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., *Respondent*s.

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

Brief in Opposition

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October 14, 2002

Counterstatement of Questions Presented

1. This Court held that the Federal Election Commission may not file a certiorari petition without authorization by the Solicitor General. *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). Is the Solicitor General authorized to petition where

> (a) the FEC--given special administrative, enforcement, and policy-formulation authority over federal election laws--decided *not* to ask the Solicitor General to petition,
>
> (b) there is no representation that the Solicitor General decided to petition "in consultation with [the FEC]" as required by 28 C.F.R. § 0.20, and
>
> (c) the Solicitor General is authorized to "[d]etermine whether and to what extent[] appeals will be taken" but is given only authority to "conduct[]" certiorari petitions, 28 C.F.R. § 0.20(a) & (b))?

2. This Court has held that the First Amendment protects expressive associations from restrictions permissible on other corporations. Is the federal corporate campaign contribution ban constitutional as applied to an expressive association of the sort held exempt from the independent expenditure ban in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263 (1986), because "it does not pose . . . a threat [of corruption to the political system] at all"?[1]

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[1]Respondents strongly object to the Solicitor General's characterization of North Carolina Right to Life, Inc. in his Question Presented as having the "primary purpose" of "engag[ing] in political advocacy." This characterization is factually baseless and legally misleading. *See infra* at 1-7. Rule 15.2.

Parties to the Proceeding

The Solicitor General failed to provide the listing of parties to this case either in his caption or in a separate listing, as required by Rule 24.1(b). Therefore, Respondents provide the complete listing in the caption to this Brief.

Corporate Disclosure Statement

North Carolina Right to Life, Inc. has no parent company and issues no stock, so that there is no "publicly held company owning 10% or more of the corporation's stock." Rule 29.6.

Table of Contents

Table of Authorities

Cases

Constitution, Statutes, Regulations & Rules

Other Authorities

Counterstatement Concerning Jurisdiction

As stated more fully below in the Reasons for Denying the Writ, *infra* at 7-13, Respondents contend that this Court lacks jurisdiction to consider this petition for a writ of certiorari because the Solicitor General was not authorized to file the petition where (a) the Federal Election Commission decided not to pursue a certiorari petition, (b) there is no representation that the Solicitor General consulted with the FEC concerning the certiorari petition as required by the authorizing regulation, and (c) the authorizing regulation grants the Solicitor General the sole authority to "*[d]etermine whether*" to take *appeals* but only grants him authority to "*conduct*" cases taken to the Court on *certiorari petition*. 28 C.F.R. § 0.20 (emphasis added).

Counterstatement of the Case

Rule 24.1(g) requires that the statement of the case "set[] out the facts material to the consideration of the questions presented." The Solicitor General's "Statement" focuses largely on characterizing a line of cases he believes governs this case, which Respondents dispute in Reasons for Granting the Writ. *See infra* at 13-22.

Missing from the Solicitor General's history of the proceedings are the facts that (a) the FEC decided not to file a petition for a writ of certiorari in this case and (b) he did not decide to file this certiorari petition "in consultation" with the FEC. *See* 28 C.F.R. § 0.20. In an earlier footnote he concedes that "[t]he FEC did not request the Solicitor General to seek certiorari on its behalf in this case." *Petition* at 1, n.1.

Also missing from the Solicitor General's Statement are the facts about the corporate Respondent, North Carolina Right

to Life, Inc. ("NCRL"). Filling this vacuum is vital, especially in light of the Solicitor General's mischaracterization of NCRL in his framing of the Question Presented as "a nonprofit corporation whose primary purpose is to engage in political advocacy." *Petition* at I.

There is no evidence in the record that "political advocacy" (whatever the term "political" is intended to mean) is the "primary purpose" of NCRL. As stated by the Fourth Circuit:

> NCRL is a non-profit corporation, exempt from federal taxation under § 501(c)(4) of the Internal Revenue Code. NCRL is a charitable organization that, *inter alia*, provides crisis pregnancy counseling, publishes crisis pregnancy literature and promotes alternatives to abortion. NCRL has no shareholders and none of its earnings inure to the benefit of any individual. Plaintiff Christine Beaumont is an eligible voter in North Carolina. Loretta Thompson is Vice President of NCRL. Stacy Thompson is a member of NCRL's Board of Directors, and Barbara Holt is President of NCRL.

Appendix at 2a-3a.

The Fourth Circuit noted this Court's description of Massachusetts Citizens for Life ("MCFL") in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 242 (1986) ("*MCFL*"), and declared that NCRL was just like MCFL:

> The Court in *MCFL* emphasized that MCFL had accepted voluntary donations from members; engaged in fundraising activities such as garage sales, bake sales, dances, raffles, and picnics; organized a public prayer service; sponsored a regional conference; provided speakers for discussion groups, debates, lectures, and media programs; sponsored an annual march; drafted and submitted legislation; urged its members to contact their elected representatives to express their views on legislative proposals; and published a newsletter. [citation] Similarly, NCRL engages in these same kinds of endeavors. The group is funded overwhelmingly by private contributions from individuals, and has organized such traditional fundraising activities as bake sales, walkathons, and raffles. In addition, NCRL publishes a newsletter, candidate surveys, and voter guides. It also holds conventions, provides counseling and referrals, and publicizes and promotes numerous service groups.

Appendix at 7a.

The Fourth Circuit noted that, although NCRL accepts contributions from business corporations, they are de minimis and much of the corporate contribution comes from donations from a long-distance phone company that solicits customers on the basis that a portion of their payment for long-distance

services will be contributed to a charity designated by the customer:

> Unlike MCFL, NCRL did not have a policy against accepting corporate contributions. However, NCRL was funded overwhelmingly by private, individual donations. While NCRL had accepted some corporate donations in the past, these donations made up only between zero and eight percent of NCRL's total revenues. [citation] We concluded that "this modest percentage of revenue" did not disqualify NCRL for the *MCFL* exemption. [citation] In addition, many of those corporate contributions were not part of the traditional form because they were "part of a program by which phone company customers may direct their phone bill refunds to a nonprofit of their choice." [citation]

Appendix at 21a.

Therefore, as the Fourth Circuit held, NCRL falls within the *MCFL*-exception this Court recognized for corporations wanting to make independent expenditures:

> What the Court said of the nonprofit corporation at issue in *MCFL* applies with equal force to NCRL. Applying *MCFL* in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) ("*NCRL I*"), we found that the small amount of corporate contri-

> butions NCRL received did not result in its "serving as a conduit 'for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace.' *MCFL*, 479 U.S. at 264 . . . ." *NCRL I*, 168 F.3d at 714. We therefore held that "NCRL falls squarely within the *MCFL* exception." *Id.*

Appendix at 6a, n.2.

As may be seen from these facts about NCRL, there is no factual basis for characterizing NCRL as having the "primary purpose" of "engag[ing] in political advocacy." *Petition* at I. "Political" means, inter alia, "of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy." *Black's Law Dictionary* 1042-43 (5th ed. 1979). While activities such as lobbying might be considered "political" under standard English use of the term, NCRL's educational activities, prayer services, and crisis pregnancy services would not. Given that there is no clearly defined scope for "political" in the Solicitor General's *Petition*, and given that there is no quantification in the record of NCRL's activities that would allow such identification of a "primary purpose," it is factually inaccurate to so characterize NCRL's "primary purpose."

It is true that this Court in *MCFL* contrasted corporations "formed to disseminate political ideas" with those formed "to amass capital." *MCFL*, 479 U.S. at 259. But while groups such as MCFL and NCRL may be formed in part to "disseminate political ideas," it does not follow that their "primary purpose

is to engage in political advocacy." *Petition* at I. The Fourth Circuit correctly characterized the "central energizing principle" of groups such as MCFL and NCRL as "unabashedly political *and* expressive." *Appendix* at 6a (emphasis added).

Of course, the problem with characterizing NCRL as having the "primary purpose" of "political advocacy" is that this Court in *MCFL* used quite similar language in describing entities that were outside the exemption for MCFL-type organizations and were instead rightly considered a political committee. This court declared that "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 (emphasis added). In *Buckley*, this Court identified as a "political committee" any entity "under the control of a candidate or the *major purpose* of which is the *nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). In its analysis, the *MCFL* Court used other similar terminology regarding, speaking of "organizations whose *major purpose* is not *campaign advocacy*, but who occasionally make independent expenditures on behalf of candidates," 479 U.S. at 252-53 (emphasis added), or whose "*major purpose* is to *further the election of candidates*." *Id.* at 253 (emphasis added).

By mischaracterizing NCRL as a corporation whose "primary purpose" is "political advocacy," *Petition* at I, the Solicitor General evokes the language of *MCFL* about corporations that are really political committees because their "major purpose" is "campaign advocacy." NCRL strongly objects to this characterization because it is factually baseless, legally

confusing, and prejudicial--and because NCRL was properly found by the lower courts to be an authentic MCFL-type corporation.

Reasons for Denying the Writ

This Court should deny a writ of certiorari because (a) the FEC did not seek a writ of certiorari, (b) there is no true circuit split, and (c) the lower court's decision was correct under the expressive association cases.

I. The FEC Did Not Seek Certiorari, Raising Deference and Jurisdictional Issues.

A. Given the FEC's Exclusive Authority, Deference Should be Afforded Its Decision Not to Seek Review.

The FEC is the independent federal agency created and charged by Congress to "administer, seek to obtain compliance with, and formulate policy with respect to [the Federal Election Campaign Act of 1971 ("FECA")] and chapter 95 and chapter 96 of title 26." 2 U.S.C. § 437c(b)(1). The FEC has "exclusive jurisdiction with respect to the civil enforcement of such provisions." *Id.* In some contexts, the FEC even has authority to petition for a writ of certiorari without seeking authorization from the Solicitor General. 26 U.S.C. §§ 9010(d) & 9040(d); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 91 (1994) ("*NRA*"). These powers are unusual for a federal agency, indicating the judgment of Congress that administering, enforcing, and formulating policy concerning the federal election laws requires special expertise and authority.

Based on this special expertise and employing this special authority, the FEC decided not to pursue review of the Fourth Circuit's decision in this case. The FEC had sought review of the district court's decision, which was affirmed by the Fourth Circuit, and the FEC had sought a rehearing en banc. *Appendix* at 61a-62a. But exercising its congressionally-mandated administrative, enforcement, and policy-making authority over the statute at issue in this case (2 U.S.C. § 441b) and over the FEC's own regulations (11 C.F.R. §§ 114.2(b) & 114.10), the FEC decided not to seek review of the Fourth Circuit's decision in this case. The Solicitor General concedes that "[t]he FEC did not request the Solicitor General to seek certiorari on its behalf in this case." *Petition* at 1, n.1.

It may be that the FEC viewed the decision below as convincing. Perhaps the FEC intends to promulgate new regulations that will remove the offending regulatory language and provide a constitutionally permissible interpretation of the challenged statute. But these are decisions within the purview of the FEC, not the Solicitor General. The Solicitor General cites no statute or regulation granting him administrative, enforcement, and policy-making authority over provisions of the FECA--and certainly he has no such authority over the FEC's own regulations.

Given the grant of exclusive administrative, enforcement, and policy-making authority over both the FECA and FEC regulations to the FEC, the Agency's decision not to pursue a writ of certiorari in this case should be afforded deference and the present *Petition* should be denied. And as seen next, the exclusive grant of authority and the FEC's exercise of it to not

seek certiorari review actually removes the authority of the Solicitor General to file the present *Petition*.

B. The Solicitor General Lacks Authority to Seek Review.

As set out in the Counterstatement Concerning Jurisdiction, *supra* at 1, this Court lacks jurisdiction to consider this certiorari petition because the Solicitor General was not authorized to file the petition where (a) the Federal Election Commission decided not to petition, (b) there is no representation that the Solicitor General consulted with the FEC concerning the petition as required by the authorizing regulation, and (c) the authorizing regulation grants the Solicitor General the authority to "*[d]etermine whether*" to take *appeals* but only grants him authority to "*conduct*" cases taken to the Court on *certiorari petition*. 28 C.F.R. § 0.20 (emphasis added).

This Court decided in *NRA*, 513 U.S. at 99, "that the FEC may not independently file a petition for certiorari in this Court under 2 U.S.C. § 437d(a)(6)," without the Solicitor General's authorization. However, *NRA* leaves open the question of whether the Solicitor General may file a petition for certiorari in the present circumstances.[2] Applying the same technical language analysis employed in *NRA* reveals that the Solicitor General's current *Petition* is similarly unauthorized.

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[2] *Cf. NRA*, 513 U.S. at 97 (citing cases for holding that past practice does not govern where lack of authority to petition for certiorari has not been raised).

Under 28 U.S.C. § 518(a), the Attorney General has delegated the following authority to the Solicitor General by regulation:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, *in consultation with* each agency or official concerned:
>
> (a) *Conducting*, or assigning and supervising, all Supreme Court cases, including appeals, *petitions for and in opposition to certiorari*, briefs and arguments, and, in accordance with Sec. 0.163, settlement thereof.
>
> (b) *Determining whether*, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs) and, in accordance with Sec. 0.163, advising on the approval of settlements of cases in which he had determined that an appeal would be taken.
>
> (c) *Determining whether* a brief amicus curiae will be filed by the Government, or whether the Government will intervene, in any appellate court.

28 C.F.R. § 0.20 (emphasis added).

This regulation requires the Solicitor General to act *in consultation with* the FEC on whether to seek certiorari review. There is no representation by the Solicitor General that any consultation took place. The FEC did not ask the Solicitor General to authorize or file the present *Petition*, as he concedes. *Petition* at 1, n.1. Given the FEC's exclusive authority to administer, enforce, and formulate policy with respect to the FECA and its own regulations, the Solicitor General's failure to consult with the FEC and obtain its consent to the filing of the present *Petition* constitutes a lack of authority to file it. While *NRA* holds that the FEC may not independently seek certiorari review in these circumstances, the governing regulation mandates that neither may the Solicitor General. The law envisions mutual consent before filing a petition is authorized.

The statutory grant of administrative, enforcement, and policy-formulation authority to the FEC and the "in consultation with" language of the governing regulation of themselves establish the necessity of mutual consent before the present *Petition* could be authorized. But other language of 28 C.F.R. § 0.20 also supports the mutual-consent requirement.

While the Solicitor General is granted authority to *determine whether* to take an appeal or to file an amicus curiae brief, 28 C.F.R. § 0.20(b) & (c), the authority to "determin[e] whether" to file a certiorari petition is not granted to him. Rather, he is given authority to *conduct* a certiorari petition. 28 C.F.R. § 0.20(a). The Solicitor General will doubtless assert that "conduct" encompasses "determine whether," but this Court in *NRA* rejected such an imprecise approach.

In *NRA*, the FEC argued that it had authority to take an "appeal" and that "appeal" should be considered in its broad sense as encompassing a certiorari petition. *NRA*, 513 U.S. at 93-94. This Court held that "appeal" could not be given such a broad reading where other authorizing provisions specifically referred to "certiorari review." *Id.* at 94. This Court cited *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) for the transferrable concept that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *NRA*, 513 U.S. at 95) (omitting internal quotation marks and citation).

Therefore, under this Court's analytical approach in *NRA*, the Solicitor General is not authorized by 28 C.F.R. § 0.20(a) to *decide whether* to petition for certiorari review without FEC agreement and the certiorari petition should be denied.[3]

This makes good policy sense because the Solicitor General in his general overview position cannot possibly have the same grasp of the nuances, intricacies, and policy considerations concerning federal election law as has the FEC, governed by commissioners and assisted by staff with broad and long experience in the field. It is for this reason that deference is commonly afforded federal agencies in matters relating to their area of expertise, and such deference is particularly appropriate in regard to election law and the decision whether

[3] *Cf. NRA*, 513 U.S. at 97 (citing cases for holding that past practice does not govern where lack of authority to petition for certiorari has not been raised).

to seek certiorari review of a case in which the FEC has been a defendant/appellant since January 3, 2000.

II. There Is No True Circuit Split.

The Solicitor General argues that there is a split in the circuits. *Petition* at 12. However, there is no split that affects the federal statute and regulations at issue (2 U.S.C. § 441b; 11 C.F.R. §§ 114.2(b) & 114.10). The Solicitor General concedes, as he must, that *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), involves a state statute. *Petition* at 13. Beside the fact that the two cases do not deal with the "same . . . matter," because both do not involve the same federal statute and regulations, any perceived conflict in analysis does not rise to the level of being "the same *important* matter," as shown below. Rule 10(a) (emphasis added).

III. The Lower Court's Decision Was Correct Under the Expressive Association Cases.

The Solicitor General concludes his *Petition* (at 15) with the comment that "guidance is needed from this Court." But this Court has already given guidance in the expressive association line of cases, which includes *MCFL* (although that case did not use the term). The Fourth Circuit and district court opinions in the *Appendix* ably demonstrate the inexorable logic of this Court's opinion in *MCFL*, 479 U.S. 238, as applied to the present question before the Court, so the whole argument need not be reiterated in this opposition brief. However, certain key points bear highlighting.

The Solicitor General's representation that the Fourth Circuit's decision below conflicts with this Court's decision in

FEC v. National Right to Work Comm., 459 U.S. 197 (1982) ("*NRWC*") is erroneous. 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.*

Reviewing the actual holding of this Court in *NRWC* raises the immediate question of how there could be a conflict between that decision and the one of the Fourth Circuit presently being offered for certiorari review. Nowhere did this Court discuss the issue of whether an MCFL-type organization could be prohibited from making contributions (or even independent expenditures). That issue not being addressed, it plainly was not decided.

NRWC did contain commentary to the effect that § 441b "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 209-10. And it did speak of corporations "without great financial resources, as well as those more fortunately situated," *id.* at 210, but that commentary did not address the nature of the corporation.

But assuming *arguendo* that, because NRWC was a nonprofit, *NRWC* stands for the proposition that § 441b properly extends to nonprofit corporations, the present Fourth Circuit opinion does not conflict with it because the decision does not say that *nonprofits* are constitutionally exempt from the corporate contribution ban. The opinion below only holds that *certain* nonprofits--those like MCFL--must be exempted from the contribution ban because they "do[] not pose the danger that has prompted regulation." *MCFL*, 479 U.S. at 265.

Before this Court in *MCFL* was the issue of whether § 441b could be applied to *independent expenditures* by an MCFL-type corporation. *MCFL*, 479 U.S. at 241. *MCFL* did not decide the present issue--whether MCFL-type organizations must also be exempted from the *contribution* ban--because contributions were not at issue in that case. It is true that 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.[4] But that was not the holding of this Court, because the issue presented by the

[4] *MCFL* also focused on the fact that in *NRWC* the solicitations at issue were for contributions "to a *political committee*," "established for the purpose of making direct contributions to political candidates." *MCFL*, 479 U.S. at 259-60 (citing *NCRL*, 459 U.S. at 200) (emphasis added). The complaint filed with the FEC that gave rise to the *NRWC* case was filed against a *political committee* created by NRWC. *NRWC*, 459 U.S. at 200. Thus, even if *NRWC* is supposed to stand for the proposition that an entity like the one at issue in that case may be regulated as to contributions, NCRL is not a political committee.

present case was not before the Court.[5] When this 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 organizations.

The analytical key in *MCFL*, which the Fourth Circuit recognized, is to examine the nature of the corporation to determine whether it poses any threat of corruption to the political system--whether it should be a prohibited source of *any* type of financial participation in the federal political process because the participation of *this* type of organization would have an adverse effect. Because an MCFL-type corporation poses absolutely none of the "danger of corruption" to the political system that business corporations pose, *MCFL*, 479 U.S. at 259, there is no justification for barring it from either independent expenditures or contributions to candidates.

Consequently, any distinction between independent expenditures and contributions is irrelevant, except that limitations on contributions can be constitutionally justified. But exempting NCRL from the contribution ban does not exempt if from the contribution limit. Any contribution NCRL would make is subject to federal contribution limits.

For the Solicitor General and others who do not recognize the *MCFL* analytical key, the critical factor is simple incorporation. According to them, if an association is incorporated, that is controlling. It can't make contributions. But, of course, that

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[5] "This Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001).

is too simplistic. A political action committee may be incorporated for the liability advantages, and it clearly may make contributions 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.

Many expressive associations incorporate for the same reason that PACs do. They want the protections from potential liability that the corporate form offers. They don't incorporate to shield income from personal income taxation and thereby amass capital. Historically, this has been an advantage of the corporate form because the corporate income tax was much lower than the personal income tax. So using the corporate form permitted faster accumulation of money and, as a consequence, using such funds for political purposes was considered unfair and corrupting to the political system. This Court held that such potential justified banning corporate contributions. But nonprofit associations don't incorporate for this reason. As nonprofit entities, they already pay no tax. So they incorporate for liability reasons, not to amass money. Consequently, the notion that the corporate form per se is corrupting is simply incorrect with respect to MCFL-type corporations, which this Court in *MCFL* found to pose no threat of corruption at all to the political system. *MCFL*, 479 U.S. at 259.

This Court in *MCFL* went one step further. Even if an MCFL-type corporation accumulates funds using the corporate form, it raised the funds on the basis of its "popularity in the political marketplace," not its business "success in the economic marketplace." This Court succinctly dismissed the corporate-form-per-se argument:

> Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes. [footnote] Groups such as MCFL, however, do not pose that danger of corruption."

Id.

Consequently, this Court's analytical key with regard to regulating expressive associations is to carefully examine the nature of the organization and evaluate the interests asserted, not to employ per-se analysis based on technical form. Because NCRL is clearly an expressive association within the line of this Court's decisions such as *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) ("*BSA*"), strict scrutiny must be applied in reviewing the corporate contribution ban if the ban "impairs" "expressive activity" in which BCRA "engages." *BSA*, 530 U.S. at 655; *cf. id.* at 657-58. The corporate contribution ban clearly burdens a form of expression in which NCRL would like to engage.

Therefore, the government must demonstrate that its restriction is narrowly tailored to a compelling interest in barring NCRL from making a contribution with general funds. *Id.* at 658; *MCFL*, 479 U.S. at 256. A blanket ban on corporate contributions because of their per-se form addresses neither the compelling interest nor the narrow tailoring requirement of First Amendment heightened scrutiny. And because this Court

has declared that an MCFL-type corporation poses absolutely none of the "danger of corruption" to the political system that business corporations pose, *MCFL*, 479 U.S. at 259, there is no justification for barring it from contributing to candidates.

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 organizations small, but the case below was decided only as-applied to NCRL, a small organization, despite a specific request by NCRL for facial invalidation of the statute and regulations at issue. *Appendix* 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. The issue is theoretical and unlikely to develop because expressive associations are generally small[6] and do not have extra money lying around from their bake sales to make large or many contributions.

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[6]This Court in *MCFL* took special note of the burdens on *small* organizations of maintaining a PAC and declared it an inadequate substitute for an MCFL-type corporation using general funds to make independent expenditures because PAC compliance "impose[s] administrative costs that many *small* entities may be unable to bear. [footnote] Furthermore, such duties require a far more complex and formalized structure than many *small* groups could manage. Restriction of solicitation of contributions to 'members' vastly reduces the sources of funding for organizations with either *few or no formal members* . . . ." 479 U.S. at 254-55 (emphasis added).

This Court addressed similar concerns in *MCFL* with respect to independent expenditures and dismissed them. The FEC had maintained that exempting MCFL-type organizations 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. Consequently, there need be no such concern now.

As this Court said in *MCFL*, if contributions become the "major purpose" of an MCFL-type organization then it rightly must register and report as a political action committee, *Id.* at 262. This court continued:

> Even if § 441b is inapplicable, independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of

> contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.

Id.

The same principles apply to contributions. No legitimate concern over "massive undisclosed political spending," *id.*, is presented by this case. Consequently, as the Fourth Circuit declared, this case represents a "step [that is] cautious and modest." *Appendix* at 34a.

Finally, the Solicitor General argues the "need for uniform campaign financing rules governing federal elections across the country." *Petition* at 15. He ignores the fact that the decision and injunction below were as-applied only to NCRL, and the Fourth Circuit expressly rejected the facial challenge. *Appendix* at 30a. The fact that NCRL will be able to make contributions because § 441b is unconstitutional as applied to it while other MCFL-type organizations may not, does not raise the sort of important issue that warrants the expenditure of the limited resources of this Court. Even if there are other organizations in the Fourth Circuit like NCRL that are able to obtain similar as-applied injunctions because of the decision below, this raises no momentous issue for the reasons this Court stated in *MCFL*, cited above. *Supra* at 19-20. And even if NCRL-type organizations in the Fourth Circuit can obtain similar relief from the burdens of § 441b while similar organizations in other circuits cannot, that is not a matter worthy of this Court's attention at this time. As Justice Stevens has stated:

> the existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . . It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

CONCLUSION

For the foregoing reasons, the Solicitor General's *Petition* should be denied.

Respectfully submitted,

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