No. 02-403

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Federal Election Campaign Act of 1971, 2 U.S.C. 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy.

PARTIES TO THE PROCEEDING

Petitioner is the Federal Election Commission. Respondents are Christine Beaumont, Loretta Thompson, Stacy Thompson, Barbara Holt, and the North Carolina Right to Life, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 278 F.3d 261. The opinion of the district court (Pet. App. 41a-60a) is reported at 137 F. Supp. 2d 648.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. A petition for rehearing was denied on May 16, 2002 (Pet. App. 61a-62a). On August 5, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 13, 2002. The petition for a writ of certiorari was filed on September 12, 2002, and was granted on November 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law * * * abridging the freedom of speech." Section 441b of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 441b, provides in part: "It is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a). Section 441b is reprinted at Pet. App. 71a-75a.

STATEMENT

This case involves a First Amendment challenge brought by a nonprofit advocacy corporation to the longstanding prohibition established by Congress that bars corporations from directly contributing to candidates for federal office.

1. a. For nearly a century, Congress has prohibited all corporations from making direct campaign contributions and certain expenditures in connection with federal elections. See *FEC* v. *National Right to Work Comm.* (*NRWC*), 459 U.S. 197, 208-209 (1982); pp. 11-13, *infra*. Today that prohibition is set forth in Section 441b of the Federal Election Campaign Act of 1971 (FECA), as amended, which in pertinent part makes it unlawful for "any corporation whatever * * * to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a).

The prohibition on direct corporate contributions in connection with federal elections is designed to combat "the problem of corruption of elected representatives through the creation of political debts." *NRWC*, 459 U.S. at 208 (quotation omitted). It reflects the fact that all corporations "receive from the State the special

benefits conferred by the corporate structure and present the potential for distorting the political process." *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990). As this Court has emphasized, the prohibition protects the "integrity of our electoral process" by preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *NRWC*, 459 U.S. at 208.

At the same time, individuals affiliated with corporations may still engage in voluntary political activity. Section 441b authorizes corporations to establish and solicit "contributions to a separate segregated fund to be utilized for political purposes by a corporation." 2 U.S.C. 441b(b)(2)(C). Such a fund is commonly known as a political action committee or PAC. A corporation may solicit PAC funds from stockholders, certain employees, or members, and a PAC, in turn, may make both contributions and independent expenditures in connection with federal elections. 2 U.S.C. 441b(b). A PAC "may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist." *NRWC*, 459 U.S. at 200 n.4.

b. In *NRWC*, this Court upheld a determination by the Federal Election Commission (FEC) that the National Right to Work Committee (NRWC), a nonprofit advocacy corporation, violated Section 441b by soliciting contributions to its PAC from individuals who were not members of NRWC. In so ruling, the Court rejected the argument that such an interpretation of FECA posed any constitutional difficulty, explaining that Congress's effort to address "the problem of corruption of elected representatives through the creation of political debts" justified any burden imposed by Sec-

tion 441b on the political activity of corporations through contributions. 459 U.S. at 208. In addition, while recognizing that Section 441b's categorical prohibition on contributions applied to corporations "without great financial resources" as well as traditional business corporations, the Court refused to "second-guess" Congress's judgment that "prophylactic measures" were necessary to combat the special dangers of actual or apparent corruption posed by corporate contributions to candidates for federal office. *Id.* at 210.

Four years later, in *FEC* v. *Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986), the Court held that Section 441b's prohibition on independent *expenditures* violates the First Amendment as applied to the Massachusetts Citizens for Life, Inc. (MCFL), a nonprofit advocacy corporation. The Court explained that, because MCFL's resources "in fact reflect popular support for [its] political positions," *id.* at 258, the entity's independent political expenditures did not pose the "danger of corruption" justifying the regulation of election expenditures by traditional business corporations. *Id.* at 259.[1] The Court rejected the argument that *NRWC* compelled a different result, explaining that *NRWC* involved application of Section 441b's prohibition of *contributions*, not expenditures. *Ibid.* As the Court emphasized, "[i]n light of the historical role of contributions in the corruption of the electoral process," "the Government enjoys greater latitude in limiting

[1] The Court stated that MCFL had three features "essential" to its holding: "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; "it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 263-264.

contributions than in regulating independent expenditures." *Id.* at 260, 261-262.

2. Respondent North Carolina Right to Life, Inc. (NCRL) is a nonprofit advocacy corporation organized under the laws of North Carolina. J.A. 28.[2] NCRL is exempt from taxation under Section 501(c)(4) of the Internal Revenue Code, has no shareholders, and is "overwhelmingly funded by private contributions from individuals." J.A. 12, 14. NCRL also accepts contributions from traditional business corporations. J.A. 14. In 1996, NCRL's contributions from such corporations amounted to 2.44% of its total contributions from all sources; that figure increased to 3.57% in 1997, and to 3.63% in 1998. J.A. 15. In addition, NCRL engages in fundraising activities such as raffles and generates revenue from "minor business activities" involving special events and literature that it promotes. *Ibid.*

NCRL is "dedicated to protecting and fostering the most basic value of our society—life itself." J.A. 13. NCRL provides crisis pregnancy counseling, publishes crisis pregnancy literature, and promotes alternatives to abortion. J.A. 14. "To further its general purposes NCRL has spent money for issue advocacy communications and publications such as its newsletter, candidate surveys and voter guides." J.A. 16. "NCRL has made lawful contributions to candidates for state office and has lawfully made independent express advocacy communications advocating the nomination, election or defeat of state candidates." *Ibid.* "NCRL has never made contributions to candidates for federal office." *Ibid.*

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[2] The J.A. citations are to the description of NCRL set forth in respondents' complaint, which for purposes of this statement is accepted as true.

But NCRL states that, if it were lawful for it to do so, NCRL would make such contributions. *Ibid.*

NCRL has established a separate segregated fund—North Carolina Right to Life Inc. Political Action Committee—through which it makes contributions and expenditures in connection with federal elections, as required by Section 441b of FECA. See *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 709 (4th Cir. 1999), cert. denied, 528 U.S. 1153 (2000); *FEC Disclosure Report for North Carolina Right to Life Inc. Political Action Committee* <<http://herndon-1.sdrdc.com>> (committee query for "North Carolina Right to Life") (listing expenditures and contributions).

3. Respondents—NCRL, its officers, and an eligible North Carolina voter—brought this action against the FEC, challenging Section 441b's prohibition on corporate contributions and expenditures under the First Amendment.[3] Respondents sought a declaration that Section 441b is unconstitutional on its face and as applied to NCRL, and an injunction against its enforcement. In October 2000, the district court granted respondents' motion for summary judgment and held that Section 441b is unconstitutional as applied to NCRL

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[3] Respondents also challenged the FEC's regulations implementing Section 441b of FECA. See 11 C.F.R. 114.2(b), 114.10. The first regulation (11 C.F.R. 114.2(b)) prohibits contributions and expenditures in connection with federal elections by any corporation and, thus, tracks the prohibition contained in Section 441b. The second regulation (11 C.F.R. 114.10) exempts from the prohibition on independent expenditures corporations that share the same basic features of the corporation in *MCFL*. See Pet. App. 3a-4a, 49a-50a The courts below held that those regulations were invalid as applied to NCRL, *id.* at 34a, 69a, but the question presented in this Court is limited to the application of Section 441b's prohibition on direct contributions. See Pet. i.

with respect to its prohibition on both direct contributions and independent expenditures, but declined to hold the statute unconstitutional on its face. Pet. App. 41a-60a. In January 2001, the district court permanently enjoined the FEC from enforcing Section 441b against NCRL. *Id.* at 63a-68a.

4. a. The court of appeals affirmed. Pet. App. 1a-40a. The court first held that Section 441b's prohibition on independent *expenditures* is unconstitutional as applied to NCRL. In so holding, the court reasoned that NCRL is in material respects like the nonprofit advocacy corporation in *MCFL*, and that this Court's decision in *MCFL* therefore compelled the conclusion that Section 441b's prohibition on independent expenditures may not be applied to NCRL. *Id.* at 6a n.2, 20a-21a. The court further held that Section 441b's prohibition on direct *contributions* violates the First Amendment as applied to NCRL. *Id.* at 25a. In reaching that conclusion, the court rejected the FEC's argument that this Court's decision in *NRWC* called for a different result with respect to the prohibition on direct contributions, as opposed to expenditures. *Id.* at 26a-27a.

The court of appeals reasoned that *NRWC* "did not decide the constitutionality of the corporate ban provision as applied to *MCFL*-type corporations," but instead addressed only the constitutionality of the bar preventing a nonprofit corporation from using its funds to solicit nonmembers to contribute to its PAC. Pet. App. 27a. Moreover, the court continued, "[t]he rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions." *Id.* at 25a. Thus, under the court of appeals' decision, "the distinc-

tion between contributions and expenditures [is] immaterial in this case." *Id.* at 29a.

b. Judge Gregory concurred in part and dissented in part. Pet. App. 35a-40a. He agreed with the court's analysis of Section 441b insofar as it concerned independent expenditures, but dissented with respect to the court's analysis of the prohibition on campaign contributions. In Judge Gregory's view, the court's holding that NCRL was entitled to "an *MCFL*-type exemption for its campaign contributions * * * is inconsistent with [this Court's decision in *NRWC*]." *Id.* at 35a. Pointing to the discussion of *NRWC* in both the majority and dissenting opinions in *MCFL*, he concluded that the Court in *MCFL* had addressed the "very question" in this case, *i.e.*, the "constitutional difference between contributions and independent expenditures in the context of § 441b." *Id.* at 38a-39a. Accordingly, Judge Gregory concluded that this Court's resolution of that issue in "*NRWC* is dispositive with respect to § 441b's ban on corporate contributions." *Id.* at 40a.

c. The Fourth Circuit denied the FEC's petition for rehearing en banc by a vote of seven to four. Pet. App. 61a-62a.[4]

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[4] As noted, the court of appeals' conclusion that Section 441b's prohibition on independent expenditures cannot be applied to NCRL is based on its factbound determination that NCRL shares the same essential features of the nonprofit corporation at issue in *MCFL*. See Pet. App. 20a-21a. The government has not sought certiorari on that aspect of the court of appeals' decision. See Pet. i. Accordingly, as this case comes to the Court, NCRL is not subject to Section 441b's ban on independent expenditures, and the only question is whether the statute's prohibition on direct corporate contributions may be applied to NCRL.

SUMMARY OF ARGUMENT

Under this Court's precedents, the longstanding statutory prohibition on direct campaign contributions by "any corporation whatever," 2 U.S.C. 441b(a), is constitutional as applied to respondent NCRL.

This Court has long recognized that Congress has broad authority to regulate federal elections, and that insulating federal elections from the actual or apparent corruption associated with the creation of political debts is of the utmost importance to American democracy. The statutory prohibition on direct campaign contributions by corporations has been in place for nearly a century and "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *NRWC*, 459 U.S. at 209-210. This Court has repeatedly refused to "second-guess" Congress's judgment that corporate contributions pose special dangers that merit a broad prophylactic prohibition. *Id.* at 210.

The Court has further recognized that direct contributions to political candidates pose a unique risk of actual or apparent corruption due the prospect of a quid pro quo arrangement, and that limits on contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley* v. *Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam). By contrast, limits on election "*expenditures* generally curb more expressive and associational activity than limits on contributions do," and therefore, the Court has stated, may "deserve closer scrutiny than restrictions on political contributions." *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351, 2358 (2001) (emphasis added). At the same time, the Court has recognized that individuals affiliated with corporations

may still make contributions in connection with a federal election through a PAC. See *NRWC*, 459 U.S. at 201. The prohibition on direct corporate contributions in connection with federal elections thus imposes a relatively insubstantial burden on First Amendment activity in this vital arena of expression.

The court of appeals' conclusion that Section 441b's prohibition on direct corporate contributions nonetheless violates the First Amendment as applied to respondent NCRL cannot be squared with this Court's decisions. In *NRWC*, this Court recognized that Section 441b's prohibition on corporate contributions is constitutional as applied to "corporations and labor unions without great financial resources, as well as those more fortunately situated," and refused to "second-guess a legislative determination as to the need for [such] prophylactic measures where corruption is the evil feared." 459 U.S. at 210. Moreover, in subsequent decisions, the Court has specifically recognized that *NRWC* accepted Congress's judgment to bar *all* corporations, including nonprofit advocacy corporations, from directly contributing to federal campaigns. See *FEC* v. *National Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 495, 500 (1985); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

MCFL only reinforces that conclusion. In that case, the Court held unconstitutional Section 441b's prohibition on independent expenditures as applied to a nonprofit advocacy corporation. In so holding, the Court carefully distinguished *NRWC* on the ground that "the political activity at issue in that case was contributions," not expenditures, and emphasized that the Court has "consistently held that restrictions on contributions require less compelling justification than re-

strictions on independent spending." 479 U.S. at 259-260. The fundamental constitutional difference between limits on contributions and independent expenditures is deeply rooted in this Court's campaign-finance jurisprudence, see *Colorado Republican*, 121 S. Ct. at 2358-2359, and explains the Court's treatment of Section 441b's prohibition on expenditures in *MCFL*.

There is no reason for this Court to reconsider, much less overturn, its prior decisions accepting Congress's judgment that a prohibition on direct campaign contributions by "any corporation whatever," including a corporation such as NCRL, is warranted to ensure the integrity of federal elections.

ARGUMENT

SECTION 441b'S LONGSTANDING PROHIBITION ON DIRECT CAMPAIGN CONTRIBUTIONS BY CORPORATIONS IS CONSTITUTIONAL AS APPLIED TO RESPONDENT NCRL

A. The Constitutional Validity Of Congress's Prohibition On Direct Contributions By Corporations Is Well-Established

The statutory prohibition on direct campaign contributions by corporations in connection with federal elections has been in place for almost a century. Moreover, as this Court has recognized, the general prohibition on corporate contributions is of "well-established constitutional validity." *NCPAC*, 470 U.S. at 495 (acknowledging "the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office"); see *Colorado Republican*, 121 S. Ct. at 2358-2359; *NRWC*, 459 U.S. at 208-210.

1. This Court has previously canvassed the history of "the movement to regulate the political contributions

and expenditures of corporations and labor unions." *NRWC*, 459 U.S. at 208; see *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 402-409 (1972); *United States* v. *Automobile Workers*, 352 U.S. 567, 570-587 (1957); *United States* v. *CIO*, 335 U.S. 106, 113 (1948). To summarize, federal law has prohibited corporate contributions to candidates for federal offices since 1907. That year Congress—at the urging of President Theodore Roosevelt, who in his annual message to Congress asked that "a law prohibiting political contributions by corporations" be the first item of business—passed the Tillman Act. *Automobile Workers*, 352 U.S. at 57; Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 864. The Tillman Act made it "unlawful for *any corporation whatever* to make a money contribution in connection with [federal elections]." *Ibid.* (quoting 34 Stat. 864-865) (emphasis added).[5]

In 1925, Congress extended the prohibition against corporate contributions in connection with federal elections to include "anything of value," and made the acceptance or conferral of such a contribution a crime. Federal Corrupt Practices Act of 1925, ch. 368, §§ 302, 313, 43 Stat. 1070, 1074. In 1947, Congress strengthened the prohibition again, this time by extending it to "expenditure[s]" as well as contributions. Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (codified at 18 U.S.C. 610). Congress recodified these provisions when it enacted FECA in 1971. The current prohibition on direct

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[5] In enacting the Tillman Act, Congress considered bills that would have "prohibited political contributions by certain classes of corporations." *Automobile Workers*, 352 U.S. at 573. But Congress rejected such a piecemeal approach to the problems of corruption posed by corporate contributions and, instead, applied its prohibition to "any corporation whatever." *Id.* at 575.

corporate contributions in Section 441b of FECA is "merely a refinement of this gradual development of the federal election statute." *NRWC*, 459 U.S. at 209.[6]

2. The longstanding prohibition on direct corporate contributions "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *NRWC*, 459 U.S. at 210; see *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981). In particular, the prohibition was designed to rid the electoral process of the evils associated with both actual corruption and the appearance of corruption created by the prospect of a "financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497; see *MCFL*, 479 U.S. at 257, 260; *NRWC*, 459 U.S. at 207-208; *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978); *Automobile Workers*, 352 U.S. at 570-575; see also *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 389-390 (2000) (discussing the unique threat of corruption posed by direct political contributions).

The government interests in insulating federal elections from the threat of actual and apparent corruption are "of the highest importance." *Bellotti*, 435 U.S. at 788-789; see *id.* at 788 n.26 ("The importance of the governmental interest in preventing [corruption] has never been doubted.") (quoted in *Nixon*, 528 U.S. at 389); *NCPAC*, 470 U.S. at 496-497 ("preventing corruption or the appearance of corruption are * * * compelling government interests"); *Buckley*, 424 U.S. at 27 (The

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[6] On March 27, 2002, President Bush signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. The BCRA made substantial changes to federal campaign-finance laws, but the Act left intact Section 441b's prohibition on direct contributions to federal campaigns by "any corporation whatever." 2 U.S.C. 441b(a).

"appearance of corruption" is "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements."). Indeed, the existence or even suggestion of such corruption "directly implicate[s] the 'integrity of our electoral process,'" *NRWC*, 459 U.S. at 208 (quoting *Automobile Workers*, 352 U.S. at 570), and thus threatens the foundation of American democracy itself.

The prohibition on direct corporate contributions to candidates also responds to the "special characteristics of the corporate structure." *NRWC*, 459 U.S. at 210. As the Court has explained:

> State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

Austin, 494 U.S. at 658-659 (quoting *MCFL*, 479 U.S. at 257). "In return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." *NCPAC*, 470 U.S. at 495. That includes an individual's ability to make direct contributions to a candidate for federal office.[7]

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[7] The prohibition on direct corporate campaign contributions in connection with federal elections also "protect[s] individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to

3. At the same time, the Court has recognized that direct corporate contributions pose particularly acute problems of actual and apparent corruption, and that the federal prohibition on such contributions is "sufficiently tailored" to the government interest in eliminating such corruption "to avoid undue restriction" of First Amendment interests. *NRWC*, 459 U.S. at 208. In particular, the Court has emphasized that the prohibition is the product of the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations." *Id.* at 209 (citation omitted); see also *Austin*, 494 U.S. at 660-661 (state statute modeled on Section 441b is "sufficiently narrowly tailored to achieve its goal" of addressing the unique legal and economic concerns posed by corporations).

In a similar vein, the Court has emphasized that limits on political contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. As the Court recently reiterated:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. * * * A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it * * * does not in any way infringe the contributor's freedom to discuss candidates and issues.

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support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208; see *Pipefitters*, 407 U.S. at 414-415.

Nixon, 528 U.S. at 386-387 (quoting *Buckley*, 424 U.S. at 21); see *id.* at 387 (limitations on campaign contributions leave "communication [in this area] significantly unimpaired").

By contrast, the Court has emphasized that limits on election "*expenditures* generally curb more expressive and associational activity than limits on contributions do," and therefore "deserve closer scrutiny than restrictions on political contributions." *Colorado Republican*, 121 S. Ct. at 2358 (emphasis added); see *MCFL*, 479 U.S. at 259-260, 261-262; *NCPAC*, 470 U.S. at 495-496; *California Med. Ass'n*, 453 U.S. at 196-197; *Buckley*, 424 U.S. at 20-21. So too, the Court has also concluded that "limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence)." *Colorado Republican*, 121 S. Ct. at 2358. Certainly, the direct transfer of money to a political candidate raises the specter of quid pro quo corruption in a more direct and historically familiar way than election expenditures made *independent* of a candidate.[8]

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[8] Although this Court has concluded that legislatures have more leeway under the First Amendment to combat the well-established threat of real or apparent corruption posed by direct contributions and the creation of political debts, it has also recognized that the Constitution allows for regulation of independent election expenditures when a showing is made that such expenditures pose a threat of distorting or corrupting the political process. See, *e.g.*, *Austin*, 494 U.S. at 660 (holding that the "State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations" in state statute modeled on Section 441b of FECA); *Bellotti*, 435 U.S. at 788 n.26

Furthermore, in reviewing challenges to the application of Section 441b's prohibition on direct corporate contributions, the Court has recognized that FECA allows individuals affiliated with corporations to make contributions in connection with federal elections through a separate segregated fund or PAC. See *NRWC*, 459 U.S. at 201; 2 U.S.C. 441b(b)(2)(C). Indeed, such a PAC "may be completely controlled by the sponsoring corporation or union," and "'must be separate from the sponsoring [corporation or union] only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *NRWC*, 459 U.S. at 200 n.4; see *Austin*, 494 U.S. at 660; *Buckley*, 424 U.S. at 28 n.31. The ban on direct corporate contributions imposes even less of a burden on corporations that are subject to the exception recognized in *MCFL*, and therefore may make independent election expenditures directly without the use of a PAC.[9]

In other words, Section 441b's prohibition on direct corporate contributions in connection with federal elections imposes a relatively small burden on First Amendment activity in this vital arena. This Court has accepted the legislative judgment that such a burden is

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(recognizing that in an appropriate case "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections"). In any event, because the question presented in this case is limited to Section 441b's prohibition on corporate *contributions*, there is no occasion for the Court to consider the scope of Congress's authority to limit independent expenditures.

[9] In addition, because Section 441b applies only to corporations and unions, it of course has no effect on the right of individuals to participate in federal election activities.

warranted in light of the overriding government interest in protecting the integrity of federal elections.

B. The Court Has Repeatedly Recognized That The Prohibition On Direct Corporate Contributions Is Valid As Applied To Nonprofit Advocacy Corporations

Congress has unambiguously determined that all corporations—including nonprofit advocacy corporations such as NCRL—should be subject to the prohibition on direct campaign contributions in connection with federal elections. As noted, Section 441b of FECA emphatically makes it unlawful for "*any* corporation *whatever*" to make such contributions. 2 U.S.C. 441b(a) (emphasis added). Thus, the only question in this case is whether that considered legislative judgment should be given effect as applied to a nonprofit advocacy corporation such as NCRL. The Court's prior decisions answer that question in the affirmative.

1. As discussed above, in *NRWC* the Court upheld an FEC determination that a nonprofit advocacy corporation had violated Section 441b by soliciting funds from nonmembers to be used by its PAC to make campaign contributions. 459 U.S. at 201-206. The corporation in *NRWC* was similar in material respects to respondent NCRL. NRWC was a "nonprofit corporation without capital stock" that was formed to educate the public on a particular issue of perceived public concern. *Id.* at 199-200; Pet. App. 2a-3a, *NRWC*, *supra* (No. 81-1506). In addition, while most of NRWC's funding came from individuals, NRWC received some contributions from traditional business corporations. See J.A. 84-86, *NRWC*, *supra* (No. 81-1506).

The Court's decision in *NRWC* focused on whether NRWC had violated Section 441b of FECA by soliciting

PAC funds from individuals who were not members. 459 U.S. at 198-199. But in addressing that question, the Court considered the statute's solicitation limits in the context of Section 441b's broader prohibition on non-PAC contributions by corporations. *Id.* at 207-209. Indeed, the Court explained at the very outset of its decision that the question whether NRWC improperly solicited nonmembers was "but the tip of the statutory iceberg," which included Section 441b's prohibition on direct corporate campaign contributions. *Id.* at 198 n.1. Furthermore, in deciding *NRWC*, the Court specifically considered both the broader "statutory prohibitions," *i.e.*, the prohibition on direct corporate campaign contributions, and the "exceptions," *i.e.*, the provisions allotwing such contributions through PACs. *Id.* at 208.

The Court in *NRWC* explicitly assumed that "NRWC is a corporation covered by § 441b," 459 U.S. at 205 n.6, and unanimously affirmed that Section 441b is a constitutionally legitimate effort by Congress to address "the problem of corruption of elected representatives through the creation of political debts." *Id.* at 208 (quoting *Bellotti*, 435 U.S. at 788 n.26); see *id.* at 210 n.7. As the Court stated: "[Section 441b] reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 209-210. In considering that "legislative judgment," the Court recognized that Section 441b applies to "corporations and labor unions without great financial resources, as well as those more fortunately situated," but refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210.

2. In subsequent decisions, the Court has repeatedly acknowledged that *NRWC* upheld Section 441b's prohibition on direct campaign contributions as applied to

nonprofit corporations that may lack "great financial resources." *NRWC*, 459 U.S. at 210.

a. In *NCPAC*, the Court held unconstitutional a provision of the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, which made it a crime for PACs to make independent *expenditures* in support of presidential candidates that have accepted public funding. See 470 U.S. at 491, 501. But in so holding, the Court reaffirmed the reasoning of *NRWC*, stating: "In *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, *though contributions by the latter might not exhibit all of the evil that contributions by traditionally economically organized corporations exhibit.*" *Id.* at 500 (emphasis added). The Court further emphasized that such "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized" is "proper" in the case of corporations. *Ibid.* But the Court explained that, unlike Section 441b, the statute at issue in *NCPAC* was not limited to corporations, and instead "indiscriminately lump[ed] with corporations any 'committee, association, or organization.'" *Ibid.*

In *NCPAC*, the Court further recognized that "*NRWC* is consistent with th[e] Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates," given that contributions involve direct transfers of funds to candidates and serve only as a general expression of support for a candidate. 470 U.S. at 495-496 (citing *Bellotti*, 435 U.S. at 789-790). *NRWC*, a contribution case, is consistent with the "well-

established constitutional validity of legislative regulation of corporate contributions to candidates for public office." *Id.* at 495. But, the *NCPAC* Court held, the long-accepted justifications for adopting "prophylactic limitations" with respect to campaign contributions did not justify the prohibition challenged in *NCPAC* with respect to election *expenditures*. *Id.* at 501.

b. *MCFL* is to the same effect. As discussed above, in *MCFL* this Court held that Section 441b's prohibition on independent *expenditures* is unconstitutional as applied to a nonprofit advocacy corporation similar to respondent NCRL. 479 U.S. at 241. Like respondent NCRL, MCFL was a nonprofit corporation without capital stock formed for the express purpose of "foster[ing] respect for human life." *Id.* at 241-242; see *id.* at 264. MCFL had a policy of not accepting any contributions from business corporations. *Id.* at 241, 264. As noted above, NCRL does not have such a policy, but states that it is nonetheless "overwhelmingly funded by private contributions from individuals." J.A. 14.

In concluding that Section 441b's prohibition on independent expenditures is unconstitutional as applied to MCFL, the Court distinguished *NRWC*. As the Court explained, "the political activity at issue in that case was *contributions*," not expenditures, and this Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *MCFL*, 479 U.S. at 259-260 (emphasis added); see *id.* at 261-262 ("[T]he Government enjoys greater latitude in limiting contributions than in regulating independent expenditures."); p. 29, *infra*. Moreover, the Court in *MCFL* reiterated that "[i]n light of the historical role of *contributions* in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in [*NRWC*] to

support a limitation on the ability of a committee [covered by Section 441b] to raise money for direct contributions to candidates." *Id.* at 260 (emphasis added).

The Chief Justice's dissenting opinion in *MCFL* underscores the significance of the majority's careful treatment of *NRWC*. See 479 U.S. at 268-270 (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., dissenting in part and concurring in part). After reviewing the history of Section 441b of FECA and noting that "[i]t is, of course, clear that Congress intended § 441b to apply to corporations like MCFL," *id.* at 267 n.1., the Chief Justice analogized the corporation in *NRWC* to the one in *MCFL*. See *id.* at 269 ("The corporation whose fund was at issue [in *NRWC*] was not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public significance."). In addition, the Chief Justice emphasized that in *NRWC* the Court refused to second-guess Congress's judgment "as to the need for prophylactic measures" in the case of Section 441b's prohibition on corporate contributions, and argued that the same restraint was called for in reviewing the statute's prohibition on corporate expenditures. *Id.* at 266.

Pointing to "the historical role of contributions in the corruption of the electoral process," and the heightened First Amendment scrutiny that applies to restrictions on independent spending as opposed to contributions, the Court in *MCFL* disagreed with the Chief Justice that "the desirability of a broad prophylactic rule" with respect to contributions could "justify treating alike business corporations and [corporations such as MCFL] in the regulation of *independent spending*." *MCFL*, 479 U.S. at 260 (emphasis added). But the *MCFL* Court nonetheless reaffirmed that, as it recognized in *NRWC*,

such "a broad prophylactic rule" is permissible with respect to corporate contributions. *Ibid.*

c. In *Austin*, the Court again reaffirmed the rationale of *NRWC*. *Austin* involved a First Amendment challenge brought by a nonprofit advocacy corporation, the Michigan Chamber of Commerce (Chamber), to a state law modeled on Section 441b of FECA prohibiting corporations from making election expenditures. See 494 U.S. at 655 & n.1. In upholding that state law, the Court rejected the Chamber's argument that the provision was "substantially overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital." 494 U.S. at 661. As the Court explained:

> We rejected a similar argument in [*NRWC*], in the context of federal restrictions on the persons from whom corporations could solicit contributions to their segregated funds. The Court found that the federal campaign statute, 2 U.S.C. § 441b, "reflect[ed] a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. 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." Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies [the state law's] general applicability to all corporations.

Ibid. (quoting *NRWC*, 459 U.S. at 209-210) (emphasis in original).[10]

In short, this Court has repeatedly reaffirmed its decision in *NRWC* accepting the legislative judgment to prohibit direct contributions in connection with federal elections by "any corporation whatever," 2 U.S.C. 441b(a), including nonprofit advocacy corporations. As explained next, the court of appeals in this case erred in invalidating that same legislative judgment.

C. The Court Of Appeals Erred In Concluding That Section 441b's Prohibition On Direct Corporate Contributions Is Unconstitutional As Applied To NCRL

In holding that Section 441b's prohibition on direct campaign contributions is unconstitutional as applied to respondent NCRL, the court of appeals reasoned that the FEC's reliance on *NRWC* was misplaced, Pet. App. 26a-27a, and that this Court's decision in *MCFL* dictated the conclusion that Section 441b's prohibition on contributions is invalid as applied to NCRL, *id.* at 23a-25a. That reasoning cannot be squared with this Court's decisions in *NRWC* and *MCFL*, or with numerous other decisions of this Court recognizing Congress's broad authority to limit direct campaign contributions in connection with federal elections.

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[10] The *Austin* Court further rejected the Chamber's argument that the State's prohibition on independent expenditures by corporations was unconstitutional under *MCFL*, finding that the Chamber was distinguishable in several respects from the nonprofit corporation in *MCFL*. See 494 U.S. at 661-665. In that regard, the Court noted, *inter alia*, that the Chamber did not have a policy against accepting contributions from business corporations and, thus, "could, absent application of [the state law], serve as a conduit for corporate political spending." *Id.* at 664.

1. As Judge Gregory concluded in his separate opinion, there is "no way to avoid the import of the Supreme Court's analysis in *NRWC*." Pet. App. 35a. As discussed above, in *NRWC* this Court specifically considered the application of Section 441b's prohibition on direct corporate contributions in the context of an FEC enforcement proceeding involving a nonprofit advocacy corporation similar to NCRL. Moreover, the Court recognized that Section 441b applies to corporations "without great financial resources, as well as those more fortunately situated," and unanimously "accept[ed]" Congress's judgment that due to the unique threat of corruption posed by corporations in connection with federal elections "prophylactic measures" were appropriate to ensure the integrity of the electoral process. *NRWC*, 459 U.S. at 209-210.

To be sure, the precise question presented in *NRWC* focused on whether the nonprofit corporation at issue had violated Section 441b by soliciting PAC funds from nonmembers. But as the Court made clear, Section 441b's limits on PAC solicitations only can be understood in light of the statute's general prohibition on corporate contributions. See *NRWC*, 459 U.S. at 198 n.1 ("As will appear from the following discussion, the phrasing of this question is but the tip of the statutory iceberg."); *id.* at 208 ("We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to [Congress's purposes in enacting Section 441b] to avoid undue restriction on the associational interests asserted by respondent."); *id.* at 208-210 & n.7 (reviewing Section 441b's prohibition on direct corporate contributions).

Furthermore, as discussed in Part B, *supra*, in subsequent decisions this Court has consistently read *NRWC* as broadly upholding Section 441b's prohibition

on direct campaign contributions as an appropriate prophylactic measure to combat the evils of actual and apparent corruption, including with respect to nonprofit corporations that may not pose the same threat of corruption as traditional business corporations. See *NCPAC*, 470 U.S. at 495-496, 500; *MCFL*, 479 U.S. at 259-260; *Austin*, 494 U.S. at 661. Indeed, in *NCPAC* this Court stated that "[i]n *NRWC* we *rightly* concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." 470 U.S. at 500 (emphasis added). So too, in *Austin*, the Court recognized that *NRWC* rejects the notion that a prohibition on direct corporate contributions may not be applied to a nonprofit corporation simply because such a corporation "may not have accumulated significant amounts of wealth." 494 U.S. at 661.

Lower courts have read this Court's decision in *NRWC* in the same fashion. In particular, in *Kentucky Right to Life, Inc.* v. *Terry*, 108 F.3d 637, cert. denied, 522 U.S. 860 (1997), the Sixth Circuit upheld a state law that prohibited, *inter alia*, corporations from making direct campaign contributions in connection with state elections. The plaintiffs in that case argued that the Kentucky Right to Life, Inc. (KRL), a nonprofit advocacy corporation similar to NCRL, could not be barred from making campaign contributions in connection with such elections, and "that the reasoning underlying *NRWC* does not apply to nonprofit corporations like KRL because such corporations do not have the resources to amass the political 'war chests' which

spurred Congress to enact the statute at issue in *NRWC*." *Id.* at 646. The Sixth Circuit disagreed.

The Sixth Circuit explained that, despite the "broad application" of Section 441b of FECA, this Court in *NRWC* deferred to Congress's judgment that "prophylactic measures" were needed to combat the well-documented problems posed by campaign contributions, even in the case of a nonprofit corporation, such as the plaintiff in *NRWC*. See 108 F.3d at 646. Indeed, the Sixth Circuit held that "the reasoning of *NRWC* applie[d] *directly*" to the challenge to the statute at issue in *Kentucky Right to Life*. *Ibid.* (emphasis added); see *ibid.* ("Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the * * * restrictions [in this case].").[11]

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[11] Other courts have also read this Court's decision in *NRWC* as generally affirming the constitutionality of Section 441b's ban on direct corporate contributions. See, *e.g.*, *Mariani* v. *United States*, 212 F.3d 761, 773 (3d Cir.) (en banc) ("Because of the strong implication we draw from *NRWC*, [*NCPAC*], and *Austin*, * * * we feel compelled to reject [plaintiff's] facial challenge to § 441b(a)."), cert. denied, 531 U.S. 1010 (2000); *Athens Lumber Co.* v. *FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (per curiam) ("Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion in [*NRWC*], and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional."), cert. denied, 465 U.S. 1092 (1984). The court of appeals in this case believed that its narrow interpretation of *NRWC* was supported by the District of Columbia Circuit's decision in *FEC* v. *National Rifle Ass'n*, 254 F.3d 173 (2001). See Pet. App. 27a-28a. But as the District of Columbia Circuit emphasized in its order denying rehearing in that case, *National Rifle Ass'n* concerned the limitation on independent *expenditures*. See *FEC* v. *National Rifle Ass'n*, No. 00-5163 (Aug. 23, 2001) ("[W]e emphasize, as should be obvious from our opinion,

2. *MCFL* only bolsters that interpretation of *NRWC*. Indeed, in his dissenting opinion in *MCFL*, the Chief Justice (who authored the unanimous decision for the Court in *NRWC*) reasoned that *NRWC* had settled that Section 441b "is constitutionally sound and entitled to substantial deference" in light of the longstanding "concerns arising from corporate campaign spending." 479 U.S. at 266-267. The majority in *MCFL* did not take issue with either the result or reasoning in *NRWC*, but instead distinguished that case based on the fact that it involved application of Section 441b's prohibition on direct corporate contributions, and not expenditures. See *id.* at 259-260. As the Court explained:

> [T]he political activity at issue in [*NRWC*] was *contributions* * * * . We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in [*NRWC*] to support a limitation on the ability of a committee to raise money for direct contributions to candidates. The limitation on solicitation in this case, however, means that nonmember corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. * * * Therefore, the desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of *independent spending*.

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that nothing in this case involves corporate contributions made directly to candidates.").

Ibid. (citations omitted; emphasis added); see *id.* at 261-262 ("[T]he Government enjoys greater latitude in limiting contributions than in regulating independent expenditures.").

The court appeals reasoned that the distinction between contributions and expenditures is "immaterial" in this case. Pet. App. 29a. But that distinction is the key to *MCFL*'s analysis of *NRWC* and, more fundamentally, is deeply entrenched in this Court's campaign-finance jurisprudence. See *Colorado Republican*, 121 S. Ct. at 2358-2359 (Given the different First Amendment interests at stake, "we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits") (footnote and citations omitted); *Nixon*, 528 U.S. at 386 (discussing the constitutional "line between expenditures and contributions"); *id.* at 386-389; *NCPAC*, 470 U.S. at 495-496 ("a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates"); accord *California Med. Ass'n*, 453 U.S. at 196-197; *Buckley*, 424 U.S. at 20-22; see also *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 610 (1996) (opinion of Breyer, J.) ("The provisions [in this area] that the Court found constitutional mostly imposed *contribution* limits.") (emphasis in original).

The court of appeals accordingly erred in concluding that "[t]he rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions." Pet. App. 25a. Moreover, that rationale is particularly misplaced with respect to a nonprofit advocacy corporation such as respondent NCRL, which does not

have a policy against accepting contributions from traditional business corporations. See J.A. 14-15. As this Court recognized in *Austin*, 494 U.S. at 664, such a corporation could "serve as a conduit for corporate political spending," and thus presents a risk of actual or apparent corruption. In any event, this Court has already accepted Congress's judgment that a broad prophylactic rule proscribing campaign contributions by "any corporation whatever," 2 U.S.C. 441b(a), is warranted to ensure the integrity of federal elections. There is no more reason to second-guess that considered legislative judgment today than there was to do so in *NRWC*.

3. The court of appeals also faulted Section 441b on the ground that it constitutes "a complete ban on NCRL's making contributions." Pet. App. 12a; see *id.* at 28a. But in *Austin*, this Court specifically rejected a similar argument in the context of a state law modeled on Section 441b, emphasizing that the law left corporations free to engage in political activity through a PAC. See *Austin*, 494 U.S. at 660 ("Contrary to the dissents' critical assumptions, the Act does not pose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds"). Similarly, in *NRWC* this Court recognized that, while barring direct contributions, Section 441b nonetheless permits corporations to participate "in the federal electoral process by allowing them to establish and pay the administrative expenses of [a PAC]." 459 U.S. at 201. As noted, respondent NCRL has already established and made political contributions and expenditures through such a PAC. See p. 6, *supra*.

Moreover, corporations that fit within the exception established by *MCFL* enjoy a unique opportunity to participate in the political process more directly

through independent expenditures. For such corporations, Section 441b bars only direct contributions which pose the greatest risk of actual and apparent corruption yet involve less expressive activity than independent expenditures. In that regard, respondent NCRL occupies a much more favorable position under Section 441b than most corporations. As discussed, the court of appeals held that under this Court's decision in *MCFL* Section 441b's prohibition on independent expenditures may not be applied to NCRL. See Pet. App. 21a.

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This Court has repeatedly affirmed the "constitutional validity" (*NCPAC*, 470 U.S. at 495) of the categorical prohibition at issue in this case on direct campaign contributions by corporations, and emphasized that it will not "second-guess a legislative determination as to the need for [such] prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210. There is no reason for the Court to reconsider, much less upset, that settled precedent in this case.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as the court held that Section 441b of FECA's prohibition on direct corporate contributions is unconstitutional as applied to respondent NCRL.

Respectfully submitted.

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