No. 02-403

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF REALCAMPAIGNREFORM.ORG, INC., CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, GUN OWNERS OF AMERICA, INC., ENGLISH FIRST, AND U.S. JUSTICE FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The *amici curiae*, RealCampaignReform.org, Inc., Conservative Legal Defense and Education Fund, Gun Owners of America, Inc., English First, and U.S. Justice Foundation, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] All of these *amici* were established for public education purposes related to participation in the public policy process, and are tax-exempt under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code.

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to fidelity to the original text of the United States Constitution, including its several Amendments. The First Amendment issues presented in this case directly impact the right of individuals and organizations to express their views on educational, social and political topics and issues and are of great interest and importance to these *amici*. In the past, these *amici* have filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

STATEMENT OF THE CASE

Respondents, North Carolina Right to Life ("NCRL"), its officers, and an eligible North Carolina voter (collectively "Beaumont") filed a legal challenge to 2 U.S.C. 441b(a) of the Federal Election Campaign Act of 1971, as amended, ("FECA") and two implementing regulations adopted by the Federal Election Commission ("FEC"), 11 C.F.R. §§ 114.2(b) and 114.10, which make it "unlawful ... for any corporation whatever ... to make a contribution or expenditure in connection with any election" for federal office. The regulations include an exemption for independent expenditures by certain nonprofit corporations as required by FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ("MCFL").

At trial and on appeal, the FEC argued that NCRL should not be permitted to make independent expenditures because NCRL allegedly did not match certain specific factors identified by this Court in MCFL. Both the trial court and the Fourth Circuit held that the MCFL factors were illustrative rather than absolute and that NCRL was sufficiently like MCFL to require a similar exemption. In its petition for certiorari, the FEC expressly conceded this point.

The trial court and the Fourth Circuit also each ruled that under this Court's reasoning in MCFL, NCRL presented no significant risk of corrupting the federal election process through campaign contributions. Thus, each held that NCRL was also entitled to an exemption from the prohibition against corporate campaign contributions in federal elections.

SUMMARY OF ARGUMENT

The court of appeals' opinion, that the ban of 2 U.S.C. Section 441b(a) on corporate contributions in federal elections is unconstitutional, should be affirmed. With respect to nonprofit advocacy corporations, there is no legitimate distinction between expenditures and contributions. Thus, the rule of FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), governs this case.

Further, the Congressional prohibition against contributions and expenditures by corporations in federal elections embodied in 2 U.S.C. Section 441b(a) and associated FEC regulations violates the freedom of the press. Section 441b(a) constitutes an integral component of a comprehensive licensing system governing core political speech, and, as such, it operates as an unconstitutional prior restraint and discriminatory burden in violation of the freedom of the press. In addition, as an integral component of a comprehensive licensing system governing core political speech, 2 U.S.C. Section 441b(a) grants to the FEC unconstitutional editorial control in violation of the freedom of the press.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THE MCFL ISSUE, AND THE FEC'S RELIANCE ON THE NRWC DECISION IS MISPLACED.

The FEC and the dissent below rely upon FEC v. National Right to Work Committee ("NRWC"), 459 U.S. 197 (1982), for the proposition that this Court has conclusively held that an MCFL-type corporation may, consistent with constitutional guarantees, be prohibited from making direct campaign contributions. But the court of appeals correctly rejected this

argument. NRWC, decided four years prior to MCFL, involved a challenge to an FEC decision that NRWC had defined "members" in an impermissible manner, with regard to the rule that only members may be solicited for donations to a corporate affiliated PAC. NRWC stands for the limited proposition that a corporation or unincorporated organization which concedes the applicability of 2 U.S.C. Section 441b may not define the term "member" in such a way as to undermine the limitations of that section. That was the only issue litigated by the parties in that case, and the language of this Court in its opinion should be read with that limited scope in mind.

The court of appeals below correctly rejected the FEC contention that NRWC virtually decided the issue now before the Court. See Beaumont v. FEC, 278 F.3d 262, 276 (4th Cir. 2002). The FEC's position on corporate contributions rests upon a claim, rejected in MCFL, that the potential of "corruption/appearance of corruption" arises whenever an entity uses the corporate form. The court of appeals, like this Court in MCFL, rejected this claim, concluding that the threat of corruption did not arise in the case of an MCFL-type corporation, even with respect to contributions.

Additionally, this Court has recently confirmed that it will subject to strict scrutiny the claimed purpose of a law that directly infringes upon First Amendment freedoms. In Republican Party of Minn. v. White, 536 U.S. ___, 153 L.Ed.2d 694 (2002) ("Rep. Party Minn."), the State attempted to justify a rule limiting campaigns for judicial office as necessary to "preserv[e] the impartiality ... and ... appearance of impartiality of the state judiciary." This Court rejected the State's position, (1) noting that the State was "rather vague ... about what they mean by 'impartiality,'" (2) pointing out that, "although the term is used throughout ... the briefs, ... none of the[] sources [cited] bother[] to define it," and (3) concluding that "[c]larity on this point is essential...." *Id.*, 536 U.S. ___, 153 L.Ed.2d at

704-05. In light of this ruling, this Court's prior acceptance of Congress' "corruption" rationale for prohibiting campaign contributions by corporations should be re-evaluated. This is particularly pertinent where the ban is based solely upon the corporate form of a particular entity.[3] Thus, despite earlier decisions by this Court accepting the rationale of Congress in enacting the statutory prohibition against corporate contributions in federal elections, there should be no such presumption of corruption or appearance of corruption at least where, as here, there were no findings of corruption or the appearance of corruption, and where corruption should be given its ordinary meaning in the political context.[4] *See* Rep. Party Minn., 536 U.S. at ___, 153 L.Ed. 2d at 705.

II. 2 U.S.C. SECTION 441b(a) VIOLATES THE FREEDOM OF THE PRESS.

Following this Court's lead in Buckley v. Valeo, 424 U.S. 1 (1976), and its progeny, the courts below measured the constitutionality of 2 U.S.C. Section 441b(a) and accompanying regulations, on their face and as applied, **solely** by the First Amendment guarantees of freedom of **speech** and freedom of **association**. *See* Beaumont v. FEC, 278 F.3d 261

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[3] Petitioner would argue against any such re-evaluation on the theory that the statute in question (2 U.S.C. Section 441b(a)) "emphatically makes it unlawful for '*any* corporation *whatever*' to make such contributions." Pet. Br. at 18. Yet, as shown in Part II.A. below, Section 441b(a)'s ban on corporate contributions is riddled with exceptions.

[4] In its political sense, "corruption" means the "inducement (of a political official) by means of improper considerations (as bribery) to commit a violation of duty." Webster's Third International Dictionary 512 (3d ed. 1964). *See also* Nixon v. Shrink Missouri Gov't. PAC, 528 U.S. 377, at 422 (2000) (Thomas, J., dissenting) ("[C]orruption ... mean[s] 'perversion or destruction of integrity in the discharge of public duties by bribery or favor.'").

(4th Cir. 2002) ("Beaumont III"); Beaumont v. FEC, 2001 U.S. Dist. LEXIS 7704 (E.D.N.C. 2001) ("Beaumont II"); Beaumont v. FEC, 137 F.Supp.2d 648 (E.D.N.C. 2000) ("Beaumont I"). Accordingly, they found 2 U.S.C. Section 441b(a) unconstitutional as applied, relying upon this Court's ruling in MCFL, but refused to find 2 U.S.C. Section 441b(a) unconstitutional on its face, relying on numerous free speech and association opinions of this Court. *See* Beaumont III, 278 F.3d at 266, 267; Beaumont I, 137 F.Supp.2d at 651, 652, 655, 656.

Had the courts below measured the constitutionality of 2 U.S.C. Section 441b(a) and accompanying regulations by the First Amendment guarantee of the freedom of the **press**, they should have found in addition that Section 441b(a) and related regulations are invalid, having imposed upon North Carolina Right to Life ("NCRL") an unconstitutional prior restraint and discriminatory burden, and exercised editorial control over NCRL's core press activities, as part of an administratively flawed and constitutionally impermissible FEC-administered licensing scheme.

A. The Distinction Between Direct Campaign Contributions and Independent Expenditures is Flawed.

According to the Government, the issue before this Court requires it to make a constitutional distinction between direct campaign contributions and independent expenditures in connection with a federal election, permitting some nonprofit corporations to make expenditures, but forbidding the same nonprofit corporations from making contributions. *See* Pet. Br. at 15-16, 18, 21-23. With respect to expenditures, the Government has conceded that it must show a compelling state interest to justify a regulatory policy. *Id.* at 16. With respect to contributions, however, the Government insists that it need

only show a "less compelling" (presumably substantial) interest to justify a regulation. *Id.*, at 28. The Government's attempt to draw a Maginot line between contributions and independent expenditures, and thus justify one rule governing expenditures and another governing contributions, however, is seriously flawed.

Since Buckley v. Valeo, it has become common parlance to make the campaign expenditure/contribution divide. A closer look at FEC regulations, however, reveals that there is a third category of campaign finance spending — expenditures which are neither "campaign contributions" in that no cash or in-kind contribution is given to any campaign, nor "independent expenditures." These "non-independent expenditures" are generally treated as prohibited contributions by the FEC. At the same time, many non-independent expenditures (usually those made by for-profit corporations) have been determined to be lawful by the FEC, giving rise to serious question as to the rationality of the regulatory scheme and the vitality of the two distinct constitutional tests applied in campaign finance reform cases. This point is especially significant when examined in relation to the FEC rules governing contributions and expenditures by corporations, both profit and nonprofit.

To decide in this case whether a nonprofit advocacy corporation, such as NCRL, has the right under the First Amendment to make contributions to federal candidates, it is necessary to understand the nature of the statutory "prohibition" on corporate contributions and all of its exceptions. The court of appeals below rightfully observed that FECA "Section 441b(a) makes it 'unlawful ... for any corporation whatever ... to make a contribution or expenditure in connection with any election' for federal office." Beaumont III, 278 F.3d at 264. This prohibition, while absolute on its face, does not mean that **all** corporations are barred from making **any** contribution or expenditure. Most definitely, this

statute does not prohibit **all** corporate expenditures on behalf of candidates for federal office; and, notwithstanding the FEC's contention that "federal law has prohibited corporate contributions to candidates for federal offices since 1907" (Pet. Br. at 12), federal law does not prohibit absolutely **all** corporate contributions to such candidates. There are numerous exceptions.

1. Permissible Corporate Expenditures

(a) As the court of appeals acknowledged, 11 C.F.R. § 114.10 provides for an exemption for "independent expenditures" in support of a federal candidacy made by certain corporations that meet the qualifications laid down by this Court in MCFL. Beaumont III, 278 F.3d at 265.

(b) Corporations may endorse and communicate their endorsement of a candidate to corporate executives, stockholders and their families, coupled with a public announcement of such endorsement by means of a press release or press conference so long as the disbursements incurred in connection with such release or conference are *de minimis*. 11 C.F.R. § 114.4(c)(6)(i).

2. Permissible Corporate Contributions

(a) A corporation may provide free legal and accounting services for the purpose of enabling a candidate's campaign committee to comply with the FECA. 11 C.F.R. § 100.7(b)(14).[5] This regulation allows a corporation to make, in

[5] The corporation must be the regular employer of the individual performing the service. 11 C.F.R. § 100.7(b)(14). The corporation may not hire additional employees to free regular employees to perform the services. 11 C.F.R. § 114.1(a)(2)(vii). The corporate employee providing the service may use the corporation's resources, such as computer equipment. Advisory

effect, in-kind contributions to federal candidates worth tens of thousands of dollars for necessary services which otherwise would have to be paid for by campaign funds.

(b) Corporations may make available to a candidate use of a corporate airplane at the first class rate (payment to be made in advance) (i) if the destination city is served by commercial air service (otherwise the candidate must pay the usual charter rate), and (ii) if the corporation is not licensed to provide commercial air services 11 C.F.R. § 114.9(e)(1). The first class rate is known to represent only a fraction of the true cost of the in-kind contribution being made by the corporation.

(c) Corporations in the business of selling food and beverages may sell food and beverages for use by a candidate's campaign committee at a charge less than the commercial rate, so long as the charge is at least equal to the costs of such food or beverage to the vendor and so long as the aggregate value of such discount (in-kind contribution) does not exceed $1,000 per individual candidate per election. 11 C.F.R. § 114.1(a)(2)(v).

(d) Corporations may provide incidental use of corporate facilities for volunteer campaign work up to one hour per week and four hours per month. 11 C.F.R. § 114.9(a)(1).

(e) Incorporated banks and other financial institutions may make loans in unlimited amounts to federal campaigns without those loans being considered contributions, as the receipt of loans are otherwise considered.[6] (11 C.F.R. § 100.7(b)(11).)

Opinions ("AO") 1989-13 and 1980-137.

[6] For an individual who is in the business of lending money (*e.g.*, an individual who makes postage loans to the clients of direct mail agencies), any loan to a candidate's committee would be limited to $1,000 per election. 11 C.F.R. § 110.1(b). This combination of FEC rules results in the peculiar

(f) There is no prohibition in law or in practice which prohibits civil monetary penalties assessed by the FEC against a political committee (even a candidate's campaign committee) for FECA violations to be paid by a corporation. *See*, *e.g.*, FEC Advisory Opinion ("AO") No. 1980-135.

3. Permissible Corporate Mixed Expenditures-Contributions

At least seven types of permissible corporate expenditures which need not be "independent" from federal election campaigns, and can be "coordinated" with the campaigns, making them in effect in-kind contributions, exist and are found in the FEC regulations. (With respect to MCFL-type corporations, expenditures must be independent, and any coordinated expenditures are classified as prohibited contributions. 11 C.F.R. § 114.10(d)(2) and 11 C.F.R. § 109.2.)

(a) Corporations may expressly advocate the election or defeat of a candidate for federal office so long as such express advocacy is directed only to corporate executives, stockholders and their families. 11 C.F.R. §§ 114.3(a)(1) and 109.1. There is no requirement that such expenditures be independent from federal candidates, and, indeed, such express advocacy may be coordinated with the candidate.

(b) As neither court below acknowledged, FECA contains a blanket exemption with respect to any corporation that owns "any broadcasting station, newspaper, magazine, or other periodical publication" for any expenditure for "any news story, commentary, or editorial [when] distributed through the

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circumstance where corporations have greater rights to make loans (contributions) to federal campaigns than individuals.

facilities" of the station, newspaper, magazine or other periodical publication owned by such corporation (or other), "unless such facilities are owned or controlled by any political party, political committee, or candidate." *See* 2 U.S.C. Section 431(9)(B)(i). Although this "media exemption" is expressed in terms of expenditures, since there are no prohibitions on coordination with federal candidates (so long as there is no ownership or control), the media expenditures need not be independent from the campaign, taking on the nature of contributions.

(c) A corporate broadcaster, *bona fide* newspaper, magazine or other periodical, or qualified nonprofit corporation (*i.e.,* a 26 U.S.C. Section 501(c)(3) or (c)(4) organization) may sponsor a candidate debate in accordance with 11 C.F.R. §§ 110.13 and 114.4(f) to which not all candidates for the office need be invited. 11 C.F.R. §§ 110.13 and 114.4(f). Additionally, any corporation may donate funds to a qualified nonprofit organization to stage such debates. 11 C.F.R. § 114.4(f)(3). Since a candidate's debate is coordinated with the included candidates (often to the exclusion of minor party candidates), this type of expenditure can take on the nature of a contribution to two or more major party candidates.

(d) Any incorporated nonprofit educational institution exempt under 26 U.S.C. Section 501(c)(3) may sponsor, at no charge or at less than the usual and normal charge, appearances by candidates or candidate representatives open to the academic community or general public, if the sponsoring institution (i) makes reasonable efforts to ensure that the appearances constitute speeches, question-and-answer sessions or similar communications, (ii) does not, in conjunction with the appearance, expressly advocate the election or defeat of any candidate, and (iii) does not favor any candidate over another in allowing such appearances. 11 C.F.R. § 114.4(c)(7).

(e) Corporations may sponsor election-related appearances by a candidate before company employees at a meeting, convention or other function (i) so long as the company does not expressly advocate the election of the candidate or defeat of his or her opponent(s), and (ii) so long as the company does not solicit contributions on behalf of the candidate, even though the candidate may solicit contributions at such events. 11 C.F.R. §§ 114.4(b)(1) and 114.4(b)(1)(iv).

(f) Corporations may make available to a candidate corporate meeting rooms for free, or at a discount, if the corporation: (i) customarily makes its meeting rooms available to clubs, civic or community organizations, or other groups; (ii) makes the rooms available to other candidates upon request; and (iii) makes the rooms available to the candidates on the same terms given to other groups. 11 C.F.R. § 114.13.

(g) Corporations may sponsor an appearance, which may be open to the general public, of an incumbent federal officeholder in his or her official capacity so long as the appearance is limited to issues of concern to the sponsoring corporation, provided that the officeholder make no solicitation at such event. FEC AO 1996-11.

4. Permissible Contributions and Expenditures by Corporate SSFs

As the FEC admitted to both the district court and the court of appeals, the "FECA and its implementing regulations ... allow[] all corporations to make campaign contributions through a separated segregated fund, and corporations that do not fall within *11 C.F.R. § 114.10's* exception to make independent expenditures through such a fund." Beaumont III, 278 F.3d at 269. Such separated segregated funds ("SSFs") may be supported from the general corporate treasury to cover operating costs, such as office space, telephones, salaries,

supplies, legal and accounting fees, and fundraising activities without any dollar limit and without any required reporting to the FEC. 11 C.F.R. § 114.1(b). With the SSF's operating and fundraising expenses completely paid by the corporation, every single dollar contributed to the SSF may be used for either contributions or expenditures to affect federal elections.

5. Incorporated Political Committees

Lastly, it is a curious fact that innumerable corporations regularly make contributions to federal candidates (as well as expenditures relating to federal candidates) with the blessing of the FEC. The reason is that political committees of all types may, themselves, be incorporated. 11 C.F.R. § 114.12(a). Despite the FEC's citation to authorities which focus on the "special characteristics of the corporate structure" and the "special advantages that the State confers on the corporate form" as justifying prohibitions on direct contributions to federal elections (Pet. Br. at 14), the FEC apparently has the ability to look beyond corporate form to substance when it justifies its own policy choices.

B. 2 U.S.C. Section 441b(a) Constitutes an Integral Component of a Comprehensive Licensing System Governing Core Political Speech.

In order to administer these numerous exceptions permitting corporate participation (as well as other limitations and exceptions to participation) in core political speech connected to federal election campaigns, Congress established the FEC. The FEC is composed of six members "appointed by the President, by and with the consent of the Senate[,] no more than three members [of which] may be affiliated with the same political party." 2 U.S.C. Section 437c(a)(1). As this Court found in Buckley, Congress has conferred upon the FEC "significant" powers:

(1) "Recordkeeping, disclosure and investigative functions," having made the Commission "the principal repository of the numerous reports and statements which are required ... to be filed by those engaging in the regulated political activities." Such duties include the "filing and indexing" of the required reports and statements, "making them available for public inspection, preservation, and auditing and field investigations," and thus, "serv[ing] as a national clearinghouse for information in respect to the administration of elections" [*Id.*, 424 U.S. at 109-10];

(2) "[E]xtensive rulemaking and adjudicative powers," having granted to the Commission authority to "formulate general policy with resepct to the administration of [the] Act," with "primary jurisdiction with respect to [the] civil enforcement" of the Act coupled with authority to issue "advisory opinions" [*Id.*, 424 U.S. at 110]; and

(3) "Direct and wide-ranging enforcement powers," having conferred upon the Commission authority to conduct "administrative determinations and hearings, and civil suits for "injunctive relief" in order to ensure compliance with the statute and rules. [*Id.*, 424 U.S. at 111, 137.]

Armed with such powers, the FEC functions as a federal government licensing commission, permission from which is virtually required before any corporation (other than an institutional media corporation) may have reasonable assurance that it may lawfully engage in core political speech in connection with a federal election campaign. Such licensing power extends even to the administration of entities and activities that are exempted from FEC control in that the FEC has the power to determine, in the first instance, whether any entity or its activity falls within such an exception.

In other words, the FEC statutory rules are not self-executing; nor, with respect to these rules, are the interpretive or constitutional rulings of this Court. For example, when this Court handed down its decision in the MCFL case, MCFL-qualified corporations were not automatically identified, and thus entitled to their constitutional rights. Rather, under the three-part test[7] of MCFL, all nonprofit advocacy corporations remained under the jurisdiction of the FEC. Thus, they remained subject to significant FEC discretionary power.

In the hands of a government agency determined to minimize the adverse effect of its loss in court, this Court's three-part test has become a powerful tool to frustrate MCFL-type corporations in their ability to engage in independent expenditures. The FEC-articulated requirements have become so precise, stringent, and technical that it has been frequently remarked that even MCFL would be fortunate to qualify as an MCFL-type organization under the FEC's rules. For example, the Court's second test that the nonprofit corporation has no shareholders was expanded into 11 C.F.R. § 114.10(c)(3)(ii).[8]

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[7] "*First*, it was **formed for the express purpose of promoting political ideas**, and cannot engage in business activities.... *Second*, it has **no shareholders** or other persons affiliated so as to have a claim on its assets or earnings.... *Third*, MCFL was **not established by a business corporation or a labor union**, and it is its **policy not to accept contributions from such entities**." [479 U.S. at 264 (emphasis added).]

[8] The FEC did little to advise the political committees it licenses as to the new rules. The FEC's "Campaign Guide for Corporations and Labor Organizations," relied on by political committees as a statement of the requirements in simpler terms than the law and regulations, did not include any indication of the 1986 change in the law until it was revised in 1992 and then it described the ruling as one which only involved "a small, nonprofit corporation." "Campaign Guide for Corporations and Labor Organizations," March 1992, p. 21.

The MCFL decision was issued December 15, 1986. The FEC's initial

FEC regulations require that a nonprofit corporation jump through more hoops than constructed by this Court to be entitled to make independent expenditures. As illustrated by this case, the FEC has enormous discretion in applying the three-factor formula determining whether a nonprofit advocacy corporation, such as NCRL, is qualified for an exemption from the 2 U.S.C. Section 441b(a) prohibition against corporate expenditures in connection with a federal election campaign. Even after the court of appeals below had found that NCRL qualified for the MCFL exemption, the FEC "has not foresworn its ultimate intention to prohibit NCRL ... from making independent expenditures." Beaumont III, 278 F.3d at 269, n. 3.

The FEC's treatment of NCRL appears to reflect the FEC's general policy with respect to any nonprofit advocacy

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MCFL rulemaking was initiated not by the FEC, but by a political organization which filed a rulemaking petition, published in the *Federal Register*, 52 Fed. Reg. 16,275 (May 4, 1987). It was not until January 7, 1988 that the FEC issued an Advance Notice of Proposed Rulemaking, 53 Fed. Reg. 416 (Jan. 7, 1988). It was not until October 13, 1988 that the FEC scheduled a hearing, for November 16, 1988. 53 Fed. Reg. 40,070 (Oct. 13, 1988). On October 3, 1990, the FEC requested further comments in view of this Court's decision in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). 55 Fed. Reg. 40,397 (Oct. 3, 1990). On October 31, 1990, the FEC extended the comment period relating to Austin. 55 Fed. Reg. 45,809 (Oct. 31, 1990). Then, on July 29, 1992, the FEC finally issued a Notice of Proposed Rulemaking implementing MCFL, seeking comments due in September and a hearing in October. 57 Fed. Reg. 33,548 (July 29, 1992).

It was not until July 6, 1995, that the FEC issued Final Regulations implementing MCFL. 60 Fed. Reg. 35,292 (July 6, 1995). These rules were revised December 14, 1995, 60 Fed. Reg. 64,260 (Dec. 15, 1995), and these were not made effective until March 13, 1996, exactly **nine months shy of a decade** subsequent to this Court's decision in MCFL. 61 Fed. Reg. 10,269 (Mar. 13, 1996).

corporation which claims the MCFL exemption. That claim is subject to prior FEC review every election cycle. At a pretrial hearing in McConnell, *et al.* v. FEC, *et al.*, Docket No. 02-CV-581 (U.S.D.C.-D.C.), in support of the FEC's position that extensive discovery might be required into the membership and finances of several MCFL-type advocacy organization plaintiffs, an FEC assistant general counsel revealed how intrusive the FEC information demands and requirements are for such an organization to meet the MFCL qualifications:

> I'd like to remind this court that in FEC versus NRA this circuit specifically said that it's the burden of the Federal Election Commission to take a look at the purpose of the members for joining and the nature of the income of these organizations
>
> I'm not going to be satisfied to have counsel tell me, well, we only received a thousand dollars worth of corporate activity -- corporate income. I want to take a look at the books myself.
>
> I'm not going to be satisfied with looking at their charter to determine whether, you know, what members believe when they joined.
>
> And, in fact, I believe the court specifically says that it is our burden to take a look at those studies and develop that kind of record....
>
> This circuit, unlike some of the other circuits, have [*sic*] said we have to take a look at the absolute amount of activity, corporate activity, not a mere percentage. [Transcript of April 23, 2002, Scheduling Conference, before the three-judge United States District Court in McConnell, *et al.* v. FEC, *et al.*, Docket No. 02-CV-581 (U.S.D.C.-D.C.) at 66-68.]

Thus, a nonprofit corporation like NCRL claims the MCFL exemption at its peril, unless, prior to, or at the outset of, each election cycle it obtains from the FEC an Advisory Opinion

("AO") affirming that it qualifies as an MCFL-type corporation. *See* 2 U.S.C. Section 437f. Under current FEC procedures, however, there is no guarantee that such an organization, even if it seeks an AO, will obtain such an opinion, because such opinions require the affirmative vote of four FEC members. *See* 11 C.F.R. § 112.4(a). If no AO is forthcoming, or if it is adverse, the nonprofit advocacy organization must either forego making federal election-related expenditures and contributions, or, comply with the FECA's onerous SSF rules, or file a law suit claiming violation of its constitutional rights.

C. As an Integral Component of a Comprehensive Licensing System Governing Core Political Speech, 2 U.S.C. Section 441b(a) Operates as an Unconstitutional Prior Restraint and Discriminatory Burden in Violation of the Freedom of the Press.

As noted by the court of appeals below, the FEC has insisted that 2 U.S.C. Section 441b(a) does not operate as a "blanket prohibition" upon NCRL's desire to make contributions to, and independent expenditures on behalf of, federal election candidates. It may do both, but it must do so by means of an SSF created and operated in accordance and compliance with 2 U.S.C. Section 441b(a) and (b)(2)(C) and FEC regulations. Beaumont III, 278 F.3d at 269. As also noted by the court of appeals below, however, "organizations that use a segregated fund must adhere to significant reporting requirements, staffing obligations, and other administrative burdens [that] stretch far beyond the more straightforward disclosure requirements on unincorporated associations." *Id.* Relying on the majority and concurring opinions of this Court in MCFL, the court of appeals below concluded that such burdens were so "severely demanding" that there was no doubt that they infringed upon "the exercise of political speech and association," thereby

triggering its inquiry into whether "2 U.S.C. § 441b(a) and the associated regulations [limiting expenditures are] narrowly tailored to serve a compelling governmental interest," and whether that statute and associated regulations limiting contributions are "closely drawn to match a sufficiently important governmental interest." Beaumont III, 278 F.3d at 271. While such constitutional tests may be germane to a claim that the statute and regulations in question abridge the freedoms of speech and association, they are not determinative in this case because 2 U.S.C. Section 441b(a) and associated regulations not only "burden" free speech and association, but also operate as a "prior restraint" and "discriminatory burden" upon NCRL's press activities.

A nonprofit advocacy corporation does not automatically qualify as exempt from Section 441b(a)'s prohibition against corporate expenditures in connection with a federal election campaign. According to 11 C.F.R. §§ 114.10(a) and 114.10(e)(1), such a corporation must "demonstrat[e] qualified nonprofit corporation status" by "certify[ing] [to the FEC] ... that it is eligible for an exemption from the prohibitions against corporate expenditures."[9] Therefore, according to 11 C.F.R. § 114.10, a nonprofit advocacy corporation may qualify as exempt from Section 441b(a)'s prohibition against corporate expenditures in connection with a federal election **only** if its registration as an MCFL-qualified corporation is approved by the FEC.

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[9] While it may make such expenditures before filing FEC Form 5, or a letter containing the information required by the form, it must meet various regulatory deadlines and informational requirements as stated in 11 C.F.R. § 114.10(e)(1)(i)-(ii) and (2). Among the informational requirements are data designed to enable the FEC to determine whether such expenditures are truly independent, or whether they might be classified as coordinated expenditures, and, thus forbidden contributions. 11 C.F.R. § 114.10(e)(2) and 11 C.F.R. § 109.2.

As the court of appeals pointed out, the exemption contained in 11 C.F.R. § 114.10 "was created in response to the Supreme Court's decision that Section 441b(a)'s prohibition on independent expenditures from a corporation's general treasury was unconstitutional as applied to ... MCFL" and tailored to the three-factor formula laid down in that case. Beaumont III, 278 F.3d at 265. As currently structured, however, 11 C.F.R. § 114.10 imposes a *de facto* licensing system, requiring nonprofit advocacy corporations to certify to the FEC that they are not covered by the expenditure prohibition contained in 2 U.S.C. Section 441b(a). By placing "the initial burden" on the nonprofit, 11 C.F.R. § 114.10 operates as an administrative censorship system without any of the prompt review and judicial safeguards required of such a system, and thus, constitutes an unconstitutional prior restraint. *Cf.* Freedman v. Maryland, 380 U.S. 51, 60 (1967).[10]

In contrast with its administration of the MCFL exception, the FEC does not require a broadcasting facility, newspaper, magazine or other periodical to register with the FEC, certifying that it is not owned by a political party, political committee, or candidate, and thus is exempt under 2 U.S.C. Section 431(9)(B)(i). Nor is any broadcasting facility, newpaper, magazine of other periodical required to file reports with the FEC, accounting for its expenditures, even for the limited purpose of enabling the FEC to determine if such expenditures had been made in coordination with a federal election campaign. To the contrary, FEC enforcement of the media exemption has been severely curtailed by two district courts in deference to freedom of the press. *See* Reader's

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[10] A nonprofit corporation may seek from the FEC an AO determination that it is qualified before it makes any expenditures in connection with a federal election, but neither the statute nor the regulations assure the corporation an administrative decision on the merits, much less a prompt judicial determination. *See* 11 C.F.R. § 112.4(a).

Digest Ass'n. Inc. v. FEC, 509 F.Supp. 1210 (S.D.N.Y. 1981); FEC v. Phillips Publishing, Inc., 517 F.Supp. 1308 (D.D.C. 1981).

The media exemption provided for in 2 U.S.C. Section 431(9)(B)(i) does not extend to "contributions," but it does appear that the expenditure exemption means that media exempt under that section could make contributions in the form of coordinated expenditures, so long as they are made in connection with a news story, commentary or editorial. Such is not the case with respect to the MCFL exception, so there is every reason to believe that the FEC will continue its supervisory oversight of MCFL-qualified corporations with respect to both expenditures and contributions, even if the opinion of the court of appeals is affirmed by this Court.

According to the FEC's position, however, the prior restraints placed upon an MCFL-qualified corporation are not sufficient with respect to contributions, and the enforcement of its contribution limits upon corporations call for the more stringent policing standards provided for SSFs in 2 U.S.C. Section 441b(b). Such an alternative only exacerbates the prior restraint violation. According to 2 U.S.C. Section 431(4)(B), an SSF is a "political committee" which, in turn, is required to register with the FEC within 10 days of its establishment. *See* 2 U.S.C. Section 433(a) and 11 C.F.R. § 102.1(c). To register, the treasurer of an SSF must prepare and file an initial FEC Form 1 with the FEC, providing the name and address of the SSF, the name and address of the connected organization, the type of connected organization, the name and address of the custodian of its records, the name and address of the treasurer, and the names and mailing addresses of banks or other depositories with which the SSF does business. 11 C.F.R. §§ 102.2 and 105.4. After FEC Form 1 has been filed, the FEC assigns an identification number to the SSF. 11 C.F.R. § 102.2(c). Failure to file Form 1, alone, subjects the nonprofit

corporation to the FEC enforcement powers, including the authority to seek injunctive relief from a federal court.

It has long been the rule that the freedom of the press prohibits even a court from issuing an order restraining the publication of core political speech, which this Court has described as "of the essence of censorship." Near v. Minnesota, 283 U.S. 697, 713 (1931). Such a system of prior restraints may be justified, if at all, only by proof of an imminent threat of the highest order, such as that the "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" in wartime. New York Times v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

Nonprofit advocacy corporations such as NCRL engage in a variety of press activities. They publish news, editorials, and commentaries, to communicate to the public, often in competition with other press sources, including the institutional and commercial media such as newspapers, magazines, radio, and television. In order to engage in the political marketplace of ideas, however, any press activities of NCRL would be burdened by the prior restraints of the FEC's certification, registration, reporting, and record-keeping requirements, whereas the ordinary publishing activities of the institutional and commercial media are totally exempted, and protected from any comparable restraints. *See* 2 U.S.C. Section 431(9)(B)(i); FEC v. Phillips Publishing Inc., *supra,* 517 F. Supp. at 1312-13. *See also* Hasen, "Campaign Finance Laws and the Rupert Murdoch Problem," 77 *Tex. L. Rev.* 1627, 1632-34 (1999).

If Congress were to repeal the FECA's institutional media exemption, and place the news reporting, editorial writing, and commentaries of such media under the supervisory jurisdiction of the FEC — requiring such institutions as *The Charlotte*

Observer or *The Greensboro News & Record* to certify, register, report, keep records, and abide by specified limits on their expenditures in order to prevent corruption and the appearance of corruption, before they can publish anything that might influence the outcome of a federal election — there is little doubt that such corporate media outlets would institute a lawsuit challenging the constitutionality of such federal regulation as a violation of the freedom of the press. But the freedom of the press was never designed as a special institutional privilege, nor has the U.S. Supreme Court ever so limited that freedom.[11]

In attempting to justify the so-called prohibition on corporate contributions to candidates in federal elections, the FEC has pointed to statements in certain of this Court's opinions, beginning at least with the decision in Buckley v. Valeo, noting that the treatment given certain corporations under the campaign finance system is designed to prevent "corruption and the appearance of corruption." Pet. Br. at 13-14. Such treatment saddles for-profit and nonprofit corporations with the tinge of potential corruption irrespective of any facts or events. As pointed out by the court of appeals, there would appear to be no danger of corruption, actual or apparent, with respect to contributions from corporations such as NCRL. Beaumont III, 278 F.3d at 273-274.

The FEC assumes that there is no need to settle on a definition of "corruption," on the theory that this Court's prior decisions have already justified the ban against corporate

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[11] The suggestion that the freedom of the press was a special institutional privilege prompted Chief Justice Burger to write, in his concurring opinion in First National Bank of Boston v. Bellotti, 435 U.S. 765, 801 (1978), that the "very task of including some entities within the 'institutional press' while excluding others [is] reminiscent of the abhorred licensing system [that] the First Amendment was intended to ban."

contributions in federal elections on a presumption of "corruption." *See, e.g.,* Pet. Br. at 13-14, 18. Nevertheless, defining "corruption" should be a key issue in determining the constitutionality of such campaign finance reform legislation. *See* Nixon v. Shrink Missouri Gov't. PAC, 528 U.S. 377, 424 (2000) ("Shrink PAC") (Thomas, J., dissenting). Although Justice Thomas's view was not joined by the majority in Shrink PAC, the majority read Buckley v. Valeo to have adopted a more amorphous definition of "corruption," noting that no party in Shrink PAC had "challenged the legitimacy of the ... objectives" of campaign reform as articulated in Buckley, nor called "for any reconsideration of Buckley." Shrink PAC, 528 U.S. at 390. Neither Buckley, nor any of its progeny, has examined the sufficiency of the claim of corruption or appearance of corruption under the press principle of no prior restraint. If the general claim of "national security" is not sufficient to justify such a restraint (*see* New York Times v. United States, 403 U.S. at 718), then neither is a generalized appeal to corruption or the appearance of corruption.

D. As an Integral Component of a Comprehensive Licensing System Governing Core Political Speech, 2 U.S.C. Section 441b(a) Grants to the FEC Editorial Control in Violation of the Freedom of the Press.

Nonprofit advocacy corporations that qualify under the MCFL rule to make independent expenditures in connection with a federal election campaign are required by FEC regulations to submit to significant FEC editorial control of their press activities undertaken in relation to such campaigns. If the MCFL rule is extended to contributions made by MCFL-qualified nonprofit advocacy corporations to candidates running for federal office, the FEC rules governing such contributions impose significant editorial control over such corporations. If the MCFL rule is not extended to contributions, then the FEC will exercise significant editorial

control over MCFL-qualified corporations via its rules and regulations governing SSFs. In either event, such editorial controls constitute unconstitutional abridgments of NCRL's freedom of the press.

According to 11 C.F.R. § 114.10(e)(2), an MCFL-qualified nonprofit advocacy corporation must comply with the expenditure reporting requirements of 11 C.F.R. § 109.2. 11 C.F.R. § 109.2, in turn, requires periodic reports to the FEC of "all independent expenditures aggregating in excess of $250 during a calendar year." 11 C.F.R. § 109.2(a). Such reports must contain the following information: (1) the reporting person's name, address, occupation, and employer; (2) the identification of the person to whom the expenditure was made; (3) the date, amount and purpose of the expenditure; (4) a statement whether the expenditure was made in support of, or in opposition to a candidate, together with the candidate's name and office sought; (5) a notarized certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of any candidate or any authorized committee or agent thereof; and (6) the identification of any person who contributed more than $200 to the person filing the report if the contribution was made for the purpose of furthering the reported expenditure. 11 C.F.R. § 109.2(a)(1)(i)-(vi).

Additionally, an MCFL-qualified nonprofit advocacy corporation is required by 11 C.F.R. § 114.10(g) to comply with the disclaimer requirements of 11 C.F.R. § 110.11. Accordingly, if an MCFL-qualified nonprofit corporation expends money for "a communication that expressly advocates the election or defeat of a clearly identified candidate, or solicits a contribution" by means of certain specified public media, the communication or solicitation must "present... in a clear and conspicuous manner ... giv[ing] the reader, observer or listener adequate notice of the identity of persons who paid

for and, where required, who authorized the communication," as well as a disclaimer that such communication or solicitation has not been authorized by a candidate or the candidate's committee. 11 C.F.R. § 110.11(a)(1)(iii). If, however, the communication or solicitation appears in any media specified in 11 C.F.R. § 110.11(a)(6), then the disclosure and disclaimer rules of 11 C.F.R. § 110(a)(1) do not apply.

Finally, an MCFL-qualified nonprofit advocacy corporation is required by 11 C.F.R. § 114.10(f) to "inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates" in all communications that solicit donations to support the advocacy corporation.

There is no question that these regulations, as applied to the expenditures of an MCFL-qualified corporation, transfer editorial control over its communications and solicitations from the corporation to the FEC. According to 11 C.F.R. § 114.10(g), the corporation must include certain disclosures and disclaimers in its communications advocating the election or defeat of a candidate for federal office. Such an intrusion upon the corporation's editorial function is *per se* a violation of the freedom of the press. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-54, 256, 258 (1974)("[T]he court has expressed sensitivity as to whether a restriction or requirement constituted a compulsion exerted by government of a newspaper to print.... The clear implication has been that any such compulsion to publish that which 'reason tells them should not be published' is unconstitutional.") This salutary rule has been extended by this Court to solicitations for money by **all** nonprofit advocacy corporations. Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781,

797 (1988).[12] After all, the freedom of the press is not a special institutional press privilege, but a freedom enjoyed by all. *See* Lovell v. Griffin, 303 U.S. 444, 450, 452 (1938).

Additionally, compliance with the reporting requirements, as provided for in 11 C.F.R. § 114.10 (e)(1) and (2), imposes a financial burden upon MCFL-qualified corporations that, likewise, infringes upon the editorial function of such corporations. As this Court ruled in Miami Herald v. Tornillo, freedom of the press is predicated not only upon the right of the publisher to decide what to publish and what not to publish, but also upon the financial freedom to make such decisions unburdened by government-imposed costs. *Id.,* 418 U.S. at 255-58. In the Miami Herald case, a Florida right-to-reply statute was struck down, in part, because the law exact[ed] a penalty in the form of increased costs in the printing of the newspaper. Certainly the costs of complying with the reporting requirements contained in 11 C.F.R. § 109.2, imposed upon an MCFL nonprofit advocacy corporation when it makes expenditures in connection with a federal election campaign, is no different from the costs that would have been incurred by the *Miami Herald* if it had been forced to publish the reply of a candidate running for public office as required by the Florida statute struck down in that case.

These unconstitutional impositions upon an MCFL- qualified corporation's editorial function are multiplied by the disclosure requirements of 11 C.F.R. § 110.11(a)(1), which force such corporations to reveal the publisher of any communication that expressly advocates the election or defeat of a candidate for election to federal office. As Justice Black cogently observed

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[12] The court in FEC v. Phillips Publishing, Inc., *supra,* observed that "newsletters and other publications solicit[ing] subscriptions, and in their advertising doing so, ... publicize content and editorial positions." *Id.*, 517 F.Supp. at 1313.

in Talley v. California, 362 U.S. 60 (1960), "the obnoxious press licensing law of England, which was also enforced in the Colonies was due in part to the knowledge of the exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government." *Id.,* 362 at 64. *Accord*, McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) (Thomas, J., concurring).

Should the MCFL exception to the prohibition against corporate expenditures be extended to contributions, as the court of appeals concluded below, the FEC administration of that exception would, nonetheless, violate NCRL's right of editorial control guaranteed by the freedom of the press. As the court of appeals found, and as this Court has consistently held since Buckley v. Valeo, contributions to another's election campaign constitutes core political speech. Beaumont III, 278 F.3d at 267-68. Additionally, as the court of appeals noted and as this Court recognized in MCFL, the decision to contribute money to another's election campaign is a discretionary one based, in part, upon an individual "regard [that] such a contribution [is] a more effective means of advocacy than spending the money under their own personal direction." *Id.*, 278 F.3d at 268. While this observation has been made in relation to the courts' recognition that campaign contributions are a form of free speech and free association, it is equally applicable to a recognition that the decision to make a contribution to another's political campaign is an editorial one, designed to "enhance[] the donee's ability to comunicate a message," and perhaps in the process, "to put the funds to more productive use than can the individual" donor. Colorado Rep. Fed. Campaign Comm. v. FEC, 518 U.S. 604, 636 (1996) (Thomas, J., concurring in judgment and dissenting in part).

As an exercise of the editorial function, contributions, like expenditures, may not be burdened in such a way as to wrest editorial control from the person, including a corporation. As

this Court held in Miami Herald, a corporation may not be financially burdened to accommodate a government policy that directly impacts upon that corporation's exercise of editorial judgment. *Id.*, 418 U.S. at 255-58. The court of appeals below found that if a nonprofit advocacy corporation were required to create an SSF in order make contributions to a candidate's federal election campaign, it would be saddled with "significant reporting requirements, staffing obligations, and other administrative burdens ... stretch[ing] far beyond the more straightforward disclosure requirements on unincorporated associations." Beaumont III, 278 F.3d at 269. Indeed, after cataloguing the extent of such reporting and organizational burdens, the court of appeals concluded that "[f]aced 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 nonmembers take a fancy to merchandise on display, it would be surprising if at least some groups decided that the contemplated political activity was simply not worth it." *Id.*, 278 F.3d at 270.

In Miami Herald, this Court found that the "economic reality" of operating a newspaper similarly does not allow for the assumption that "a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available." *Id.,* 418 U.S. at 257. To permit the government to lay such an economic burden upon the exercise of a person's editorial judgment is tantamount to a penalty in the form of increased costs that is impermissible under the free press guarantee. *See id.,* 418 U.S. at 255-58.

Should this Court affirm the court of appeals, extending the MCFL rule to contributions, NCRL will probably still be subject to burdensome registration, reporting and even editorial requirements. As noted in Section II.B. above, following the MCFL decision, the FEC implemented regulations requiring a

corporation that seeks MCFL protection to demonstrate by certification that it is a qualified nonprofit under the MCFL three-factor test and to file certain reports and abide by certain regulations governing its communications and solicitations. *See* 11 C.F.R. § 114.10. In any event, NCRL will be subject to the current individual contribution limitations imposed by 2 U.S.C. Section 441a which directly and adversely impact upon NCRL's editorial function to decide how to spend money in support of, or in opposition to, an individual election campaign in violation of the freedom of the press rule in Miami Herald.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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