UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1719

FEDERAL ELECTION COMMISSION,

Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,

Appellee.

On Appeal from the United States
District Court for the District of Massachusetts

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED

1. Whether Massachusetts Citizens for Life, Inc. violated 2 U.S.C. § 441b by expending general corporate treasury funds for the printing and distribution of its special election flyers to the general public, advocating the election of pro-life candidates in federal elections.

2. Whether 2 U.S.C. § 441b violates the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

This case is before the court on an appeal of the Federal Election Commission (the "Commission") from a judgment of the United States District Court for the District of Massachusetts.

On cross-motions for summary judgment, the district court held that Massachusetts Citizens for Life, Inc. ("MCFL") did not violate 2 U.S.C. § 441b(a), a provision of the Federal Election Campaign Act of 1971 ("the Act" or "FECA"), 2 U.S.C. § 431 et seq., which prohibits expenditures of corporate funds in connection with any federal election. The court also held that the election flyers distributed to the public by MCFL were exempted from the definition of expenditure by 2 U.S.C. § 431(9)(B)(i).1/ In the alternative, the court found application of 2 U.S.C. § 441b to MCFL would violate its rights to freedom of speech, press, and association under the First Amendment to the United States Constitution. The district court's opinion was issued on June 29, 1984. This court has jurisdiction of the proceeding under 28 U.S.C. § 1291 and 2 U.S.C. § 437g(a)(9).

A. Background

MCFL was incorporated on January 26, 1973, as a non-stock, non-membership corporation under Massachusetts law. 2/ Joint

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1/ The alleged violation of FECA occurred in 1978. In 1979, FECA was amended, Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The numbering of statutory sections in effect in 1978, therefore, may not always comport with the present amended version of FECA. However, no change made by the 1979 amendments has any substantive effect on the statutory provisions relied upon by the FEC in this action. Accordingly, unless otherwise noted, all statutory citations in this memorandum will be to the current version of the Act.

2/ After the FEC began its administrative enforcement proceeding, MCFL filed amended articles of incorporation with the state of Massachusetts, which apparently converted it into a membership corporation (J.A. 369-370).

Appendix (hereafter "J.A.") 154-157. MCFL published and distributed a Special Election Edition flyer in September 1978, prior to the September 19, 1978 primary election (J.A. 300-307). The flyer was later reedited and a partial complimentary copy redistributed (J.A. 355-358). The flyers cost MCFL $9,812.76 to prepare, print and distribute (J.A. 12). The source of the $9,812.76 spent on the election flyer was the corporation's general corporate treasury funds (J.A. 12).

Over 100,000 copies of the Special Election Edition flyers were printed for distribution (J.A. 473-474). They were distributed to 5,986 people who had contributed or paid dues to MCFL and to 50,674 other people whom MCFL had identified as supporters of its goals. (J.A. 21-30, 396-397, 468). The remaining copies apparently were left in public areas to be picked up by those who happened to be in the vicinity at the time (J.A. 475). These flyers were complimentary-- no payment of any kind was required to receive one (J.A. 355-358).

The leading caption on the flyer read "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE" (J.A. 300). Statements with similar messages were made throughout the flyer. For instance, on the first page it requested the reader to join "in voting in the primary and together let us make our votes shout against the continuing killing of the unborn." The back page of the flyer had "VOTE PRO-LIFE" written on it in large bold-faced capital letters. On the same page, opposite this exhortation was another

statement, in small print, that "this special election edition does not represent an endorsement of any particular candidate." (J.A. 307).

Every candidate for each office in Massachusetts was listed, and was identified as either supporting a pro-life position or opposing a pro-life position on three issues which MCFL chose to survey. A "y" meant the candidate to be pro- life, and an "n" meant the candidate opposed MCFL's pro-life position. An asterisk was placed next to the name of certain incumbent candidates to indicate their "special contribution to the unborn in maintaining a 100% pro-life voting record in the state house by actively supporting MCFL legislation" (J.A. 302).

The flyer also featured the pictures of thirteen candidates out of the hundreds listed who were running for political office. Each one of these thirteen candidates had received a triple "y" rating. Many of the thirteen were further identified in writing as having a 100% pro-life voting record (J.A. 301, 306-307). No candidate was pictured who had received even one "n" rating.

MCFL also distributed a newsletter at irregular intervals (J.A. 26-27). Each of these regular newsletters was identified as such and carried a volume and an issue number. These regular newsletters contained articles of interest to MCFL members, information on relevant legislation, opinions and commentary on pro-life issues, and entertainment information. Generally, between 3,000 and 6,000 copies of the regular MCFL newsletter

were printed for distribution (J.A. 27-28). They were distributed by mail, and only to the approximately 6,000 people who had contributed or paid dues to MCFL (J.A. 27-30, 395-397, 421).

Upon the foregoing facts, the Commission found probable cause to believe that MCFL had violated 2 U.S.C. § 441b(a) by using corporate funds to prepare, print and distribute its special election edition to members of the general public. When the Commission was unable to successfully conciliate the matter it authorized the filing of the instant action against MCFL to enforce section 441b of the Act. See, 2 U.S.C. § 437g(a)(4)(A).

B. The District Court Proceedings

On February 22, 1982, the Commission filed its complaint in this case pursuant to 2 U.S.C. § 437g(a)(6)(A), seeking a civil penalty and such other relief as the court deemed appropriate (J.A. 6-9). MCFL admitted that it had caused to be prepared, printed and distributed the Special Election Edition and Complimentary Partial Copy but claimed that the money spent on it was not an "expenditure" under the Act, and that 2 U.S.C. § 441b was unconstitutional (J.A. 10-17). Both parties filed motions for summary judgment (J.A. 141-142, 458-459) and on June 29, 1984, the district court granted summary judgment in favor of MCFL (J.A. 481).

The district court found that MCFL's corporate expenditures were not direct or indirect "expenditures in connection with a federal election" under § 441b because "[t]he publication was uninvited by any candidate and uncoordinated with any campaign" (J.A. 488). Second, the court held the flyers were not "expenditures" because they fell within the exception in 2 U.S.C. § 431(9)(B)(i) for "periodical publications" (J.A. 489). Third, the court held that "[i]f § 441b were intended by Congress to prohibit MCFL's expenditures of printing and distributing the newsletters in question, it would be unconsitutional under the First Amendment as applied to MCFL because violative of MCFL's freedoms of speech, press and association" (J.A. 492). The court based this last holding on three features of the expenditures: that they "were (a) independent of any candidate or party, (b) by a nonprofitmaking corporation formed to advance an ideological cause and (c) for the purpose of publishing direct political speech" (J.A. 492).

The Commission filed a timely notice of appeal on August 24, 1984.

ARGUMENT

I. MCFL'S USE OF CORPORATE TREASURY FUNDS TO PUBLISH AND DISSEMINATE "SPECIAL ELECTION" FLYERS TO THE PUBLIC VIOLATED 2 U.S.C. § 441b(a)

Section 441b(a) of the Act makes it unlawful for "any corporation whatever" to use corporate treasury funds to make "a contribution or expenditure in connection with" a federal

election 3/. The facts supporting the Commission's position that MCFL violated this statutory provision are virtually undisputed. MCFL is organized and operates as a corporation under the laws of Massachusetts (J.A. 11, 154). The corporation disbursed $9,812.76 of its treasury funds to pay for the printing and distribution to the public of "special election edition" flyers in connection with the September, 1978 federal primary elections (J.A. 12). These facts are sufficient to make out a violation of section 441b.

The district court, however, concluded that MCFL's activity did not violate section 441b. First, the court found that because the expenditures were not made in coordination with any candidate, they were not prohibited by section 441b. The court also concluded that the flyers did not expressly advocate the election or defeat of candidates, and therefore found they were permissible under section 441b. Finally, the court determined that the flyers were "periodical publications" and thus exempted from the definition of "expenditure" by section 431(9)(B)(i). As demonstrated below, each of these conclusions is premised on a misconstruction of the statute.

3/ The full text of section 441b has been reprinted at the conclusion of this brief as Attachment A.

A. The Use Of Corporate Treasury Funds For The Printing And Distribution of Election Flyers Constitutes An Expenditure Prohibited By 2 U.S.C. § 441b(a) Regardless Of Whether They Were Coordinated With A Candidate's Campaign

The district court concluded that the contested corporate disbursements were not expenditures within the meaning of section 441b(a) because the election flyers were "uninvited by any candidate and uncoordinated with any campaign" (J.A. 488). This conclusion is contrary both to the legislative history of the statute and to the Supreme Court's decisions interpreting it. Indeed, the legislative history of section 441b demonstrates that the statute was amended in 1947 precisely to cover "expenditures," such as those in this case, which express to the public the corporation's own views on candidates for federal office.

The Federal Corrupt Practices Act of 1925 broadly prohibited corporate contributions of "anything of value" to federal candidates. 4/ In the War Labor Disputes Act of 1943, 57 Stat. 167, Congress responded to the enormous rise in the economic power and political activity of unions during the late 1930's by extending the Federal Corrupt Practices Act's prohibition on contributions to apply to unions, as well as corporations, for the duration of the war.

4/ In response to corporate excesses in the 1904 presidential elections, Congress passed the Tillman Act, 34 Stat. 864 (1907), prohibiting "any corporation whatever" from making "money contributions" in connection with federal elections.

(Footnote continued on next page)

The unions, however, proved capable of circumventing the prohibitions of the Corrupt Practices Act by making political expenditures in support of the candidates they supported, rather than by contributing directly to the candidates' campaign funds. As a result, Congress enacted Section 304 of the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), 61 Stat. 136, which not only permanently extended the Federal Corrupt Practices Act to unions as well as corporations, but also broadened its proscription to include "expenditures" as well as contributions. As Senator Taft explained:

> [W]e have long prohibited corporations from contributing money for political purposes, and it was always supposed that the law prevented a corporation from operating newspapers for that purpose or advertising in newspapers for that purpose, until labor organizations were included . . . and then it was said that the law prohibited contributions, but that political advertisements and political pamphlets could be published by the union or corporation itself.
>
> So what we are proposing to do is to subject labor organizations to exactly the same prohibition to which corporations have been subjected, and, so far as I know, including the things which I think the original law covered but regarding which doubt was raised by labor organizations.

4/ (Footnote continued)
The Federal Corrupt Practices Act, 43 Stat. 1070, was signed into law in 1925. Section 313 of that Act strengthened the prohibition on corporate contributions by extending it to cover "a gift, subscription, loan, advance, or deposit of money, or anything of value, [including] a contract, promise, or agreement whether or not legally enforceable, to make a contribution." 43 Stat. 1071. The 1925 Act also made acceptance of a corporate contribution a crime, as well as the giving of one. See United States v. UAW, 352 U.S. 567, 570-577 (1957).

93 Cong. Rec. 6,437 (1947), reprinted in II NLRB, Legislative History of the Labor Management Relations Act of 1947, 1527 (GPO, 1948) ("1947 Leg. Hist.").

There can be no doubt that the Taft-Hartley Act was designed to proscribe expenditures made independently to express the corporation's own views. The new provision was adopted partly in response to a recommendation by the House Special Committee to Investigate Expenditures that the Corrupt Practices Act, be amended to:

> provide that expenditures of money for salaries to organizers, purchase of radio time, and other expenditures by the prohibited organizations in connection with elections, constitute violations of the provisions of said section, whether or not said expenditures are with or without the knowledge or consent of the candidates.

H.R. Rep. No. 2739, 79th Cong., 2d Sess. 46 (1946), quoted in, United States v. UAW, 352 U.S. at 582-3. Moreover, in response to questions posed during the Senate debate on the legislation, Senator Taft, the manager of the bill, consistently stated that expenditures would be prohibited, whether or not made in coordination with a candidate. 5/ For example, the following colloquy between Senators Pepper and Taft demonstrates the applicability of the term "expenditure" to this case:

> Mr. PEPPER . . . . Would the newspaper called Labor, which is published by the Railway Labor Executives, be permitted to put out a special edition of the paper, for example, in support of President Truman, if he should be the Democratic candidate for the presidency next year, and in opposition to

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5/ The Supreme Court has found Senator Taft's explanation of the scope of this provision to be "controlling." Pipefitters v. United States, 407 U.S. 385, 409 (1972).

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

93 Cong. Rec. 6,437-38 (1947) (emphasis added); 1947 Leg. Hist. at 1526-27. Similar statements were repeated throughout the legislative history of the Taft-Hartley amendments. See e.g., 93 Cong. Rec. 6,437, 6,438, 6,439, 6,440, 1947 Leg. Hist. at 1528-35 (remarks of Sens. Pepper, Taft and Magnusen).

The Supreme Court firmly recognized Congress' intent to prohibit corporate and union independent expenditures in United States v. UAW, 352 U.S. 567 (1957). The UAW had used union funds "to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections." 325 U.S. at 585. In reversing the district court's dismissal of the indictment, the Court stated:

> To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious

> influences in federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute . . . As indicated by the reports of the Congressional Committees that investigated campaign expenditures, it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended § 313 to proscribe "expenditures." . . . Because such conduct was claimed to be merely "an expenditure [by the union] of its own funds to state its position to the world," the Senate and House Committees recommended and Congress enacted, as we have seen, the prohibition of "expenditures" as well as "contributions" to "plug the existing loophole."

352 U.S. at 585 (brackets in original).

This provision has undergone only two major amendments since 1967, and Congress expressed no intention in either instance to modify the scope of the prohibition on corporate and union expenditures.

In the Federal Election Campaign Act of 1971 Congress reaffirmed the general prohibition on federal campaign contributions and expenditures by corporations and unions. That Act contained what has come to be known as the Hansen Amendment, which clarified the Corrupt Practices Act, then codified at 18 U.S.C. § 610, to incorporate expressly the judicial gloss that had been placed on the statute. 6/ Pipefitters v. United States, 407 U.S. at 399, 410-411, 427. According to Representative Hansen, the purpose of his amendment was to accommodate

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6/ The Hansen Amendment retained the prohibition on contributions and expenditures, but expressly exempted from the definition: (1) communications by a corporation to its

(Footnote continued on next page)

legitimate interests in engaging in group political activity without undermining the important purposes section 610 was intended to serve.

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

117 Cong. Rec. 43,381 (1971), reprinted in FEC, Legislative History of the Federal Election Campaign Act of 1971, 759 (GPO 1981) (hereafter "1971 Leg. Hist."). See also, 117 Cong. Rec. 43,384-85, 1971 Leg. Hist. at 762-63 (remarks of Reps. Thompson and Udall); 117 Cong. Rec. 43,386, 1971 Leg. Hist. at 764 (remarks of Rep. Crane); 117 Cong. Rec. 43,389, 1971 Leg. Hist. at 767 (remarks of Rep. Gude) (referring to the "evil" section 610 was intended to correct as the "use of union funds to influence the public at large to vote for a particular candidate

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6/ (Footnote continued)
stockholders and their families and by a labor organization to its members and their families "on any subject," (2) nonpartisan get-out-the-vote campaigns aimed at a corporation's stockholders and their families or a union's members and their families, and (3) "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes" by a corporation or labor organization.

or a particular party"); 117 Cong. Rec. 43,409, 1971 Leg. Hist. at 787 (remarks of Rep. Conte); 117 Cong. Rec. 28,814, 1971 Leg. Hist. at 460 (remarks of Sen. Prouty).

The other major revision of the Corrupt Practices Act was contained in the 1976 amendments to FECA. At that time section 610 was repealed and its text transferred to FECA (2 U.S.C. § 441b), thereby making a violation of its prohibitions primarily a civil offense. In addition, Congress adjusted the balance it had struck in the 1971 legislation by adding several new provisions to permit corporations to use corporate funds to solicit contributions to their separate segregated funds from certain constituencies which had not been recognized in the 1971 Act. See, H.R. Rep. No. 917, 94th Cong. 2d Sess. 7 (1976), reprinted in FEC, Legislative History of the Federal Election Campaign Act Amendments of 1976, 807 (GPO 1977) (hereafter "1976 Leg. Hist.").

The 1976 legislative history clearly demonstrates that Congress did not change the scope or application of the prohibition on corporate expenditures contained in that provision as applied to this case. As explained by Sen. Cannon, the floor manager of the bill, "if [corporations and unions] are trying to elect or defeat someone for Federal office they are not exempt" 122 Cong. Rec. S. 3,556, 1976 Leg. Hist. at 388. See also, 122 Cong. Rec. H2,655, 1976 Leg. Hist. at 949 (remarks of Rep. Wiggins); H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 7 (1976), 1976 Leg. Hist. at 807; 122 Cong. Rec. H3,779,

1976 Leg. Hist. at 1079 (remarks of Rep. Ullman); 122 Cong. Rec. H2,597, 1976 Leg. Hist. at 927 (remarks of Rep. Burton); 122 Cong. Rec. H3,777, 1976 Leg. Hist. at 1077 (remarks of Rep. Hays); 122 Cong. Rec. H2,537, 1976 Leg. Hist. at 907 (remarks of Rep. Brademas); 122 Cong. Rec. S3,555, 3,557-58, 1976 Leg. Hist. at 387, 389-390 (remarks of Sen. Packwood); 122 Cong. Rec. S3,678, 1976 Leg. Hist. at 396 (remarks of Sen. Griffin).

In sum, it has been clear since 1947 that the Act was intended to prohibit corporate "expenditures" in connection with federal elections whether or not they are coordinated with a candidates' campaign. The district court's contrary conclusion, that because MCFL's "publication was uninvited by any candidate and uncoordinated with any campaign" (J.A. 488) it was not within the scope of section 441b, cannot be sustained.7/

B. Section 441b(a) Applies To MCFL's Special Election Flyers Whether Or Not They Expressly Advocated The Election Of A Candidate.

A second reason the district court gave for finding MCFL's flyers to be outside congressional intent in prohibiting corporate expenditures is that they "listed the positions of hundreds of candidates on a single political issue, without however expressly advocating the election or defeat of any particular candidate . . . ." (J.A. 488). However, neither the

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7/ The district court drew support for its conclusion from Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court decision that invalidated the provision of FECA which imposed a ceiling on independent expenditures. However, nothing in Buckley discusses congressional intent in enacting the prohibition of corporate expenditures, which are treated separately under section 441b of the FECA.

wording nor the legislative history of section 441b indicates that express advocacy of the election or defeat of a candidate is a prerequisite to finding a violation of that section. To the contrary, section 441b only requires that an expenditure be "in connection with" a federal election. For example, a corporation that conducted a get-out-the-vote campaign limited to members of the public listed as registered Democrats would have made a prohibited corporate expenditure regardless of whether any candidate's election or defeat was advocated in the process. See, 2 U.S.C. § 441b(b)(2)(B) and 2 U.S.C. § 431(8)(ii). See also, 117 Cong. Rec. 43,380-81, 1971 Leg. Hist. at 758-759 (remarks of Rep. Hansen); 117 Cong. Rec. 43,382, 1971 Leg. Hist. at 760 (colloquy between Reps. Anderson and Hansen). As the Supreme Court has noted, "[t]he evil at which Congress has struck in § 313 [now section 441b] is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party," United States v. UAW, 352 U.S. at 589, and MCFL has admitted (J.A. 410, 445) that the special election edition flyers were distributed to influence readers to vote for candidates identified therein as supporting the pro-life position. This is enough to make the expenditures unlawful under section 441b.

The Commission has not suggested that the mere dissemination of candidates positons on issues in a nonpartisan fashion would violate section 441b. See 11 C.F.R. § 114.4(b)(4) and (5).

However, while it is true that the MCFL flyers stated the records and positions of a number of candidates on certain issues, it did not do so in a neutral fashion. Rather it also urged readers to vote for those candidates indentified as supporting the pro-life position. During the debate over inclusion of "expenditures" in the predecessor of section 441b in 1947, Senator Taft expressly stated that such distributions of voting records presented in a partisan manner were to be prohibited.

> Mr. PEPPER. I wish to ask the Senator from Ohio whether he agrees . . . that if a labor organization used its funds to disseminate the voting record of a candidate for office, during the time of the campaign, that would not be unlawful. . . .
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> Mr. TAFT. I think it would depend upon all the circumstances of the case. If it was merely a bare statement of actual facts and simply direct quotations of what the man had said in the course of certain speeches on certain subjects, and was not colored in any way, I would rather agree . . . . But I think it would depend, in each case, on the character of the publication.
>
> Mr. PEPPER. Of course, the language is "in connection with." The provision does not contain any statement as to whether the statement is colored or not . . . I do not see how the Senator could say that the publication of a voting record, in the midst of a campaign, was not an expenditure in the midst of an election.
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> Mr. TAFT. That is not a very practical question, because no one would do just that. Either it is an argument for him or against him, or it is not.

93 Cong. Rec. 6,437, 1947 Leg. Hist. at 1548. See also, 93 Cong. Rec. 6,437, 1947 Leg. Hist. at 1546 (colloquy between Sens. Taft and Ball). This distinction, which has been applied by the

courts 8/ and incorporated into the Commission's regulations, 11 C.F.R. § 114.4(b)(4) and (5), establishes that MCFL's election flyer was within the prohibition of the Act.

However, in this case the court need not reach the question whether section 441b prohibits expenditures "in connection with" a federal election that do not contain express advocacy, for MCFL's special election edition flyers unquestionably did contain express advocacy of the election or defeat of specified candidates. 9/ The term "express advocacy" derives from the Supreme Court's construction of a different section of the Act in Buckley v. Valeo, 424 U.S. at 44, n.52, to apply only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Even a quick perusal of MCFL's special election flyers (J.A. 206-209, 260-263, 300-307) reveal that they contain precisely the words of advocacy mentioned by the Supreme

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8/ United States v. Lewis Food Company, 366 F.2d 710, 712 (9th Cir. 1966) ("The 'Notice to Voters' also makes it plain that, in Lewis' opinion, those office holders given low ratings on their votes 'in favor of constitutional principles' should not be re-elected."). See also United States v. UAW, 352 U.S. at 592 (distinguishing between "active electioneering" and merely "stat[ing] the record of particular candidates on economic issues").

9/ The district court's assertion (J.A. 484) that the Commission had not contended that the special election editions contained express advocacy for any candidate is erroneous. The Commission clearly did contend, as we have here, that although express advocacy is not required under 2 U.S.C. § 441b, MCFL's flyers contained express advocacy (J.A. 460-465).

Court.10/ Headed in large print "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," the special election edition states on its first page:

> As you read this edition, you will see that the final election or defeat of pro-life candidates in November will really be determined by the outcome of the September 19 primary. No pro-life candidate can win in November without your vote in September . . . . Thus, your vote in the primary will make the critical difference in electing pro-life candidates.

The pamphlet then goes on in the next few pages to list the candidates running in each upcoming primary race, and next to each one for whom a response could be determined are three letters representing their votes on three issues relating to abortion, "y" representing what MCFL states is the pro-life position, and "n" meaning the candidate opposes what MCFL states is the pro-life position. Only candidates running for office were listed in the flyer; if an incumbent were not up for reelection his pro-life stance was not listed. The flyer grouped the candidates together according to the race in which they were involved; incumbents were identified in capital letters and further identified for quick reference as to whether they had a 100% pro-life voting record. Only the pictures of selected pro-life candidates were featured; all opponents were identified and their views on the pro-life issues indicated whenever known. Finally, on the last page was a form, entitled "VOTE PRO-LIFE,"

10/ Of course, the Supreme Court listed only examples of such phrases, and did not indicate that its list was intended to be exclusive.

to be filled in with the pro-life candidates in the reader's district, and clipped out to take to the polls.

There can be no doubt that this flyer contained express advocacy. It identified by name which candidates in each electoral contest MCFL considered to be "pro-life" and explicitly urged the reader to vote for pro-life candidates. That the flyer advocated the election of a category of candidates does not make it any less express, for it carefully listed the names of each candidate in each election that was in the category of "pro-life" candidates the reader was to vote for. 11/ This is no different than a flyer that urged the reader to "vote for Democrats" and then specified which candidates in each electoral race were Democrats, and which were not. Such a flyer could not reasonably be described as anything other than "express advocacy" as defined

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11/ The district court found it significant that "[w]hen competing candidates were on the same side of the abortion issue, it did not suggest a preference." (J.A. 488). MCFL's failure to state a preference in some electoral races does not detract from the fact that the flyer expresses support for pro-life candidates in all those races that presented a choice. Nothing in the Act requires that a distribution contain only advocacy of an election choice to violate section 441b. Nor could it reasonably make a difference that the district court believes that MCFL's support of a candidate is more likely to hurt than help him (J.A. 488), for the statute makes expenditures unlawful whether they are made by a corporation espousing popular or unpopular views. Moreover, since the flyer was distributed primarily to individuals already identified as supporting MCFL's cause, the validity the of district court's observation is questionable.

by the Supreme Court in Buckley v. Valeo, 424 U.S. at 44.12/

In sum, the MCFL special election edition clearly falls within section 441b's proscription on expenditures "in connection with" an election, whether or not that language is interpreted to apply only to express advocacy of the election or defeat of a specified candidate.

C. The Special Election Edition Flyers Are Not "Periodical Publications" Exempt From The Prohibition On Corporate Expenditures.

Section 431(9)(B)(i) of the Act exempts from the general definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newpaper, magazine, or other periodical publication. . . ." The district court found that MCFL's special election edition constituted a "periodical publication" under this provision, and was therefore exempted from section 441b(a)'s prohibition on corporate expenditures (J.A. 489).13/ This finding was based upon the district court's conclusion that the special election edition looked like MCFL's

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12/ Compare FEC v. CLITRIM, 616 F.2d 45, 49 (2d. Cir. 1980)(en banc) (circular found not to contain express advocacy because "no mention is made of any particular federal election, the political affiliation of any congressman, the fact that he is or is not a candidate for elective office, or the name or views of any electoral opponent of any congressman.")

13/ This finding is inconsistent with the district court's earlier conclusion (J.A. 487-88) that the Act's general definition of "expenditure" in section 431(9) does not apply to the term as used in section 441b, which has its own definition of "contribution or expenditure" in 2 U.S.C. § 441b(b)(2). The Commission has always maintained that these two definitions must be read together, and has adopted regulations which do so. 11 C.F.R. § 114.1(a)(1). The Commission's position is supported by the fact, apparently recognized by the district court in applying the media exemption here, that it would make little sense for the statute's news media exemption not to apply to the provisions regulating activity of corporations, since most news media are corporations.

regular newsletter,14/ which the district court apparently believed was a periodical publication within the meaning of the statute. However, even if the regular MCFL newsletter were a "periodical publication" under the Act, the special election edition was still a prohibited political expenditure.15/ Thus, although the regular MCFL newsletter had never been distributed to anyone beyond the corporation's 3,000 to 6,000 dues paying or contributing "members" (J.A. 27-30, 395-397, 421), the corporation printed up 100,000 copies of the special election edition, mailed free and unrequested copies to more than 50,000 individuals who had never received the regular newsletter

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14/ "[T]hey were similar in newsprint, sheet form, size and format" (J.A. 490).

15/ Although it is unnecessary to this case to determine whether the regular MCFL newsletter is a periodical publication under the Act, it appears that it would not qualify. The Commission, whose interpretation of the Act is entitled to substantial deference, FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 34 (1981), has interpreted "periodical publication" to mean "a publication in bound pamphlet form appearing at regular intervals . . . containing articles of news, information, opinion or entertainment, whether of general or specialized interest which ordinarily derive their revenues from subscriptions and advertising." Explanation and Justification of 11 C.F.R. § 114.4(e), 44 Fed. Reg. 76,735(1979). Although this regulation deals with the sponsorship of candidate debates, as the district court noted (J.A. 490 n.7), it was explicitly promulgated "in light of congressional acknowledgement of the media's role in election campaigns as expressed in 2 U.S.C. § 431(f)(4)(A) [now § 431(9)(b)(i)]." Id. at 76,734-76,735. See also Buckley v. Valeo, 424 U.S. at 51 n.56 ("the Act exempts most elements of the institutional press"). Since MCFL's newsletter does not appear at regular intervals (J.A. 26-27) and is published with corporate funds and distributed free of charge, rather than deriving its revenues from subscriptions and advertising (J.A. 12), it would not appear to fall within this definition. As shown infra, p.25, this distinction is consistent with the legislative history of section 441b.

(J.A. 397-398), and apparently made the remainder available in public places to anyone who passed by (J.A. 475).16/ MCFL's aggressive efforts to promote its political views to a public far beyond the regular readership of its newsletter does not constitute the normal operation of the news media protected by the Act; rather, it was exactly the sort of active electioneering with corporate funds that section 441b was designed to prohibit. As one court has explained,

> [I]n exempting the "distribu[tion] of news or commentary "through the facilities of any broadcsting station, newspaper, magazine or other periodical publication. . .", the statute would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function. It would not seem to exempt any dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function. If, for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate

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16/ In the district court, MCFL argued that its distribution fell within the exemption from the definition of "expenditure" permitting a membership corporation to communicate with its members on any subject. See, 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.3. MCFL claimed that both its dues paying "members" and the additional 50,000 individuals placed on its mailing list because the corporation had concluded that they were sympathetic to MCFL's goals (J.A. 21, 396-397) were "members" of the corporation within the meaning of the Act. However, the Supreme Court's decision in FEC v. National Right to Work Committee, 459 U.S. 197, 202-206 (1982) makes clear not only that the 50,000 individuals on MCFL's mailing list lack all the relevant indicia of "members" under the statute, but that MCFL could not have had any "members" at all in 1978 since it was incorporated under the laws of Massachusetts at that time as a nonmembership corporation. See p.2, supra. Thus, it must be conceded that MCFL's special election edition was distributed to the general public, rather than merely to MCFL's members as permitted by the Act.

> and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers, this activity would not come within the press exemption -- even though it might comply with a technical reading of the statutory exemption, being a "news story . . . distributed through the facilities of . . . [a] newspaper."

Reader's Digest Assn. v. FEC, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981).

The district court's broad interpretation of the media exemption would completely eviscerate the prohibitions of section 441b, for it would permit any of the many corporations and unions that operate house organs to use their treasury funds to distribute election propaganda to the general public merely by putting the house organ's logo at the top and printing it on similar paper.17/ It is safe to assume that if Congress had intended to create such a gaping loophole in the law, that intention would be spelled out in the legislative history. However, as we show below, what legislative history there is clearly supports the Commission's balanced interpretation of the media exemption rather than the district court's expansive one.

17/ In fact, the special election edition does not even bear the full logo of the MCFL newsletter. While the newsletter is entitled "Massachusetts Citizens For Life Newsletter" (J.A. 300), the special election edition did not include "Newsletter" in its caption (J.A. 300). Moreover, each of the regular newsletters was printed with a volume and issue number (J.A. 402), while the special election edition was not--only later was a volume and issue number added by hand to a copy provided to the Commission (J.A. 403), and even this number had already been used for one of the regular newsletters (J.A. 200). Finally the election flyers were not produced by the staff that generally produced the newsletters; instead, the election flyers were primarily the work of Mrs. Rea-Luthin, who later became chairman of MCFL's political action committee, but who had never worked on the regular newsletter (J.A. 26, 424, 428-429).

The media exemption was first added to the Act in 1974 with little controversy or discussion. The House Report that accompanied the amendment stated merely that it was intended to reaffirm prior law by assuring "the unfettered right of the newspapers, TV networks and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong. 2d Sess. 4 (1974); reprinted in FEC, Legislative History of the Federal Election Campaign Act Amendments of 1974 638 (GPO 1977). As this Report indicates, section 441b's predecessors had never been intended or construed to interfere with the ability of the press to cover political campaigns. Indeed, the line between permitted press activities and prohibited corporate expenditures had been thoroughly explicated in the legislative history of the 1947 amendment that first extended the statute to cover corporate and union expenditures.

> Mr. TAFT. I would say the word "expenditure" does not mean the sale of newspaper for money for their worth. If they are sold to subscribers and if the newspaper is supported by subscriptions, then I would not say that constituted such an expenditure. But if the newspaper were given away--even an ordinary newspaper--I think that would violate the Corrupt Practices Act. That act would be violated, it seems to me, if such a newspaper were given away as a political document in favor of a certain candidate. I think that would have been so under the present law, and I think we make it more clearly so, perhaps, by this measure.
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> Mr. TAFT. . .If the newspaper is prepared and distributed and circulated by means of the expenditure of union funds, then how could a line be drawn between that and political literature or pamphlets or publications of that nature? It is perfectly easy for a labor union to publish lawfully a bona fide newspaper and to charge subscriptions for that newspaper, either by itself or as a corporation.
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> * * * * * * *

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

93 Cong. Rec. 6,437-38, 1947 Leg. Hist. at 1528-1530.

In short, the Act permits the press to report and comment on political campaigns in the course of their normal publications produced for sale to their usual customers; it does not permit media corporations, any more than other corporations, to distribute election advocacy to the general public free of charge. As the Supreme Court commented long ago,

> It is one thing to say that trade or labor union periodicals published regularly for members, stockholders or purchasers are allowable under § 313 [now § 441b] and quite another to say that in connection with an election occasional pamphlets or dodgers or free copies widely scattered are forbidden. United States v. CIO, 335 U.S. 106, 123 (1948).18/

In sum, the statutory language, its legislative history, relevant judicial precedent, and plain common sense all indicate

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18/ As this quotation demonstrates, the Supreme Court's decision in CIO supports the Commission's position in this case, contrary to the district court's view (J.A. 491). The crucial fact in CIO was that the newspaper containing the political endorsement was distributed in the regular course of its publication only to those CIO members and other purchasers who normally received the paper. 335 U.S. at 123. It was on this basis that the Supreme Court distinguished that case from the indictment it found valid in United States v. UAW, 352 U.S. at 589:

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

that MCFL's special election edition flyers, distributed free and unrequested to tens of thousands of people who never received MCFL's regular newsletter, do not fall within the media exemption from the Act's prohibition on corporate political expenditures.

II. THE CONGRESSIONAL PROHIBITION AGAINST USING CORPORATE FUNDS TO MAKE EXPENDITURES IN CONNECTION WITH FEDERAL ELECTIONS DOES NOT VIOLATE THE FIRST AMENDMENT

The district court concluded that section 441b would violate MCFL's First Amendment rights if it were construed to prohibit MCFL from distributing its special election edition to the public, primarily because the court found the election edition to constitute direct political speech by an ideological corporation that was independent of any candidate (J.A. 492). However, as we show below, section 441b does not prevent corporations and unions from engaging in independent political speech; rather, it only regulates the manner in which such speech is financed. Moreover, even if the statute did infringe upon First Amendment activities, to some extent the Supreme Court has already found that it serves sufficiently compelling governmental interests to withstand First Amendment attack. In fact, although the statute has been challenged on First Amendment grounds many times, the courts have consistently upheld it.19/

19/ FEC v. National Right To Work Committee, 459 U.S. 197, 206-211 (1982); Athens Lumber Co., Inc. v. FEC 718 F.2d 363 (11th Cir. 1983) (en banc) (answering in the negative questions listed at 689 F.2d 1006, 1015-1016 1982), appeal dismissed, cert. denied, 104 S.Ct. 1580 (1984); California Medical Association v. FEC, 453 U.S. 182 193-201 (1981); United States v. Chestnut, 394

(footnote continued on next page)

A. Section 441b Does Not Prohibit Independent Political Speech By Corporations And Unions.

Contrary to the district court's assumption, even though MCFL's special election edition falls within the prohibition of 2 U.S.C. § 441b(a), the Act does not actually prohibit corporations such as MCFL from engaging in such political advocacy. Although section 441b(a) broadly proscribes the use of corporate treasury funds in connection with federal elections, the provision's subsections draw three express exceptions to section 441b's overall prohibition: a corporation may use corporate funds to communicate with its stockholders and executive or administrative personnel and their families on any subject (section 441b(b)(2)(B)); a corporation may use corporate funds to conduct non-partisan registration and get-out-the-vote campaigns aimed at its stockholders and executive or administrative personnel and their families (section 441b(b)(2)(B)); and a corporation may use treasury funds for the establishment, administration, and solicitation of contributions to a voluntary separate segregated fund to be used for political purposes (section 441b(b)(2)(C)).

19/ (footnote continued)
F. Supp. 581, 588-591 (S.D.N.Y. 1975) affirmed, 533 F.2d 40, 51 n.12 (2d Cir.), cert. denied, 429 U.S. 829 (1976); International Assn. of Machinists v. FEC, 678 F.2d 1092, 1099-1118 (D.C. Cir.) (en banc), affirmed, mem., 459 U.S. 983 (1982); Bread Political Action Committee v. FEC, 635 F.2d 621, 626-633 (7th Cir. 1980) (en banc), reversed on other grounds 455 U.S. 577 (1982); United States v. Boyle, 482 F.2d 755, 763-764 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973); United States v. Pipefitters, 434 F.2d 1116 1122-1123 (8th Cir. 1970), adhered to en banc, 434 F.2d 1127, 1128 rev'd on other grounds, 407 U.S. 385 (1972); FEC v. National Education Association, 457 F. Supp. 1102, 1109 (D.D.C. 1978); FEC v. Weinsten, 462 F. Supp. 243, 246-249 (S.D.N.Y. 1978); United States v. Clifford, 409 F. Supp. 1070, 1071, 1072 (E.D.N.Y. 1976); United States v. Brewers' Association, 239 F.2d 163 (W.D.Pa. 1916).

Section 441b(b)(2)(C) allows corporations, such as MCFL, to use their treasury funds to operate a voluntary separate segregated fund for political purposes. A "separate segregated fund may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist." FEC v. National Right to Work Committee, Inc., 459 U.S. at 200 n.4. "[S]uch a fund must be separate from the sponsoring union [or corporation] only in the sense that there must be a strict segregation of its monies" from the organization's other funds. Pipefitters v. United States, 407 U.S. at 414-417. "In short, the separate segregated funds are simply political arms of the parent organizations." Bread Political Action Committee v. FEC, 635 F.2d at 624 n.3. See also, Buckley v. Valeo, 424 U.S. at 28 n.31. Any corporation may solicit contributions for its separate segregated fund from its own stockholders, executive and administrative personnel and their families, and membership corporations can also solicit contributions from their members. 2 U.S.C. § 441b(b)(4)(C). Thus, although the corporation is precluded from expending its treasury funds to publicize its support for or opposition to a federal candidate, it is permitted through its separate segregated fund to contribute up to $5,000 directly to a candidate and to make unlimited independent expenditures communicating to the public its support for or opposition to any federal candidate.

This statutory scheme, unlike the statutes limiting independent expenditures that were struck down in First National

Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and in Buckley v. Valeo, 424 U.S. at 44-51, preserves the ability of the corporations and unions it regulates to engage fully in political speech through separate segregated funds. There is nothing in the record before the court to indicate that this statutory scheme has had the effect of reducing corporate political speech. To the contrary, the Commission's records of the level of activity by separate segregated funds 20/ demonstrate that the balance drawn by Congress in Section 441b has accommodated a substantial flow of political information and opinion about federal candidates from corporations and unions to the electorate. The statute has merely required that such activity be financed by funds contributed expressly for that purpose. In fact, in 1980 MCFL itself established a separate segregated fund (J.A. 25), and there is nothing in the record to indicate that it has not thereby been able to engage fully in political advocacy in the manner permitted by Congress.

B. The Supreme Court Has Found That Section 441b Serves Compelling Governmental Interests.

Even if the district court had been correct in concluding

20/ Although the financial data for the entire 1983-84 election cycle is not yet complete, separate segregated funds have reported expending 93.4 million dollars during the first 18 months of the cycle (January 1, 1983 through June 30, 1984). In contrast, during the first 18 months of the 1979-80 election cycle, the disbursements of corporate and union separate segregated funds totaled 45.4 million dollars. See FEC Press ((Release, "FEC Releases 18-Month PAC Study" (October 26, 1984).

that section 441b infringes upon MCFL's ability to engage in political advocacy, the statute would still have to be upheld. The constitutional rights of free political speech and association lie "at the foundation of a free society." Buckley v. Valeo, 424 U.S. at 25, quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960). It is well settled, however, that these rights are not immune from appropriate governmental regulation.

> [I]t is clear that "[n]either the right to associate nor the right to participate in political activities is absolute."
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> CSC v. National Assn. of Letter Carriers, 413 U.S. 548, 567 (1973). Even "'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.

Buckley v. Valeo, 424 U.S. at 25. Accord, FEC v. National Right to Work Committee, 459 U.S. at 206-7.

In FEC v. National Right to Work Committee, 459 U.S. 197 (1982), the Supreme Court rejected First and Fifth Amendment challenges to a subsection of section 441b, 2 U.S.C. § 441b(b)(4)(C), which restricts expenditures of corporate funds to solicit contributions to the corporation's separate segregated fund. The Court's discussion of the constitutional issues in NRWC plainly establishes that the district court below erred in finding section 441b unconstitutional.

In NRWC, the Court observed that, although "[t]he statutory purpose of § 441b . . . is to prohibit contributions or expendi-

tures by corporations or labor organizations in connection with federal elections," the statute "permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of 'separate segregated funds', which may be 'utilized for political purposes.' 2 U.S.C. § 441b(b)(2)(C)." 459 U.S. at 201. The Court recognized that this statutory scheme was designed to serve at least two important governmental purposes: "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions"; and "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." 459 U.S. at 207-8. Noting that "'[t]he importance of the governmental interest in preventing [the corruption of elected officials] has never been doubted,'" the Court found that these dual purposes were sufficient to overcome the corporation's First Amendment objections to the statute. 459 U.S. at 207, quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978). Finally, the Court concluded that "the statutory prohibitions and exceptions we have considered are sufficiently tailored to these purposes" to avoid unnecessary infringement of First Amendment rights. 459 U.S. at 207.

Thus, while acknowledging that "Congress aimed a part of its regulatory scheme at corporations," the Court concluded that "[t]he statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," and refused to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 459 U.S. at 209-210.

As can be seen from this summary, the Supreme Court in NRWC upheld the constitutionality of the integrated scheme of "prohibitions and exceptions" contained in section 441b, as being properly balanced to serve important purposes without unnecessarily infringing on First Amendment activities. See, Athens Lumber Company v. FEC, 718 F.2d 363 (11th Cir. 1983) (en banc) (finding that NRWC controlled question whether section 441b's prohibition of independent expenditures by corporations violated the First Amendment [Question (2), set out in 689 F.2d at 1015-1016].

The district court in this case found that the decision in NRWC only applied to limits on corporate solicitation of political contributions (J.A. 485-86). However, it is clear that the statutory limitations on corporate solicitation could not stand alone; rather, the Supreme Court upheld that provision because of its role in the statutory scheme as a whole. In addition, the district court's assumption that solicitation of contributions merits less constitutional protection than other forms of speech has repeatedly been rejected by the Supreme

Court. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) ("solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease.") See also, Secretary of State of Maryland v. Joseph H. Munson Co., 104 S.Ct. 2839, 2849 (1984); Heffron v. International Society For Krishna Consciousness, 452 U.S. 640, 647 (1981). Indeed, MCFL's special election flyer included a solicitation for contributions to support further election advocacy (J.A. 307).

The district court also found that because the expenditures involved in this case came from the treasury of a non-profit, ideological corporation, application of section 441b serves no compelling governmental interest. Section 441b, however, does not differentiate between non-profit and profit-making corporations, nor between ideological and commerical corporations.21/ In factthe National Right to Work Committee is

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21/ The very language of the provision states that it applies to "any corporation whatever," and Senator Taft expressly stated that it would apply even to religious corporations. 93 Cong. Rec. 6,440, 1947 Leg. Hist. at 1534-55.

also a so-called "ideological" corporation, and the court of appeals in that case found, like the district court here, that application of the Act to such a corporation would not serve the compelling governmental interests behind section 441b. National Right to Work Committee v. FEC, 665 F.2d 371, 374-376 (D.C. Cir. 1981). However, the Supreme Court rejected that rationale and upheld Congress' authority in this area to enact a prophylactic rule applicable to all corporations: FEC v. National Right to Work Committee, 459 U.S. at 210. 22/

> While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.

22/ The district court's reliance on First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), is also misplaced. As the Supreme Court stated in NRWC:

> Our discussion in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), is entirely consistent with our conclusion here. . . The Court explicitly stated in Bellotti that its decision did not involve "the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections." Id, at 788, n.26 (emphasis added). In addition, . . . the Court specifically pointed out that in elections of candidates to public office, unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption. As discussed in text, Congress has relied on just this threat in enacting § 441b.

459 U.S. at 210 n.7. (emphasis in original).

In sum, the Supreme Court in NRWC has already upheld the constitutionality of 2 U.S.C. § 441b as being narrowly tailored to serve compelling governmental interests, and has rejected the approach of the court of appeals in that case, and the district court here, of reassessing the applicability of the governmental interests in each specific instance. Accordingly, the district court's conclusion that section 441b is unconstitutional cannot be sustained.

CONCLUSION

For the reasons set forth, above, the Commission submits that this court should reverse the district court's judgment that MCFL's printing and distribution of its special election flyers did not constitute an expenditure in connection with a federal election in violation of 2 U.S.C. § 441b(a). The court should also reverse the district court's alternative holding that 2 U.S.C. § 441b is unconstitutional under the First Amendment.

Respectfully submitted,

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ATTACHMENT A

Text of 2 U.S.C. §441b

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, 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, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of title 15, 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 (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.