10-1986

# Federal Elections Commission v. Massachusetts Citizens for Life, Inc.

Lewis F. Powell Jr.

Probably a Note
(though I'm
reluctant to
enter this thicket
again)

Involves interpretation of
§ 441 b of Fed Election Campaign
Act ~~of~~ (FECA).
CA1 held ~~to~~ § 441 b ~~*~~invalid
as applied in this case to ~~re~~
restrict ~~[redacted]~~ non-profit corporation
from making certain expenditures
on behalf of candidates for office.
Resp. is a "Right to Life" Group.

PRELIMINARY MEMORANDUM

January 10, 1986 Conference
List 1, sheet 1

No. 85-701

CA1 found no compelling
state interest justified the
limitation ~~of~~ 1st amend rights.

| | | |
|---|---|---|
| FEDERAL ELECTION COMMN. | Appeal from CA1 (Rosenn-SCJ, Breyer, Torruella) | |
| v. | | |
| MASS. CITIZENS FOR LIFE, INC. (corporate speaker) | Fed./Civ. | Timely |

1. SUMMARY: The Federal Election Commission (FEC) challenges the CA1's decision that 2 U.S.C. §441b, which prohibits corporations from ~~making certain expenditures~~ on behalf of a candidate in connection with a federal election, was unconstitutional as applied to a nonprofit, "ideological" corporation making indirect, uncoordinated expenditures to express its views of candidates.

2. FACTS AND DECISIONS BELOW: The Federal Election Campaign Act (FECA), 2 U.S.C. §441b(a), makes it unlawful for a

Note probable jurisdiction
Mike

corporation

> "to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office ...."

Section 441b(b)(2) provides that 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 ...."

This section refers to election expenditures by corporations, which the Act prohibits unless such expenditures are made from segregated funds. §441b(b)(2)(C).

The general "definitions" section of FECA contains a broader definition of expenditure, which "includes"

> "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office ...." 2 U.S.C. §431(9)(A)(1) (emphasis added).

Appee Massachusetts Citizens for Life, Inc. (MCFL) is a Massachusetts nonprofit, nonmembership corporation, organized "[t]o foster respect for human life and to defend the right to life of human beings, born and unborn, through education, political and other forms of activities." App., at 3. Shortly before the September 1978 Massachusetts primary elections, MCFL published and distributed a flyer entitled "Special Election Edition." The flyer (a copy of which is included in the Juris. Stmt.) was headed "EVERYTHING YOU NEED TO VOTE PRO-LIFE." The publication contained the voting records on abortion-related

issues of many candidates for federal and state offices. It included at least two exhortations to "vote pro-life" and a statement that "No Pro-Life Candidate Can Win In November Without Your Vote In September." The publication contained photographs only of those candidates who were considered "pro-life." At the back of the publication, next to the exhortation "Vote Pro-Life," MCFL printed a disclaimer stating "This Special Election Edition Does Not Represent An Endorsement Of Any Particular Candidate." Copies of the Special Election Edition (along with a subsequently published correction sheet) were distributed to about 6,000 MCFL contributors and some 50,000 noncontributing supporters. MCFL also sent copies to local chapters and to individuals who requested them. The FEC contends that the rest of the 100,000 copies printed were left in public areas for general distribution. MCFL spent a total of $9,812.76 from its general treasury in preparing, printing and distributing the publications.

In response to a complaint, the FEC investigated and found probable cause to believe that MCFL violated 2 U.S.C. §441b(a) by printing the flyers and distributing them to the general public. When conciliation proved unsuccessful, the FEC filed a complaint pursuant to 2 U.S.C. §437(g)(a)(6)(A), seeking a civil penalty and such other relief as the court deemed appropriate.

The parties filed cross-motions for summary judgment in the DC (D. Mass., Garrity), and the court granted summary judgment for appee, holding that the two publications did not fit within the term "expenditure" in §441b(b)(2). It also held that the

publications were exempted from the prohibition against expenditures by §431(9)(B)(i), which exempts

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

Finally, the court concluded that if §441b were applied to prohibit appee's expenditures in connection with the publications in question, the statute would be unconstitutional, violating the organization's right to freedom of speech, press, and association.

CA1 affirmed. The court first rejected appee's (and the DC's) arguments that its expenditures were not covered by §441b, and specifically found that those expenditures violated §441b as alleged by the FEC. 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 newsletters or periodicals codified in §431(9)(b)(i).

Although it found that appee had violated §441b, the court went on to conclude that as applied to expenditures by nonprofit "ideological" corporations like MCFL, §441b was unconstitutional. Section 441b is a content-based restriction of expression, and may be justified only by a showing of substantial government interest. Although the statute permits appee to use its corporate funds to establish a voluntary, segregated fund to be used for political purposes, §441b(b)(2)(C), the availability of alternative methods of funding speech does not justify

"eliminating the simplest method." App., at 20. Nor is the regulation necessary to protect a substantial government interest. The interests at stake in FEC v. National Right to Work Committee (NRWC), 459 U.S. 197, 207-208 (1982), are simply not present here. Because MCFL did not contribute directly to a political campaign, its expenditures did not incur any political debts from legislators. See FEC v. National Conservative Political Action Committee, 53 U.S.L.W. 4293, 4297 (1985) ("NRWC is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.") Moreover, contributors to MCFL need not be protected from having their money used for expenditures such as the special election edition; individuals who contribute to MCFL do so because they support its anti-abortion position and presumably would favor expenditures for a publication that informs subscribers and others of the position of various candidates on the abortion issue.

3. CONTENTIONS: APPNT - Appnt FEC attacks the judgment below on two grounds. (1) Section 441b does not restrict political speech, but merely prohibits the use of corporate and union treasury funds to reach the general public in support of, or opposition to, federal candidates. To make this limited purpose clear, Congress enacted in 1971 an explicit exception from the statute's prohibitory language, now codified as 2 U.S.C. §441b(b)(2)(C), which allows corporations and unions 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." NRWC, supra, 459 U.S., at 200 n. 4. Section 441b would not prohibit MCFL from distributing the same election flyers to the same people in the same manner it did here, so long as it financed the distribution through a separate account containing contributions voluntarily designated for political purposes.[1]

Rather than disputing the Commission showing that §441b has not had the effect of limiting corporate or union political speech, CA1 found the statute unconstitutional because it eliminated what the court considered "the simplest method" of financing corporate speech. App., at 20. But 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. See, e.g., NRWC, supra (limitation on use of corporate funds to solicit contributions to finance political activities); Buckley v. Valeo, 424 U.S. 1, 23-38 (1976) (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. 182, 197 (1981) (limitation upon contributions to political

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[1] Appnt notes that MCFL did establish such a separate segregated fund in 1980, and that it has reported to the FEC of having made expenditures from that fund in every federal election since.

committees). 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).

Finally, CAl's assertion that the First Amendment requires a general exemption from §441b for corporations like MCFL because of the Act's requirement of disclosure of certain contributors to all political committees, including separate segregated funds, was effectively rejected by this Court in Buckley v. Valeo, supra, 424 U.S., at 68 (upholding 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").

(2) Even if §441b indirectly burdens corporate and union political speech to some extent by making fund raising less "simple," the statute plainly serves compelling governmental purposes. First, it is intended to ensure that the wealth that corporations and unions 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 NRWC, supra, 459 U.S., at 207. The CAl found this purpose to be inapplicable here because "MCFL's expenditures did not incur any political debts from legislators." App., at 22. But the same could be said about the independent expenditures for solicitations made by the National Right to Work Committee; in fact, the CA in that case had

concluded that such independent solicitation, without more, would neither corrupt officials nor distort elections. In reversing that decision, this Court emphasized that the constitutionality of §441b should not be judged by evaluating the effects on the electoral process of the particular expenditure at issue. Rather, §441 is a valid "prophylactic measure" aimed at "the special characteristics of the corporate structure." NRWC, at 210. MCFL's corporate structure carries the potential for influence that is the proper object of congressional regulation; whether or not debts were actually incurred in this case does not alter the constitutional analysis.

Second, §441b is designed "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." NRWC, supra, at 208. There is no reason to assume, as CA1 did, that anyone who supported MCFL's anti-abortion position would necessarily be willing to contribute to its efforts to elect candidates. Individuals who oppose abortion do not necessarily use this as the sole criterion for choosing candidates. 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. Moreover, §441b serves the congressional purpose of "total disclosure," see Buckley v. Valeo, 424 U.S., at 76, by requiring that corporations and unions make their political contributions and expenditures only from a separate segregated fund that, as a

policital committee, is required to report both its expenditures and its sources of funding for disclosure on the public record. 2 U.S.C. §434. If CA1's decision is permitted to stand, the voting public will be denied the identities of the individuals (and corporations) who finance the political expenditures of corporations like MCFL, information that Congress has reasonably determined to be important to maintenance of an informed electorate.

APPEE - MCFL argues that if indeed its expenditures are prohibited by §441b,[2] that section is unconstitutional as applied in this case. MCFL essentially tracks the reasoning of CA1.

(1) Section 441b impermissibly regulates based on the

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[2]MCFL indicates that if the Court determines that this case is not appropriate for summary affirmance and sets it down for oral argument, it intends to raise and brief the following additional statutory and constitutional issues:

(1) Whether §441b prohibits the independent expenditures made by MCFL, since §441b(b)(2) defines those expenditures that are prohibited and that section only includes expenditures made directly or indirectly to a candidate or campaign committee?

(2) Whether §441b prohibits MCFL's expenditures, which included no "express advocacy."

(3) Whether MCFL's newsletter is exempt from §441b's prohibition because it is a newsletter or periodical publication within the meaning of FECA?

(4) Whether §441b violates the Equal Protection Clause by impermissibly regulating the subject of expression and the identity of the speaker?

(5) Whether the phrases "in connection with," "for the purpose of influencing," and "newspaper" contained in §441b are unconstitutionally vague?

political content of the speech in question. It also violates the guarantees of freedom of the press and freedom of association. Expenditure limits particularly impinge on associational rights because any limitation on independent expenditure "precludes most associations from effectively amplifying the votes of their adherents, the original basis for the recognition of the First Amendment protection of freedom of association." Buckley v. Valeo, 424 U.S., at 22. Since limits on expenditures have been found to violate an organization's associational rights, e.g., FEC v. NCPAC, 55 U.S.L.W., at 4297, clearly the total prohibition of expenditure by MCFL, simply because it has chosen to associate in a corporate form, undercuts its and its member's right of association. That MCFL now publishes its newsletter through a separate segregated fund is of no moment (and indeed should not be considered, see Fed. Rule Evid. 407). The segregated fund was created only after the in terrorem effect of enforcement proceedings by the FEC and was possible only after MCFL's articles of organization and bylaws had been amended to create membership categories. In addition, FECA's requirement that PAC's disclose the names of contributors, 2 U.S.C. §434(b)(2), may be sufficient to deter political activities.

(2) Nor does §441b serve a sufficiently compelling governmental interest to justify the substantial restriction on the First Amendment rights of MCFL. Truly independent expenditures have scant potential for corrupting elected representatives. And even assuming there is a potential for a

corrupting influence from large independent expenditures by business corporations, that danger simply does not exist in the context of minimal expenditures (in this case less than $10,000) by grass roots, nonpartisan, nonprofit, ideological organizations such as MCFL. FEC's second concern--that MCFL's publication of the special election edition may go against the desires of some its contributors--is misplaced. That publication merely provides an information service, leaving MCFL members free to decide to vote for candidates based upon whatever criteria they choose.

4. DISCUSSION: CA1 explicitly found that §441b, as applied to MCFL's expenditures in this case, violated the First Amendment. Accordingly, this is a proper appeal under 28 U.S.C. §1252.

On the merits, this case presents a substantial federal question. While CA1 was not clearly wrong, appt rightly identifies NRWC as providing substantial support for its position. There the Court unanimously rejected First and Fifth Amendment challenges to a subsection of §441b that restricts expenditures of corporate funds to solicit contributions to a corporation's separate segregated fund. §441b(b)(4)(C). The contested section allows a non-stock corporation to solicit funds only of its "members." Resps in NRWC claimed that the term "members" had to be defined very broadly in order to avoid infringing the corporation's First Amendment rights. This Court rejected both the resps' broad reading of the term and its constitutional challenge to a narrower interpretation. In so doing, the Court described and approved of §441b. It concluded

that the twin purposes advanced above by the FEC--preventing wealth accumulated through special advantages accorded corporations from being converted into political "war chests," and protecting individual contributors from misuse of their contributions, were sufficiently compelling to justify the First Amendment intrusion by the regulations.

Because NRWC dealt only with the term "member" as used to define who may lawfully be solicited for contributions to a corporation's segregated fund, it is not necessarily controlling here (and hence summary reversal would probably be inappropriate). The discussion of the "member" issue, however, seems to rest on the premise that the limitations on corporate speech contained in §441b are constitutionally permissible. It would be odd, in other words, for the Court to uphold restrictions on who may be solicited for contributions to a corporation's segregated fund, and then to strike down as too restrictive the statutory scheme as a whole (of which the solicitation restrictions are a nonseverable part).

Because this case plainly raises a substantial federal question that seems too complicated to warrant summary treatment in either direction, I recommend noting probable jurisdiction.

There is a motion to affirm.

December 13, 1985 Moulton opn in petn

January 10, 1986

*Court* .....
*Argued* ....., *19*...
*Submitted* ....., *19*...

*Voted on* ....., *19*...
*Assigned* ....., *19*...
*Announced* ....., *19*...

No. 85-701

FEC

vs.

MASSACHUSETTS CITIZENS FOR LIFE, INC.

Note

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | |
| Burger, Ch. J. | | | | ✓ | | | | | | | | | |
| Brennan, J. | | | | ✓ | | | | | | | | | |
| White, J. | | | | ✓ | | | | | | | | | |
| Marshall, J. | | | | ✓ | | | | | | | | | |
| Blackmun, J. | | | | ✓ | | | | | | | | | |
| Powell, J. | | | | ✓ | | | | | | | | | |
| Rehnquist, J. | | | | ✓ | | | | | | | | | |
| Stevens, J. | | | | ✓ | | | | | | | | | |
| O'Connor, J. | | | | ✓ | | | | | | | | | |

LFP/djb 08/11/86

No. 85-701, Federal Election Commission v. Massachusetts Citizens for Life, Inc. (CA 1)

Memorandum for File

The question presented is whether § 441b of the Federal Election Campaign Act is unconstitutional when applied to expenditures by nonprofit "ideological" corporations like Massachusetts Citizens for Life, Inc., the appellee in this case.

Section 441b, entitled "Contributions or expenditures by national banks, corporations, or labor organizations", is printed in full at p. 75(a) et seq. of the Jurisdictional Statement. This section, like the entire Federal Election Campaign Act, is long, complex, and must have been written by a chess player. For present purposes, the first paragragh on page 3 of appellant's brief summarizes the relevant provisions of § 441b. Perhaps the most important of these is that it prohibits "any corporation whatever" or any labor organization from utilizing "treasury funds" to finance contributions or expenditures in connection with a Federal election.

The appellee is a pro-life entity incorporated under Massachusetts law as a non-stock, non-membership corporation. It has distributed by mail a newsletter to some 6,000 people who have contributed or paid dues. These newsletters have contained articles of interest to pro-life people, but apparently

has not supported or opposed political candidates. In September 1978, prior to the September primaries for the election of Massachusetts' candidates for Federal office, appellee published an eight page "Special Election Edition" of its newsletter, and mailed it to 58,000 people. The cost of printing and distributing this edition was $9,812., paid for by the corporation from its general treasury funds. The front page headline read: "Everything you need to know to vote pro-life"; the newsletter listed the names of candidates, and reported their positions on pro-life issues. It did state, however, that no "particular candidate" was endorsed. The appellant (the Commission) does not dispute this.

After an investigation by the Commission, it filed a complaint in the DC for Massachusetts alleging a violation of § 441b, and seeking a civil penalty as provided by the Act.

Appellee admitted that it had expended "corporate funds" to publish the Special Election Edition, but claimed that was not an unlawful "expenditure" under the Act, and that in any event § 441b as applied to it was unconstitutional. On cross motions for summary judgment, the DC held that the expenditure by appellee did not violate § 441b, and also that the application of the Act to appellee's expenditures "would violate its rights to freedom of speech, press and association ...". Joint Appendix p. 38(a).

The CA disagreed with the DC as to the applicability of § 441b, and found that these expenditures violated that section as alleged by the Commission. The CA reasoned that the Special Election Edition expressly advocated the election of clearly identified candidates within the meaning of our decision in Buckley v. Valeo. Moreover, CA 1 held that this publication did not come within the exemption for certain activities of the media.

As noted above, the only question before us is the constitutionality of § 441b as applied in this case. The brief on behalf of the Commission argues that CA 1 erred in holding that § 441b, as applied to expenditures by non-profit corporations, violates the First Amendment. It is emphasized that this section does not restrict the amount, content or method of corporate and union political speech. The Act does permit a corporation to use its treasury funds to establish a separate segregated fund to be used for political purposes, and such a fund can be controlled by the corporation or union so long as its money is kept separately. Appellant further argues that substantial governmental interests are involved, and that § 441b (as applied) is consistent with the intent of Congress to insure that the electorate is fully informed not only about candidates and issues but also about

sources of campaign financing. Buckley v. Valeo, of course, is relied upon by appellant as well as appellee.

In a brief unduly encumbered by an appendix that apparently includes the entire Federal Campaign Election Act, appellees argue first that the DC correctly held that the publication of this newsletter did not violate § 441b. It notes that the definition of "expenditure" in § 441b(b)(2), applicable to corporation, proscribes only a "direct or indirect payment ... to any candidate." The newsletter, according to appellee, did not make any payment to a candidate, and indeed did not advocate "the election or defeat of clearly identified candidates". Rather, it published the voting records of candidates, but did not urge that particular candidates be elected or defeated. [I note here, however, that the purpose of the newsletter clearly was to elect pro-life candidates. I am not persuaded by this line of argument, but do think appellee plausibly contends that the newsletter is a "newspaper" or "periodical publication", within the meaning of the Act, and therefore is exempt from the corporate prohibition.] Although the newsletter is not a "newspaper" in the normal sense of the term, this special edition of appellees' regular newsletter possibly can be viewed as a "periodical publication".

As to the constitutional issue, appellee of course argues the CA 1 correctly held that § 441b is unconstitutional as applied to this publication. As would be expected, appellee relies on Buckley v. Valeo, and subsequent decisions under the Act. See brief, p. 23 et seq.

I will not prolong this memo dictated only to refresh my recollection as to the issues. I need to devote a good deal more time to the case before coming to rest. The brief on behalf of the Commission is better written, and - on its face - more persuasive than the rather unattractive brief for appellee. One quite telling argument by the Commission is that § 441b does not in fact restrict corporate political speech. It only prohibits "the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates ..." (Emphasis added). Thus, if appellee had created a separate segregated fund, derived from contributions of subsribers or sympathizers, that fund could be used without limit to publish the corporation's views in support of, or in opposition to, any candidate. Thus, the burdening of First Amendment rights is - at most - quite limited, and as appellees' brief argues the Government interests are substantial.

I would welcome my Clerk's views. There are a number of decisions construing and applying this Act that I have had no opportunity to reread. I was one of the three justices (with Stewart and Freeman) who wrote Buckley, but I do not have the more recent cases in mind.

L.F.P.

Reviewed preliminarily 8/22. Excellent memo on difficult issue.

See summary of relevant principles - 6, 7
Interpretation of "Expenditure" in §441b - 8
See particularly pp 17-23.

Leslie agrees case is close but would affirm CA1 - holding §441b invalid as applied to non small non-stock, non membership corp

BENCH MEMORANDUM

To: Mr. Justice Powell August 19, 1986

From: Leslie

No. 85-701

Federal Election Commission v. Massachusetts Citizens for Life, Inc.

Cert. to CA1 (Breyer, Rosenn, Torruella, C.J.s)

Tuesday, Oct. 7, 1986 (last argument)

I

This is another in a line of cases presented to this Court challenging certain provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-455. The question presented is whether §441b, which prohibits corporations from making expenditures in connection with federal elections, is unconstitu-

tional as applied to a nonprofit ideological nonmembership corporation.

II

This is an appeal from an enforcement action brought by the Federal Election Commission (FEC) against the Massachusetts Citizens for Life, Inc. (MCFL). MCFL is a nonprofit, nonmembership corporation, organized "[t]o foster respect for human life and to defend the right to life of all human beings, born or unborn, through education, political and other forms of activities." For several years, MCFL published a newsletter at irregular intervals, between five and eight times a year. The list of receivers included all individuals who contributed to the organization, either through the payment of $15 per year in "dues" or any lesser amount, and when funds were available, expanded to include individuals who merely indicated interest in the organization. The circulation in May and October of 1978 were 2,109 and 3,119, respectively. The MCFL newsletter typically contained information about MCFL's pro-life activities, and political developments in the area.

MCFL sometimes published a "Special Elections Edition" prior to elections. In September 1978, it published 100,000 copies of its "Special Elections Edition" headlined "Everything You Need To Vote Pro-Life." The edition contained the voting records on abortion issues of many federal and state candidates, favorable pro-life votes marked with a "y" and unfavorable votes marked with an "n". The candidates were also rated with stars according to the totality of their records, with photographs of

some of the most stellar candidates included. In several places, the edition stated "VOTE PRO-LIFE." On the back of the edition, beside one of these exhortations, was printed the caveat, "This special election edition does not represent an endorsement of any particular candidate." MCFL spent a total of $9,812.76 from its general treasury on the Special Edition and 20,000 copies on a partial Special Edition published to correct errors in the first edition. Copies of the two Special Editions were distributed to 5,985 MCFL contributors and 50,674 non-contributors. Other copies were sent to MCFL local chapters for distribution and the parties are in dispute over whether to additional copies were left in public areas for general distribution.

The FEC determined that, by printing the special election editions, MCFL violated 2 U.S.C. §441b(a), which makes it unlawful "for any corporation whatever ... to make a contribution or expenditure in connection with any election at which a Senator or Representative in ... Congress are to be voted for." The FEC filed a civil complaint pursuant to 2 U.S.C. §437g(a)(6)(A) seeking a civil penalty and other appropriate relief. The DC found that the Special Editions did not meet the definition of "expenditure" applicable to § 441b, because they were not "to any candidate."

The DC also found that the editions were not prohibited by §441b because they qualified under an exception for a "news story, commentary, or editorial distributed through the facilities of any ... periodical publication." 2 U.S.C. §431(9)(B)(i). Finally, the DC held that if §441b were intended by Congress to

apply to the Special Editions it would be unconstitutional under the First Amendment because it would violate MCFL's freedoms of speech, press and association. The DC relied on three factors in finding the statute unconstitutional as applied: first, that the danger of corruption did not exist because the expenditures were independent of any candidate or party; second, that MCFL's status as a nonprofit ideological corporation distinguished it from the profit-making corporations which Congress could legitimately seek to regulate; and third, that the purpose of the publication was direct political speech, not solicitation of contributions.

The CA1 affirmed on the constitutional grounds only. The CA1 adopted a broader definition of "expenditure" in §441b, and found that the Special Editions qualified. The CA1 further found that the editions did not meet the "press" exception to the expenditure regulation. Finally, the CA1 found that §441b as applied to "indirect, uncoordinated expenditures by a non-profit ideological corporation expressing its views of political candidates violates the organization's First Amendment rights." The CA1 noted that nonprofit corporations could engage in the same political speech by forming a separately-funded political action committee (PAC), but held that the availability of other methods of funding speech did not justify eliminating the simplest method. The CA1 based this decision on a finding that expenditures by nonprofit corporations does not pose the problem of corruption that §441b was meant to address. Consequently, the government did not offer a substantial justification for the limitation on speech imposed. The FEC now appeals from the CA1's decision.

III

Several cases form the background for the issue presented in this case. In Buckley v. Valeo, 424 U.S. 1 (1975), the Court upheld limitations on contributions imposed by the FECA, but ~~struck down~~ invalidated similar limitations on expenditures.[1] The Court also upheld the FECA provision which requires all individuals and groups to report expenditures, so long as "expenditure" is limited to a communication that expressly advocates the election or defeat of a clearly identified candidate.

In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (Powell, J.), the Court held that a state could not constitutionally regulate corporate speech on issues of public concern, as opposed to speech on candidate elections, since speech on issues does not pose a danger of corruption.

The Court in Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) held that a city may not constitutionally limit the contributions to committees formed to support or oppose ballot measures, because again, the danger of corruption was only present in candidate elections. The Court found that freedom of association is diluted if it does not include the right to pool money through contributions since funds are often necessary if advocacy is to be effective.

In Federal Election Commission v. National Right to Work Committee (NRWC), 459 U.S. 197 (1982), the Court upheld one subsection of §441b which provides that a corporation without capital stock may solicit contributions to a separate segregated fund for political activity only from "members," even as it was ap-

plied to a nonprofit nonmember advocacy corporation. In this context, the Court respected the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," because substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization could be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions.

The Court in Federal Election Commission v. National Conservative Political Action Committee (NCPAC), 105 S. Ct. 1459 (1985) invalidated a limit on independent expenditures by political committees. The Court found the First Amendment freedom of association squarely implicated, finding PACs to be "mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to amplify the voice of their adherents." The Court stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances," and the danger of corruption did not support wholesale regulation of the expenditures by PACs. Even if Congress could have seen some danger of corruption from expenditures by large PACs, the regulation was fatally overbroad.

Relevant principles

Several principles emerge from these cases. First, the only basis for regulating campaign financing is the danger of actual or apparent corruption of candidates. Second, contributions to candidates or their committees are likely to pose the danger of corruption, whereas independent expenditures are not.

Third, corporate speech as to candidates may be limited because it may pose the danger of corruption, but corporate speech as to issues does not pose a corruption danger and so may not be regulated. Fourth, Congress may determine that certain dangers are inherent in the corporate form and may adopt prophylactic measures regarding contributions addressed to all corporations, large and small, profit and nonprofit. Fifth, a prophylactic measure which impinges on associational and speech rights without a justification in preventing corruption is overbroad.

The statutory scheme as it now exists reflects these principles to a large extent. A "person" is any individual or group, including a political committee or corporation. 2 U.S.C. §431(11). All persons are subject to contribution limitations. 2 U.S.C. §441a. Persons are subject to no limitation on expenditures, except that they must disclose "independent expenditures" in excess of $250 per year, defined as communications which expressly advocate the election or defeat of a particular identified candidate. 2 U.S.C. §434(b). Corporations are subject to an absolute bar on "contributions and expenditures". 2 U.S.C. §441b. They may, however, form a separate segregated fund (PAC). 2 U.S.C. §441b(b). The PAC can solicit contributions from the executive personnel and stockholders of a profitseeking corporation, and from the members of a nonprofit corporation. 2 U.S.C. §441b(b). A political committee is a PAC or any group under the control of a candidate or the major purpose of which is the nomination or election of a candidate, Buckley, 424 U.S. at 79, which receives contributions or makes expenditures in excess of $1000

per year. 2 U.S.C. §431(4). There is no limit on expenditures by political committees, except that they are subject to extensive reporting requirements. 2 U.S.C. §434.

A. Interpretation of "Expenditure"

The first question presented in this case is one of statutory interpretation. The DC found that the MCFL Special Editions did not fit within the definition of "expenditure" in §441b. The CA1 found that they did. This Court is faced with a choice. It can construe the statute narrowly, as did the DC, and avoid addressing the constitutional question directly, or it can adopt a broad interpretation of the statute and determine whether the broad definition is constitutional as applied. Neither the narrow nor the broad definition is completely supported by the statutory language and legislative history.

1. Narrow Definition of "Expenditure"

CA1 found the "funds" spent on the "Special Election Issue" were "expenditures" under 441b

The CA1 found the funds spent in publishing the Special Editions to be an "expenditure" under §441b. Section 441b prohibits "any corporation whatever" from making "a contribution or expenditure in connection with any election ...." Subsection (b)(2) provides that "[f]or purposes of this section ..., the term "contribution or expenditure" shall include any direct or indirect payment, ..., or anything of value ... to any candidate, campaign committee, or political party or organization, in connection with any election ...." The general definitions section of the FECA contains a broader definition of "expenditure" to include " any purchase, ... or anything of value, made by any person for the purpose of influencing any election for Federal

office." This section further states that "expenditure" does not include "any payment made or obligation incurred by a corporation or a labor organization, which under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization." These sections read together appear to limit the prohibition of corporate expenditures to the definition of expenditures in §441b. There appears to be no other reason to have a separate definition of expenditure in §441b and explicitly to limit the general definition to the separate definition as applied to corporations and labor unions.

Despite the words of the statute, an examination of the legislative history indicates that it is unlikely that Congress intended to limit the definition of "expenditure" in §441b to what is in effect an indirect contribution. The Court in Buckley found indirect contributions to fit within the definition of "contribution." 424 U.S. at 78. The retention of the word "expenditure" in the statute after Buckley would thus be superfluous. If the retention of the words "to any candidate" in the definition of "expenditure" in §441b nevertheless requires explanation, these words could be read to distinguish corporate spending on issues, protected under Bellotti, from corporate spending on candidate elections. Read in this way, the words do not necessarily limit expenditures "in connection with" candidate elections.

Neither the narrow nor the broad definition of "expenditure" in §441b is completely supported by the language or congressional intent. The narrow definition, however, appears to

stretch congressional intent further and run the risk of judicial legislating. Moreover, the result of a narrow interpretation would be to exempt most expenditures by all corporations and labor unions from coverage under §441b. Although the narrow interpretation would save the constitutionality of §441b, it may not be appropriate when the result is to alter greatly the apparent statutory coverage.

2. Broad Definition of "Expenditure"

The other way to interpret §441b is as the CA1 did -- that "expenditure" incorporates the broad definition of §431. The Buckley Court found the broad definition "for the purpose of ... influencing" an unconstitutionally vague basis for imposing criminal sanctions and limited the definition to expenditures which expressly advocate the election or defeat of a particular candidate. The CA1 did not decide whether the "express advocacy" limitation of Buckley applies to the corporate definition of "expenditure" because it decided that the MCFL Special Editions met this definition.

There is statutory support for the position that Congress did not intend to apply the "express advocacy" limitation to the definition of "expenditure" in §441b. Congress specifically amended the FECA to include a definition of "independent expenditure". If Congress had intended it to apply to corporate expenditures, it could have changed the language in §441b from "expenditure" to "independent expenditure". Nevertheless, if §441b is not read to include the "express advocacy" limitation, under Buckley it would be unconstitutionally vague because criminal

sanctions may be imposed for a violation. Moreover, the "express advocacy" limitation imposed in Buckley was specifically aimed at disclosure requirements. Because the formation of a PAC requires disclosing all contributors, the disclosure safeguard of Buckely should apply.

One alternative would be for the Court to find that Congress did not intend the "express advocacy" limit to apply to the definition of "expenditure" in §441b and to invalidate §441b as unconstitutionally vague. This decision, however, would be very narrow and of short duration since Congress could amend §441b to contain the limit and the same challenge now presented would recur in a few years. The better alternative appears to be for the Court to adopt the position it did in Buckley and "construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness." 424 U.S. at 78.

If this interpretation of "expenditure" in §441b is adopted -- that "expenditure" actually means "independent expenditure" as defined in the FECA -- then it is necessary to determine whether the MCFL Special Editions meet the definition. The exact "definition" as stated in Buckley is:

> expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office. ... This construction would restrict the application ... 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." 424 U.S. at 44 & n. 52.

In finding the Special Editions to meet the definition, the CA1 relied on the facts that the editions several times said "VOTE

PRO-LIFE", contained pictures of the candidates, and were distributed to a wide audience of nonmembers.

Whether the Special Editions meet the definition of "express advocacy" is a very close question. The FEC has recently revised its regulations to state that distribution of voting records alone does not constitute an "independent expenditure." 11 C.F.R. §114.4(b)(4),(5). The only way that these editions went beyond voting records was that they connected voting record with issues, and advocated votes based on the candidates' records on the issues. The Buckley Court emphasized that "[f]unds spent to propogate one's views on issues without expressly calling for a candidate's election or defeat are ... not covered." 434 U.S. at 44. In one sense, the editions merely advocated a position on a particular issue. The editions further stated, however, that the issue should form the basis for choosing candidates. The implication of this is that the editions supported particular candidates according to their positions on the issue. There is a very fine line between saying "Vote for Jones" and saying "Vote Pro-Life" next to a picture of Jones with a stellar pro-life voting record.

a. Narrow Definition of "Express Advocacy"

The most straightforward application of Buckley to the facts of this case results in a finding that the Special Editions are "outside" the narrow definition of "express advocacy". First, the Buckley Court found an unlimited definition of "expenditure" unconstitutionally vague because it had "the potential for encompassing both issue discussion and advocacy of a political re-

sult." 424 U.S. at 79. Here, the Special Editions can be viewed as primarily "issue-oriented," with the candidates incidentally benefiting from the expenditure because of their positions on pro-life issues. Second, because the Special Editions contained the voting records of hundreds of candidates, the connection between the advocacy and a "particular candidate" was attenuated. Third, the disclaimer on the back of the first Special Edition, that it did "not represent an endorsement of any particular candidate," may be read to mitigate the effect of any advocacy. Finally, the Buckley Court did not appear disturbed by the prospect that many expenditures of benefit to a candidate's campaign would not constitute "express advocacy": "So long as persons and groups eschew ["express advocacy"] ..., they are free to spend as much as they want to promote the candidate and his views." 424 U.S. at 45.

A finding that the MCFL Special Editions do not constitute "express advocacy" should be based on some principle that the lower courts will be able to apply. Any definition which attempts to distinguish issue advocacy from candidate advocacy will be very difficult to apply. Here, it is clear that the Special Editions were published by an issue-oriented group. But future applications will be more ambiguous. Individuals and groups usually do not support candidates in the abstract, but instead base their support on the candidate's views on issues. So, in the context of candidate elections, the distinction between issue and candidate advocacy appears illusory. For example, on which side of the "express advocacy" definition would a

flyer which said "Vote reduced military spending" next to a picture of Smith fall? The only apparent bright line would be that "express advocacy" requires that a word of exhortation, e.g., "vote", be verbally connected with the name of a candidate. Any less rigid standard would require lower courts to make fine distinctions in emphasis and wording. This narrow definition would exclude the MCFL Special Editions from coverage under §441b and resolve the case.

b. Broad Definition of "Express Advocacy"

Reading Buckley as a whole, however, a broader definition of "express advocacy" may be justified. The primary application of the "express advocacy" definition is in 2 U.S.C. §434(c), which requires that all "persons" disclose all "independent expenditures" and the primary contributors thereto. Thus, a narrow definition of "express advocacy" would not only exclude any corporate expenditures similar to the MCFL Special Editions from regulation under §441b, it would also exclude these types of expenditures from any type of disclosure. The Buckley Court recognized Congress' strong interest in achieving "total disclosure" by reaching "every kind of political activity." 434 U.S. at 76 (quoting S. Rep. No. 92-229, p. 57 (1971)), primarily because disclosure helps voters to define the candidates' constituencies. Where a communication contains words of exhortation such as "Vote for ...." and pictures of candidates, it appears to be an expenditure that Congress could legitimately require be disclosed for the informational purpose of defining a candidate's constituency. Here, the fact that certain candidates are supported by a pro-

life group may be extraordinarily relevant to voters on both sides of the pro-life debate. Disclosure in fact furthers public information rather than stifling it. For this reason, the definition of "expenditure" as it relates to disclosure regulations may be viewed differently than as it relates to expenditure limitations.

Congress' interest in disclosure exists whenever a particular constituency indicates its support for a particular candidate. Thus, the appropriate test would be that where a communication contains "advocacy" ("vote for") and one or more "particular candidates" it should constitute "express advocacy". This definition would allow lower courts to distinguish between publications which contain nonpartisan voting records, which simply portray every candidate's vote without expressing a point of view, and those which incorporate advocacy and therefore indicate support by a particular constituency for a particular candidate. Applying this definition to the MCFL Special Editions, they would constitute "express advocacy" and thus qualify as "expenditures" under §441b.

B. Press Exemption

If the MCFL Special Editions are found to fit within the §441b definition of "expenditure" because they constitute "express advocacy", then it is necessary to determine whether they are nonetheless exempt from censure because they fall within the "press" exemption from "expenditure." This exemption provides that: "[t]he term 'expenditure' does not include ... any news story, commentary, or editorial distributed through the facili-

ties of any broadcasting station, newspaper, magazine, or other periodical publication, ...." 2 U.S.C. §431(9)(B)(i). The CA1 found that the MCFL newsletters were not "periodical publications" and thus that the Special Editions were not "distributed through the facilities of any ... periodical publication." The CA1 assumed arguendo that the MCFL newsletter was a periodical publication but found that the Special Editions did not qualify for the exemption because their circulation was 20 times that of any edition of the newsletter, they did not carry the MCFL newsletter masthead, nothing in them informed readers that they were related to the newsletter, and the Special Editoins were published by a different staff.

The press exemption was adopted in 1974. The House Report indicates that it was intended not to limit freedoms of press or association, and that it was intended to conform the statute to preexisting law. One important element of preexisting law was a statement by this Court that:

> [i]t would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of publication. United States v. CIO, 335 U.S. 106, 123 (1948).

The MCFL newsletter appears like a trade journal. However, the CIO Court also noted that:

> [i]t is one thing to say that trade or labor union periodicals published regularly for members, stockholders or purchasers are allowable ... and quite another to say that in connection with an election occasional pamphlets or dodgers or free copies widely scattered are forbidden. Ibid.

Here, the CA1 relied upon the fact that the Special Editions were distributed widely to individuals not accustomed to recieving the periodical. If such facts were found to fit the press exemption, then any publication by a corporation which resembled a newsletter would be protected, no matter what its distribution and no matter how blatant and vehement its advocacy. When a communication falls within the press exemption, it falls completely outside the FECA. There is no disclosure requirement, expenditure limitation, or contribution limitation. Because this exemption is so drastic, it should be limited to truly press-related statements. The limitation implied in CIO that the press exemption should apply only to communications published and distributed in the regular course of business and in the same manner as the trade journal itself appears a sensible and enforceable line to draw.

C. Constitutionality of §441b as Applied

If the MCFL Special Editions are found not to fit the press exemption, then §441b ostensibly forbids MCFL from publishing them unless it forms a PAC. The FEC argues that §441b does not limit speech at all, it simply imposes necessary safeguards. MCFL, however, claims a number of burdens from forming a PAC. First, if corporations like MCFL have to form PACs, then they must change into membership organizations, since nonstock corporations can only solicit PAC contributions from "members." NRWC. This impinges on the corporation's chosen method of organization and limits the individuals from whom it can seek contributions since many individuals will not want to become members. Second,

the burdensome administrative and record-keeping requirements severely impinge on the ability of a small corporation like MCFL to use its limited funds for political communication. Third, the FECA requires PACs to disclose the names of contributors. This would deter the small contributors upon which an organization like MCFL relies.

If a regulation imposes any burden on First Amendment rights, then the government must show a "compelling justification that is narrowly tailored to meet the perceived threat. Buckley, 434 U.S. at 25. The principles developed in previous cases form the framework for this analysis. The "only legitimate and compelling government interests thus far identified for restricting campaign finances [is the] preventing [of] corruption or the appearance of corruption." NCPAC, 105 S. Ct. at 1469. The danger of corruption has only thus far been tied to contributions, not to expenditures. In fact, even PACs, which are explicit political advocacy machines, cannot constitutionally be subject to an expenditure limit. NCPAC. The only justification for the expenditure limits of §441b would appear to be that Congress has rightly discerned a danger of corruption stemming from the "corporate form." The Court has upheld the "corporation" classifications when contributions were at issue. NRWC. It has ~~struck down~~ invalidated a classification "which indiscriminately lumps with corporations any 'committee, association or organization'" where expenditures were at issue. NCPAC, 105 S. Ct. at 1471.

In light of these principles, the Court can take three different positions. First, the Court could hold that "corpora-

tions" is a valid congressional classification for all campaign regulation purposes because of their special attributes, and uphold §441b as applied in this case. Second, the Court could rely on the contribution/expenditure distinction and find that Congress cannot limit corporate expenditures because they do not pose the danger of corruption. Third, the Court could rely on the danger of corruption as the only legitimate basis for regulating campaign funding and find that expenditures by nonprofit corporations do not pose this threat.

The first route seems the weakest. This Court has consistently looked at the facts of each individual case and weighed the impact of the regulation on the particular speech against the governmental interest asserted. The strongest argument in favor of the FEC is that the regulation at issue does not completely bar speech, it only channels it. Nevertheless, in the context of a small, low budget corporation, this argument is not compelling. The very essence of this Court's decisions invalidating campaign financing regulations is that money is necessary for speech. The requirement that a corporation form a PAC diverts money from speech to administrative costs and therefore burdens speech rather than merely channeling it. As to the government's compelling interest, the danger of corruption here does not appear any greater than in NCPAC, where the Court invalidated expenditure limitations on PACs. The Court found the statute "fatally overbroad" because it was "not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views

...." 105 S. Ct. at 1470. Here, MCFL is not a war chest. It is a grass roots organization that sells roses and holds car washes to raise money. The Court in NCPAC reiterated the distinction between contributions and expenditures, finding that the absence of prearrangement and coordination of PAC spending undermined the danger of corruption. Exactly the same rationale should hold true in this case. The expenditures were completely uncoordinated, in fact much more so than most PAC spending. The candidates here were supported because of already established voting records. The publication was more a recognition of deeds already done than a call to begin bestowing favors on a constituency.

Another justification offered for the broad "corporations" category is that it is necessary to effectuate the expenditure limits on big, powerful corporations which do pose a danger of corruption. This Court has refused to uphold campaign financing regulations on the basis that they close loop-holes in other valid rules. Buckley, 434 U.S. at 80-81. Moreover, where a regulation infringes a First Amendment right, "[p]recision of regulation ... [is] the touchstone." Buckley, 434 U.S. at 41 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). There appears to be no reason why the FEC could not adopt more functional categories which address a real corruption danger, if there is one. The FEC could, for example, limit the category to corporations over a certain net profit, if war chests are the real danger. The FEC also claims that big corporations and other powerful individuals could funnel money through ideological corporations and thereby avoid contribution and disclosure requirements.

That is not, however, possible. Any group which makes independent expenditures over $250 per year must disclose all contributors of over $200, and identify any contributor of over $200 who earmarked the funds for a political purpose. 2 U.S.C. §434(c). These requirements imposed on all groups and individuals ensure that all contributions over $200 and all expenditures over $250 will be disclosed.

The second route, distinguishing between contributions and "expenditures," is well supported in this Court's recent cases and is already reflected to a large extent in the FECA. It is an easy principle to apply, and if it were adopted, should reduce lower court confusion substantially. One problem with this route is that it appears that four justices no longer agree with the distinction. See NCPAC, 105 S. Ct. at 1481 (The justices are BURGER, WHITE, BLACKMUN and most recently, MARSHALL). It is unclear what the result of a change in the Court will be. The second problem with this route is that the easy answer may not be the best one. There is a strong argument that "unlimited expenditures" by large corporations could indeed pose the danger of corruption. It is inconceivable to me that if Xerox spends a lot of money independently advancing an individual's candidacy, that the fact is not brought to the individual's attention. If a candidate knows of a large expenditure, it seems that the danger of corruption is there. The Court has reiterated that multimillion dollar war chests may pose a danger of corruption. The Court may want to leave open the option to Congress to tailor a statute which rationally isolates for regulation those war chests, be

they corporations or PACs, whose expenditures pose a real danger of corruption.

The third route appears the best one. In NCPAC, the Court invalidated as overbroad a statute which limited the expenditures of corporations, committees, associations or organizations. The Court declined to adopt a limiting construction to save the statute, primarily because it found no legislative indication that Congress would be content with the new construction. The same method could be employed in this case. The statute could be invalidated, because it indiscriminately suppresses expenditures which do not pose a danger of corruption. The principle of a link to potential corruption could be rearticulated, and Congress left free to redraft a statute which meets this requirement.

IV

In sum, Congress appears to have intended that the definition of "expenditure" in §441b go beyond indirect contributions. Under Buckley, however, the definition must be limited to "express advocacy". Whether the MCFL Special Editions constitute "express advocacy" is a close question. In order to preserve the disclosure requirements of the FECA, it may be better to adopt a definition of "express advocacy" which applies whenever an identified constituency advocates certain candidates in an election, whether or not the constituency is issue-oriented. This definition of "express advocacy" means that §441b is unconstitutionally broad as applied to an organization like MCFL, because the requirement that a corporation form a PAC in order to engage in

political speech burdens the members' rights to speak and to associate without the justification that it is necessary to address a threat of corruption. The best approach appears to be for the Court to invalidate the section as unconstitutionally broad, leaving Congress the option to tailor its statute to reach corporations whose expenditures present an identifiable threat of corruption.

L.F.F.

Merck. Notes 10/3
10/4

85-701 Fed Election Comm. v. Mass. Citizens for Life, Inc [CA 1 that invalidated § 441b of Fed Election Campaign Act as applied to Appellee]

Inclined to Affirm

1. Relevant facts. Appellee is a non-profit non-membership corp. - a pro-life entity. It published a newsletter to some 2000/3000 persons who paid $15 or made contributions. Two Special Editions issued, went to 50 000 non-contributors urging "Vote Pro-Life", & with record of state & fed candidates. Appellee used its corporate funds.

not formal members

2. Close Case. Inclined to Affirm CA1 on Front Amend grounds: § 441(b), as applied, unduly burdened appellee rights.

(a) § 441(b) appears to forbid publishing in support of candidates unless appellee forms a PAC. If PAC is formed, appellee must become a membership corp. since non-stock corps may solicit PAC contributions only from "members". Thus would limit individuals from whom it could solicit (i.e. "members")

(b) Becoming a PAC membership corp. would create burdensome admin. & record-keeping responsibilities for small entities like appellee.

(c) Names of contributors would

Shankel (9th Circuit)

Three questions:

1. Does [illegible] violate [illegible] or [illegible] prevent diversion [illegible] funds. Keeps [illegible] to ignore education [illegible].

2. § 441(b) does [illegible] in 1907 - the Corrupt Practices Act.

Ferri (expedite)

The exhibit "corruption" would [illegible] usually many argued [illegible] "contributions" = cash by [illegible]

lsg 10/09/86

Full

Fine memo

MEMORANDUM

To: Justice Powell October 9, 1986

From: Leslie

No. 85-701

Federal Election Commission v. Massachusetts Citizens For Life

Supplementary Memorandum

Massachusetts Citizens For Life (MCFL) is a nonmember [1] ideological organization. It claims that 2 U.S.C. §441b, which requires that as a corporation it form a PAC in order to engage in independent expenditures relating to candidate elections, is

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[1] MCFL eventually established a PAC, and amended its Articles of Organization and bylaws to create membership categories. MCFL objects to reference to this fact under Fed. R. Evid. 407. MCFL insists that it only formed the PAC and became a membership organization due to the in terrorem effect of the FEC enforcement proceedings.

unconstitutional as applied to it. To succeed in its challenge, MCFL must prove that the statute imposes a significant burden on its First Amendment rights, and that the statute is not narrowly tailored to further legitimate governmental objectives.

To determine the burdens that MCFL will suffer as a result of the statute, it is necessary to determine the extra burdens MCFL would suffer if it were forced to form a PAC to make an independent expenditure. [2] There are two such burdens. First, MCFL would have to change into a membership corporation in order to be able to solicit funds for the PAC. Section 441b(4)(C), as interpreted by this Court, limits solicitation for corporate PACs to the corporation's members. Thus, any time that MCFL solicited funds for independent expenditures, it would have to ensure that it solicited only from members. This would prohibit activities such as bake sales, car washes, or passing the hat after a meeting to collect funds which might be used to make independent expenditures. MCFL could engage in such activities to fund the organization itself, just not to fund independent candidate-related expenditures. MCFL would thus have to isolate funds which could be used for independent expenditures from those which could not be so used.

change to a membership corp. in order to solicit funds for its PAC

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2 An "independent expenditure" is an expenditure by a group expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate. Since we have reached the constitutional issue, we assume that the MCFL newsletter at issue was an independent expenditure. Thus, the relevant comparison is between the burdens MCFL would suffer to make such an expenditure if it had to form a PAC, as opposed to the burdens MCFL would suffer to make such an expenditure if it did not have to form a PAC to do so.

= made independently of + w/o consulting with the candidate

The second burden is the administrative, record-keeping, and reporting requirements for PACs. A PAC must have a treasurer who files reports pursuant to 2 U.S.C. §434. The reports must be quarterly or monthly and include: (1) the cash on hand at the beginning of the reporting period; (2) the total amount of receipts in a number of different categories; (3) the identification of all contributors of over $200; (4) itemization of all disbursements; and (5) the sum of contributions offset by operating expenses. The reporting requirements for MCFL if it were not required to form a PAC are that if it made an independent expenditure over $250, it would have to report all contributors of over $200, and identify whether such contribution was earmarked for an independent expenditure.

It is important to note that as far as disclosing the names of contributors, the requirement that MCFL form a PAC does not require greater disclosure. Both as a PAC and as a group making independent expenditures over $250, MCFL would have to disclose contributors of over $200. The fact that the disclosure of contributors for a PAC and for a group making independent expenditures is the same cuts both ways. On the one hand, it weakens MCFL's argument as to the additional burdens it will suffer by having to form a PAC. On the other hand, it weakens the government's argument that §441b is necessary in order to compel full disclosure.

It appears that the burdens mentioned above are significant enough to require that the statute be narrowly tailored to serve legitimate objectives. First it is necessary to determine

whether it serves legitimate governmental purposes as applied to MCFL. As mentioned above, the statute will not further the government's interest in disclosure of contributors. The government argues that large corporations will be able to funnel money through small ideological corporations, but this is not true because any contribution over $200 would have to be disclosed. The government also argues that the extensive PAC reporting requirements are necessary to keep corporations honest. That is, without the requirements small ideological organizations can act as funnels without reporting contributions as required by law. First, this assumes that these corporations will behave illegally, which is a problematic assumption. Second, any organization primarily organized to support political candidates must register as a political committee, and thus be subject to the PAC requirements. With any organization not primarily organized to support candidates, the danger that it will act as a corporate funnel appears remote.

The government also argues that §441b is necessary to protect innocent contributors to the corporation from having their money used to make independent expenditures on behalf of candidates. The question here is: is it important to protect the person who buys a cake at a bake sale, or gives a donation when the hat is passed, from having their money used by the organization for political purposes. It appears that this concern is much more rationally directed profit-making corporations and labor unions. With those organizations, their share-holders and members are associated with the organization for a purpose much

different from politics and often related to economic necessity. Thus, their "contributions" to the corporation or labor union are not voluntary in the same sense as a donation to a nonprofit organization. The ability of the nonprofit contributor to monitor the activities of the organization to which he contributes and to terminate contributions if he is displeased is much greater than with a shareholder or a labor union member. As a final point, we are concerned about the use of economic "war chests" in the political arena. Just because a corporation or labor union has a lot of money which it gained from its economic activities does not mean that its political viewpoints are supported to the same extent. That is, the amount of money spent (and money is in some sense speech) is not an accurate proxy for how widely the viewpoint is held in society. In contrast, contributions to ideological organizations are a much more accurate proxy of how widely the public supports the viewpoint, because the only reason to give to an ideological organization is to promote the ideas espoused. For these reasons, the government's interest in protecting contributors to ideological organizations from the unwitting use of their contributions for political purposes appears much less strong than the government's interest in protecting corporate shareholders and labor union members from the same thing.

If the statute imposes significant burdens without strong justifications as applied to a corporation like MCFL, it is nevertheless necessary to determine whether the statute is as narrowly drawn as possible to serve the objectives which apply to profit-making corporations and labor unions. Drawing a line be-

tween profit and nonprofit corporations would be simple, but may not accurately isolate those corporations which the FEC may not legitimately seek to regulate. Of course, this Court does not have to write a new statute, but in the inquiry as to whether the statute is narrowly tailored, it is relevant to determine whether a rational line other than between corporations and noncorporations can be drawn. Amicus Common Cause suggests some guidelines which address the legitimate concerns of Congress. Although they seem complex at first, they appear to be workable. Amicus would apply four factors to determine whether a corporation falls outside the restriction of §441b: (1) the corporation must be a not-for-profit corporation that does not engage in business or commercial transactions of any kind; (2) the corporation must not have any shareholders or other affiliated persons with a claim to any of its assets or earnings; (3) the corporation must not have been established by a business corporation or labor union and it must not accept contributions from business corporations, labor unions or other artificial entities; and (4) the corporation must have been formed for the express purpose of promotion of political or ideological positions, and its sole source of funds must be voluntary contributions from individuals who have been informed that the funds will be spent for campaign-related purposes.

Seems reasonable

In sum, the question presented in this case is close, because there is no absolute limit on expenditures by a corporation like MCFL, only a regulatory burden. Nevertheless, because it appears that as applied to a small organization the burdens

are significant and that Congress would tailor the statute more narrowly to cover only corporations where the danger of corruption and misuse of contributors' funds is present, it appears that the statute is unconstitutional as applied to MCFL.

mems. 10/9 Z 7d

85-701 Fed. Election Comm. v.
Citizens for Life (CA1)

Inclined to Affirm, but will await conference discussion.

1. The Q (stated simply)
Is § 441 b valid when applied to a non-stock, non-membership corp like Resp, requiring Resp. to form a PAC as a condition to make independent expenditures in an election?

Is case moot? DIG?

2. Burdens are substantial
(a) Must change to membership corp., & limit solicitation to its members
(b) Adm. expense: recordkeeping & reporting.
But Resp. now must disclose of names of contributors of more than $200.

3. Govt's interest is limited.
No danger of corruption by Resp's activities absent indirect activities.

4

85-701 (cont.-p2)

4. Absent a substantial Govt. interest, § 441 b as applied to this type of issue comp probably is violated. [case is close]

Amicus Common Cause suggests guidelines:
1. Must be non-profit
2. No shareholders or affiliated persons with an economic interest
3. Must not have been established by a business corp. or labor union or accept contributions from either.
4. ~~The~~ Sole source of funds limited to individuals

We can't prevent all abuses. These are reasonable suggestions.

Memo. 10/9 LFH
85-701 Fed. Election Comm. v. Citizens for Life (CA1)

Inclined to Affirm, but will await conference discussion.

1. The Q (stated simply)
Is § 441 b valid when applied to a non-stock, non-membership corp like Resp, requiring Resp. to form a PAC as a condition to making independent expenditures in an election?

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(b) Admin. expense: recordkeeping & reporting. But Resp. now must disclose of names of contributors of more than $200.

3. Govt's interest is limited. No danger of corruption by Resp as to these modest activities

Affm 5-4

No. 85-701 FEC v. Massachusetts Citizens Conf. 10/10/86

The Chief Justice Pass; Reverse was final vote
Close case. CA 1 held statute could not be applied to this type corp. could agree
Clearly Congress could impose a limit like this on a major corp.
Can go either way in this case. Can write a reasonable op. "either way."

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Justice Brennan Aff'm
Agree with CA 1 & would aff'm.
~~5~~ 441 b burdens 1st Amend rights & state interest is not substantial.
No ~~[illegible]~~ danger of corruption by a non-profit issue corp. Unlike business corp or labor union.
The statute does require disclosure of contributions of $200 or more
Could provide guidelines like those of Common Cause.

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Justice White Rev.
"I've been out-of-step in cases like this"
Congress has identified substantial interests that support these regulations

Justice Marshall apl

JUSTICE STEVENS Rev. (very tentative)

Many problems in saying certain types of groups are protected & others are not.
Impossible to draw lines intelligently.
One has to be sympathy

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JUSTICE O'CONNOR Aff in in part (?)

"Very tough case."

CA 1 was right on to there not ~~being~~ violating a newspaper.

On const. issue, apply strict scrutiny & govt interest in combatting on to compulsion. Q therefore is whether there are less restrictive means.

Closer to Nat Political than to ?

Don't know which cases SD'C cited

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JUSTICE SCALIA Aff in

There is no right to have an org. take them & to operate the way Rank. ~~op~~ operated.

aff'ms CA 1

Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor
Justice Scalia

From: **Justice Brennan**

Circulated: NOV 5 1986

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 85-701

FEDERAL ELECTION COMMISSION, APPELLANT *v.*
MASSACHUSETTS CITIZENS FOR LIFE, INC.

Renewed

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

[November —, 1986]

Joins

JUSTICE BRENNAN delivered the opinion of the Court.

The questions for decision here arise under §441b of the Federal Election Campaign Act (FECA or Act), 2 U. S. C. §§431–455 (1982). The first question is whether respondent Massachusetts Citizens for Life, Inc. (MCFL), a non-profit, non-stock corporation, by financing certain activity with its treasury funds, has violated the restriction on independent spending contained in §441b of the Act. That section prohibits corporations from using treasury funds to make an expenditure "in connection with any election to any public office," and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund. If respondent has violated §441b, the next question is whether application of that section to MCFL's conduct is constitutional. We hold that the respondent's use of its treasury funds is prohibited by §441b, but that §441b is unconstitutional as applied to the activity of which the Federal Election Commission (FEC or Commission) complains.

## I

### A

MCFL was incorporated in January, 1973 as a non-profit, non-stock corporation under Massachusetts law. Its cor-

porate purpose as stated in its articles of incorporation is

> "To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized . . ."

App. 84. MCFL does not accept contributions from business corporations or unions. Its resources come from voluntary donations from "members," and from various fund-raising activities such as garage sales, bake sales, dances, raffles, and picnics. The corporation considers its "members" those persons who have either contributed to the organization in the past or indicated support for its activities.[1]

Respondent has engaged in diverse educational and legislative activities designed to further its agenda. It has organized an ecumenical prayer service for the unborn in front of the Massachusetts State House; sponsored a regional conference to discuss the issues of abortion and euthenasia; provided speakers for discussion groups, debates, lectures, and media programs; and sponsored an annual March for Life. In addition, it has drafted and submitted legislation, some of which has become law in Massachusetts; sponsored testimony on proposed legislation; and has urged its members to contact their elected representatives to express their opinion on legislative proposals.

MCFL began publishing a newsletter in January, 1973. It was distributed as a matter of course to contributors, and, when funds permitted, to non-contributors who had ex-

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[1] MCFL concedes that under this Court's decision in *Federal Election Commission* v. *National Right to Work Committee*, 459 U. S. 197 (1982), such a definition does not permit it to solicit contributions from such persons for use by a separate segregated fund established under the Act. That case held that in order to be considered a "member" of an non-stock corporation under the Act, one must have "some relatively enduring and independently significant financial or organizational attachment" to the corporation. 459 U. S., at 204.

pressed support for the organization. The total distribution of any one issue has never exceeded 6,000. The newsletter was published irregularly from 1973 through 1978: three times in 1973, five times in 1974, eight times in 1975, eight times in 1976, five times in 1977, and four times in 1978. App. 88. Each of the newsletters bore a masthead identifying it as the "Massachusetts Citizens for Life Newsletter," as well as a volume and issue number. The publication typically contained appeals for volunteers and contributions, and information on MCFL activities, as well as on matters such as the results of hearings on bills and constitutional amendments, the status of particular legislation, the outcome of referenda, court decisions, and administrative hearings. Newsletter recipients were usually urged to contact the relevant decision-makers and express their opinion.

B

In September 1978, MCFL prepared and distributed a "Special Election Edition" prior to the September 1978 primary elections. While the May 1978 newsletter had been mailed to 2,109 people and the October 1978 newsletter to 3,119 people, more than 100,000 copies of the "Special Election Edition" were printed for distribution. The front page of the publication was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the name of the "pro-life" candidates. Next to the exhortation to vote "pro-life" was a disclaimer: "This special election edition does not represent an endorsement of any particular candidate." App. 101.

To aid the reader in selecting candidates, the flyer listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as

either supporting or opposing what MCFL regarded as the correct position on three issues. A "y" indicated that a candidate supported the MCFL view on a particular issue and an "n" indicated that the candidate opposed it. An asterisk was placed next to the names of those incumbents who had made a "special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation." While some 400 candidates were running for office in the primary, the "Special Edition" featured the photographs of only thirteen. These thirteen had received a triple "y" rating, or were identified either as having a 100% favorable voting record or as having stated a position consistent with that of MCFL. No candidate whose photograph was featured had received even one "n" rating.

The "Special Edition" was edited by an officer of MCFL who was not part of the staff that prepared the MCFL newsletters. The "Special Edition" was mailed free of charge and without request to 5,986 contributors, and to 50,674 others whom MCFL regarded as sympathetic to the organization's purposes. The Commission asserts that the remainder of the 100,000 issues were placed in public areas for general distribution, but MCFL insists that no copies were made available to the general public.[2] The "Special Edition" was not identified on its masthead as a special edition of the regular newsletter, although the MCFL logotype did appear at its top. The words "Volume 5, No. 3, 1978" were apparently handwritten on the Edition submitted to the FEC, but the record indicates that the actual Volume 5, No. 3 was distributed in May–June, 1977. The corporation spent $9,812.76 to publish and circulate the "Special Edition," all of which was taken from its general treasury funds.

[2]The FEC submitted an affidavit from a person who stated that she obtained a copy of the Special Election Edition at a statewide conference of the National Organization for Women, where a stack of about 200 copies were available to the general public. App. 174.

A complaint was filed with the Commission alleging that the "Special Edition" was a violation of § 441b. The complaint maintained that the Edition represented an expenditure of funds from a corporate treasury to distribute to the general public a campaign flyer on behalf of certain political candidates. The FEC found reason to believe that such a violation had occurred, initiated an investigation, and determined that probable cause existed to believe that MCFL had violated the Act. After conciliation efforts failed, the Commission filed a complaint in the District Court under § 437(g)(a)(6)(A), seeking a civil penalty and other appropriate relief.

Both parties moved for summary judgment. The District Court granted MCFL's motion, holding that: (1) the election publications could not be regarded as "expenditures" under § 441b(b)(2); (2) the "Special Edition" was exempt from the statutory prohibition by virtue of § 439(9)(B)(i), which in general exempts news commentary distributed by a periodical publication unaffiliated with any candidate or political party; and (3) if the statute applied to MCFL, it was unconstitutional as a violation of the First Amendment. 589 F. Supp. 649 (D. Mass. 1984).

On appeal, the Court of Appeals for the First Circuit held that the statute was applicable to MCFL, but affirmed the District Court's holding that the statute as so applied was unconstitutional. 769 F. 2d 13 (CA1 1985). We granted certiorari, and now affirm.

## II

We agree with the Court of Appeals that the "Special Edition" is not outside the reach of § 441b. First, we find no merit in respondent's contention that preparation and distribution of the "Special Edition" does not fall within that section's definition of "expenditure." Section 441b defines "contribution or expenditure" as the provision of various things of value "*to* any candidate, campaign committee, or political party or organization, in connection with any election . . ."

(emphasis added). MCFL contends that, since it supplied nothing to any candidate or organization, the publication is not within § 441b. However, the general definitions section of the Act contains a broader definition of "expenditure," including within that term the provision of anything of value made "*for the purpose of influencing* any election for Federal office . . ." 2 U. S. C. § 431(9)(A)(1). (emphasis added). Since the language of the statute does not alone resolve the issue, we must look to the legislative history of § 441b to determine the scope of the term "expenditure."[8]

That history clearly confirms that § 441b was meant to proscribe expenditures in connection with an election. We have exhaustively recounted the legislative history of the predecessors of this section in prior decisions. See *Pipefitters Local Union 562* v. *United States*, 407 U. S. 385, 402–409 (1972); *United States* v. *Auto Workers*, 352 U. S. 567, 570–587 (1957). This history makes clear that Congress has long regarded it as insufficient merely to restrict payments made directly to candidates or campaign organizations. The first explicit expression of this came in 1947, when the Taft-Hartley Act, Pub. L. No. 80–101 § 304, 61 Stat. 136, 159 (1947), amended 18 U. S. C. § 610, the criminal statute prohibiting corporate contributions and expenditures to candidates.

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[8] MCFL argues that the definition in the general definitions section is not as broad as it appears, for § 431(9)(B)(v) of that section says that nothing shall be considered an "expenditure" under § 431 that would not be regarded as such under § 441b(b). Therefore, MCFL argues, the definition of expenditure under § 431 necessarily incorporates § 441b's restriction of that term to payments *to* a candidate. It is puzzling, however, why § 431 would in one subsection purport to define an expenditure as a payment made for the purpose of influencing an election and in another subsection eliminate precisely that type of activity from the ambit of its definition. The answer may lie in the fact that § 441(b)(2) says that expenditures "include" payments to a candidate, a term that indicates that activities not specifically enumerated in that section may nonetheless be encompassed by it. In any event, the need for such speculation signals that the language of the statute is not on its face dispositive.

The statute as amended forbade any corporation or labor organization to make a "contribution or expenditure in connection with any election . . ." for federal office. The 1946 report of the House Special Committee to Investigate Campaign Expenditures explained the rationale for the amendment, noting that it would undermine the basic objective of § 610

> "if it were assumed that the term 'making any contribution' related only to the donating of money directly, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?

H. R. Rep. No. 2739, 79th Cong., 2d Sess. 36–37 (1947), quoted in *Auto Workers*, *supra*, at 581.

During the legislative debate on the bill, Senator Taft was asked whether § 610 permitted a newspaper published by a railway union to put out a special edition in support of a political candidate, or whether such activity would be considered a political expenditure. The Senator replied, "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 stockholders' funds, published such an advertisement in the newspaper supporting one candidate as against another . . ." 93 Cong. Rec. 6436–6437 (1947).

*United States* v. *CIO*, 335 U. S. 106 (1948), narrowed the scope of this prohibition, by permitting the use of union funds to publish a special edition of the weekly *CIO News* distributed to union members and purchasers of the issue. In *Auto Workers*, *supra*, however, we held that a union was subject to indictment for using union dues to sponsor political advertisements on commercial television. Distinguishing *CIO*, we stated that the concern of the statute "is the use of corporation or union funds to influence the public at large to vote

for a particular candidate or a particular party." 352 U. S., at 589.

The Federal Election Campaign Act enacted the prohibition now found in § 441b. This portion of the Act simply ratified the existing understanding of the scope of § 610. *See Pipefitters, supra*, at 410–411. Representative Hansen, the sponsor of the provision, declared:

> "The effect of this language is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for active electioneering directed at the general public on behalf of a candidate in a Federal election."

117 Cong. Rec. H43379 (1971). The representative concluded:

> "The net effect of the amendment, therefore, is to tighten and clarify the provisions of section 610 of title 18, United States Code, and to codify the case law."

*Ibid.*[4] Thus, the fact that § 441b uses the phrase "to any candidate . . . in connection with any election," while § 610 provides "in connection with any federal election," is not evidence that Congress abandoned its restriction, in force since 1947, on expenditures on behalf of candidates. We therefore find no merit in MCFL's argument that only payments to a candidate or organization fall within the scope of § 441b.

Respondent next argues that the definition of an expenditure under § 441b necessarily incorporates the requirement that a communication "expressly advocate" the election of candidates, and that its "Special Edition" does not constitute express advocacy. The argument relies on the portion of *Buckley* v. *Valeo*, 424 U. S. 1 (1976), that upheld the disclosure requirement for expenditures by individuals other than candidates and by groups other than political committees.

[4] See also 117 Cong. Rec. 43381 (remarks of Rep. Hays), 43383–43385 (remarks of Rep. Thompson), 43388–43389 (remarks of Reps. Steiger and Gude).

See 2 U. S. C. § 434(c). There, in order to avoid problems of overbreadth, the Court held that the term "expenditure" encompassed "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U. S., at 80 (footnote omitted). The rationale for this holding was that

> "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest."

*Id.*, at 42 (footnote omitted).

We agree with respondent that this rationale requires a similar construction of the more intrusive provision that directly regulates independent spending. We therefore hold that an expenditure must constitute "express advocacy" in order to be subject to the prohibition of § 441b. We also hold, however, that the publication of the "Special Edition" constitutes "express advocacy."

*Buckley* adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc., *Buckley*, *supra*, at 44, n. 52. Just such exhoration appears in the "Special Edition." The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these [named] candidates. The fact that this message is marginally less di-

rect than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact. The Special Election Edition thus falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public.

Finally, MCFL argues that it is entitled to the press exemption under 2 U. S. C. § 431(9)(B)(i) reserved for

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

MCFL maintains that its regular newsletter is a "periodical publication" within this definition, and that the "Special Edition" should be regarded as just another issue in the continuing newsletter series. The legislative history on the press exemption is sparse; the House of Representatives' Report on this section states merely that the exemption was designed to

> "make it plain that it is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press or of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns."

H. R. Rep. No. 93–1239, p. 4 (1974). We need not decide whether the regular MCFL newsletter is exempt under this provision, because, even assuming that it is, the "Special Edition" cannot be considered comparable to any single issue of the newsletter. It was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group twenty

times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal MCFL publication. The MCFL masthead did not appear on the flyer, and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume and issue number identifying it as one in a continuing series of issues.

MCFL protests that determining the scope of the press exemption by reference to such factors inappropriately focuses on superficial considerations of form. However, it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications. We regard such an inquiry as essential, since we cannot accept the notion that the distribution of such flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption. A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition.[5]

In sum, we hold that MCFL's publication and distribution of the Special Election Edition is in violation of § 441b. We therefore turn to the constitutionality of that provision as applied to respondent.

## III

### A

Independent expenditures constitute expression "at the core of our electoral process and of the First Amendment freedoms." *Buckley*, *supra*, at 39 (quoting *Williams* v.

[5] Nor do we find the Special Election Edition akin to the normal business activity of a press entity deemed by some lower courts to fall within the exemption, such as the distribution of a letter soliciting subscriptions, see *FEC* v. *Phillips Publishing Co.*, 517 F. Supp. 1308, 1313 (DDC 1981), or the dissemination of publicity, see *Reader's Digest Association* v. *FEC*, 509 F. Supp. 1210 (SDNY 1981).

*Rhodes*, 393 U. S. 23, 32 (1968)). See also *Federal Election Commission* v. *National Conservative Political Action Committee (NCPAC)*, —— U. S. ——, (1985) (independent expenditures "produce speech at the core of the First Amendment"). We must therefore determine whether the prohibition of § 441b burdens political speech, and, if so, whether such a burden is justified by a compelling state interest. *Buckley*, 424 U. S., at 44–45.

The FEC contends that the Act does not infringe upon MCFL's First Amendment rights, since the corporation is free to establish a separate segregated fund that may engage in unlimited spending. Consideration of this argument requires comparison of the regulations to which MCFL is subject by virtue of operating such a fund with those that would apply if it were not required to do so.

If it were not incorporated, MCFL's obligations under the Act would be those specified by § 434(c), the section that prescribes the duties of "[e]very person (other than a political committee)."[6] Section 434(c) provides that any such person that during a year makes independent expenditures exceeding $250 must: (1) identify all contributors who contribute over $200 in the aggregate in a given year, § 434(c)(1); (2) disclose the name and address of recipients of independent expenditures exceeding $200 in the aggregate, along with an indication of whether the money was used to support or oppose a particular candidate, § 434(c)(2)(A); and (3) identify any persons who make contributions over $200 that are earmarked for the purpose of furthering independent expenditures, § 434(c)(2)(C). All unincorporated organizations whose

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[6] In *Buckley* v. *Valeo*, 424 U. S. 1 (1976), this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.*, at 79. It is undisputed on this record that MCFL fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these regulations.

Because it is incorporated, however, MCFL must establish a "separate segregated fund" if it wishes to engage in any independent spending whatsoever. § 441b(a),(b)(2)(C). Since such a fund is considered a "political committee" under the Act, § 431(4)(B), all MCFL independent expenditure activity, is as a result, regulated as though the organization's major purpose is to further the election of candidates. This means that MCFL must comply with several requirements in addition to those mentioned. Under § 432, it must appoint a treasurer, § 432(a); ensure that contributions are forwarded to the treasurer within ten or thirty days of receipt, depending on the amount of contribution, § 432(b)(2); see that its treasurer keeps an account of: every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, and the name and address of any person to whom a disbursement is made regardless of amount, § 432(c); and preserve receipts for all disbursements over $200 and all records for three years, § 432(c),(d). Under § 433, MCFL must file a statement of organization containing its name, address, the name of its custodian of records, and its banks, safety deposit boxes, or other depositories, § 433(a),(b); report any change in the above information within ten days, § 433(c); and may dissolve only upon filing a written statement that it will no longer receive any contributions nor make disbursements, and that it has no outstanding debts or obligations, § 433(d)(1).

Under § 434, MCFL must file either monthly reports with the FEC or reports on the following schedule: quarterly reports during election years, a pre-election report no later than the twelfth day before an election, a post-election report within 30 days after an election, and reports every six months during non-election years, § 434(a)(4)(A),(B). These

reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by ten different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by twelve different categories; the names of all authorized or affiliated committees to whom expenditures aggreggating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation. § 434(b). In addition, MCFL may solicit contributions for its separate segregated fund only from its "members," 441b(4)(A),(C), which does not include those persons who have merely contributed to or indicated support for the organization in the past. See *National Right to Work Committee*, 459 U. S., at 204.

It is evident from this survey that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech. Detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear.[7] Furthermore, such duties require a far more com-

Burdens on speech

[7] It is true that we acknowledged in *Buckley*, *supra*, that, although the reporting and disclosure requirements of the Act "will deter some individuals who otherwise might contribute," *id.*, at 68, this is a burden that is justified by substantial government interests. *Id.*, at 66–68. However, while the effect of additional reporting and disclosure obligations on an organization's *contributors* may not necessarily constitute an additional burden on speech, the administrative costs of complying with such in-

plex and formalized organization than many small groups could manage. Restriction of solicitation of contributions to "members" either vastly reduces the sources of funding for organizations with no formal members, or requires the creation of some type of organizational affiliation, sufficiently documented, for those persons who would be solicited. It is not unreasonable to suppose that, as in this case, an incorporated group of like-minded persons might seek donations to support the dissemination of their political ideas, and their occasional endorsement of political candidates, by means of garage sales, bake sales, and raffles. Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act. Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest non-members take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.[8]

Thus, while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities. In *Freedman* v. *Maryland*, 380 U. S. 51 (1965), for instance, we held that the absence of certain procedural safeguards rendered unconstitutional a state's film censorship program. Such procedures were necessary, we said, because, as a prac-

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creased responsibilities may create a disincentive for the organization itself to speak.

[8] The fact that MCFL established a political committee in 1980 does not change this conclusion, for the corporation's speech may well have been inhibited due to its inability to form such an entity before that date. Furthermore, other organizations comparable to MCFL may not find it feasible to establish such a committee, and may therefore decide to forego engaging in independent political speech.

tical matter, without them "it may prove too burdensome to seek review of the censor's determination." *Id.*, at 59. *Speiser* v. *Randall*, 357 U. S. 513 (1958), reviewed a state program under which taxpayers applying for a certain tax exemption bore the burden of proving that they did not advocate the overthrow of the United States and would not support a foreign government against this country. We noted, "In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." *Id.*, at 526. The same may be said of § 441b, for its practical effect is to make engaging in protected speech a severely demanding task.[8]

B

When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest. *Williams* v. *Rhodes*, *supra*, 393 U. S., at 31; *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). The FEC first insists that justification for § 441b's expenditure restriction is provided by this Court's acknowledgment that "the special characteristics of the corporate structure require particularly careful regulation." *National Right to Work Committee*, *supra*, at 209–210. The Commission thus relies on the long history of regulation of corporate political activity as support for the

[8]The Commission relies on *Regan* v. *Taxation With Representation*, 461 U. S. 540 (1983), in support of its contention that the requirement that independent spending be conducted through a separate segregated fund does not burden MCFL's First Amendment rights. *Regan*, however, involved the requirement that a non-profit corporation establish a separate lobbying entity if contributions to the corporation for the conduct of other activities were to be tax-deductible. If the corporation chose not to set up such a lobbying arm, it would not be eligible for tax-deductible contributions. Such a result, however, would infringe no protected activity, for there is no right to have speech subsidized by the government. 461 U. S., at 545–546. By contrast, the activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment.

application of § 441b to MCFL. Evaluation of the Commission's argument requires close examination of the underlying rationale for this long-standing regulation.

It is true that this Court has consistently noted with approval the series of Congressional efforts to restrict the direct participation of corporations in electoral affairs. See *National Right to Work Committee*, 459 U. S., at 208–210; *Pipefitters*, *supra*, at 402–409; *Auto Workers*, *supra*, at 570–87. Those efforts, however, have been prompted by concerns that are not implicated by the activity of organizations such as respondent. In upholding a different provision of § 441b in *National Right to Work Committee*, *supra*, we described that section as an attempt to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization." 459 U. S., at 207. We later characterized that decision as upholding a provision designed to restrict "the influence of political war chests funneled through the corporate form." *NCPAC*, *supra*, at —— (1985). In *Pipefitters*, *supra*, we observed that the objective of predecessor statute § 610 was to "eliminate the effect of aggregated wealth on federal elections." 407 U. S., at 416. In *Auto Workers*, *supra*, we held that a labor union could be indicted under § 610 for sponsoring a campaign broadcast intended for the general public, given consistent Congressional efforts to curb the political influence of "those who exercise control over large aggregations of capital." 352 U. S., at 567.

This concern over the corrosive influence of concentrated wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas. It acknowledges the wisdom of Justice Holmes' observation that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."

*Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes and Brandeis, JJ., dissenting).[10]

Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace. Political "free trade" does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. *See NCPAC*, *supra*, at —— (1985)(invalidating limits on independent spending by political committees); *Buckley*, *supra*, at 39–51 (striking down expenditure limits in 1971 Campaign Act). Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

By requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to *this* fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee. *Pipefitters*, *supra*, acknowledged this objective of § 441b in noting the statement of Representative Hansen, its

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[10] While this market metaphor has guided Congressional regulation in the area of campaign activity, First Amendment speech is not necessarily limited to such an instrumental role. As Justice Brandeis stated in his discussion of political speech in his concurrence in *Whitney* v. *California*:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.

274 U. S. 357, 375 (1927).

sponsor, that the "underlying theory" of this regulation "is that substantial general purpose treasuries should not be diverted to political purposes," and that requiring funding by voluntary contributions would ensure that "the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source." 407 U. S., at 423–424 (quoting 117 Cong. Rec. 43381).[11] See also *Auto Workers*, *supra*, at 582 (Congress added proscription on expenditures to Corrupt Practices Act "to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power"). The expenditure restrictions of § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.

Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes.[12] Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form,

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[11] While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which we have said we owe considerable deference. *National Right to Work Committee*, *supra*, 459 U. S., at 209 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46 (1937).

[12] The regulation imposed as a result of this concern is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978)

those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise. In short, MCFL is not the type of "traditional corporation[] organized for economic gain," *NCPAC*, *supra*, at ——, that has been the focus of regulation of corporate political activity.

*National Right to Work Committee*, *supra*, does not support the inclusion of MCFL within § 441b's restriction on direct independent spending. That case upheld the application to a non-profit corporation of a different provision of § 441b: the limitation on who can be solicited for contributions to a political committee. However, the political activity at issue in that case was contributions, as the committee had been established for the purpose of making direct contributions to political candidates. 459 U. S., at 200. We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. *NCPAC*, U. S., at ——; *California Medical Assn.* v. *Federal Election Commission*, 453 U. S. 182, 194, 196–197 (1981); *Buckley*, *supra*, at 20–22.

In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money for direct contributions. This case, however, involves core political speech, the regulation of which demands far greater precision than § 441b provides. The desirability of a broad prophylactic rule cannot justify treating alike business corporations and respondent in the regulation of independent spending.

The Commission next argues in support of § 441b that that it prevents an organization from using an individual's money for purposes that the individual may not support. We acknowledged the legitimacy of this concern as to the dissenting stockholder and union member in *National Right to Work*, *supra*, at 208, and in *Pipefitters*, *supra*, at 414–15. But such persons, as noted, contribute investment funds or

union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union. It was thus wholly reasonable for Congress to require the establishment of a separate political fund to which persons can make voluntary contributions.

This rationale for regulation is not compelling with respect to independent expenditures by respondent. Individuals who contribute to respondent are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor. In addition, an individual desiring more direct control over the use of his or her money can simply earmark the contribution for a specific purpose, an option whose availability does not depend on the applicability of § 441b. Cf. § 434(c)(2)(C) (entities other than political committees must disclose names of those persons making earmarked contributions over $200). Finally, a contributor dissatisfied with how funds are used can simply stop contributing.

The Commission maintains that, even if contributors may be aware that a contribution to respondent will be used for political purposes in general, they may not wish such money to be used for electoral campaigns in particular. That is, persons may desire that an organization use their contribu-

tions to further a certain cause, but may not want the organization to use their money to urge support for or opposition to political candidates solely on the basis of that cause. This concern can be met, however, by means far more narrowly tailored and less burdensome than § 441b's restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.

It is true that *National Right to Work*, *supra*, held that the goal of protecting minority interests justified solicitation restrictions on a non-profit corporation operating a political committee established to make direct contributions to candidates. As we have noted above, however, the government enjoys greater latitude in limiting contributions than in regulating independent expenditures. *Supra*, at ——. Given a contributor's awareness of the political activity of the respondent, as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on the independent spending of MCFL.

Finally, the FEC maintains that the inapplicability of § 441b to MCFL would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions. We see no such danger. Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who provide annual aggregate funds exceeding $200, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can

be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.

Furthermore, should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, *supra*, at 79. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

C

Our conclusion is that §441b's restriction of independent spending is unconstitutional as applied to MCFL, for it infringes protected speech without a compelling justification for such infringement. We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace. Not all corporations, however, implicate this concern. Some have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status. Such corporations have three features in common, and an organization must possess all three to be free from the reach of §441b's restriction on independent spending. *First*, a corporation must be formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political re-

sources reflect political support. *Second*, the corporation must have no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity.[13] *Third*, the corporation may not be established by a business corporation or a labor union, nor may it accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that may constitutionally be proscribed under the Act.

It may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake. Freedom of speech plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensible condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U. S. 319, 327 (1937). Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech we are as against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation. In enacting the provision at issue

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[13] This restriction does not deprive such organizations of "members" that can be solicited for donations to a separate segregated fund that makes contributions to candidates, a fund that, under our decision in *National Right to Work Committee*, *supra*, must be established by all corporations wishing to make such candidate contributions. *National Right to Work* requires that "members" have either a "financial or *organizational* attachment" to the corporation, 459 U. S., at 204 (emphasis added). Our decision today merely states that a corporation may not have persons affiliated *financially* if it is to fall outside § 441b's prohibition on direct expenditures.

to this case. Congress has chosen two blunt an instrument for such a delicate task.

The judgment of the Court of Appeals is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 5, 1986

Re: No. 85-701 FEC v. Massachusetts Citizens for Life

Dear Bill,

In due course I will circulate a dissent in this case.

Sincerely,

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 6, 1986

Re: No. 85-781 - FCC v. Massachusetts Citizens for Life

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

leg 11/05/88

MEMORANDUM

To: Justice Powell November 8, 1988

From: Leslie

No. 88-711, FEC v. Mass. Citizens for Life

I do not see any major problems with the circulating opinion. The opinion limits the exception established to corporations formed for the express purpose of promoting political ideas. This alone is very limiting. I would think that the major non-profit foundations would not meet this definition. Neither would an organization of churches. The other major limitation is that the corporation must not accept business corporation or labor union money. This would seem to limit the exception to grass roots level political corporations. Others would find it too inconvenient not to accept such funds.

The major question for you is whether you agree with the principle set out in III, B that organizations are properly subject to the requirement that they form a PAC when there is a danger that they will use funds gained from the economic arena to engage in speech in the political arena. We permit regulation, i.e., the requirement that the organization form a PAC, to ensure that amount of money spent in the political arena is a reasonable proxy for the degree to which the view is held in the country. Although complete equality in ability to speak in the political arena is not required, Congress can at least require that all money spent in the political arena be intended by its contributor to be so spent. This would seem to be the principle from this opinion that will be applied to later opinions. It would appear to accord with your point of view, but if it does not, you should consider requesting alterations.

November 10, 1994

93-791 FEC v. Massachusetts Citizens for Life

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 11, 1988

88-781 -

FEC v. Massachusetts Citizens for Life, Inc.

Dear Bill,

I await the dissent.

Sincerely yours,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 18, 1986

85-701 - FEC v. Massachusetts Citizens for Life, Inc.

Dear Chief,

Please add my name to your separate opinion in this case but add the following at the end thereof:

> JUSTICE WHITE, while joining the Chief Justice's opinion, adheres to his view that Buckley v. Valeo, 424 U.S. 1 (1975), First National Bank v. Bellotti, 435 U.S. 765 (1978), and Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 495 (1985), were wrongly decided.

Sincerely yours,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 21, 1986

Re: 85-703 - CBS v. Massachusetts Citizens
for Life, Inc.

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

November 21, 1986

FEC v. Massachusetts Citizens for Life, Inc.
No. 85-701

Dear Bill,

I would be delighted to join your opinion in the above-captioned case.

Sincerely,

Justice Brennan
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 14, 1986

Re: No. 85-721, FEC v. Massachusetts Citizens

Dear Chief:

Please join me in your opinion concurring in part and dissenting in part.

Sincerely,

HAB

The Chief Justice
cc: The Conference

MJR for the Court 10/14/96
1st draft 11/3/96
2nd draft 11/10/96
3rd draft 11/21/96
Joined by CK 11/6/96
LPP 11/13/96
KS 11/21/96
CT concurring in part and dissenting in part
1st draft 11/17/96
2nd draft 11/20/96
3rd draft 11/30/96
4th draft 12/14/96
Joined by JPS 12/21/96
SAB 12/14/96
SOC concurring in part and concurring in judgment
1st draft 12/11/96
2nd draft 12/13/96
SGB adds statement 11/18/96
CT will dissent 11/8/96
SGB awaiting dissent 11/11/96