No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEES.

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

JURISDICTIONAL STATEMENT

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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.

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OPINION BELOW

The July 31, 1985 opinion of the court of appeals (App. A, *infra*) is published at 769 F.2d 13 (1st Cir. 1985). The June 29, 1984 decision of the United States District Court for the District of Massachusetts is published at 589 F. Supp. 649 (D. Mass. 1984) (App. B, *infra*).

JURISDICTION

This case arises from a suit filed by the Federal Election Commission pursuant to 2 U.S.C. § 437g

(a)(6) to enforce the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("the Act").[1] The United States Court for the District of Massachusetts had original jurisdiction of the case pursuant to 28 U.S.C. § 1345, and the appellate jurisdiction of the United States Court of Appeals for the First Circuit was based upon 2 U.S.C. § 437g (a)(9) and 28 U.S.C. § 1291. On July 31, 1985 the First Circuit entered its final judgment, holding that respondent's corporate expenditures violated 2 U.S.C. § 441b, but finding that section unconstitutional as applied to "indirect, uncoordinated expenditures by a non-profit ideological corporation" (App. 24a). The Commission filed a timely notice of appeal in the United States Court of Appeals for the First Circuit on August 28, 1985 (App. D, *infra*). This Court has jurisdiction of this appeal pursuant to 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

[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, 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. 602, 91 Stat. 1565, by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980), and by the Federal Courts Improvements Act, Pub. L. No. 98-620, 98 Stat. 3357 (1984).

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 in App. F, *infra*.

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). Since the statutory definition of "political committee" expressly includes separate segregated funds, 2 U.S.C. § 431(4)(B), they are governed by the same reporting and disclosure requirements applicable to other political committees. *See* 2 U.S.C. §§ 433 and 434.

The Massachusetts Citizens for Life, Inc. ("MCFL") is a non-profit, non-stock, non-membership corporation incorporated under the laws of the Commonwealth of Massachusetts (App. 3a). Shortly before the September 19, 1978 Massachusetts primary elections, MCFL published and distributed a

flyer entitled "Special Election Edition." The flyer was headed "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE." Every candidate for each office in Massachusetts was identified as either supporting a pro-life position or opposing a pro-life position on three issues which MCFL chose to highlight. The flyer expressly urged readers that "[n]o pro-life candidate can win in November without your vote in September . . . . Thus, your vote in the primary will make the critical difference in electing pro-life candidates." The last page of the flyer contained a form, captioned "VOTE PRO-LIFE," to be filled in with the pro-life candidates in the reader's district, and clipped out to take to the polls.[2]

MCFL had more than 100,000 copies of the Special Election Edition flyers printed for distribution (App. 4a).[3] MCFL expended $9,812.76 to prepare, print and distribute the flyers. MCFL paid the entire $9,812.76 for the election flyer from the corporation's general treasury funds, for it did not establish its separate segregated fund until 1980 (App. 5a).

On May 1, 1979, a complaint was filed with the Commission alleging that MCFL had violated the Act

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[2] Ten Copies of the Special Election Edition flyers, designated as Exhibits 1 and 2 of the District Court Complaint, App. E, *infra* have been lodged with the Court.

[3] MCFL distributed a newsletter irregularly several times a year. Each of these regular newsletters included a newsletter masthead and carried a volume and issue number, neither of which appeared on the Special Election Edition. The regular newsletters contained articles of interest to MCFL members, information on relevant legislation, opinions and commentary on pro-life issues, and entertainment information. MCFL had never distributed any of its regular newsletters to more than a few thousand recipients, and the October, 1978 newsletter was distributed to only 3,119 recipients. (App. 3a).

by utilizing corporate funds to distribute the Special Election Edition flyers. 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 flyers to members of the general public. After the Commission's attempt to conciliate failed to produce an agreement that would correct or prevent the violation, the Commission authorized the filing of this civil action to enforce section 441b. (App. E, *infra.*)

B. The Decision Of The Court Below

The court of appeals rejected MCFL's arguments that its expenditures were not covered by 2 U.S.C. § 441b, and specifically found that those expenditures violated section 441b as alleged by the Commission [4] (App. 15a). The court held that the Special Election Edition expressly advocated the election or defeat of clearly identified candidates, and that it did not fall within the statutory exemption for the media codified at 2 U.S.C. § 431(9)(B)(i) (App. 16a-19a). After a detailed examination of the legislative history, the court concluded "that section 441b prohibits

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[4] The district court had granted MCFL's motion for summary judgment because it had accepted the arguments rejected by the court of appeals and found that MCFL's expenditure of corporate funds did not violate section 441b. The district court also opined that if it had misinterpreted the Act, application of section 441b to MCFL's expenditures "would violate its rights to freedom of speech, press and association . . . ." (App. 38a).

expenditures in connection with federal elections as well as expenditures made to candidates for federal office (App. 6a-15a). Therefore, we hold that the expenditure in the instant case is embraced by the section 441b definition of expenditure." (App. 15a).

Although it thus found that MCFL's expenditure of corporate funds to produce and distribute the Special Election Edition violated section 441b, the court went on to conclude that as applied to expenditures by non-profit "ideological" corporations like MCFL, section 441b was unconstitutional (App. 24a). Although it apparently recognized that section 441b does not restrict corporate expenditures so long as they are financed through a separate segregated fund, the court found that the statute infringed the corporation's First Amendment rights by eliminating what the court viewed as a "simpler method" of financing such expenditures (App. 20a-21a). The court of appeals acknowledged that this Court identified several compelling governmental interests supporting section 441b in *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 207-208 (1982), but concluded that MCFL's expenditures in this case did not pose the risks to the "integrity of the electoral process" which section 441b was enacted to prevent (App. 21a-22a). For these reasons, the court of appeals affirmed the district court's judgment in MCFL's favor, but on alternate constitutional grounds.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING UNCONSTITUTIONAL AN INTEGRAL AND LONG-STANDING PROVISION OF THE FEDERAL ELECTION CAMPAIGN ACT.

The issue presented by this appeal is the constitutionality of the Congressional judgment in enacting 2 U.S.C. § 441b, that all corporate and union political expenditures in connection with federal elections should be financed solely from a separate segregated fund containing contributions voluntarily designated for political purposes.[5] The court of appeals, while acknowledging that the Act did not bar MCFL from making such expenditures through a separate segregated fund, found the provision unconstitutional as applied to "non-profit, ideological corporations" because it eliminates what the court considered the "simplest method" of financing political expenditures (App. 20a-24a).

Three years ago, this Court unanimously rejected a similar argument — that section 441b's prohibition on the expenditure of corporate treasury funds to solicit political contributions from the public at large was unconstitutional as applied to a corporation that is as non-profit and "ideological" as MCFL. *FEC* v. *National Right to Work Committee*, 459 U.S. at 209-210. "That case turned on the special treatment historically accorded corporations," *FEC* v. *National*

[5] The court of appeals specifically found that MCFL's corporate expenditures violated 2 U.S.C. § 441b, but that the statute as applied to MCFL was unconstitutional. It is well settled that when a federal statute is found unconstitutional as applied, a direct appeal pursuant to 28 U.S.C. §§ 1252 and 2101(a) is in order. *Fleming* v. *Rhodes*, 331 U.S. 100, 104 (1947); *California* v. *Grace Brethren Church*, 457 U.S. 393, 405 (1982); *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981).

Conservative Political Action Committee, 105 S. Ct. 1459, 1468 (1985), a consideration which is equally applicable here.[6] The decision of the court below to single out "non-profit, ideological corporations" for a constitutional exemption from Congress' longstanding regulation of the financing of corporate and union expenditures to influence federal elections cannot be reconciled with this Court's conclusion in *National Right to Work Committee*, 459 U.S. at 206-211, that the First Amendment does not require Congress to treat such corporations differently under section 441b.

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[6] The Eleventh Circuit, sitting *en banc*, unanimously found this Court's reasoning in *FEC* v. *National Right to Work Committee* to compel upholding section 441b's prohibition on the use of corporate and union treasury funds to make expenditures in connection with federal elections. *Athens Lumber Co.* v. *FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (answering in the negative questions listed at 689 F.2d 1006, 1015-1016 (1982)), *appeal dismissed, cert. denied*, 104 S. Ct. 1580 (1984). The courts have upheld 2 U.S.C. § 441b and its predecessors against similar First Amendment challenges in a variety of circumstances. *See California Medical Association* v. *FEC*, 453 U.S. 182, 193-201 (1981); *United States* v. *Chestnut*, 394 F. Supp. 581, 588-591 (S.D.N.Y. 1975), *affirmed*, 533 F.2d 40, 51 n.12 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *International Association of Machinists* v. *FEC*, 678 F.2d 1092, 1099-1118 (D.C. Cir.) (en banc), *affirmed mem.*, 459 U.S. 983 (1982); *Bread Political Action Committee* v. *FEC*, 635 F.2d 621, 626-633 (7th Cir. 1980) (en banc), *rev'd on other grounds*, 455 U.S. 577 (1982); *United States* v. *Boyle*, 482 F.2d 755, 763-764 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters*, 434 F.2d 1116, 1122-1123 (8th Cir. 1970), *adhered to en banc*, 434 F.2d 1127, 1128, *rev'd on other grounds*, 407 U.S. 385 (1972); *FEC* v. *National Education Association*, 457 F. Supp. 1102, 1109 (D.D.C. 1978); *FEC* v. *Weinsten*, 462 F. Supp. 243, 246-249 (S.D.N.Y. 1978); *United States* v. *Clifford*, 409 F. Supp. 1070, 1071, 1072 (E.D.N.Y. 1976).

As we show below, the court of appeals' decision here, if allowed to stand, will substantially alter federal election campaigns by permitting, for the first time in almost forty years, the unlimited use of corporate and union treasury funds for political expenditures with no public disclosure of the actual sources of such financing. Just last Term, this Court noted that it had not yet been presented with a case requiring it to reach "the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *FEC* v. *National Conservative Political Action Committee*, 105 S. Ct. at 1468. The constitutionality of this longstanding federal statute regulating the financing of such expenditures is an unresolved question of significant national importance, which merits plenary consideration by this Court.

A. Section 441b Does Not Restrict Political Speech.

As stated by the sponsor of the 1971 amendments to the predecessor of section 441b, Congress intended that provision to prohibit only "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. 385, 431 (1972). To make this limited purpose clear, Congress in 1971 enacted an explicit exception from the statute's prohibitory language, now codified at 2 U.S.C. § 441b (b) (2) (C), which allows corporations 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; *Buckley* v. *Valeo*, 424 U.S. 1, 28 n.31 (1976). 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, the Act is carefully limited to restricting only the corporation's or union's use of its treasury funds to make contributions or expenditures to influence federal elections; it expressly permits the corporation or union, through its separate segregated fund, to contribute up to $5,000 directly to any candidate and to make unlimited independent expenditures communicating to the public the corporation's or union's support for, or opposition to, any candidate. Indeed, section 441b would not prohibit MCFL's distributing the same election flyers to the same people in the same manner it did here, so long as it finances it through a separate account containing contributions voluntarily designated for political purposes.[7]

There is nothing in the record of this case to justify the court of appeals' failure to defer to Congress' considered judgment that the financial regulations contained in 2 U.S.C. § 441b represent a permis-

[7] In fact, MCFL did establish such a separate segregated fund in 1980, and has reported to the Commission having made expenditures from that fund in every federal election cycle since.

sible constitutional balance.[8] More than 2900 separate segregated funds have been established by corporations and unions, which reported to the Commission receiving $185.6 million in voluntary political contributions and expending $169.1 million on contributions and expenditures during the 1983-84 election cycle. *See FEC Reports on Financial Activity 1983-1984*, Vol. I at p. 78 (May 1985). This graphically demonstrates that, in contrast to the statutes this Court found unconstitutional in such cases as

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[8] In 1971, when the exception expressly permitting establishment of separate segregated funds was added to section 441b, Congress carefully weighed the constitutional considerations. As summarized by Congressman Hansen, the author of the 1971 amendments:

> [T]here is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy 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), *quoted in Pipefitters* v. *United States*, 407 U.S. at 431. This conscious conclusion by Congress is entitled to substantial 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. 94, 103 (1973).

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. at 1465-1471, section 441b has not had the effect of limiting the free flow of political information and opinion from corporations and unions to the public.

The court of appeals did not dispute the Commission's showing that section 441b has not had the effect of limiting corporate or union political speech. Instead, the court found the statute unconstitutional because it eliminated what the court considered "the simplest method" of financing corporate speech (App. 20a). While the Act's administrative requirements for political committees, 2 U.S.C. §§ 432-434, are applicable to separate segregated funds as well, this Court has never suggested that the First Amendment entitles corporations to employ a "simpler method" of financing political expenditures than is available to others who wish to engage in group political expenditures. As we have shown, section 441b leaves the amount and content of a separate segregated fund's expenditures unrestricted, and "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). *Cf. Regan* v. *Taxation With Representation*, 461 U.S. 540, 545, 549 (1983) (upholding Congress' requirement that corporations exempt from federal taxation under 26 U.S.C. § 501 (c)(3) must finance their lobbying efforts through a separate, affiliated corporate entity). Indeed, this

Court has upheld virtually all of the Act's requirements with respect to federal campaign financing without ever finding it necessary to determine whether there was a "simpler method" available.[9] 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 makes the task of financing less "simple".[10]

The court of appeals' assertion (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 of disclosure of certain contributors to all political commit-

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[9] *See, e.g., FEC* v. *National Right to Work Committee,* 459 U.S. at 207-211 (limitation on use of corporate funds to solicit contributions to finance political activities); *Buckley* v. *Valeo,* 424 U.S. at 23-38 (prohibition of contributions to publicly financed candidates); *id.* at 60-82 (upholding reporting and recordkeeping requirements for political committees and individuals); *California Medical Association* v. *FEC,* 453 U.S. at 197 (limitation upon contributions to political committees). The Court has similarly upheld against First Amendment challenges a variety of statutes regulating the financial and business operation of newspapers, where the statutes were nondiscriminatory and did not restrict the newspapers' expression. *See* cases discussed in *Branzburg* v. *Hayes,* 408 U.S. 665, 682-683 (1972).

[10] *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 (App. 20a-21a), are not on point. In those coses the Court concluded that the availability of alternative means of communication 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 method of communication it desires.

tees, including separate segregated funds, was effectively rejected by this Court long ago. In *Buckley* v. *Valeo*, 424 U.S. at 68, this Court upheld the reporting requirement 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 it is likely that its contributors will be subjected to harassment if their names were disclosed. *Buckley* v. *Valeo*, 424 U.S. at 72-74. *See also Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91-98 (1982). The court of appeals did not even attempt to explain why these principles would not be as applicable to MCFL as to any other group. *See also Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265, 2282 n.14 (1985).[11]

In sum, there has been no showing in this case that section 441b has interfered at all with the freedom

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[11] The court of appeals' further observation 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. As the court of appeals concluded (App. 16a), 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 a non-profit corporation is charged with violating section 441b by making an 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.

of corporations and unions to expend as much as they want, through their separate segregated funds, to publicize their views on federal candidates. In the absence of such a showing, the court of appeals' decision to strike down section 441b as applied on First Amendment grounds cannot stand.

B. Section 441b Serves Compelling Governmental Purposes.

Even if the court of appeals were correct in concluding that section 441b indirectly burdens corporate and union political speech to some extent by making fundraising less "simple", the statute should nevertheless be upheld.

> [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 interest and employs means closely drawn to avoid unnecessary abridgment 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.

Section 441b serves several purposes which this Court has already found to be compelling. First, it is intended to ensure that the wealth which corporations and unions are able to accumulate with the aid of special legal protections intended to serve other purposes cannot be diverted to the electoral process to incur political debts from candidates for federal elective office. *See FEC* v. *National Right to Work Committee*, 459 U.S. at 207; *United States* v. *UAW*;

352 U.S. 567, 579 (1957). 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. 632, 652 (1950). Such "[f]avors from government often carry with them an enhanced measure of regulation." *Id. See also FEC* v. *National Conservative Political Action Committee*, 105 S. Ct. at 1469.

As this Court has previously explained,[12] Congress acted to prevent the diversion of the assets of corporations and unions to the political sphere only after it became aware of widespread abuses which were thought to present imminent danger of corruption of 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,[13] so that the "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

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

[13] *See, e.g., 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.

the electoral process." *FEC* v. *National Right to Work Committee*, 459 U.S. at 209.

The court below found this purpose to be inapplicable here because "MCFL's expenditures did not incur any political debts from legislators" (App. 22a). However, the same could be said about the independent expenditures for solicitations made by the National Right to Work Committee; in fact, the court of appeals in that case concluded that such independent "solicitation, without more, will neither corrupt officials nor distort elections." *National Right to Work Committee* v. *FEC*, 665 F.2d 371, 375 (D.C. Cir. 1981), *rev'd*, 459 U.S. 197 (1982). In reversing that decision, this Court emphasized that the constitutionality of section 441b was not to be judged by evaluating the effects on the electoral process of the particular expenditure at issue. Rather, this Court found section 441b to be a valid "prophylactic measure[]" aimed at "the special characteristics of the corporate structure", and concluded:

> 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.

FEC v. *National Right to Work Committee*, 459 U.S. at 210. As was true of the National Right to Work Committee, MCFL's corporate structure carries the potential for influence which is the proper object of Congressional regulation; whether or not debts were actually incurred in this case does not alter the constitutional analysis.

The second purpose behind section 441b "is to protect the individuals who have paid money into a cor-

poration or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. See *United States* v. *CIO*, 335 U.S. 106, 113 (1948)." *FEC* v. *National Right to Work Committee*, 459 U.S. at 208. This emphasis upon ensuring that individuals have the opportunity to make an informed and voluntary choice as to whether their money can be used by others to support political candidates (*see, e.g.*, 2 U.S.C. § 441b(b)(3)(C)), safeguards the individual's First Amendment interest in not being required to contribute to the support of any political candidates against his or her will.[14] It also furthers the important governmental 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 political 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 of appeals' conclusion that contributors to an ideological corporation like MCFL do not need this protection was candidly based upon a presumption, without any supporting evidence, that anyone who supported MCFL's anti-abortion position would necessarily be willing to contribute to its efforts to elect candidates (App. 22a-23a). However, there is no reason to assume that individuals who oppose abortion necessarily use this as the sole criterion for choosing candidates, or that they are any less interested than

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[14] *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).

other Americans in being able to decide for themselves whether their money will be used to assist candidates for federal office, and if so, which candidates it will be used to support. Instead of merely trusting MCFL to make their political decisions for them, such individuals might prefer to make such choices in other ways; for example, they might choose to follow party loyalty in electoral politics, 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.

Even if the court's presumption were correct, however, it would not justify rejecting the Congressional judgment. If all of MCFL's contributors were willing to support its political expenditures, as the court believes, MCFL would have no more trouble obtaining contributions to its separate segregated fund than to its corporate treasury. If, on the other hand, even a handful of the individuals who contribute to MCFL's campaign to outlaw abortion would prefer to reserve to themselves the choice of when and how their money will be used to support candidates, the statute will have served an important purpose. In either event, it is up to Congress, not the court of appeals, to determine the desirability of ensuring an opportunity for corporate contributors to make an informed choice in this important area. *See Walters* v. *National Association of Radiation Survivors*, 105 S. Ct. at 3190.[15]

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[15] The legislative history shows that Congress considered this purpose to apply fully to non-profit corporations whose money comes from ideological adherents. In fact, Senator Taft, whose views on the reach of this statute this Court found to be "controlling" in *Pipefitters* v. *United States*, 407 U.S. at 409, stated that under the statute, even corporations organized for religious purposes "cannot take the church members' money and use it for the purpose of trying to elect a candidate

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 serves this purpose by requiring that corporations and unions make their political contributions and expenditures only from a separate segregated fund which, as a political committee, is required to report both its expenditures and its sources of funding for disclosure on the public record. 2 U.S.C. § 434. This Court has found Congress' interest in public disclosure of the sources of campaign spending to be compelling even when applied to those making independent expenditures rather than contributions, since "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 reasonably determined to be important to maintenance of an informed electorate. In fact, as discussed *supra*, pp. 13-14, the court of appeals indicated that eliminating this disclosure requirement was one of the objectives of its decision.

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or defeat a candidate, and they should not do so." 93 Cong. Rec. 6437 (1947).

Moreover, it is not only the identity of individual contributors that will be withheld from the public. Although it appears that MCFL presently may have a voluntary policy against accepting money from corporations, there is no legal bar to other non-profit, apparently "ideological" corporations covered by the lower court's decision accepting funding from commercial corporations having a financial interest in the causes they advocate.[16] The court of appeals' decision would, for the first time, permit such corporations to convert unlimited amounts of money from corporations with substantial commercial interests into campaign expenditures, without ever disclosing to the public the true source of financing. Thus, despite the court of appeals' assumption that its decision only invalidates section 441b's requirements with respect to non-profit, "ideological" corporations, this decision's actual effect is to open an avenue that could be utilized by *any* corporation or union to transfer unlimited amounts of their treasury funds into political expenditures, while keeping the actual source of the financing secret.

In sum, political expenditures by corporations are not restricted by section 441b; only the manner of financing such expenditures is affected, and corporations and unions have been demonstrably successful in

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[16] 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. *Cf. Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 298 (1981), ("[W]hen individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source.")

utilizing the financing methods specified by the statute. Compelling governmental interests support the statute's requirements and it is narrowly drawn to serve those interests without unnecessarily infringing upon corporate and union political activity. In these circumstances, the court of appeals' decision to strike down section 441b as applied is an unwarranted infringement upon Congress' authority to legislate to protect the integrity of the federal electoral process.

CONCLUSION

Based on the foregoing arguments and authorities, the appellant Federal Election Commission respectfully requests that this Court note probable jurisdiction in this appeal, and set this case for briefing and argument on the merits.

Respectfully submitted,

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