No. 02-403

In The
Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Petitioner*,

v.

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC., *Respondents*.

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

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Counterstatement of Question Presented

Are expressive associations that this Court held are not a prohibited source for independent expenditures, because they pose no potential for political corruption, also not a prohibited source for contributions?

Corporate Disclosure Statement

This statement is unchanged. *Brief in Opposition* at ii.

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Counterstatement of the Case

The government's Statement of the "case" and "facts," Rule 24.1(g), is mainly the government's spin on prior cases. *Brief for the Petitioners* (*Pet. Brf.*) at 2-5. This spin distorts the holding of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), and ignores the application of that holding by the court below.

This Court, in *MCFL*, held that certain nonprofit ideological corporations are not a prohibited source for political activity because they do not "merely pose[] less of a threat of the danger that has prompted the regulations. Rather [they] do[] not pose such a danger at all." *Id.* at 263. The "danger," of course, was the "*potential* for unfair deployment of wealth for corporate purposes," and this Court held that "[g]roups such as MCFL . . . *do not pose that danger of corruption*." *Id.* at 259 (emphases added).

Thus, while this Court focused, in *MCFL*, on the nature of the *group*, which "do[es] not pose that danger of corruption," the government shifts the focus to the group's *expenditures*. *Pet. Brf.* at 4 ("[T]he entity's independent political expenditures did not pose the 'danger of corruption' justifying the regulation of election expenditures by traditional business corporations."). The critical question in *MCFL*, however, was whether MCFL could be prohibited from all "political activity," because the group's nature required "concern over the corrosive influence of concentrated corporate wealth." 479 U.S. at 257. However, this Court held that "MCFL is not the type of 'traditional [corporation] organized for economic gain,' *NCPAC* [*v. FEC*], 470 U.S. [480,] 500 [(1985)], that has been the focus of regulation of corporate political activity." 479 U.S. at 259.

This focus on the nature of the group, rather than the nature of the "political activity," was the critical point in the decision of the court below, which the government

also ignored. *Pet. Brf.* at 7-8. As the Fourth Circuit explained:

> Organizations that in substance pose no risk of 'unfair deployment of wealth for political purposes' may not be banned from participating in political activity simply because they have taken on the corporate form. *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. The 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. . . . A corporation that qualifies for an *MCFL* exemption poses no special threat to the political process. *See MCFL*, 479 U.S. at 263, 107 S. Ct. 616 ("It is not the case . . . that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all."). As a consequence, neither [North Carolina Right to Life]'s expenditures nor its contributions may be prohibited under the First Amendment.

Petition Appendix (*P.A.*) at 25a.

This distinction is especially important in light of the government's characterization of North Carolina Right to Life (NCRL), in the Question Presented, as "a nonprofit corporation whose primary purpose is to engage in political advocacy." *Pet. Brf.* at I. It is undoubtedly true that "NCRL, like MCFL, 'was formed to disseminate *political* ideas, not to amass capital.'" *P.A.* at 23a (citing *MCFL*, 479 U.S. at 259) (emphasis added). However, its primary purpose is not candidate advocacy, since "should MCFL's independent spending become so extensive that the organization's *major purpose* may be regarded as *campaign activity*, the corporation would be classified as a political committee. See *Buckley*[*v. Valeo*], 424 U.S. 1[,]

79 [(1976)]." *MCFL*, 479 U.S. at 262 (emphases added).[1] By characterizing NCRL as a corporation whose "primary purpose" is "political advocacy," without clearly defining such advocacy as issue advocacy, the government implies that NCRL is like a PAC. This is not true.[2]

NCRL is like MCFL: "Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of candidates," *MCFL*, 479 U.S. at 253 n.6, and, as such, qualifies for the *MCFL* exemption from the prohibition on corporate political activity in federal election law. 2 U.S.C. § 441b.[3]

Summary of the Argument

The government insists that form governs—NCRL made its Procrustean bed by incorporating for liability protection, and NCRL should now lie quietly while Procrustes racks it to fit the business corporation frame. Deference must be accorded congressional preference for a bright-line, prophylactic rule, despite complete absence of the corruption potential justifying such a rule.

In *MCFL*, however, this Court recognized that pro forma "rel[iance] on the long history of regulation of

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[1] *See also infra*, note 3, discussing the IRS's "primary activity" test, which prohibits nonprofits from having "expenditures for political campaigns" as their "primary activity."

[2] The undisputed facts about NCRL are succinctly set out in the verified complaint. *J.A.* at 10-17.

[3] The *Brief Amicus Curiae of the Brennan Center for Justice at New York University School of Law in Support of Petitioner* solely addresses FEC regulation 11 C.F.R. 114.10 (defining *MCFL*-type corporations) and the holding of the court below that NCRL qualifies for the *MCFL* exemption, an issue the FEC lost below and for which the Solicitor General acknowledges that he did not seek certiorari review. *Pet. Brf.* at 6 n.3, 8 n.4. Thus, this *Brief Amicus Curiae* should be disregarded.

corporate political activity" "requires close examination of the underlying rationale for this longstanding regulation," *MCFL*, 479 U.S. at 256-57, and that "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate *form per se*, but about the *potential* for unfair deployment of wealth for political purposes. Groups such as MCFL . . . *do not pose that danger of corruption*." *Id.* at 259 (emphases added). This was because the *MCFL* classification was self-limiting—any corporation attempting to realize the "potential" that made business corporations a threat would immediately remove itself from the *MCFL* classification. *Id.* at 263-64. Thus, *MCFL*-type corporations were different in "kind," not "degree," and deference to congressional "desire for a bright-line rule" would fail constitutional mandate. *Id.* at 263.

This rationale is equally applicable whether the proposed political activity is an independent expenditure or a contribution to a candidate. While it is true that this Court has distinguished between expenditures and contributions—upholding limits on the amount of contributions but striking down limits on expenditures—this was not based on the source of the contribution, but on its amount. Here, the question is not its amount, but its source—contributions from corporations would be subject to contribution limits. Because *MCFL*-type corporations pose no danger of corruption, they should not be a prohibited source of political activity, whether independent expenditure or contribution.

Because there is no reason to overturn the rationale of *MCFL*, that rationale should be accorded stare decisis effect and substance should triumph over form. Prophylaxis is unnecessary absent anything to prevent, and a "bright-line" rule that violates the Constitution cannot be upheld.

Argument

I. Expressive Associations Give Ordinary Americans an Amplified Voice on Issues Vital to the Republic.

Issue advocacy groups, such as NCRL, are private, expressive associations that provide a vehicle for average citizens to effectively participate in the political process by pooling resources to amplify their voices to advocate issues of public concern, lobby for legislation, and directly promote the election of candidates favoring those issues. The wealthy and powerful have no such need,[4] but citizen

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[4]The *Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Petitioner* represents the view of rich, powerful, influential individuals who are experienced at expressing themselves and educated in the intricacies of complying with legal rules. ATLA is approximately 50,000 plaintiffs' trial lawyers. *Id.* at 2. They have little need for *MCFL*-type expressive associations in order to be heard in the political marketplace. Perhaps only the Screen Actors Guild represents members with more personal financial clout. While ATLA asserts that it "is also a nonprofit corporation," *id.*, it made no representation that it is an *MCFL*-type organization. And ATLA's self-interested membership is a far cry from the very ordinary Americans that make up diminutive, poor, public-interest NCRL.

Thus, when these lawyers say that *they* have a PAC and compliance burdens "are not so onerous," *id.*, they are wholly out of touch with the reality of NCRL's experience and of this Court's description of the significant burden that such requirements impose on unsophisticated organizations of ordinary folks with little legal experience and few resources. *MCFL*, 479 U.S. at 254-56; *id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment). *See infra* Part IV.B (discussion of failure of PAC alternative).

ATLA argues that even if "NCRL is exempted from § 441b requirements, NCRL would remain subject to the ban on campaign contributions which it accepted in exchange for tax exemption." *ATLA Brf.* at 14 (citing I.R.C. § 501(c)(4) and Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990)). However, NCRL's tax-exempt status under § 501(c)(4) does not prohibit it from making contributions to

(continued...)

groups are a vital populist tool for maintaining the equality envisioned in the *Declaration of Independence*. *See NCPAC*, 470 U.S. at 495 ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources."). And contributing in association with like-minded persons to like-minded candidates is a vital part of advocating for issues. *P.A.* at 6a-7a.

Authentic grassroots citizen groups are not part of the problem this Nation faces, but part of the solution. Americans have been from the beginning a nation of joiners,[5] as Alexis de Tocqueville observed nearly two

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[4](...continued)
candidates. Organizations exempt under § 510(c)(4) "may engage in political campaigns on behalf of or in opposition to candidates for public office provided that such intervention does not constitute the *organization's primary activity*." Dep't of Treas., I.R.S., *Exempt Organizations-Technical Instruction Program for FY 2003* at L2 (*Exempt Organizations*) (emphasis added). This is known as the "primary activity" test, deriving from Treas. Reg. § 1.501(c)(4)-1(a)(2)(i), which states that "[a]n organization is operated exclusively for the promotion of social welfare *if it is primarily engaged* in promoting in some way the common good and general welfare of the people of the community" (emphasis added). Thus, "IRC 501(c) organizations may generally make expenditures for political campaigns if such activities (and other activities not furthering its exempt purposes) do not constitute the organization's primary activity." *Exempt Organizations* at L3 (citing Rev. Rul. 81-95, 1981-1 C.B. 332 ("less than primary participation in political campaigns will not adversely affect its exempt status")).

[5]The right to assemble to petition the government as an expressive association is a deeply rooted tradition, tracing its lineage as far back as the association of nobles that wrung from the English (continued...)

centuries ago, and such association is part of the genius of America: "Americans of all ages, all conditions, and all dispositions constantly form associations." Alexis de Tocqueville, 2 *Democracy in America* 106 (Phillips Bradley, ed., Vintage Books ed. 1990) (1840) (chap. V, para. 2). He added:

> In democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made.
>
> Among the laws that rule human societies there is one which seems to be more precise and clear than all the others. If men are to remain civilized or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased.

Id. at 110 (chap. V, para. 14).

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[5](...continued)
monarchy King John's Charter (Magna Carta), which itself acknowledged a right to petition the King at chapter 21. *See* Richard L. Perry & John C. Cooper, eds., *Sources of Our Liberties*, 21 (rev. ed. 1991) (*Sources*).

> The rights of the people to assemble and petition the government for a redress of grievances are, of course closely related to the right of free discussion. For centuries petitions of the people had been used to present grievances to the king. Flagrant violations of this customary privilege by James II (1685-89) led to one of the provisions of the English Bill of Rights of 1689.

Sources, at 426 (footnote omitted).

American colonists assumed that association and assembly to petition were their rights as subjects of the British crown, asserting, "That [the people] have a right peaceably to assemble, consider of their grievances [sic], and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." Declaration and Resolves of the First Continental Congress, Oct. 14, 1774 (8th Resolution) (quoted in *Sources* at 288).

Tocqueville concluded that free association is an inalienable right and issued a warning against restricting it:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. *No legislator can attack it without impairing the foundations of society*.

Id. at 196 (chap XII, para. 17) (emphasis added).

Nonprofit associations continue to perform this vital role in our modern democracy:

> In addition to solving problems themselves, nonprofit organizations also play a vital role as mechanisms for mobilizing broader public attention to societal problems and needs. In this sense, they give crucial support to another basic value, the value of free expression. In a complex society such as ours, the right to free expression has little effective meaning unless it is joined to the right of free association, so that individuals can merge their individual voices and thereby make them effective. Nonprofit organizations are among the principal vehicles for doing this. Indeed, most of the social and political movements that have animated American life over the past half century or more—the women's suffrage movement, the labor movement, the civil rights movement, the environmental movement, the consumer movement, the equal rights movement, and now the

> conservative movement[6]—have operated through private, nonprofit organizations. By making it possible to surface significant social and political concerns, to give voice to under-represented people and points of view, and to integrate these perspectives into social and political life, these organizations function as a kind of social safety valve that has helped to preserve American democracy and maintain a degree of social peace in the midst of massive, and often dramatic, social dislocations.

Lester M. Salamon, *Holding the Center: America's Nonprofit Sector at a Crossroads* 9 (1997).

The right to associate and the ability of average citizens to thereby affect public policy are so essential to the Republic that this Court has recognized free association as a fundamental right with powerful constitutional protection. The right was articulated most fully in *NAACP v. Alabama*, 357 U.S. 449 (1958), when this Court rejected Alabama's attempt to compel disclosure of the membership list of the National Association for the Advancement of Colored People. The unanimous Court strongly affirmed constitutional protection for free political association to amplify the voices of ordinary Americans:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that

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[6]Jeffrey Berry argues that liberal groups have had the most success in influencing public policy through the efforts of nonprofit advocacy groups. Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* 2-3 (1999).

> freedom in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to *political*, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61 (citations omitted) (emphasis added).[7]

Since *NAACP v. Alabama*, this Court has consistently protected the freedom to associate for private groups engaged in First Amendment protected activities. *See NAACP v. Button*, 371 U.S. 415 (1963) (striking down a prohibition on soliciting prospective litigants for civil rights cases by attorneys for the NAACP); *Healy v. James*, 408 U.S. 169 (1972) (requiring college to justify denying recognition to student organization); *In re Primus*, 436 U.S. 412 (1978) (holding unconstitutional rule barring lawyer solicitation as applied to ACLU); *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982) (holding that NAACP boycott activities were protected by First Amendment).

Protection of the association right focuses on the difference between expressive and nonexpressive associations. "[T]his Court's case law recognizes radically different constitutional protections for expressive and nonexpressive associations. . . . The proper approach to analysis of First Amendment claims of associational

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[7]The freedom of association finds its origin in the nexus between the freedom of speech and the freedom of assembly, *see De Jonge v. Oregon*, 299 U.S. 253 (1937); *Thomas v. Collins*, 323 U.S. 516 (1945), and was first explicitly recognized by this Court in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

freedom is, therefore, to distinguish nonexpressive from expressive associations and to recognize the former lack the full constitutional protections possessed by the latter." *Roberts v. United States Jaycees*, 468 U.S. 609, 638 (1984) (O'Connor, J., concurring). In so doing, this Court has found the Jaycees and the Rotary Club to be nonexpressive associations, *id.*; *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and the Boston St. Patrick's Day parade and the Boy Scouts to be expressive associations. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of America v. Dale*, 520 U.S. 640 (2001).

This association liberty has also been vigorously protected from campaign finance restrictions. The association liberty, like political speech, is a First Amendment right and "the constitutional guarantee [of the First Amendment] has its *fullest and most urgent application* precisely to the conduct of *campaigns for political office*." *Buckley*, 424 U.S. at 14-15 (emphases added). The most obvious example of political associations are political parties. Political parties are clearly expressive associations and this Court has rigorously protected the associational rights of political parties from various infringements. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Sweezy*, 354 U.S. 234.

However, the freedom of association extends to all private political associations. In *Buckley*, this Court reaffirmed the constitutional protection for association: "effective advocacy of both *public* and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of

political beliefs and ideas." 424 U.S. at 15 (emphases added). *See also NCPAC*, 470 U.S. 480; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

Nor does an expressive association lose its First Amendment rights by incorporating. At least since *First National Bank v. Bellotti*, 435 U.S. 765 (1978), this Court has recognized that the abridgement of the First Amendment rights of corporations demanded strict scrutiny. *Id.* at 786-787. Thus, this Court's cases have turned on whether a sufficiently compelling state interest has been advanced to justify the infringement. In considering the claimed justifications for heightened restrictions on corporations, this Court has distinguished between business corporations and expressive associations. Corporations generally can be limited in their political activity regarding candidate elections, whether in the form of contributions, *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*), or independent expenditures, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), because the attributes of business corporations pose a threat of corrupting the electoral process.

However, because nonprofit ideological corporations pose no such threat, the general corporate ban on political activity cannot be constitutionally applied to them. *MCFL*, 479 U.S. 238. Thus, the decisive issue is whether the corporation is an expressive association.[8] If it is, the corporation's political activity cannot be constitutionally limited.

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[8]In *NAACP v. Alabama*, the NAACP was objecting to a requirement that the State of Alabama imposed on foreign corporations seeking to qualify to do business in the state. There was no suggestion that the NAACP's incorporated status justified an infringement of its associational rights.

II. Expressive Associations' Political Activity Enjoys High First Amendment Protection, and Because This Case Involves a Prohibited Source Instead of an Amount Limit, Strict Scrutiny Is Required.

Since this case involves the constitutional guarantees of free expression and association, strict scrutiny is required: the government must demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest. *Buckley*, 424 U.S. at 64 ("[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). This highest level of constitutional protection flows from the essential function of expressive associations in allowing effective participation in our democracy for ordinary Americans.

In cases involving limits on the amount of contributions to candidates, this Court has employed only heightened scrutiny, i.e., government must demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000) (*Shrink*). But as shown below, this case is not about a limitation on *how much* an approved-source entity may make (e.g., $2,000), rather it is about whether a corporation that poses no potential of political corruption is a prohibited *source* of contributions.

The Fourth Circuit employed both levels of scrutiny in this case: strict scrutiny to decide the challenge to restrictions on independent expenditures and heightened scrutiny to decide the present prohibited source issue. *P.A.* at 2a. As demonstrated by the Fourth Circuit, even under heightened scrutiny, this case should be decided in favor of NCRL. *P.A.* at 24a (rejecting the administrative convenience of a bright line rule as a "sufficiently important interest" because "[t]his formulation requires

something more exacting than rational basis review."). However, the proper level is strict scrutiny.

Avoiding form over substance requires a close examination of the reasons why there is a slightly lowered standard of review for limits on contribution *amount*s to see if that rationale is applicable where an organization is deemed to be a prohibited *source* of contributions of any amount.

The cases cited by the government setting a lower standard of scrutiny for contribution limits are applicable only to laws that limit the size of contributions. *See*, *e.g.*, *Pet. Brf.* at 15-16. While this Court has described limits on the amount of a contribution as imposing only marginal restrictions on contributor's communication, that conclusion was based upon the premise that, "'[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated act of contributing.'" *Shrink*, 528 U.S. at 386 (quoting *Buckley*, 424 U.S. at 21). A limit on the size of the contribution, therefore, "permits the symbolic expression of support evidenced by a contribution." *Id.* at 387 (quoting *Buckley*, 424 U.S. at 21).

However, in the present case, § 441b does not merely limit how much money NCRL can contribute to candidates, it imposes "a substantial restriction"[9] on NCRL's

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[9]While § 441b bans corporate contributions, it also establishes the PAC option found inadequate in *MCFL*. 479 U.S. at 251-56; *id.* at 265-66 (O'Connor, J., concurring). The plurality in *MCFL* did not style § 441b's prohibition on corporate independent expenditures a "ban," because of the PAC option, recognizing that "[w]hile [the restriction on use of general funds] is not an absolute restriction on speech, it is a substantial one." *MCFL*, 479 U.S. at 252. Similarly, in *Austin*, this Court viewed Michigan's prohibition on corporate independent expenditures as "not stifl[ing] corporate speech entirely"

(continued...)

ability to "affiliate . . . with a candidate" or to make even a purely symbolic "general expression of support for the candidate and his views" through a contribution to a candidate. *See Buckley*, 424 U.S. at 21-22. Prohibiting any and all contribution by the corporate entity must be held to the higher scrutiny since even "the symbolic expression of support evidenced by a contribution" is prohibited. *See id.* at 28 (contribution limits "leav[e] persons free . . . to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources"); *Shrink*, 528 U.S. at 398 n.1 (Stevens, J., concurring) (Campaign finance restrictions must be subjected to a higher level of scrutiny where "the prohibition entirely forecloses a channel of communication. . . . 'The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.'" (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988))).

Similarly, limits on the associational activities of expressive associations have been found to violate the First Amendment where "the forced inclusion of [the unwanted member] would significantly affect its expres-

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[9](...continued)
because the independent expenditures could still be done under a PAC. However, since the PAC option still "burden[s] expressive activity[,] . . . [the prohibition on corporate independent expenditures] must be justified by a compelling state interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 658. This Court still uses the term "ban" when speaking of Michigan's prohibition on corporate independent expenditures, and some members of this Court believe that such a prohibition is rightly styled a "ban." *Id.* at 654 ("The issue before us is only the constitutionality of the State's ban on independent expenditures."), 681 n.* (Scalia, J., dissenting) ("[T]he corporation *as a corporation* is prohibited from speaking." (emphasis in original)), 698 (Kennedy, J., dissenting, joined by O'Connor and Scalia, JJ.) ("The Michigan statute bans [the corporate ad].").

sion," but similar rules have been acceptable where "the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express." *Boy Scouts*, 530 U.S. at 656-658 (citation omitted). In each case, strict scrutiny was applied.

The present case is about a *ban* on association between an expressive association and a candidate. Consequently, a higher standard of review is appropriate. However, as the Fourth Circuit determined, under either strict or heightened scrutiny, there is no justification for declaring NCRL a prohibited source of contributions absent any potential of political corruption.

III. Expressive Associations That Incorporate for Liability Protection, Not Business Advantage, Lack the Potential for Political Corruption.

For the government, the pro forma key is simple incorporation—if an association is incorporated, that controls, and it can't make contributions. But that is too simplistic. A political action committee (PAC) may incorporate for liability advantage, and PACs may contribute to candidates. 11 C.F.R. § 114.12. So the mere fact of incorporation cannot be the analytical key. It must be the nature of the organization.

The analytical key established by this Court is to reject pro forma analysis of *MCFL*-type corporations and "close[ly] examin[e] . . . the underlying rationale for . . . longstanding regulations." *MCFL*, 479 U.S. at 256-57. Applying this key, the Court held that "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate form *per se*, but about the *potential* for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose

that danger of corruption." *MCFL*, 479 U.S. at 259 (footnote omitted) (emphasis added).

A. Expressive Associations Incorporate Primarily for Liability Protection, Not Business Advantage.

Nonprofit organizations have only three choices as to form—trust, association, or corporation.[10] The majority of nonprofits are incorporated. Incorporation provides the organization with limited liability for its members, centralized management, and perpetual duration. The law relating to corporations is more defined, and, as a general rule, provides more flexibility in terms of operational guidelines for the nonprofit organization. By contrast, associations generally have no power of perpetual duration, cannot contract, and cannot hold title to property. And trusts are managed by trustees and are governed by state statute, common law, and the provisions of the trust instrument. Marilyn E. Phelan, *Nonprofit Enterprises* § 1:03 (2000).

Although associations and trusts may have the features of centralized management and may also have perpetual duration, limited liability is the uniquely important benefit provided by the corporate form to *MCFL*-type corporations. Because *MCFL*-type organizations gain no advantage in incorporating with respect to (1) taxes (both nonprofit associations and nonprofit corporations are not taxed),[11] (2) business income (busi

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[10]The partnership is not an alternative. Partnerships are associations operated for profit. *See* Uniform Partnership Act § 6.

[11]Business corporations, in contrast, have the tax benefit of shielding income from personal income tax and thereby amassing capital. Historically, this has been an advantage of the corporate form because the corporate income tax was much lower than the personal

(continued...)

ness income by a nonprofit corporation is taxed and, if the amount of business income becomes more than de minimis, the nonprofit no longer qualifies as *MCFL*-type corporation), or (3) capital-acquisition from shareholders (it has none), the central attraction for nonprofit organizations to incorporate is to limit liability. *MCFL*, 479 U.S. at 263-64.

Thus, "[w]hile MCFL[-type corporations] may derive some advantages from [their] corporate form, those are advantages that redound to [their] benefit as a political organization, not as a profit-making enterprise. In short, MCFL[-type corporations are] not the type of traditional [corporation] organized for economic gain." *Id.* at 259 (quotation marks omitted). Consequently, there is no potential wealth-enhancing business advantage from the corporate form to corrupt the political system. *Id.*

B. *MCFL*-type Expressive Associations Lack the Potential for Political Corruption and Differ in Kind from Business Corporations.

In *MCFL*, this Court decided that an *MCFL*-type corporation has no "potential" for corrupting the political system. *Id.* That issue is already settled and entitled to stare decisis respect. However, the government seeks to demonstrate a corruption potential by resorting to a high level of generality in discussing prior case law. For example, the government speaks often of "political debts," "corruption," and "prophylaxis." *See*, *e.g.*, *Pet. Brf.* at 2-4.

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[11](...continued)
income tax. So using the corporate form permitted faster accumulation of capital and, as a consequence, using such funds for political purposes was considered unfair and corrupting to the political system. But nonprofit groups do not pay tax, whether or not they are incorporated, so the corporate form provides no advantage in amassing capital for nonprofit groups.

But the government fails to come to grips with the specific details of alleged corruption, unlike *MCFL* and the Fourth Circuit. Doing so reinforces this Court's holding in *MCFL* that *MCFL*-type corporations pose no potential of threat to the political system. The Fourth Circuit precisely examined the three types of corruption: (1) quid pro quo, (2) monetary influence, and (3) distortion. *P.A.* at 18a-19a, 22a-25a.[12] As shall be seen, the first type is not unique to corporations and is prevented by limits on the amount of contributions and public disclosure. The latter two are not applicable to *MCFL*-type corporations.

1. There Is No Quid Pro Quo Corruption.

In *Buckley*, this Court noted that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley* 424 U.S. at 26-27. Recognizing the cure for the "large contribution" problem in public disclosure and limits on the amount of the contribution, this Court approved "[t]he Act's $1,000 contribution limitation, [which] focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified . . . ." *Id.* at 28.

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), this cure remains intact. 2 U.S.C. § 441a(a)(1) (limit raised to $2,000 to partially account for inflation). The limits apply to any "person," encompassing corporations. 2 U.S.C. § 441a(a)(1) ("No person shall make contributions . . . "); 1 U.S.C. § 431(11) ("The term 'person'

[12]The uncontroverted evidence of this case includes no factual evidence of corruption to the political system by NCRL or any other *MCFL*-type corporation.

includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. . . ."). Thus, the cure for quid pro quo corruption is already in place, and it is certainly more closely tailored to the large contribution problem than making NCRL a prohibited source, as does § 441b.

While "prohibited source" restrictions are rare, the courts have responded, as suggested above, to the claim that quid pro quo corruption justifies a total ban by rejecting it. *See*, *e.g.*, *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1323 (9th Cir. 1992) (striking down inter-candidate transfer ban because "[t]he potential for corruption stems not from campaign contributions per se but from large campaign contributions. The inter-candidate transfer ban prohibits small contributions from one candidate to another as well as large contributions."); *Vanatta v. Keisling*, 151 F.3d 1215, 1221 (9th Cir. 1998) (striking down a ban on out-of-district contributions because quid pro quo "corruption stems from large campaign donations and not small ones" and the California ban on out-of-district contributions "did not distinguish on the basis of size of donation."). A limit on the amount of a contribution may only be properly tailored to quid pro quo corruption if it "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified." *Buckley*, 424 U.S. at 28. A ban on contributions is not.

Quid pro quo corruption is, of course, not uniquely related to any corporate-form advantage, and there has been no showing that contributions from an *MCFL*-type corporation, such as NCRL, pose a greater danger of corruption than contributions of like size from individuals. Since this Court has "never accepted mere conjecture

as adequate to carry a First Amendment burden," *Shrink*, 528 U.S. at 392, this lack of evidence of special need is fatal to the government's attempted justification. As the Fourth Circuit correctly noted, *MCFL*-type corporations are "more akin to an individual or an unincorporated advocacy group than a for-profit corporation" because *MCFL*-type corporations "do not avail themselves of the state-conferred advantages associated with the corporate form, which is the rationale for regulating corporate activity in the first place." *P.A.* at 22a. Consequently, the ban on *MCFL*-type corporate contributions is underinclusive for not banning contributions by "individuals or unincorporated associations [that bear] a strong commitment to an issue or a candidate." *Id.*[13] An underinclusive statute undercuts the government's claim that it has a special interest in limiting some alleged harm. *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2537 (2001).

And factually, a pro-life group such as NCRL is among the least likely of all public interest groups to engage in quid pro quo corruption because it would never give money to a legislator who favored abortion rights in an effort to procure a favorable vote on pro-life legislation. There is no evidence that NCRL or any pro-life group has ever made independent expenditures on behalf of such candidates, nor have their PACs ever given money to

[13]If there were some particular "quid pro quo" corruption problem here because corporate officers were directing the contributions, that problem is not remedied by only allowing corporate contributions through the corporation's PAC. As the government acknowledges, corporate officers also direct contributions to candidates from their PAC. *Pet. Brf.* at 3, 17. Corporate officers can equally seek quid pro quo benefits by directing PAC contributions to candidates as by making corporate contributions. Thus, § 441b would also be fatally underinclusive for banning one but not the other.

such candidates. Members would simply not tolerate such action on principle.

2. There Is No Monetary Influence Corruption.

In *National Right to Work Committee*, this Court expressed concern over "war chests" amassed using the special advantages of the corporate form that could be used for political purposes. *NRWC*, 459 U.S. at 207-08. The government has a compelling interest in preventing what the Fourth Circuit called this "monetary influence" type of corruption. *P.A.* at 18a-19a (citing for the classification Thomas Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment. 127, 131-33 (1997)); *NRWC*, 459 U.S. at 207-08; *MCFL*, 479 U.S. at 257.

The Fourth Circuit correctly decided, however, that *MCFL*-type corporations "do not avail themselves of the state-conferred advantages associated with the corporate form, which is the rationale for regulating corporate activity in the first place." *P.A.* at 22a. They rely on donations, not profit. *P.A.* at 22a. Therefore, "[i]t is simply implausible to argue that a small nonprofit accepting individual contributions from like-minded donors poses the same risk to our political order as a Fortune 500 company." *P.A.* at 22a. Furthermore, even though NCRL has taken the corporate form, it "was formed to disseminate political ideas, not to amass capital." *P.A.* at 23a (citing *MCFL*, 479 U.S. at 259). Thus, "[t]he advantages NCRL derives from taking on the corporate form are those 'that redound to its benefit as a political organization, not as a profit-making enterprise." *Id.* (citing *MCFL*, 479 U.S. at 259).

And factually, NCRL has no "war chests" of any sort. As may be readily calculated from the undisputed verified complaint, the total NCRL receipts in 1996, an election

year, were $154,637.29. In 1997, they were $155,125.77. In 1998, an election year, they were $118,372.17. *J.A.* at 14-15, ¶¶ 19-23. Out of this annual income, which is less than that of an Associate Justice of this Court,[14] NCRL runs a state-wide public interest organization and provides "reasonable compensation for services rendered to the corporation." *J.A.* at 14, ¶ 14; *see*, *e.g.*, <http://www.ncrtl.org/> (NCRL's web page).

3. There Is No Distortion Corruption.

In *MCFL*, this Court identified a third concern, that "[t]he resources in the treasury of a business corporation" might not be "an indication of popular support for the corporation's political ideas," *MCFL*, 479 U.S. at 258, resulting in "resources amassed in the economic marketplace" that could be used to "unfair advantage in the political marketplace." *Id.* at 257. A related concern is that corporate shareholders or members would have an "economic disincentive for disassociating with [the corporation] if they disagree with its political activity." *Id.* at 264.

The Fourth Circuit recognized, *P.A.* 23a, that this Court has already answered the question about "distortion corruption," deciding that donors contribute to *MCFL*-type corporations "precisely because they support [their] purposes" and because political activity of *MCFL*-type corporations are a "more effective means of advocacy" than trying to advocate alone. *MCFL*, 479 U.S. at 260-61. As the Fourth Circuit aptly phrased it: "There is simply no danger that a nonprofit advocacy group's cause will bear no relation to the beliefs of its contributors and

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[14] American Bar Association & Federal Bar Association, *Federal Judicial Pay Erosion: A Report on the Need for Reform* at 19 (App. I) (Feb. 2001).

members because the group's *raison d'etre* is to amplify and publicize those beliefs." *P.A.* at 23a.

And factually, "NCRL has engaged in traditional fundraising activities of not-for-profit corporations, such as walk-a-thons and raffles, and engages in minor business activities incidental and related to its advocacy of issues, such as receiving special event revenue from the price of admission to its conventions and revenue from distribution of pro-life literature." *J.A.* at 15, ¶ 25. The percentage received from such "business" activities is "negligible in relation to . . . total revenue." *Id.*

The insubstantial percentage of NCRL's income that comes from business corporations comes overwhelming through an Amerivision long-distance program that permits customers to designate which nonprofit shall receive a contribution from Amerivision equal to 10% of the customer's monthly long-distance charge. Persons who designate NCRL to Amerivision, raise pledges for a walk-a-thon, buy an NCRL raffle ticket, or pay to attend a NCRL event will clearly understand that the money supports NCRL's cause.[15]

In *MCFL*, this Court specified that an *MCFL*-type corporation must not have "shareholders or other persons affiliated so as to have a claim on its assets or earnings," so that there will be "no economic disincentive for disassociating with it if they disagree with its political activity." *MCFL*, 479 U.S. at 264.

In *Austin*, this Court decided that,

> [a]lthough the Chamber . . . lacks shareholders, many of its members may be . . . reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they

[15]If not, this Court proposed the less restrictive alternative of requiring that people simply be so notified. *MCFL*, 479 U.S. at 261.

> wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community. The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter.

Austin, 494 U.S. at 663. The Court concluded: "Thus, we are persuaded that the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL in this respect." *Id.*

NCRL has no shareholders. It provides no benefits—no endorsed insurance programs, no credit card program, no loan programs, and no discounts on prescriptions, hotels, rental cars, moving expenses, or similar discounts on goods and services—unlike many organizations.[16] Thus, NCRL undoubtedly poses no threat of distortion corruption.

4. There Is No Corruption "Potential" Because the *MCFL* Exception Is Self Limiting.

To counter this Court's holdings in *MCFL*, the government emphasizes the corporate "potential" theme, declaring that "all corporations 'receive from the State the special benefits conferred by the corporate structure and present the *potential* for distorting the political process.'" *Pet. Brf.* at 2-3 (quoting *Austin*, 494 U.S. at 661) (emphasis added).

But as already noted, this Court has held that not "all corporations" pose this "potential for distorting the

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[16] *Compare* <http://www.ncrl.org> (NCRL website) *with* <http://www. aarp.org> (AARP website, "Member Services and Discounts") *and* <http://www.nrahq.org/givejoinhelp/membership/benefits.asp> (NRA website, "Benefits & Special Offers").

political process." "Groups such as MCFL . . . do not pose [the] danger" of "the *potential* for unfair deployment of wealth for political purposes." *MCFL*, 479 U.S. at 259 (emphasis added).

So this Court in *Austin* clearly was not thinking of its already established holding in *MCFL* when it spoke of "*all* corporations," and consequently this "*potential* for distorting the political process" has no bearing on *MCFL*-type corporations and the present case. A fuller quote from *Austin* demonstrates that this Court was considering "closely held corporations" without much capital, and clearly "all" *business* corporations *do* have the "potential" to use the corporate form for amassing capital:

> The fact that [the Michigan statute barring independent expenditures] covers closely held corporations that do not possess vast reservoirs of capital does not make it substantially overinclusive, because all corporations receive the special benefits conferred by the corporate form and thus present the potential for distorting the political process.

Austin, 494 U.S. at 653 (citing for comparison *NRWC*, 459 U.S. at 209-210). Thus, all business corporations, including closely held corporations have the potential for accumulating "war chests," even if they do not currently have them. But since *MCFL*-type corporations do not use the corporate form to amass capital, the "all corporations" statement could not encompass them.[17]

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[17]Similarly broad language was used in *NRWC*, but again the broad language was not focusing on the unique characteristics of *MCFL*-type corporations. Rather, it was focusing on the difference between corporations "without great financial resources" and "those more fortunately situated." *NRWC*, 459 U.S. at 210.

The reason there is no "potential for distorting the political process" is that the *MCFL* exception is self-limiting. If an *MCFL*-type corporation begins generating or receiving substantial business income or business corporation contributions, by definition, it automatically is no longer an *MCFL*-type corporation. *MCFL*, 479 U.S. at 263-64. If it acquires shareholders or members who have an economic disincentive to disassociate, it no longer qualifies as an *MCFL*-type corporation. If political activity becomes the "major purpose" of an *MCFL*-type corporation, it automatically ceases to be an *MCFL*-type corporation and must register and report as a political action committee. *Id.* at 262.

Nothing else has to happen for an *MCFL*-type corporation to cease being an *MCFL*-type corporation than to cease fitting the definition—then it transmogrifies as instantly as fairy tale coaches revert to pumpkins at midnight.

The Fourth Circuit's decision also does not conflict with this Court's decision in *NRWC*. In *NRWC*, this Court held that the "members" whom a corporation could solicit for PAC contributions under § 441b did not include "the 267,000 individuals solicited by NRWC during 1976." 459 U.S. at 205. This was so, this Court decided, because these alleged "members" "play no part" in administration, elect no officials, exercised no "control over expenditure of their contributions," and were "explicitly disclaimed" as existing in the "articles of incorporation and other publicly filed documents." *Id.* at 206. Consequently, this Court held that "those solicited were insufficiently attached to the corporate structure of NRWC to qualify as 'members' under the statutory proviso." *Id.*

In this context, the Court spoke broadly and favorably about the history and justification for regulation of the "political contributions and expenditures of corporations

and labor unions," on the basis that "the special characteristics of the corporate structure require particularly careful regulation," *NRWC*, 459 U.S. at 209-10, and "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." *NCPAC*, 470 U.S. at 500. Nothing in the present case undermines the justification for regulation of business corporations and labor unions or of nonprofits that "serve as a conduit for corporate political spending." *Austin,* 494 U.S. at 664.[18]

However, just as this Court in *NRWC* recognized that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process,'" *id.* at 210 (citing *California Medical Association v. FEC*, 453

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[18] In *MCFL*, this Court noted that the constitutionality of applying § 441b to business corporations remained an open issue before it, although the Court had settled whether § 441b was constitutional as applied to *MCFL*-type corporations:

> We acknowledge the legitimacy of Congress's concern that organizations that amass great wealth in the economic marketplace do not gain unfair advantage in the political marketplace. Regardless of whether that concern is adequate to support application of § 441b to commercial enterprises, *a question not before us*, that justification does not extend uniformly to all corporations.

MCFL, 479 U.S. at 263 (emphasis added). *Accord*, *Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (en banc) ("[T]he facial validity of [§ 441b] never has been squarely determined by the Supreme Court.").

U.S. 182, 201 (1982)),[19] this Court, when faced for the first time with the claim for an exemption from the general ban on corporate political activity in *MCFL*, examined the "differing structures and purposes" of nonprofit ideological corporations founded to advocate political ideas and found that, as long as they did not serve as conduits for business corporation contributions, they did not pose the threat of corruption that business corporations did at all. As a result, the general ban on corporate political activity cannot be constitutionally applied to *MCFL*-type corporations.

C. The Practical Effect Will Be Minimal.

As this Court noted in *MCFL*, "[i]t may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake." *MCFL*, 479 U.S. at 264. Not only is the class of *MCFL*-type corporations small, but the case below was decided only as-applied to NCRL, a small organization that has a small budget, is dedicated to serving the common good, and provides no monetary benefits to its members. *P.A.* at 30a.

Consequently, this case does not even involve a concern of systemic political corruption by the aggregation of many contributions from *MCFL*-type corporations. That issue, should it ever arise, is not ripe in this case and should await another day, if ever. But that day is unlikely to come because expressive associations are generally small and do not have extra money lying

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[19] *See also Bellotti*, 435 U.S. at 825 n.5 (Rehnquist, J., dissenting) ("However, where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection. *NAACP v. Button*, 371 U.S. 415, 428-429 (1963). . . . [N]othing in *Button* requires that similar protection be extended to ordinary business corporations.").

around from their bake sales to make large or numerous contributions. And there is no evidence in this case of any such problem.

This Court dismissed similar concerns in *MCFL* with respect to independent expenditures. The FEC had maintained that exempting *MCFL*-type corporations from the independent expenditure ban "would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions." 479 U.S. at 262. This Court responded: "We see no such danger." *Id.* And there is no evidence that such a problem has developed.

Nor will corporate contributions be undisclosed. Federal election law requires candidates to report the identity of contributors over $200, 2 U.S.C. § 434(b)(3)(A), including any "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate." 2 U.S.C. § 441a(a)(8). Consequently, as the Fourth Circuit declared, this case represents a "step [that is] cautious and modest." *P.A.* at 34a.

D. Absent Corruption, There Should Be No Deference to Desire for Broad Prophylaxis.

The government repeatedly urges form over substance by imploring this Court to defer to the congressional determination of the need for a broad prophylactic rule. *See*, *e.g.*, *Pet. Brf.* at 4.

But putting form over substance is exactly what this Court refused to do in *MCFL*, where it decided that, with respect to *MCFL*-type corporations, any "reli[ance] on the long history of regulation of corporate political activity" "requires close examination of the underlying rationale for this longstanding regulation." *MCFL*, 479 U.S. at 256-57. This is so because this Court held that *MCFL*-type

corporations differ in kind, not degree, from other corporations:

> [T]he concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL. The dissent is surely correct in maintaining that we should not second-guess a decision to sweep within a broad prohibition activities that differ in *degree*, but not *kind*. Post, at 268-269. It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form.

MCFL 479 U.S. at 263 (emphases added).

In fact, *MCFL* expressly rejected the prophylactic approach with respect to *MCFL*-type corporations engaging in free expression and association: "Where at all possible, government must curtail speech only to the *degree necessary to meet the particular problem at hand*, and must avoid infringing on speech that does not pose the danger that has prompted the regulation." 479 U.S. at 265 (emphasis added). *See also NCPAC*, 470 U.S. at 501 ("We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restrictions of clearly protected conduct.").

In the present case, the question of whether NCRL is a prohibited source for contributions must start with an appropriate constitutional analysis, as this Court held it must do in *MCFL*, and ask whether NCRL poses any potential for corrupting the political process that makes it a prohibited source for contributions. Deference to the desire for a broad prophylactic rule on this issue at the core of constitutional protection afforded free expression and association is inappropriate. *Id.* at 256-57. *See also*

NAACP v. Button, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (citations omitted)).

E. *MCFL* Is Entitled to Stare Decisis Respect.

There is no reason here to disregard stare decisis application of *MCFL*'s analytical key (of examining the true nature of a corporation) and its holding that *MCFL*–type corporations pose no potential of corruption to the political system.[20] Neither has been "undermined by subsequent changes or development in the law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). *MCFL* and its reasoning have not proven "positive detriment[s] to coherence and consistency in the law" because their "conceptual underpinnings" have been weakened or because "later law has rendered [them] irreconcilable with competing legal doctrines or policies." *Id.* (citations omitted). Nor has *MCFL* or its reasoning become "outdated after being 'tested by experience'" or "found to be inconsistent with the sense of justice or with the social welfare." *Id.* (citations omitted).

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[20]This Court in *MCFL* distinguished *NRWC* on the handy point that *NRWC* had dealt with contributions, while *MCFL* dealt with independent expenditures, 479 U.S. at 259, but that was not the holding of the Court because the issue presented by the present case was not before the Court. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) ("This Court is bound by holdings, not language."). When the present case squarely presented the corporate contribution issue, the Fourth Circuit properly looked to the analysis of this Court in *MCFL* and held that the logic of *MCFL* requires an exemption from the corporate contribution ban for *MCFL*-type corporation. *See also infra* at Part IV.A.1.

As Chief Justice Rehnquist has stated for the Court, stare decisis is "a cornerstone of our legal system," *Webster v. Reproductive Health Services,* 492 U.S. 490, 518 (1989), that promotes "the evenhanded, predictable, and consistent development of legal principles, reliance on judicial decisions, and the actual and perceived integrity of the judicial process," and it strongly counsels against reconsidering precedent. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827 (1991)) (ellipses omitted).

Even in constitutional cases, stare decisis "carries such persuasive force" that this Court always requires "special justification" to depart from precedent. *Dickerson v. United States,* 530 U.S. 428, 443 (2000) (quoting *United States v. International Business Machines Corp.,* 517 U.S. 843, 856 (1996)). There is no "special justification" for overruling *MCFL.* Subsequent decisions have not undermined *MCFL.* To the contrary, they have relied and built upon it. *See FEC v. National Rifle Ass'n,* 254 F.3d 173, 192 (D.C. Cir. 2001); *North Carolina Right to Life v. Bartlett,* 168 F.3d 705, 714 (4th Cir. 1999); *Minnesota Concerned Citizens for Life v. FEC,* 113 F.3d 129, 130 (8th Cir. 1997); *FEC v. Survival Educ. Fund, Inc.,* 65 F.3d 285, 292-93 (2d Cir. 1995); *Day v. Hollahan,* 34 F.3d 1356, 1363-65 (8th Cir. 1994).

MCFL was not "a solitary departure from established law," *Seminole Tribe,* 517 U.S. at 66; rather, it was a logical extension of established law. It has proven to be a workable and well-reasoned decision, *Payne,* 501 U.S. at 828-30, and it has not created any confusion in the lower courts, even if there has been some minor difference in

applying its principles.[21] It's analytical key of examining the true nature of a corporation and its no-potential-for-corruption rationale should be followed and applied as the Fourth Circuit did.

IV. *MCFL*-Type Corporations Are Not a Prohibited Contribution Source.

As will be seen in this Part, applying the facts of this case to either a strict or heightened scrutiny analysis, it is apparent that making NCRL a prohibited source of contributions is constitutionally prohibited, and the government's suggested alternatives for NCRL fail constitutional scrutiny.

A. Under the Facts and Constitutional Standard, NCRL Is Not a Prohibited Source of Contributions.

Whether this Court applies strict or heightened scrutiny, a "close examination of the underlying rationale" requires the government to demonstrate more than a rational-basis desire for a uniform rule for all corporations. *P.A.* at 24a-25a. The government must demonstrate

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[21] The minor difference is over the amount of business income and business corporation contributions that a nonprofit corporation can receive and still qualify as an *MCFL*-type corporation. All Circuits reject the FEC's position that, if a group receives any business income or business corporation contributions, it doesn't qualify, and these courts have permitted such income and contributions, as long as they were "de minimis" and not "substantial." *See NRA,* 254 F.3d at 192; *MCCL,* 113 F.3d at 130; *Day,* 34 F.3d at 1363-65; *NCRL,* 168 F.3d at 714; *Survival Educ. Fund,* 65 F.3d at 292. The Second and Eighth Circuits agree with the court below that one looks at the percentage of revenue: if it is "modest," a group qualifies. *P.A.* at 21a. The D.C. Circuit looks to the absolute amount received: if $1,000, the group qualifies, but $7,000 is too much. *NRA*, 254 F.3d at192. This dispute, however, is not before this Court, since the government did not appeal this issue. *Pet. Brf.* at 6 n.3.

that NCRL poses the potential for political corruption that justifies the ban on business corporation contributions in § 441b. The government must prove next that the ban (as opposed to a limit on the amount of contributions) is either narrowly or closely tailored to effectuate that interest. As shown below, the government fails on both counts.

1. Absent Potential for Corruption, There Is No Compelling or Sufficient Interest.

Do *MCFL*-type corporations possess the potential for political corruption? This Court in *MCFL* made clear that *MCFL*-type corporations are not a prohibited source because they do not "merely pose[] less of a threat of the danger that has prompted the regulations. Rather [they] do[] not pose such a danger at all." *MCFL*, 479 U.S. at 263. The "danger" of course, was the "*potential* for unfair deployment of wealth for corporate purposes," and this Court held that "[g]roups such as MCFL . . . *do not pose that danger of corruption*." *Id.* at 259 (emphasis added).

NCRL has no such potential. It "was formed for the express purpose of promoting political ideas," *MCFL*, 479 U.S. at 264,[22] it does not amass war chests with the benefit of the corporate form, and its political activity will not distort the political system. Should it change, it would instantly cease being an *MCFL*-type corporation and would no longer be entitled to the exemption from the corporate ban on political activity recognized in *MCFL*.

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[22]There is no doubt here that as a "threshold" matter, NCRL "is an association whose activities or purposes should engage the strong protections that the First Amendment extends to expressive associations . . . [because it is] engaged exclusively in protected expression." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

Nor does the fact that contributions are involved here, rather that independent expenditure as in *MCFL*, affect the analysis. Both "implicate fundamental First Amendment interests." *Buckley*, 424 U.S. at 23. But more importantly, it is not the specific activities that are in question, as long as they are protected by the First Amendment, but the nature of the group that wants to do the activity. *See Austin*, 494 U.S. at 671 n.3 ("Whether an organization presents the threat at which the campaign finance laws are aimed has to do with the particular characteristics of the organization at issue and not with the content of its speech. Of course, if a correlation between the two factors could be shown to exist, a group would be free to mount a First Amendment challenge on that basis."); 660 ("Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."); 678 (Stevens, J., concurring) ("In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley v. Valeo*, 424 U.S. 1, 45-47, . . . should have little, if any, weight in reviewing corporate participation in candidate elections."); *MCFL*, 479 U.S. at 270 (Rehnquist, C.J., concurring in part and dissenting in part) ("[The fact that *NRWC* involved contributions and *NCPAC* involved independent expenditures] is admittedly a distinction between the facts of *NRWC* and those of *NCPAC*, but it does not warrant a different result in view of our longstanding approval of limitations on corporate spending and of the type of regulation involved here. The distinction between contributions and independent expenditures is not a line separating black from white.").

Here, we have an expressive association that poses no threat of corrupting the political process. Because the

group poses no such threat, there is no interest in prohibiting any of its political activity.

So what interest is left? As the Fourth Circuit noted, absent any potential for political corruption, the government is left with the desire for a bright-line rule in support of making NCRL a prohibited source of contributions. The Fourth Circuit rejected a bright-line rule as sufficient justification, *P.A.* at 24a-25a, noting that this Court likewise refused to do so in *MCFL*. 479 U.S. at 263 ("[t]he rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.") (emphasis added).

As the Fourth Circuit noted, "[a]lthough administrative convenience constitutes a legitimate state interest where rational basis scrutiny . . . is involved, such convenience is insufficient to justify state action that triggers any level of heightened scrutiny." *P.A.* at 24a (citing *Craig v. Boren*, 429 U.S. 190, 198 (1976)). The Fourth Circuit correctly noted that the applicable level of scrutiny in this case "requires something more exacting than rational basis review." *P.A.* at 25a. This rational basis level justification fails both heightened and strict scrutiny.

2. The Prohibited Source Ban Is Not Closely Drawn to Any Anti-Corruption Interest.

Because scrutiny of a contribution ban must be greater than that accorded to mere limits on the amount of a contribution, the anti-corruption rationale that justifies contribution *limits* does not justify the greater First Amendment burden posed here. However, a complete ban even fails close tailoring under the contribution limit standard since its impact is far greater than neces-

sary to address the government's legitimate concerns that stem from "large financial contributions." *NRWC*, 459 U.S. at 208.

In sum, there is no justification for making NCRL a prohibited source, and the prohibition itself is neither narrowly nor closely tailored to any valid governmental corruption interest.

B. Suggested PAC and Independent Expenditures Alternatives Fail Constitutional Mandate.

The government suggests that § 441b's corporate contribution ban poses a "relatively small burden" on NCRL because NCRL may make contributions through its PAC and because NCRL may make independent

expenditures as an *MCFL*-type corporation.[23] *Pet. Brf.* at 17.

Factually, the PAC alternative is as problematic for NCRL as it was for MCFL. The argument that a PAC alternative is sufficient was already dealt with in *MCFL* 479 U.S. at 252-56 (plurality opinion); *id.* at 266 (O'Connor, J., concurring), was well summarized by the Fourth Circuit, *P.A.* at 13a-16a, and merits little discussion time here. In short, that the PAC can make contributions is not the same as NCRL being able to make contributions. There are special burdens that attach to the PAC option. These are decisive even if the corporation already has a PAC in place. *MCFL*, 479 U.S. at 255 n.8 (plurality opinion); *id.* at 266 (O'Connor, J., concurring).

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[23]The government correctly concedes that NCRL is an *MCFL*-type corporation, which fact was found by the lower courts and which issue the government concedes was not presented for review by this Court. *See supra* note 2. However, it then brazenly attempts a collateral attack on this finding with inconsistent arguments.

The government first tries to draw a distinction between MCFL and NCRL by highlighting the fact that "NCRL does not have . . . a policy" against accepting corporate contributions. *Pet. Brf.* at 21. It returns to this theme in discussing *Austin*, noting 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.'" *Pet. Brf.* at 24 n.10 (citation omitted).

Finally, the government goes beyond innuendo and argues that this Court's *MCFL* no-corruption rationale concerning independent expenditures could not be extended to contributions by NCRL because "NCRL . . . does not have a policy against accepting contributions from traditional business corporations" and thus could become a "conduit." *Pet. Brf.* at 29-30. Not only is this argument erroneous because an *MCFL*-type corporation that becomes a "conduit" for business corporation contributions instantly ceases to be an *MCFL*-type corporation, but it is beyond the permitted scope of argument under the certiorari grant and should be disregarded. Rule 24.1(a) ("brief may not raise additional questions").

But the burden of segregating political activity into a PAC is greater than the administrative burden and affects the quantity of funds raised. First, because only "members" may be solicited for PAC purposes, the universe of persons who can be solicited for contributions is smaller that the group's donors. *MCFL*-type corporations with few or no members would be unable to speak. *MCFL*, 479 U.S. at 242 & n.1 (broad definition of "member" meant that MCFL had no "members" to solicit for PAC contributions), 255 (plurality opinion), 266 (O'Connor, J., concurring).

Second, there is the "free rider" effect. Where a member of a group will benefit from a group's action, a member may

> conclude that, if everyone else contributes . . . , his or her own contribution will have a negligible effect . . . [o]r, . . . if no one else contributes, only a negligible amount of the good will be produced. [Thus,] . . . he or she is better off, no matter what others do, if he or she makes no contribution. Such strategic behavior, know as free riding, will cause voluntary contributions for collective goods to understate the actual support for their production.

Alan J. Meese, *Limitations on Corporate Speech: Protection for Shareholders or Abridgment of Expression?*, 2 Wm. & Mary Bill Rts. J. 305, 319 (1993). This is true of solicitations for corporate PACs and "the difference represents a substantial quantity of speech." *Id.* at 324.

Finally, the PAC option actually involves, from the perspective of the nonprofit corporation, the creation of a new and distinct organization, with its own separate "political" identity, a new organization which the group,

for the reasons expressed above, may not wish to create.[24] Interestingly, of the twelve most effective nonprofit advocacy groups recently identified and studied by The Aspen Institute, only three had PACs. Susan Rees, *Effective Nonprofit Advocacy* 5 (1998) (Working Paper Series, Nonprofit Sector Research Fund, The Aspen Institute). Obviously, for reasons important to them, they have declined to exercise the PAC option.

Furthermore, the PAC option is not independently justified, as it was in *Austin*. In *Austin*, this Court found that, unlike MCFL which "was formed for the express purpose of promoting political ideas," the Michigan Chamber of Commerce engaged in activities that "are not inherently political." 494 U.S. at 622 (citations omitted). Thus, requiring the Michigan Chamber to put its independent expenditure under it PAC ensures that the funds used "in fact reflect popular support for the political positions of the committee." *Id.* (citations omitted). However, since NCRL's support is generated because it "was formed for the express purpose of promoting political ideas," *id.*, the PAC option serves no such purpose and, thus, "may be unconstitutional as applied to some corporations because they do not present the dangers at which the expenditure limitations are aimed." *Id.* at 671 (Brennan, J., concurring).

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[24]It should be obvious that "the more restrictive the range of purposes [nonprofit] organizations can serve, the less likely organizational entrepreneurs are to come forward to establish them and therefore the smaller the nonprofit sector we can expect. Thus, for example, restrictions on the political or advocacy activities of nonprofit organizations can discourage some 'political entrepreneurs' from the nonprofit field." Lester M. Salamon & Stefan Toepler, *The Influence of the Legal Environment on the Development of the Nonprofit Sector* 8 (2000) (Johns Hopkins Center for Civil Society Studies, Working Paper Series, No. 17).

The government's argument that the contribution ban places little constitutional burden on NCRL because NCRL can do something else, i.e., make independent expenditures, is novel but equally ineffective. *Pet. Brf.* at 17.

At one level, the argument is answered by *MCFL*'s holding that telling MCFL it could do something else (in that case, make independent expenditures through a PAC) was inadequate. And the First Amendment protects NCRL's right both to advocate and to choose its means of advocating. *Meyer*, 464 U.S. at 424 ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."). But the government's argument also erroneously assumes that contributions and independent expenditures are fungible. They are not.

For example, imagine a campaign in which there are two candidates for federal legislative office in North Carolina. Neither is closely aligned with NCRL on the life issues. However, Candidate X is notably worse than Candidate Y from NCRL's perspective. NCRL wants to promote its issues by encouraging the election of what it considers the lesser of two evils. Giving a contribution to Y, however, is out of the question because a contribution represents an association and identification with a candidate, implying endorsement. Y is not pro-life and so NCRL cannot contribute to him. But NCRL can make independent expenditures for advertisements opposing X without so identifying with Y through a contribution.

Similarly, NCRL may want to contribute to a candidate precisely because of the symbolic identification factor, even though NCRL does not want to spend the funds necessary to run an effective independent expenditure campaign in support of the candidate.

In sum, the notion that NCRL shouldn't be able to do what it wants to do because it can do something else fails. Where a corporation poses no potential for political corruption, it is wrong to ban activity on the basis of the missing potential and then try to justify the ban by telling the corporation it can just do something else.

CONCLUSION

Pro forma prophylaxis is unnecessary absent disease. *MCFL*-type expressive associations pose no potential for corruption to the political system, so there is no justification for the corporate ban in § 441b as applied to NCRL. Substance should triumph over form. The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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