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In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1172.

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
AND
WYMAN-GORDON COMPANY,
APPELLANTS,

v.

FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Appellee's Petition for Rehearing.

I.

The Appellee in the above-captioned case, acting pursuant to Rule 58 of the Rules of the Supreme Court of the United States, hereby respectfully requests a rehearing in this case. In the alternative, the Appellee seeks to have this Court alter its opinion to invalidate only certain portions of the

challenged Massachusetts statute, or an order of remand for evidentiary proceeding. In support of this petition, the Attorney General of the Commonwealth of Massachusetts states that the requested relief is consistent with the reasoning of the Court and justified for the reasons articulated in the following sections.

II.

The decision of this Court invalidates the provisions of Massachusetts law which proscribe corporate political contributions to candidates for elective state or local office, as well as those dealing with referenda. Although the Appellants in this case expressed a specific interest only in contributing or expending corporate funds to favor or oppose a question appearing on the 1976 general election ballot, they sought a declaration that G.L. c. 55, § 8, was unconstitutional on its face and as applied. In its decision, this Court has indicated that "[b]ecause § 8 prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated" and has reversed the judgment of the Supreme Judicial Court. Slip Opinion, p. 29. This Court therefore has effectively determined that G.L. c. 55, § 8, is facially invalid and has mandated its invalidation in its entirety.

The statute, which is set forth in relevant part in the margin of the majority opinion (Slip Opinion, p. 2 n. 2), prohibits corporate contributions and expenditures in a variety of political contexts which implicate additional compelling state interests which were not raised in this case. Specifically, the statute prohibits corporate contributions and expenditures to Massachusetts political candidates, to committees organized on their behalf, or to political parties.

It is respectfully submitted that invalidation of these provisions dealing with elective politics is not consistent with the reasoning of the majority opinion, and that either the Appellee should be permitted to brief and argue the constitutionality of the ban on candidate-related contributions or that the decision should be altered to reflect a determination of unconstitutionality only as applied to contributions affecting ballot questions.

In requesting reargument on this point, the Appellee does not intimate agreement or disagreement with the dissenters' assertion that the decision "casts considerable doubt upon the constitutionality of legislation passed by some 31 states restricting corporate political activity, as well as upon the Federal Corrupt Practices Act, 2 U.S.C. § 441b" (Slip Opinion, White, J., dissenting, p. 2). Whether or not the Corrupt Practices Act and similar state statutes prohibiting corporate expenditures in the context of elections to public office have been extinguished and simply await "formal interment on another day" (*id.* at 19) is an open question. Such a question should only be answered when squarely presented in a specific factual context and even then only after full consideration by lower courts and after briefing and argument by the parties. However, this question has been effectively resolved for the Commonwealth, since the broad language in Part V of the opinion purports to invalidate all of § 8, and that section is the only Massachusetts statute which prohibits corporate contributions to elected officials and candidates for elective office. Thus, the prohibition on candidate-related corporate expenditures has already been lifted in Massachusetts, and, in the absence of an immediate legislative response,[1] the issuance of this

[1] On May 2, 1978, the Attorney General of the Commonwealth informed the Governor, the Senate President, the Speaker of the House of

Court's mandate could result in the legalization of contributions which would be illegal at the federal level and in a significant number of the states. A prohibition of such wide general applicability should not be set aside without an opportunity for briefing and argument.

The differences between contributions to candidates and contributions concerning ballot questions are identified by the majority opinion in this case. This petition does not purport to treat the distinctions in depth nor to explain why the distinctions might justify different treatment by the Commonwealth; instead, the distinctions perceived by the Court are cited by Appellee as a reason for rehearing. After stating that § 8 does not apply in other contexts not directly challenged in this case, the opinion notes:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. *See, United States* v. *United Auto. Workers, supra,* at 570-575; *Schwartz* v. *Romnes, supra,* at 849-851. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right to the quite different context of participation in a political campaign for election to public office. Congress might well be

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Representatives and the chairmen of the Legislature's committee on election laws of the potential impact of this Court's decision on candidate-related campaign financing. A bill reenacting the portions of § 8 which do not deal with ballot questions has been admitted in the Legislature and is receiving expedited treatment. Passage of the bill prior to the issuance of the mandate in this case would moot this aspect of Appellee's petition and might cause Appellee to withdraw the petition.

> able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. *Buckley* v. *Valeo*, 424 U.S. at 46; Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U.Pa.L. Rev. 386, 408-410 (1977). (Slip Opinion, p. 21 n. 26.)

Assuming that the prohibitions contained in G.L. c. 55, § 8, dealing with candidate-related contributions would withstand constitutional scrutiny, then in the particular circumstances of this case the Appellee should at some point be permitted to argue that the various provisions of the statute are severable. There is no severability clause in § 8, nor is there such a clause elsewhere in the chapter dealing with campaign financing. Under Massachusetts law, however, the inquiry as to severability is not controlled by that fact. Whenever various portions of a state statute have independent force and an inference can be drawn that the General Court would have enacted one portion of the bill without the other, Massachusetts courts may uphold the remainder of the enactment after striking the offending provision. *Del Duca* v. *Town Administrator of Methuen*, 368 Mass. 1, 329 N.E. 2d 748 (1975). On rehearing or on remand, the Attorney General would offer argument supporting the proposition that the provisions of c. 55, § 8, are indeed severable, that the Appellants lacked standing to challenge those portions of the statute dealing with candidate-related contributions and expenditures, and that only the clauses dealing with questions submitted to the voters need be invalidated.

Appellee suggests that a rehearing is not necessarily required if this Court agrees with this argument. A slight modification of Part V of the majority opinion, indicating

that only the clauses in § 8 dealing with ballot questions must be invalidated, and concomitant adjustments in the mandate would suffice. *See, Klapprott* v. *United States,* 335 U.S. 601; 336 U.S. 942 (judgment modified) (1949); *Securities & Exchange Commission* v. *Drexel & Co.,* 348 U.S. 341; 349 U.S. 910 (opinion amended) (1955); *Slochower* v. *Board of Higher Education of New York City,* 350 U.S. 551; 351 U.S. 944 (opinion modified) (1956); *Union Trust Co.* v. *Eastern Air Lines, Inc.,* 350 U.S. 907; 350 U.S. 962 (opinion amended) (1955).

III.

The majority opinion contains the suggestion that the decision in this case might have been reached simply because the Appellee failed to demonstrate, by record or legislative findings, that corporations are wealthy and powerful and that the expression of corporate views may drown out the opposition. Slip Opinion, pp. 22, 23. Specifically, the opinion reads:

> If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. *Id.* (Citations omitted.)

And in the margin it notes:

> In his dissenting opinion, Mr. Justice White relies on incomplete facts with respect to expenditures in the 1972 referendum election, in support of his perception as to the "domination of the electoral process by corporate wealth." Post, at 10; see *id.*, at 8-9. The record shows only the extent of corporate and individual contributions to the two committees that were organized to support and oppose, respectively, the constitutional amendment. It does show that three of the appellants each contributed $3,000 to the "opposition" committee. The dissenting opinion makes no reference to the fact that amounts of money expended independently of organized committees need not be reported under Massachusetts law, and therefore remain unknown. *Id.* at 23.[2]

If the record is incomplete, under the circumstances of this case the Appellee should be allowed to supplement it. The Appellants brought the declaratory judgment proceeding

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[2] It is true that under Massachusetts law not all independent expenditures are reported and that the total amount of money expended to favor or oppose the graduated income tax amendment in 1972 has not been proved. However, under G.L. c. 55, § 18, which has since been recodified as G.L. c. 55, § 22, corporate independent expenditures would in fact have been reported in 1972. This inaccuracy, which Appellee concedes does not affect the reasoning of the Court, could be corrected by inserting an additional phrase "other than corporate independent expenditures reported pursuant to G.L. c. 55, § 18" after the comma in the last sentence of footnote 28. The Appellee does contend, for the reasons set forth in the text of this petition, that the incompleteness of the record should not affect the validity of his arguments and that, if given an opportunity, he would have been able to demonstrate, on the record, that the figures before this Court are complete figures.

giving rise to this appeal on April 9, 1976. App. 1, 2. By choosing to file suit a year after their cause of action arose and just six months before the relevant election, the Appellants effectively precluded the possibility of conducting a full trial on the merits before the November election. The Appellee entered into an agreed statement of facts only to permit the affected corporations to attempt to vindicate their asserted rights in advance of the election. Throughout the proceedings, the Appellee objected to the procedural posture of the case, arguing that "the factual record before the Court fails to provide an adequate basis for a decision of constitutional dimension" and urging the Court to permit evidentiary proceedings.

The lower court characterized the Appellee's argument as an assertion "that this particular case is not ripe for adjudication" and dealt with the claim in the following summary fashion:

> The defendants ground their lack of ripeness claim on their characterization of the record in this case as "inadequate" to present the issues raised. They suggest that we defer consideration of these issues until after a full trial on the merits. We think that the record in this case, which consists of an extensive stipulation of facts among the parties, is sufficient to support this adjudication and to present the issues raised. The record appendices total some 128 pages; there are 66 paragraphs of stipulated facts and 70 pages of supporting documents relevant to those stipulations. To the extent that the record may be properly characterized as "inadequate", we believe that the inadequacy is related to the plaintiffs' failure on certain evidentiary

> propositions, a matter we treat below in part 3(d) of this opinion. Thus, the only inadequacy present relates to the merits of the plaintiffs' position rather than to the procedural posture of the case. App. 8, 9.

Obviously this Court believes the inadequacy of the record relates to the sufficiency of the Appellee's case and not to the Appellants' failure on evidentiary propositions. The fact remains, however, that the Appellee has never been afforded an opportunity to develop the kind of record this Court has intimated might justify a ban on corporate contributions. A complete factual record may not have been essential below, since the Court determined that no First Amendment rights were implicated and therefore found it unnecessary to engage in a compelling state interest analysis. Under the analytical framework adopted by this Court, on the other hand, such a record is imperative. Only a full trial on the merits could produce such a record, and a remand may therefore be appropriate.

IV.

For the foregoing reasons it is respectfully submitted (a) that this Petition for Rehearing should be granted and that the case should be set down for reargument on the regular calendar, (b) that this Court should modify its opinion, and ultimately the mandate, to invalidate only the portions of § 8 that prohibit corporate contributions and expenditures to favor or oppose ballot questions and not § 8 in its entirety

or, in the alternative, (c) that the case should be remanded for an evidentiary proceeding.

Respectfully submitted,

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THOMAS R. KILEY,
STEPHEN SCHULTZ,
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Certificate of Counsel.

I, Thomas R. Kiley, First Assistant Attorney General of the Commonwealth of Massachusetts and attorney for the Appellee, certify that this Petition is presented in good faith and is not interposed for delay.