No. 85-701

In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC., APPELLEE.

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

REPLY BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

CHARLES N. STEELE *
General Counsel

RICHARD B. BADER
Assistant General Counsel

CAROL A. LAHAM
Attorney

Attorneys for
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

* Counsel of Record

SEPTEMBER 30, 1986

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I. THE COMMISSION AND THE COURT OF APPEALS PROPERLY CONCLUDED THAT MCFL'S EXPENDITURE OF CORPORATE TREASURY FUNDS VIOLATED 2 U.S.C. § 441b

A. MCFL argues (Br. 8-12) that the Commission and the court of appeals erred in construing 2 U.S.C. § 441b to prohibit the use of corporate treasury funds to make expenditures that are not coordinated with a candidate. In making this argument, MCFL has a heavy burden to sustain, for this Court has held that "the Commission is precisely the type of agency" to which deference should be afforded in interpreting the Act. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). Thus, the Court is not to "simply impose its own con-

struction on the statute"; instead, "the question for the [C]ourt is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). *Accord, e.g., Young v. Community Nutrition Inst.*, 106 S. Ct. 2360, 2364-65 (1986); *Chemical Manufacturers Ass'n v. NRDC*, 105 S. Ct. 1102, 1108 (1985). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. at 39.

Since it was established in 1975, the Commission has always construed section 441b to apply to independent corporate expenditures like the one in this case. The Commission adopted this view in its first advisory opinion,[1] and the first set of regulations promulgated when the Commission was reconstituted after *Buckley v. Valeo*, 424 U.S. 1 (1976), included a provision "to make clear that corporations and labor organizations may not make independent expenditures on behalf of Federal candidates." *Explanation and Justification of Commission Regulations*, H.R. Doc. No. 44, 95th Cong., 1st Sess. 101 (1977).[2] These regulations were submitted to Congress pursuant to the Act's legislative veto provision, 2 U.S.C. § 438(d)(1) and, although not dispositive, "Congress' failure to disapprove the regulations . . . strongly im-

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[1] Advisory Opinion ("AO") 1975-1, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5103, p. 10,021 n.1, *reprinted in* 40 Fed. Reg. 29,792 n.1 (1975).

[2] This regulation, currently codified at 11 C.F.R. § 114.1(a)(1), provides in pertinent part:

> The term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, political party or committee, organization, or any other person in connection with any election to any [federal office].

plies that the regulations accurately reflect congressional intent." *Grove City College v. Bell*, 465 U.S. 555, 568 (1984). *Accord FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. at 34-35. As we show below, both the language of the Act as interpreted by the courts and the legislative history support the Commission's construction.

1. As the Commission demonstrated in its opening brief, pp. 12-18, this Court itself determined long ago that Congress had broadened the prohibition now contained in 2 U.S.C. § 441b(a) precisely to reach "'an expenditure [by a corporation or union] of its own funds to state its position to the world,'" *United States v. UAW*, 352 U.S. 567, 585 (1957), and that the provision was intended to apply "'whether or not said expenditures are with or without the knowledge or consent of the candidates.'" *Id.* at 582, *quoting* H.R. Rep. No. 2739, 79th Cong., 2d Sess. 46 (1946). Indeed, this Court reviewed the requirements for a legally sufficient indictment under former 18 U.S.C. § 610 (section 441b's predecessor) in both *United States v. CIO*, 335 U.S. 106 (1948) and *United States v. UAW*, 352 U.S. 567 (1957), and did not include coordination with a candidate as a requisite element. *See also United States v. Lewis Food Co.*, 366 F.2d 710 (9th Cir. 1966). To the contrary, the Court specified that "[t]he evil at which Congress has struck" in this provision "is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *United States v. UAW*, 352 U.S. at 589. That is just what MCFL did in this case.

MCFL does not seriously challenge this Court's conclusion that independent corporate expenditures were prohibited by the 1947 amendments. Rather, MCFL's argument (Br. 10-12) is that in 1971 Congress narrowed the definition of expenditure in order to remove from the statute's prohibition expenditures of corporate and union treasury funds that are not coordinated with a candidate.

Only last year this Court rejected the argument that when this same 1971 Congress prohibited certain "expenditures" by political committees in excess of $1,000 in 26 U.S.C. § 9012(f), it only intended to reach expenditures that were coordinated with a candidate. *FEC v. National Conservative Political Action Committee*, 105 S. Ct. 1459, 1466-67 (1985). The Court found no support for such a construction in the legislative history and noted that since coordinated expenditures are deemed contributions under the Act such a construction would render the prohibition of "expenditures" superfluous. Accordingly, the Court concluded that the "independent expenditures at issue in this case are squarely prohibited by § 9012(f)." *Id.* MCFL makes no attempt to reconcile its assertion that the 1971 Congress acted to eliminate the longstanding prohibition on independent expenditures by corporations and unions in 18 U.S.C. § 610 with this Court's conclusion that Congress was simultaneously enacting a new prohibition on independent expenditures by political committees in 26 U.S.C. § 9012(f).

MCFL bases its argument upon a parsing of certain words in the complex 1971 amendment to former 18 U.S.C. § 610. As demonstrated in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 430-31 (1972), the primary purpose of that amendment, as the legislative debates made clear, was expressly to exempt from the statutory prohibition the internal political communications of corporations and unions which this Court had previously found to be beyond the statute's intended reach, while retaining the prohibition on expenditure of corporate and union funds to influence the public on federal elections. Thus, the heart of the amendment was the new language permitting corporations and unions to spend money freely to communicate with stockholders and members "on any subject," and to use treasury funds to administer a separate segregated political fund made up of voluntary contributions from stockholders and members.

Ignoring the purpose of the legislation, MCFL seizes upon the wording of a description of contributions and expenditures in the amendment which stated that "[f]or the purposes of this section . . . the term 'contribution or expenditure' *shall include* any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . *to any candidate*, campaign committee, or political party or organization, in connection with any election" for federal office. 2 U.S.C. § 441b(b)(2) (emphasis added). Reading these words in isolation from their context in the comprehensive Federal Election Campaign Act of 1971 ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972), MCFL argues that the second emphasized phrase should be interpreted as a limitation of the scope of the provision to expenditures made in cooperation with a candidate or political committee.[3] This Court has admonished that such "insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments." *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 417 n.7 (1960). *See also Watt v. Alaska*, 451 U.S. 259, 266 n.9 (1981).

MCFL's exclusive focus upon the words of the 1971 amendment to section 610 ignores the fact that in this same bill Congress enacted another, broader definition of "expenditure," codified at former 18 U.S.C. § 591(f). That definition contained no arguably limiting language, and expressly provided that the broader definition was also applicable to section 610.[4] The courts construed these

[3] MCFL offers no explanation why Congress did not adopt language clearly referring to coordination with a candidate, as it has done in 2 U.S.C. §§ 431(17), 441a(a)(7)(B)(i).

[4] Former 18 U.S.C. § 591(f) provided (emphasis added):

When used in sections 597, 599, 600, 602, 608, *610*, and 611 of this title—

(f) "expenditure" means—

(1) a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value . . . made

two provisions as providing supplementary definitions of expenditure for the purposes of section 610. *Ash v. Cort*, 496 F.2d 416, 424 (3rd Cir. 1974), *reversed on other grounds*, 422 U.S. 66 (1975); *United States v. Chestnut*, 394 F. Supp. 581, 585, 591 (S.D.N.Y. 1975), *affirmed*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976). As the Third Circuit explained:

> The definition given "expenditure" in both sections traces back to the Federal Election Campaign Act of 1971 . . . . The drafters clearly intended § 591's definition to affect interpretation of § 610, for they provided that the definitions in § 591 applied to use of those terms in § 610. We note also that § 591 indicates the "meaning" of expenditure while § 610 only indicates certain matters "included" in that term. We therefore read § 610 as supplementing rather than replacing § 591's definition.

Ash v. Cort, 496 F.2d at 424-25. As noted *supra*, p. 2, the Commission expressly adopted this construction of the statute in its first advisory opinion, and then promulgated a regulation, based upon the combined effect of the two definitions, which it has followed ever since.

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for the purpose of influencing the nomination for election, or election, of any person to Federal office, for the purpose of influencing the result of a primary held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(2) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; and

(3) a transfer of funds between political committees. . . .

Pub. L. No. 92-225, 86 Stat. 8-9 (1972).

This analysis of the language of the 1971 Act as a whole is supported by the recognized canons of statutory construction, and is entitled to deference under the principles discussed on pp. 1-2, *supra*. As fully discussed by the court below (J.S. App. 8a), it has long been recognized that Congress' use of the term "includes," as it did in the language relied upon by MCFL, does not evidence an intention to restrict the provision's reach, particularly when Congress defines what other terms in the statute shall "mean," as it did with the other definitions in section 441b.[5] *See, e.g., Herb's Welding, Inc. v. Gray*, 105 S. Ct. 1421, 1427 (1985); *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *United States v. Massachusetts Bay Transp. Authority*, 614 F.2d 27, 28 (1st Cir. 1980). The principle that statutes should be construed to give effect to all the words enacted by Congress, relied upon by MCFL (Br. 11-12), also supports the Commission's construction. If the description of what expenditure "shall include" added to section 610 in 1971 were an exclusive definition, the explicit language Congress added to section 591 in 1971 making that section's definition of what expenditure "means" applicable to section 610, would be nullified.[6]

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[5] *See, e.g.*, 2 U.S.C. §§ 441b(b)(1), 441b(b)(7).

[6] In 1974, Congress added a number of new exceptions to the general definition of "expenditure" in 18 U.S.C. § 591. *See* Pub. L. No. 93-443, 88 Stat. 1263, 1270-71 (1974). It also clarified that the general definition was not to override the specific exclusions from that term that had been incorporated into 18 U.S.C. § 610 in 1971, by specifying that the general definitions in section 591 were applicable, *inter alia*, to section 610 "[e]xcept as otherwise specifically provided." 88 Stat. 1268. At the same time, a similar provision was added to the definition of expenditure in the FECA, which is now codified at 2 U.S.C. § 431(9)(B)(v). *See* 88 Stat. 1274. It is clear that this alteration was not intended to render the section 431(9) definition of expenditure inapplicable to section 441b, as MCFL asserts (Br. 10), for in 1976, when Congress moved the prohibition from the criminal code to Title 2, the conference

Finally, the Commission's construction is supported by the structure of the Act, for several exemptions incorporated only into the definition of expenditure in section 431 would make little sense if they did not apply to section 441b as well. First, even MCFL agrees (Br. 18-23) that the media exception now codified at 2 U.S.C. § 431 (9) (B) (i) was intended to protect press functions from the prohibition in section 441b. Similarly, although a corporation's communication with its members is exempted from the general definition of expenditures, 2 U.S.C. § 431(9) (B) (iii), there is no such exemption from the definition in section 441b. MCFL's construction would make these special protections for certain corporate activities inapplicable to section 441b, a senseless result that is impossible to accept. *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982).[7]

2. MCFL's argument for narrowing the reach of section 441b almost completely ignores the extensive legislative history of that statute. However, in construing a

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report expressly noted that in some respects these two definitions "overlap" and "should be read together." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 63 (1976), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1976*, at 1057 (1977) (hereafter "*1976 Leg. Hist.*"). This intention is confirmed by Congress' failure to veto the regulations discussed on pp. 2-3, *supra*, or to alter the Commission's construction of section 441b when it revised the Act in 1979.

[7] Even if 2 U.S.C. § 441b(b) (2) were the exclusive definition of "expenditure," however, its terms would not exempt from section 441b a corporation's expenditures to express its own views on candidates to the public. Section 441b(b) (2) is not limited to payments made directly to a candidate, but includes as well any "indirect" payment or gift of "anything of value." As shown *infra*, p. 10, Rep. Hansen's amendment was drafted to codify previous court decisions, and this Court had found in *United States* v. *UAW*, 352 U.S. at 585 (emphasis added) that the statute "embrace[d] precisely the kind of *indirect contribution* alleged in the indictment" in that case, which did not allege a coordinated expenditure.

statute, "a page of history is worth a volume of logic," [8] and the legislative history of section 441b firmly supports the Commission's application of the statute to independent corporate expenditures like MCFL's.

As noted on p. 15 of our opening brief, the prohibition on contributions was extended to cover expenditures in 1947 because several congressional committees had discovered that labor organizations had evaded the contribution limits by conducting extensive campaigns on their own behalf in support of favored candidates. The impact of this change in the law was debated in depth in the Senate, during which Senator Taft, the manager of the bill, consistently affirmed that expenditures would be prohibited whether or not made in coordination with a candidate.[9] As noted *supra*, p. 3, in *United States v.*

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[8] *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 106 S. Ct. 1931, 1935 (1986), *quoting New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

[9] For example, the following colloquy between Senators Pepper and Taft clearly anticipated what MCFL did here:

> Mr. PEPPER . . . . Would the newspaper called Labor, which is published by the Railway Labor Executives, be permitted to put out a special edition of the paper, for example, in support of President Truman, if he should be the Democratic candidate for the Presidency next year, and in opposition to the Senator from Ohio, if he should be the Republican nominee for the Presidency, stating that President Truman was a friend of labor and that the Senator from Ohio was not friendly to labor? Would that be called a political expenditure on the part of the labor organization?
>
> Mr. TAFT. If it were supported by union funds contributed by union members as union dues it would be a violation of the law, yes. It is exactly as if a railroad itself, using its stockholders' funds, published such an advertisement in the newspaper supporting one candidate as against another . . . . The prohibition is against a labor organization using its funds either as a contribution to a political campaign or as a *direct expenditure of funds on its own behalf.*

93 Cong. Rec. 6436 (1947) (emphasis added), *reprinted in* II NLRB, *Legislative History of the Labor Management Relations*

UAW, 352 U.S. 567 (1957), this Court relied upon this legislative history to uphold an indictment that did not allege that the union's expenditure had been coordinated with any candidate.

The 1971 amendments to 18 U.S.C. § 610, upon which MCFL relies, were proposed on the floor of the House by Rep. Orval Hansen. As we have shown (FEC Br. 22-23), the policy Rep. Hansen said his amendment was intended to implement was to permit internal communications of corporations and unions while continuing to prohibit the use of corporate and union money to influence the public in the selection of candidates for federal office.

If Rep. Hansen's amendment had also been intended to effect the dramatic change in policy alleged by MCFL—removing from the statute's reach an entire class of expenditures specifically targeted by Senator Taft and overruling this Court's construction of the Act in the *UAW* case—one would expect to find some indication of this intent in the legislative history. *See, e.g., National Treasury Employees Union v. FLRA*, No. 85-1053, slip op. at 13 (D.C. Cir. Sept. 2, 1986). Rep. Hansen, however, went to great lengths to reassure his colleagues that his amendment would not make any significant changes, but would merely "codify the court decisions interpreting section 610 of title 18 of the United States Code." 117 Cong. Rec. 43,379 (1971), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act of 1971*, at 757 (1981) (hereafter *"1971 Leg. Hist."*). *See also* 117 Cong. Rec. 41,869 (1971). Rep. Hansen went on to emphasize that under his amendment section 610 was "plainly all-encompassing" and commented:

Act, 1947, at 1526-27 (1948) (hereafter *"1947 Leg. Hist."*). Similar statements were repeated throughout the legislative history of the Taft-Hartley amendments. *See, e.g.,* 93 Cong. Rec. 6437, 6438, 6439, 6440, *1947 Leg. Hist.* at 1528-35 (remarks of Sens. Pepper, Taft and Magnuson).

> That is as it should be. For as I noted at the outset the basic purpose of section 610 is to prohibit active electioneering by corporations and unions for Federal candidates directed at the public at large. There can be no doubt that this language accomplishes that end.
>
> [I]t should be noted that this prohibition is the most far-reaching in the entire election law. . . .

117 Cong. Rec. 43,380, *1971 Leg. Hist.* at 758. Rep. Hays, chairman of the House Committee which had reported the bill under debate, agreed that Rep. Hansen's amendment "is substantially what is in the law now. Everybody has lived with it for a long time. I intend to support the amendment." 117 Cong. Rec. 43,381, *1971 Leg. Hist.* at 759. Finally, during the debate on the conference committee's report, Rep. Hansen reiterated that his amendment would not alter the effect of the law as it had originally been conceived by Senator Taft and construed by this Court.

> I will repeat what I stated several times during the course of the debate that the purpose and effect of my amendment is to codify and clarify the existing law and not to make any substantive changes in the law.
>
> * * * * *
>
> The Hansen amendment is consistent with the legislative intent expressed by the original author of section 610, the late Senator Robert Taft of Ohio.
>
> * * * * *
>
> Thus the Hansen amendment does not break new ground, it merely writes currently accepted practices into clear and explicit statutory language.

118 Cong. Rec. 328-29 (1972), *1971 Leg. Hist.* at 896-97. In *Pipefitters Local Union No. 562 v. United States*, 407 U.S. at 399, 427, this Court agreed that, with one

possible exception, the Hansen amendment "merely codifies prior law." [10]

In sum, Congress had no intention of removing uncoordinated expenditures from the reach of section 610 when it adopted the Hansen amendment in 1971. Congress' intent in that amendment was to permit election advocacy to be distributed freely to a corporation's or union's own stockholders or members, but to continue to prohibit distributing such material to the public, as MCFL did, unless it was financed through a separate segregated fund. Accordingly, even if MCFL had been right in its assertion that the 1971 language literally indicated a contrary result, the Commission's construction of the Act would still be entitled to affirmance. *See, e.g., Watt v. Alaska*, 451 U.S. at 266.

B. MCFL argues (Br. 13-17) that if section 441b applies to corporate and union independent expenditures, it can only reach expenditures to expressly advocate the election or defeat of clearly identified federal candidates.[11] MCFL points to no statutory language to bolster this assertion, relying instead upon isolated phrases of legislative history divorced from their context.[12] In fact, al-

[10] The one respect in which the Court found the amendment had apparently changed the law was in permitting corporations and unions to use their treasury funds to pay for the administration and solicitation of contributions to a separate segregated fund. *Pipefitters v. United States*, 407 U.S. at 428-32.

[11] This is essentially the definition of "independent expenditure" in 2 U.S.C. § 431(17). This provision was added to the Act in 1976 in response to this Court's construction of a different section of the Act in *Buckley v. Valeo*, 424 U.S. at 44 n.52, to apply only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' "

[12] MCFL blatantly misrepresents the legislative history when it quotes from a *1974* House report that was not even discussing 18 U.S.C. § 610, and relies upon it (Br. 14) as "the House Report" on the *1971* amendment to section 610.

though Congress has expressly limited other provisions in the Act to communications containing "express advocacy," [13] it has never altered section 441b's statement that it applies to all expenditures that are "in connection with" a federal election. This striking difference in statutory language cannot be presumed to be accidental. *Russello v. United States*, 464 U.S. 16, 23 (1983).

The statute's structure and legislative history confirm that section 441b was not intended to be limited to expenditures for express advocacy.[14] In particular, the 1947 debate over extending the statutory prohibition to cover "expenditures" clearly indicates that use of candidates' positions on issues in a partisan election distribution was intended to be prohibited. Indeed, Senator Taft expressly addressed the question:

> Mr. PEPPER. I wish to ask the Senator from Ohio whether he agrees . . . that if a labor organization used its funds to disseminate the voting record of a candidate for office, during the time of the campaign, that would not be unlawful. . . .
>
> Mr. TAFT. I think it would depend upon all the circumstances in the case. If it was merely a bare statement of actual facts and simply direct quotations of what the man had said in the course of certain speeches on certain subjects, and was not colored in any way, I would rather agree . . . . But I think it would depend, in each case, on the character of the publication.

[13] 2 U.S.C. §§ 431(9)(B)(iii), 431(17), 441d(a).

[14] The plain language of section 441b establishes, for example, that a corporation's partisan get-out-the-vote campaign limited to members of the public listed as registered with one party, would be a prohibited corporate expenditure regardless of whether any candidate's election or defeat is expressly advocated in the process. *See* 2 U.S.C. §§ 441b(b)(2)(B), 431(9)(B)(ii). *See also* 117 Cong. Rec. 43,380-381, *1971 Leg. Hist.* at 758-59 (remarks of Rep. Hansen); 117 Cong. Rec. 43,382, *1971 Leg. Hist.* at 760 (colloquy between Reps. Anderson and Hansen).

93 Cong. Rec. 6447, *1947 Leg. Hist.* at 1548. *See also* 93 Cong. Rec. 6447, *1947 Leg. Hist.* at 1546 (colloquy between Sens. Taft and Ball). This distinction was adopted by the courts[15] and has been incorporated into the Commission's regulations, 11 C.F.R. § 114.4(b)(4) and (5).[16] Even MCFL has not been able to mount a serious argument that its special election leaflet satisfies this test, and it has identified nothing in the statute or legislative history that would suffice, under the principles

[15] *United States v. Lewis Food Co.*, 366 F.2d at 712 ("The 'Notice to Voters' also makes it plain that, in Lewis' opinion, those office holders given low ratings on their votes 'in favor of constitutional principles' should not be re-elected."). *See also United States v. UAW*, 352 U.S. at 592 (distinguishing between "active electioneering" and merely "stat[ing] the record of particular candidates on economic issues").

[16] MCFL argues (Br. 15 n.10) that the Commission's view of section 441b's application to distribution of candidate positions on issues has been "woefully inconsistent" and that "this case is a hangover from earlier [more restrictive] views." The facts discussed in the text, however, establish that MCFL's distribution in this case would be unlawful under the Commission's current regulations as well as its earlier advisory opinions. Thus, even if there had been earlier inconsistencies in the Commission's application of the Act in other circumstances, they would make no difference on the facts of this case.

In any event, the Commission's treatment of this issue has not been marked by any erratic changes that could fairly be characterized, as MCFL does, as "inconsistent" or "flip-flop[s]." The Commission grappled with several factual scenarios implicating the problem of corporate distribution of candidate positions on issues in early advisory opinions adopted by divided votes. *See* AO 1978-18, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5305 (April 4, 1978); AO 1979-48, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5435 (Oct. 31, 1979); AO 1980-20, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5487 (May 1, 1980). This experience led the Commission to hold hearings and adopt formal rules, now contained in 11 C.F.R. § 114.4 (b)(4) and (5), to delineate factors which determine whether a corporate or union distribution to the public is nonpartisan. These regulations are responsive to the concerns underlying section 441b, and would clearly not permit corporate money to be used for a partisan distribution to the public like MCFL's.

discussed on pp. 1-2, *supra*, to overcome a Commission construction of the Act that implements the intent stated in the legislative history.

As the court of appeals concluded (J.S. App. 16a), however, this case does not require the Court to decide what expenditures are "in connection with" a federal election under section 441b, even though not for express advocacy. MCFL's special election flyers clearly did contain express advocacy of the election or defeat of specified candidates; therefore, the expenditure in this case would be unlawful even under MCFL's own construction of section 441b.[17] MCFL's flyers did not merely inform readers of candidates' positions on issues. Rather, they went on to identify by name which candidates in each electoral contest MCFL considered to be "pro-life" and to urge the reader to vote for pro-life candidates in language that could not have been more explicit. Thus, under the large print heading "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," the flyers stated:

> As you read this edition, you will see that the final election or defeat of pro-life candidates in November will *really* be determined by the outcome of the September 19th primary. No pro-life candidate can

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[17] Since MCFL apparently concedes that section 441b reaches expenditures for express advocacy it cannot rely upon its unexplained assertion (Br. 23 n.19) that section 441b is unconstitutionally vague in defining which expenditures are prohibited. Although the "statute may leave room for uncertainty at the periphery," MCFL's corporate expenditure for express advocacy would be unlawful "under any reasonable interpretation of the statute." *FEC v. National Right to Work Committee*, 459 U.S. 197, 211 (1982). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). Any further uncertainty about the statute's reach can be resolved by obtaining an advisory opinion from the Commission under 2 U.S.C. § 437f. *See United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947); *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-85 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).

> win in November without *your vote* in September . . . Thus, *your vote in the primary will make the critical difference in electing pro-life candidates.*

(R., Vol. I, Pl. 16, Ex. A, p. 1, first emphasis original, second emphasis added).[18] That the flyer advocated the election of a category of candidates does not make it any less express, for it carefully listed the name of each candidate in each election who was in the category of "pro-life" candidates for whom the reader was to vote. This is not materially different from a television commercial sponsored by the AFL-CIO urging the viewer to "vote pro-labor" and identifying by name which candidates have supported the union position and which have not, or a flyer urging the reader to "vote for liberals" which specifies which candidates in each electoral race have supported the liberal position and which have not. Such communications could also be said to have "an educational purpose" to "inform readers about the records and positions of all candidates on critical . . . issues" (MCFL Br. 15), and to promote a particular issue as the touchstone for voting decisions (MCFL Br. 16). But like MCFL's flyer, these hypothetical communications go beyond these limited purposes to expressly advocate the election or defeat of candidates identified by name. This Court has never suggested that a communication could be insulated from the Act by including other information along with the express advocacy of a particular election result,[19] and it is clear that if communications of this

[18] This language materially distinguishes this case from *FEC v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (en banc), upon which MCFL relies (Br. 17), for that court found a leaflet contained no express advocacy because "no mention is made of any particular federal election, the political affiliation of any congressman, the fact that he is or is not a candidate for elective office, or the name of any electoral opponent of any congressman." *Id.* at 49.

[19] In 2 U.S.C. § 431(9)(B)(iii), Congress has required corporations and unions to report expenses in excess of $2000 for express

sort were excluded from section 441b there would be little left subject to its provisions.[20]

C. MCFL has argued (Br. 18-23) that the MCFL newsletters were periodical publications exempt from the definition of expenditure under 2 U.S.C. § 431(9)(B)(i), and that the Special Election Editions at issue here were also exempt because they were merely issues of that newsletter.[21] As the court of appeals found (J.S. App. 18a),

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advocacy directed to members and stockholders, but explicitly excluded "a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate." *See FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979). Congress' failure to add such an exception to section 441b clearly indicates that section 441b was meant to cover such communications. *See Russello v. United States*, 464 U.S. at 23-24.

[20] MCFL has submitted to this Court in its supplemental appendix a number of publications of other organizations to show that prohibiting dissemination of congressional voting records would have broad effect. Several *amici* make the same argument, asserting that they also distribute candidate voting records. However, as discussed above, the Act permits a corporation or union to distribute *any* communication to its stockholders or members. 2 U.S.C. §§ 431(9)(B)(iii), 441b(b)(2)(A); 11 C.F.R. § 114.3. Thus, any of these groups—including MCFL—can distribute election advocacy to their own members without running afoul of the Act. Moreover, the Commission has, as we have shown *supra*, p. 14 n.16, construed the Act to permit corporations to spend corporate funds to distribute candidates' positions on issues to the public as well, so long as they are presented in the nonpartisan manner described in 11 C.F.R. § 114.4(b)(4) and (5), as *amici* indicate they would. *See* Chamber of Commerce Brief at 5, 14 n.8; American Civil Liberties Union Brief at 3 n.1. Finally, it is clear, at a minimum, that none of the publications submitted by MCFL or described by the *amici* contain anything approaching the explicit advocacy of an election result that was distributed to the public by MCFL. Thus, none of those publications could be affected by affirming the application of section 441b to this case.

[21] Of course, this argument is inconsistent with MCFL's argument that section 431(9) is entirely inapplicable to section 441b. *See* p. 8, *supra*.

however, even if MCFL's regular newsletter were within the newsmedia exemption, the Special Election Edition would still constitute a prohibited election expenditure since it was distributed free and unrequested to tens of thousands of members of the general public who had never received MCFL's regular newsletter. *See* FEC Br. at 4.[22]

The media exemption was added to the Act in 1974 with little controversy or discussion. The House Report stated that it was one of several new amendments intended "to exempt certain limited activities" from the Act's contribution and spending limits and reporting requirements. H.R. Rep. No. 1239, 93rd Cong., 2d Sess. 4 (1974), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1974*, at 638 (1977) (hereafter "*1974 Leg. Hist.*"). Rather than breaking new ground, these amendments were only intended to "reaffirm the principles stated in the amend-

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[22] Although it is unnecessary in this case to determine whether MCFL's regular newsletter is a "periodical publication" protected by 2 U.S.C. § 431(9)(B)(i), the Commission has construed this term to mean "a publication in bound pamphlet form appearing at regular intervals . . . containing articles of news, information, opinion or entertainment, whether of general or specialized interest which ordinarily derive their revenues from subscriptions and advertising." AO 1980-109, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5556 (Oct. 6, 1980), *quoting Explanation and Justification of Regulations on Funding of Federal Candidate Debates*, 44 Fed. Reg. 76,735 (1979). MCFL's newsletter does not appear at regular intervals (J.A. 23), and does not derive any revenues from subscriptions or advertising, but is published with corporate funds and distributed free of charge (J.A. 19, 24, 26). The Commission's construction is consistent with the legislative history discussed *infra*, pp. 19-20, and the judicial deference to which it is entitled (pp. 1-2, *supra*) cannot be overcome by the cases relied upon by MCFL (Br. 22, n.18) interpreting similar terms in unrelated statutes. *See Office of Consumers' Counsel v. FERC*, 783 F.2d 206, 221 n.31 (D.C. Cir. 1986); *SEC v. Suter*, 732 F.2d 1294, 1298 (7th Cir. 1984).

ment to section 610 . . . proposed by Representative Orval Hansen, and passed by the Congress as part of the Act." *Id.* The particular purpose of the media exemption was to "assure[] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." *Id.* Rep. Frenzel, in his separate views attached to the House Report, agreed that this amendment was "non-controversial" and "basically in conformity with the law already." *Id.* at 144, *1974 Leg. Hist.* at 778.[23]

The existing law on the applicability of 18 U.S.C. § 610 to media expenditures originated in Senator Taft's explanation during the Senate debates on the 1947 amendments. Senator Taft clearly drew the line between permitted press activities and prohibited corporate and union expenditures.

> MR. TAFT. I would say the word "expenditure' (sic) does not mean the sale of newspaper (sic) for money for their worth. If they are sold to subscribers and if the newspaper is supported by subscriptions, then I would not say that constituted such an expenditure. But if the newspapers were given away—even an ordinary newspaper—I think that would violate the Corrupt Practices Act. That act would be violated, it seems to me, if such a news-

[23] MCFL's quotation (Br. 21) from the 1974 committee report, indicating Congress' general intent in all of these new provisions not to "burden" the freedoms of the press or of association," H.R. Rep. No. 1239 at 4, *1974 Leg. Hist.* at 638, does not establish that the media exemption entirely immunizes the media from the Act, for the first amendment is not violated by applying laws of general applicability to media corporations. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972). The actual intent of this general statement is clearly not as broad as MCFL believes, for the same committee report only two pages later (H.R. Rep. No. 1239 at 6-7) asserted that first amendment freedoms would not be infringed by a broad limitation on independent expenditures by individuals, which this Court found unconstitutional in *Buckley v. Valeo*, 424 U.S. at 39-59.

paper were given away as a political document in favor of a certain candidate. I think that would have been so under the present law, and I think we make it more clearly so, perhaps, by this measure.

* * * * *

Mr. TAFT. . . . If the newspaper is prepared and distributed and circulated by means of the expenditure of union funds, then how could a line be drawn between that and political literature or pamphlets or publications of that nature? It is perfectly easy for a labor union to publish lawfully a bona fide newspaper and to charge subscriptions for that newspaper, either by itself or as a corporation.

* * * * *

Mr. TAFT. I think if the paper is, so to speak, a going concern, it can take whatever position it wants to.

93 Cong. Rec. 6437-38, *1947 Leg. Hist.* at 1529-30.

In *United States v. CIO*, 335 U.S. 106 (1948), it was alleged that election advocacy was contained in an issue of a weekly periodical called "The CIO News" which was "distributed in regular course to members or purchasers." 335 U.S. at 111-112. The Court found this distribution to be permissible under the statute on the basis of the legislative history discussed above, but the Court carefully specified that it did not construe the indictment to allege that the CIO had "circulat[ed] free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies of 'The CIO News,' as members of the union." *Id.* at 111. *See also id.* at 112 ("[N]o allegation has been made of expenditures for 'free' distribution of the paper to those not regularly entitled to receive it"). The Court emphasized that this distinction was crucial to its decision.

It is one thing to say that trade or labor union periodicals published regularly for members, stockholders or purchasers are allowable under § 313 and

> quite another to say that in connection with an election occasional pamphlets or dodgers or free copies widely scattered are forbidden.

Id. at 122-23. Concluding that the particular distribution alleged was permissible under the Act, the Court cautioned that "[w]e express no opinion as to the scope of this section where different circumstances exist." *Id.* at 124.

Although it concedes (Br. 20) that this Court's *CIO* decision was the progenitor of the newsmedia exemption, MCFL's discussion of that case ignores the distinction the Court went to such lengths to emphasize.[24] Unlike the CIO, MCFL did distribute its election flyers free of charge to thousands of people who were not members of the corporation and had never received MCFL's newsletters. This sort of active electioneering among the public is precisely what section 441b was intended to prohibit.[25]

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[24] This Court has twice reaffirmed the fundamental distinction drawn in the *CIO* decision. In *United States v. UAW*, 352 U.S. at 589, the Court found valid an indictment for a union's expenditure for a public broadcast advocating the election of a federal candidate, and observed:

> [U]nlike the union-sponsored political broadcast alleged in this case, the communication for which the defendants were indicted in *C.I.O.* was neither directed nor delivered to the public at large. The organization merely distributed its house organ to its own people. The evil at which Congress has struck in § 313 is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party.

In 1972, only two years before the media exemption was enacted, the Court reiterated that the basis for its decision in *CIO* was that unions were not barred "from using union funds to publish a periodical [containing election advocacy], in regular course and for *distribution to those accustomed to receiving it.*" *Pipefitters v. United States*, 407 U.S. at 417 n.29 (emphasis added).

[25] [I]n exempting the "distribu[tion]" of news or commentary "through the facilities of any broadcasting station, newspaper,

Finally, MCFL's argument again conflicts with the structure of the Act. In 2 U.S.C. § 431(9)(B)(iii), Congress exempted from the general definition of expenditure a corporation's or union's communications with its members, but required that such organizations report the costs exceeding $2000 for communications to their members primarily devoted to express advocacy. This provision was aimed, in part, at special election editions of corporate and union house organs. H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 42 (1976); *1976 Leg. Hist.* at 1036. MCFL's construction of the media exemption would mean that a corporation or union would have to report its expenses if it distributed a special election edition of its house newsletter only to its members, but if it distributed the election edition to the public as well section 431(9)(B)(iii) would make it exempt from reporting the expenses of the distribution. Such anomalous

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> magazine or other periodical publication . . .", the statute would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function. It would not seem to exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function. If, for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers, this activity would not come within the press exemption—even though it might comply with a technical reading of the statutory exemption, being a "news story . . . distributed through the facilities of . . . [a] newspaper."

Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981). Since the media exemption would not protect *any* corporation or union that engaged in the activity MCFL is charged with —free and unrequested distribution of an election flyer to members of the public who never received MCFL's regular newsletter—there is no basis for MCFL's argument (Br. 46-48) that the application of the Act in this case denies it equal protection of the law.

results could not have been intended by Congress. *See* p. 8, *supra.*

II. SECTION 441b DOES NOT INFRINGE THE RIGHTS OF CORPORATIONS AND UNIONS TO ENGAGE IN POLITICAL SPEECH

MCFL continues to base its constitutional argument upon the false assumption that section 441b is an outright prohibition of corporate and union political speech, insisting that the statute's express authorization of corporate and union expenditures through a separate segregated fund, added to the statute in 1971, is of no significance.[26] However, this Court's recent decisions in *Regan v. Taxation With Representation,* 461 U.S. 540 (1983), and *FCC v. League of Women Voters of California,* 468 U.S. 364 (1984), clearly demonstrate that Congress' provision of an alternative method of financing unlimited corporate and union election speech directed at the public eliminates any basis for finding that the statute significantly abridges first amendment activities.[27]

In both *Regan* and *League of Women Voters* this Court reviewed statutes making it illegal for certain organizations receiving direct or indirect government subsidies to engage in certain kinds of speech.[28] In both cases, the

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[26] Thus, MCFL asserts (Br. 23 n.20) that five justices of this Court have expressed the opinion that section 441b's predecessor was unconstitutional. All of those separate opinions were issued prior to the 1971 amendment permitting corporations to communicate with the public through separate segregated funds, and all were based upon a construction of the statute that would not have permitted them to do so.

[27] Of course, the Act specifically permits unlimited corporate and union communication with their own members. 2 U.S.C. §§ 431 (9)(B)(iii), 441b(b)(2)(A).

[28] In *Regan,* most corporations exempt from taxation under 26 U.S.C. § 501(c)(3) were prohibited from engaging in lobbying; in *League of Women Voters,* publicly subsidized broadcasting stations were prohibited from editorializing.

government argued that the restriction was supported by the government's interest in not paying for the speech of the subsidized organizations, yet the Court upheld the statute in *Regan* on the basis of this interest while striking down the statute in *League of Women Voters.* The crucial difference between the two cases was spelled out in *FCC v. League of Women Voters*, 468 U.S. at 399-400—the statute in *Regan* permitted tax exempt corporations to establish unsubsidized affiliated organizations which could carry on lobbying activities, while the statute in *League of Women Voters* provided no such alternative method of financing public broadcasting stations' editorials. The Court found that "[g]iven that statutory alternative . . . 'Congress has not infringed any First Amendment rights or regulated any First Amendment activity,' " and acknowledged that if that sort of alternative had been included in the statute in *League of Women Voters*, "such a statutory mechanism would plainly be valid." *Id.* at 400, *quoting Regan v. Taxation With Representation*, 461 U.S. at 546.

Although it serves different purposes, the statutory mechanism in section 441b is in all material respects indistinguishable from the one upheld in *Regan.*[29] As dis-

[29] *Regan* cannot be distinguished from this case by arguing that the government's interest in not subsidizing private speech is more compelling than the purposes this Court has found to support section 441b. Since the statute in *League of Women Voters* was invalidated while the one in *Regan* was upheld, this common purpose of the two statutes was clearly not found to outweigh the first amendment interests asserted. The crucial factor was that the statutory mechanism in *Regan*, like the one here, did not actually restrict speech, while the statute in *League of Women Voters*, like the actual limits on election expenditures at issue in such cases as *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *FEC v. National Conservative Political Action Committee*, 105 S. Ct. 1459 (1985), did. *Regan* also cannot be dismissed, as MCFL apparently attempts to do (Br. 27), as involving a "time, place and manner" restriction different in kind from section 441b. Like section 441b, the statute in *Regan* entirely prohibited covered corporations from engaging in a category of speech, except through

cussed in our opening brief, pp. 20-22, a separate segregated fund is essentially nothing more than a separate bank account containing voluntary contributions for political purposes; the corporation or union can completely control the activities of its separate segregated fund, and is free to use the separate segregated fund to express the electoral views of the corporation or union. *Cf. Regan v. Taxation With Representation*, 461 U.S. at 553-54 (Blackmun, J., concurring). Indeed, section 441b would have permitted MCFL to produce and distribute the same election flyer to the same people as it did in this case, if it had only been financed from a wholly controlled separate segregated fund. Accordingly, as in *Regan*, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity" in section 441b. *See also, e.g., United States v. Pipefitters Local Union No. 562*, 434 F.2d 1116, 1123 (8th Cir.) (Van Oosterhout, C.J., joined by Blackmun, J.) ("Separate voluntary political associations by union members are not in any way proscribed by the statute. Therefore, § 610 is not unconstitutional under the First Amendment."), *adhered to en banc*, 434 F.2d 1127 (8th Cir. 1970), *rev'd on other grounds*, 407 U.S. 385 (1972); *United States v. Chestnut*, 394 F. Supp. at 591 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 40, 50-51 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Boyle*, 482 F.2d 755, 763-64 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).[30]

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an affiliated entity. Thus if, as MCFL implies, the statute in *Regan* was not subject to strict scrutiny because it did not actually limit speech, the same standard of review is appropriate here.

[30] Contrary to MCFL's assertion (Br. 23), both this Court and the lower courts have upheld the constitutionality of section 441b and its predecessors against a number of first amendment attacks. *See*, in addition to the cases cited in the text, *FEC v. National Right to Work Committee*, 459 U.S. at 206-211; *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-

At bottom, what this Court has sought to protect in its cases striking down actual limits on independent political expenditures by groups is the ability of "large numbers of individuals of modest means [to] join together in organizations which serve to 'amplif[y] the voice of their adherents.'" *FEC v. National Conservative Political Action Committee*, 105 S. Ct. at 1467, *citing Buckley v. Valeo*, 424 U.S. at 22; *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-96 (1981). In contrast to the statutes in those cases, section 441b clearly does not infringe this important interest because it permits a corporation or union to sponsor a separate segregated fund through which its constituents can join together to amplify their voices.[31] MCFL's complaint (Br. 28) that

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1016 (1982), *appeal dismissed, cert. denied,* 465 U.S. 1092 (1984); *California Medical Ass'n v. FEC,* 453 U.S. 182, 193-201 (1981); *International Ass'n of Machinists v. FEC,* 678 F.2d 1092, 1099-1118 (D.C. Cir.) (en banc), *aff'd mem.,* 459 U.S. 983 (1982); *Bread Political Action Committee v. FEC,* 635 F.2d 621, 626-33 (7th Cir. 1980) (en banc), *rev'd on other grounds,* 455 U.S. 577 (1982); *FEC v. National Education Ass'n,* 457 F. Supp. 1102, 1109 (D.D.C. 1978); *FEC v. Weinsten,* 462 F. Supp. 243, 246-49 (S.D.N.Y. 1978); *United States v. Clifford,* 409 F. Supp. 1070, 1071, 1072 (E.D.N.Y. 1976); *United States v. United States Brewers' Ass'n,* 239 F. 163 (W.D.Pa. 1916).

[31] In fact, the Act permits corporate separate segregated funds to perform this function more efficiently than other political committees, for a corporation can pay its fund's administrative and solicitation expenses from the organization's general treasury, 2 U.S.C. § 441b(b)(2)(C), while other political committees must use their supporters' contributions to defray these substantial expenses. This special advantage for separate segregated funds, which was added to the Act in 1971, *see* n.10, p. 12, *supra* was the subject of complaint during the hearings on the 1979 amendments to the Act, although Congress did nothing to change it. *See Hearing Before the Committee on Rules and Administration, United States Senate,* 96th Cong., 1st Sess. 37-38, 40, 46, 48-53 (1979), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1979,* at 43-44, 46, 52, 54-59 (1983).

performing this service for its supporters is too "bothersome" can hardly be considered an objection of constitutional stature, particularly since it has not deterred MCFL from establishing and operating a separate segregated fund for the last six years. The statute itself does not limit MCFL's ability to transform contributions from consenting members into political speech, and that is enough to satisfy the test applied by this Court.[32]

III. SECTION 441b IS SUPPORTED BY COMPELLING GOVERNMENTAL INTERESTS THAT OUTWEIGH ANY IMPACT ON MCFL'S POLITICAL ACTIVITIES

A. We demonstrated in our opening brief, pp. 29-33, that in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), this Court found the purposes underlying section 441b to be compelling enough to overcome first amendment objections like the ones raised by MCFL, even as applied to the nonprofit, ideological corporation in that case. MCFL argues (Br. 42 n.27, *quoting* J.S. App. 23a) that the *National Right to Work Committee* decision is inapplicable here because that case involved

[32] MCFL asserts (Br. 28) that it was precluded from establishing a separate segregated fund in 1978 because it was a nonmembership corporation at that time. However, as shown in our opening brief, p. 22 n.11, this would not have precluded MCFL from establishing a separate segregated fund; indeed, the National Right to Work Committee was also a nonmembership corporation when it established its separate segregated fund. *See FEC v. National Right to Work Committee*, 459 U.S. at 200. Any limits on solicitation would have resulted solely from MCFL's self-imposed restriction on membership in the corporation, and this Court held in *FEC v. National Right to Work Committee*, 459 U.S. at 206, that limiting solicitation for a separate segregated fund to a corporation's actual members is not unconstitutional. The statute permits anyone who chooses to join a corporation or union to be solicited for contributions to its separate segregated fund; it was MCFL, not Congress, that refused until 1980 to permit its supporters to associate with the corporation by becoming members.

corporate "solicitation for direct contributions to candidates" rather than independent expenditures to communicate with the public. In fact, what was at issue in *National Right to Work Committee* was a provision of the statute that *completely* prohibits corporations from communicating independently with sympathetic members of the public to solicit contributions to the corporation's own political committee, not to candidates. There was no allegation that the solicitations distributed to the public by the National Right to Work Committee were coordinated with any candidate, and there was no evidence that the money collected was not used for independent expenditures as well as contributions to candidates.

The fact that the independent communications prohibited in *National Right to Work Committee* contained solicitations for contributions does not lower the standard of constitutional review. To the contrary, this Court has repeatedly invalidated other statutory restrictions on the solicitation of contributions under the first amendment because "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). *Accord, e.g., Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60 (1984); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).[33] Thus, the statutory purposes found compelling enough to justify *complete* prohibition of the independent public solicitations of the ideological corporation in *National Right to Work Committee* cannot be dismissed as inadequate to support the

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[33] In fact MCFL's special election flyer included a solicitation for contributions to support further election advocacy (R., Vol. I, Pl. 16, Ex. A, p. 8).

far less intrusive impact on corporate speech at issue in this case.[34]

B. MCFL argues that the purposes behind section 441b are inapplicable here because MCFL is a nonprofit corporation whose money comes from contributions, and its expenditure was too small to corrupt candidates. However, this Court in *FEC v. National Right to Work Committee*, 459 U.S. at 210, found section 441b to be a permissible prophylactic rule aimed at the potential for abuse inherent in the corporate structure, and found it

[34] MCFL relies heavily upon cases striking down actual limitations on independent expenditures, which are not on point because, as we have shown, section 441b is not such a limitation. However, most of those cases also involved ballot measure elections, and this Court has repeatedly emphasized that the rationale for striking down limitations on corporate expenditures in ballot measure campaigns is not transferrable to candidate elections. *See First National Bank of Boston v. Bellotti*, 435 U.S. at 788 n.26 ("[A] corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office."); *FEC v. National Right to Work Committee*, 459 U.S. at 210 n.7; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 299 n.6; *FCC v. League of Women Voters*, 468 U.S. at 372 n.9. MCFL's reliance upon *FEC v. National Conservative Political Action Committee* is also misplaced because the Court there distinguished *National Right to Work Committee* as "turn[ing] on the special treatment historically accorded corporations," and noted that *NCPAC* was "not a 'corporations' case because § 9012(f) applies not just to corporations but to any [political committee]." 105 S. Ct. at 1468. *Accord Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 300 (Rehnquist, J., concurring). In fact, just a few weeks ago a federal court relied upon this distinction in upholding a Michigan statute that prohibits corporate expenditures in candidate elections except through a separate segregated fund. *Michigan State Chamber of Commerce v. Austin*, No. G85-496, slip op. at 14-15 (W.D.Mich. Sept. 3, 1986) (copies of this decision have been lodged with the Court). In sum, even if section 441b were the absolute prohibition of corporate expenditures in candidate elections that MCFL imagines it is, the cases upon which MCFL relies would still not require its invalidation.

constitutionally valid regardless of the size or wealth of the particular corporation involved. Moreover, the Court in that case found the purposes behind the statute to be fully applicable to a nonprofit, ideological corporation whose treasury was also accumulated through contributions from supporters rather than business transactions. It is too late to rely upon such circumstances to escape application of section 441b.[35]

Finally, the fact that MCFL's adherents may not currently contribute large amounts to the corporation does not diminish Congress' important interest in safeguarding their right to make only "knowing free-choice donations" [36] to support MCFL's election expenditures. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066, 1075 (1986).[37]

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[35] In fact, nonprofit corporations can and do accumulate substantial wealth. For example, *amicus* Chamber of Commerce states (Br. 1) that it has thousands of corporate members whose dues make up its treasury, and reports filed with the Commission by *amicus* National Rifle Association show that it spent more than 1.4 million dollars through its separate segregated fund during the 1983-84 election cycle—including more independent expenditures than *any* other corporate or union fund. *FEC Reports on Financial Activity 1983-1984*, Vol. IV, p. 358 (May 1985); *FEC Press Release*, "FEC Reports 1983-1984 Independent Spending Activity" (Oct. 4, 1985) at p. 3.

[36] *Pipefitters v. United States*, 407 U.S. at 414 ("the test of voluntariness under § 610 focuses on whether the contributions solicited for political use are knowing free-choice donations"); *id.* at 417 ("the only requirements for permissible political organizations were that they be funded through separate contributions and that they be recognized by the donors as political organizations to which they could refuse support.").

[37] MCFL suggests (Br. 42-43 n.28) that section 441b is underinclusive because Congress has not included lobbying expenditures in that statute and because noncorporate business entities are not covered. The first point is simply wrong, for Congress has not left lobbying unregulated, but has simply decided that "[l]obbying is a separate field which has traditionally been, and should continue to be, regulated separately." 117 Cong. Rec. 43,380 (1971) (re-

C. MCFL describes (Br. 46) the danger of apparently ideological corporations largely funded by business corporations making independent expenditures to serve the interests of their corporate sponsors as a "fantasy," arguing that a corporate contribution to an ideological corporation for the purpose of independent expenditures would still be a violation of section 441b, and that 2 U.S.C. § 434(c) would require the ideological corporation to report contributions to it that are earmarked for independent expenditures. However, it would take an excessively naive corporation to earmark its funding of an ideological corporation for independent expenditures. The real danger is that such ideological front groups could receive general funding from corporations whose business purposes they serve, and as one method of serving those interests make extensive expenditures to elect federal candidates who will aid their supporters' business interests. Nothing in the Act requires such general funding to be disclosed any more than MCFL was obligated to report the names of all of its general contributors.[38]

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marks of Rep. Hansen), *1971 Leg. Hist.* at 758. Lobbying expenditures are, in fact, extensively regulated under other statutes. *See, e.g., Regan v. Taxation With Representation,* 461 U.S. 540 (1983); *United States v. Harriss,* 347 U.S. 612 (1954). The second point has already been rejected by this Court on several occasions on the ground that Congress has authority to make a "judgment" that "entities hav[ing] differing structures and purposes . . . may require different forms of regulation in order to protect the integrity of the electoral process." *California Medical Ass'n v. FEC,* 453 U.S. at 201; *FEC v. National Right to Work Committee,* 459 U.S. at 210.

[38] In attempting to analogize this case to *FEC v. National Conservative Political Action Committee* ("NCPAC"), 105 S. Ct. 1459 (1985), MCFL fails to acknowledge that, as a political committee, NCPAC does report the names of its contributors, while MCFL seeks to make political expenditures like NCPAC's without doing so. MCFL thus seeks a special status that NCPAC, and any other "group of persons which . . . makes expenditures aggregating in

While it may well be true, therefore, that corporate contributions to an ideological corporation for the purpose of financing electoral contributions and expenditures would be a violation of section 441b (and perhaps section 441f as well), without the segregation of money used for election expenditures and the reporting of the sources of those funds, neither the Commission nor the voting public would be aware that such violations had occurred.[39] This only strengthens the governmental interest in disclosure of the sources of financing of an ideological corporation's election expenditures, for this Court has recognized the government's compelling interest in disclosure as "an essential means of gathering the data necessary to detect violations." *Buckley v. Valeo*, 424 U.S. at 68.

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excess of $1,000," 2 U.S.C. § 431(4)(A), are denied. MCFL attempts to avoid this inconsistency by asserting (Br. 45) that election expenditures do not make a group a political committee unless supporting or opposing candidates is its "major purpose." However, as this Court noted recently with respect to the parallel definition of "political committee" in the public financing statute, 26 U.S.C. § 9002(9), the express terms of the statute quoted above make *any* organization that accepts contributions or makes expenditures to influence federal elections a "political committee." *See FEC v. National Conservative Political Action Committee,* 105 S. Ct. at 1466. MCFL's expenditure of more than $9,000 on its special election edition would make it a political committee under the terms of the statute, required to report all of its contributors of more than $200.00, if that expenditure had been lawful. Of course, contrary to MCFL's assertion (Br. 45 n.30), the Commission found no probable cause to believe MCFL was a political committee because it found MCFL's expenditures to be unlawful under section 441b.

[39] For example, *amicus* Chamber of Commerce was established to serve, *inter alia,* the business interests of its thousands of corporate members, who provide general funding to the Chamber. Under MCFL's scenario, the Chamber could make large expenditures from its general treasury to influence federal elections in order to benefit its members' business interests, yet it would have no earmarked contributions to report.

D. MCFL repeatedly asserts (Br. at 43 n.28, 45, 46) that the Commission has not demonstrated that section 441b represents the least intrusive way of serving the governmental interests involved.[40] For the most part, however, MCFL has failed to suggest any way in which those purposes could be served in a less intrusive way. In fact section 441b serves the purposes we have identified in the manner least restrictive of constitutional rights. Thus, by requiring segregation of political funds, Congress has been able to ensure disclosure of only those who contribute separately to the corporation's political activities,[41] to protect contributors' ability to make a separate, informed decision about supporting a corporation's political activities, and to screen from the electoral process the aggregations of wealth accumulated under the special advantages of the corporate structure, while at the same time permitting corporations and unions to use

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[40] Since, as we have shown, section 441b does not actually restrict the ability of corporations and unions "to engage in protected political advocacy, Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme." *California Medical Ass'n v. FEC,* 453 U.S. at 199 n.20 (plurality opinion).

[41] MCFL argues (Br. 45) that "[i]f Congress wants the names of all contributors to a non-profit corporation which engages in any express advocacy to be made public, it could enact such a statute." Initially, it is obvious that this would be *more* intrusive than section 441b's requirement that only those who contribute directly to a corporation's political activities need be reported. Moreover, Congress clearly does *not* want to make public the names of all contributors to nonprofit corporations; the mechanism of section 441b ensures that only the names of those who choose to make discrete contributions to the corporation's political fund need be disclosed. Finally, MCFL does not really believe this is a less intrusive method of serving Congress' interests, for it goes on to cast doubt on whether such a provision could "survive constitutional scrutiny."

their separate segregated funds to amplify the voices of their supporters in the electoral realm.

The alternative arrived at by the court of appeals and defended by MCFL is far more intrusive than the statute enacted by Congress. By exempting "ideological" corporations from the Act, the court of appeals' decision would require the Commission and the courts to investigate the political views and activities of an organization in order to determine, under some as yet undefined test, whether the corporation is truly "ideological." This would require, at least, investigation of the names and interests of the organization's supporters and contributors to determine whether an ideological facade conceals an actual economic special interest. See FEC Brief at 35-36. Such an investigation would run counter to first amendment values, and an evaluation by the Commission or the courts of whether an organization's views are "ideological" or economic—assuming such a distinction can reliably be drawn—even more so. *See, e.g., NAACP v. Alabama*, 357 U.S. at 459-62; *Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864, 878-80 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), *cited in Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 848 n.23 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). The legislation enacted by Congress avoids this difficult and intrusive inquiry altogether, and does so without limiting corporate or union political speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening brief, 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,

CHARLES N. STEELE *
General Counsel

RICHARD B. BADER
Assistant General Counsel

CAROL A. LAHAM
Attorney

Attorneys for
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 376-8200

* Counsel of Record

SEPTEMBER 30, 1986

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