purely moral grounds. Senator Taft responded that so long as the organization was incorporated the statute would ensure that it "cannot take the church members' money and use it for the purpose of trying to elect a candidate or defeat a candidate, and they should not do so." 93 Cong. Rec. 6440 (1947). *See also* pp. 12-13 n.7, *supra*. Congress' determination that it is desirable to ensure that contributors to nonprofit corporations have the opportunity to make an informed choice in this important area clearly outweighs the court of appeals' view that this policy is unnecessary. *See Walters v. National Association of Radiation Survivors*, 105 S. Ct. at 3190.

Finally, a third compelling interest undermined by the court of appeals' decision is the public disclosure of the sources of federal campaign financing. The

Act as a whole reflects "Congress' effort to achieve 'total disclosure' by reaching 'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Buckley v. Valeo*, 424 U.S. at 76. Section 441b was intended to serve this purpose by requiring that corporations and unions make their political contributions and expenditures only from a separate segregated fund, which Congress has specifically included in the definition of political committee, 2 U.S.C. § 431(4)(B). Congress has thus indicated particular concern for disclosure by corporations and unions, for the primary effect of this special provision is to require a separate segregated fund to report both its expenditures and its sources of funding for disclosure on the public record under 2 U.S.C. § 434 even before its financial activity reaches the minimum level for other groups to become political committees under 2 U.S.C. § 431(4)(A).

This Court has found Congress' interest in public disclosure of the sources of campaign funding to be compelling even when applied to those making independent expenditures rather than contributions, concluding that "the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Buckley v. Valeo*, 424 U.S. at 81. If the court of appeals' decision is permitted to stand, the voting public will be denied the identities of the individuals who finance the political expenditures of corporations like MCFL, information which Congress has properly determined to be important to maintenance of an informed electorate. In fact, as discussed *supra*, pp. 26-27, the court of appeals indicated that

immunizing MCFL from this disclosure requirement was actually one of the objectives of its decision.

Moreover, it is not only the identity of *individual* contributors that would be withheld from the public under the court of appeals' decision. Although it appears that at the time of its expenditures in this case MCFL may have had a voluntary policy against accepting money from business corporations (J.A. 168-169), nonprofit, issue-oriented corporations covered by the lower court's decision can and often do receive funding from commercial corporations and/or unions.[18] The court of appeals' decision could for the first time enable such corporations, bearing "seductive names that may tend to conceal the true identity of the source," *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981), to convert into campaign expenditures unlimited amounts of money received from corporations or unions with substantial commercial interests in the causes they advocate, without ever disclosing to the public the true source of financing.[19] Thus, despite the court of appeals' assumption that its decision only invalidates section 441b's requirements with respect to nonprofit, issue-oriented corporations, this decision's actual effect is to open the way to the use of such corpora-

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[18] For example, the National Right to Work Committee admitted that it received funding from commercial corporations. *See FEC v. National Right to Work Committee*, No. 81-1506, Joint Appendix at 19-22.

[19] For example, an organization engaged in apparently "ideological" opposition to nuclear power might receive funding from a corporation engaged in coal mining that is interested in reducing its competition, or an organization engaged in apparently "ideological" advocacy of increased defense spending could be funded primarily by defense contractors.

tions as a vehicle through which *any* corporation or union would be able to transform unlimited amounts of its treasury funds into political expenditures, while keeping the actual source of the financing secret.

The Congressional scheme accomplishes this compelling objective of disclosing the true sources of campaign financing in the least intrusive manner. If corporations are permitted to make political expenditures from their general treasury funds, the only way in which Congress can ensure that the actual sources of these funds are disclosed to the public is to require corporations to file reports listing the sources of the corporations' general treasury funds.[20] By requiring the corporation to segregate its political contributions in a separate fund, segregated from its general corporate treasury, Congress has been able to satisfy its important interest in public disclosure of the sources of financing of political expenditures without requiring any disclosure of the names of the contributors to the corporation's other activities who choose not to support its electoral activities. Since this scheme has resulted in no discernible restriction on the amount or nature of corporate and union political expression during the almost 40 years that it has been in effect, it is entitled to substantial deference from this Court.

In sum, the application of section 441b in this case is fully supported by governmental interests which this Court has already recognized as compelling. The

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[20] In fact, it is arguable that if MCFL's more than $9,000 in expenditures are lawful "expenditures" under 2 U.S.C. § 431(9)(B), as the court of appeals concluded, the definition of "political committee" currently contained in 2 U.S.C. § 431(4) would require the corporation itself to register and report as a "political committee."

statute is narrowly drawn to serve these important purposes without unnecessary infringement upon corporate and union political activities. In these circumstances, there is no basis for finding section 441b to be unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals that 2 U.S.C. § 441b is unconstitutional as applied to uncoordinated expenditures of nonprofit corporations should be reversed.

Respectfully submitted,

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