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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

BRIEF FOR APPELLANTS

Opinion Below

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at Mass. Adv.

Sh. (1977) 134, 359 N.E. 2d 1262, and is printed in the Appendix to the Jurisdictional Statement, pp. 1-24.

Jurisdiction

Appellants brought this action in the Single Justice session of the Supreme Judicial Court for the Commonwealth of Massachusetts seeking, *inter alia,* to have declared unconstitutional Massachusetts General Laws c. 55, §8 ("Section 8") on its face and as applied to plaintiffs insofar as it prohibited plaintiffs from expending or contributing any moneys to defeat a proposed constitutional amendment submitted to the voters at the general election on November 2, 1976. The complaint sought relief on the grounds that Section 8 violated the First and Fourteenth Amendments to the United States Constitution.

The case was reserved and reported by the Single Justice to the Full Court without decision. After argument, that Court issued a judgment on September 28, 1976, denying Appellants any relief and upholding Section 8. (Appendix to the Jurisdictional Statement, p. 27) The opinion of the Court entered February 1, 1977.

Appellants filed a timely notice of appeal with the clerk of the Supreme Judicial Court on September 29, 1976. (A. 2). The time for docketing this appeal was extended to February 25, 1977, on December 8, 1976.

The Jurisdiction of this Court is conferred by 28 U.S.C. §1257(2). *Commonwealth Bank* v. *Griffith,* 39 U.S. 55 (1840).

Constitutional and Statutory Provisions

There are numerous constitutional and statutory provisions referred to in this brief. They are listed in the Table of Contents and their texts are set out in Appendix "B" hereto. The case involves the constitutionality of Massachusetts General Laws c. 55, §8, which is set forth verbatim herewith:

No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, *no business corporation* incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, *shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of* aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or *influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.* No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of

the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both. 6 Mass. Gen. Laws Ann. 71 (Supp. 1977-1978) (emphasis added).

Questions Presented

1. Whether the appeal is moot because the November 2, 1976, election has passed.

2. Whether Section 8, insofar as it forbids a business corporation from contributing or expending any moneys to communicate its views in opposition to a ballot question solely concerning taxation of individual income, absent a demonstration by the corporation that the proposed ballot question does, in fact, materially affect its business, property or assets, is invalid as a denial of freedom of speech.

3. Whether the words "materially affecting any of the property, business or assets of the corporation" as used in Section 8 are so vague as to deprive Appellants of their liberty or property without due process of law in violation of the Fourteenth Amendment.

4. Whether Section 8 denies Appellants equal protection of the law in that:

a. it prohibits corporate expenditures, and thus corporate expression of views, pertaining to an individual income tax ballot question but does not prohibit corporate expenditures pertaining to other ballot questions, thus creating a classification based solely upon the content of the expression;

b. it prohibits business corporations, but not labor unions, partnerships, business trusts or others sim-

ilarly situated, from expending funds to oppose ballot questions solely concerning individual income taxes.

5. Whether the provision in Section 8, a criminal statute, that no question concerning solely the taxation of individuals "shall be deemed materially to affect" the business of a corporation is an improper presumption which deprives Appellants of liberty or property without due process of law.

Statement of the Case

Preliminary Notes:

The Order of the Supreme Judicial Court dated September 22, 1976, the judgment of the Supreme Judicial Court dated September 28, 1976, and the opinion of the Supreme Judicial Court dated February 1, 1977, are printed in the Appendix to Jurisdictional Statement and are not reproduced in the Appendix. Appellants will refer to the Appendix to Jurisdictional Statement herein as "(J.S. App.)."

The case of *First National Bank* v. *Attorney General,* 362 Mass. 570, 290 N.E. 2d 526 (1972), will be referred to herein as *FNB I.*

I. Procedural Background

Appellants are five business corporations (two banks, two scientific/technical concerns, and a business engaged in the development, manufacturing and sale of consumer products and services) who wished to expend moneys in opposition to a proposed state constitutional amendment submitted to the voters at the general election on November 2, 1976. The amendment, as it appeared on the ballot, proposed that the Legislature be granted the authority to

impose a graduated tax on individual income.[1] The defendant, Attorney General of the Commonwealth, indicated that he would prosecute Appellants pursuant to Section 8 should they expend funds to publicize their views on the proposed amendment to the public. (A. 9, 14). Appellants then sought declaratory relief in the Single Justice Session of the Massachusetts Supreme Judicial Court.

Appellants contended that Section 8 was unconstitutional on its face and as applied, and that it violated the First Amendment, the right to equal protection of the laws, and the due process clause of the Fourteenth Amendment. Similar contentions were raised under the Massachusetts Constitution.

The case was presented to the Single Justice on a Statement of Agreed Facts on April 26, 1976, and reserved and reported by him to the Full Bench without decision the same day. The case was argued before the Supreme Judicial Court on June 8, 1976. On September 22, 1976, the Court entered an order holding that Section 8 was not unconstitutional. (J.S. App. 25). No opinion was filed at that time. On September 28, 1976, a judgment was entered, without opinion, declaring that Section 8 was constitutional on its face and as applied. (J.S. App. 27). A notice of appeal was filed on September 29, 1976, and efforts to obtain a stay from the Supreme Judicial Court and from this Court thereafter were unavailing. On February 1, 1977, the opinion of the Supreme Judicial Court was entered.[2] This Court postponed a decision on jurisdiction on April 18, 1977, and ordered the parties to brief and argue mootness as well as the merits.

---

[1] At present, the Massachusetts state constitution permits only flat-rate taxation upon individual income. Mass. Const., Amend. Art. 44.

[2] Because a judgment had been entered without an opinion Appellants had obtained an extension for the filing of the Jurisdictional Statement.

II. Factual Background

The general election of November 2, 1976, contained a ballot question asking whether the electorate would approve an amendment to the Constitution of the Commonwealth authorizing the General Court (the Legislature) to impose a graduated income tax on personal income. The proposed constitutional amendment was as follows (A. 10):

> ART. As an alternative to levying a tax on incomes in the manner provided in Article XLIV of the Amendments to the Constitution, the General Court shall have full power and authority to levy a tax on personal incomes at rates which are graduated according to the total amount of income received, regardless of the sources from which it may be derived, and to grant reasonable exemptions, deductions, credits and abatements to such tax. Further, the General Court may define the tax liability or the total income upon which such tax is levied or the graduated rates at which it is taxed by reference to any provision of the laws of the United States as the same may be or become effective at any time or from time to time and may prescribe reasonable exceptions to and modifications of such provision.

Massachusetts General Laws c. 55, §7 ("Section 7"), the so-called political contributions law, had for many years prior to June, 1972, provided that business corporations were prohibited from expending moneys for the purpose of influencing the vote on any question submitted to the voters other than one which materially affected the property, business, or assets of the corporation. In 1962 that provision was held not to prohibit corporate expenditures to oppose a graduated income tax referendum proposal. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E. 2d 871

(1962). By Chapter 458 of the Acts of 1972, effective June 20, 1972, the Legislature amended Section 7 by inserting, after the first sentence, the following (A. 7, 13):

> No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

In an action brought by four of the present Appellants, *FNB I*, 362 Mass. 570, 290 N.E. 2d 526 (1972), two members of the Supreme Judicial Court held Section 7, as thus amended, to be unconstitutional and three members of that Court held that the statute did not prohibit plaintiff corporations from making expenditures for the purpose of affecting the vote on the 1972 ballot question concerning the adoption of a constitutional amendment which would allow the Legislature to impose a graduated income tax both on individuals and on corporations.

In June, 1972, plaintiffs The First National Bank of Boston ("First National"), New England Merchants National Bank ("Merchants"), Wyman-Gordon Company ("Wyman-Gordon") and The Gillette Company ("Gillette") each had contributed $3,000 to the Committee for Jobs and Government Economy, a duly organized political committee which raised and expended approximately $120,000 to oppose the proposed amendment. There was also a committee organized to promote passage of this constitutional amendment. The Statement of Agreed Facts submitted to the court below showed that this committee, Coalition for Tax Reform, Inc., raised and expended approximately $7,000 in this 1972 effort. Prior to argument before the Supreme Judicial Court two organizations[3] were

[3] The intervenors were the Coalition for Tax Reform, Inc., itself, and United Peoples, Inc. They have withdrawn from the case and are not parties to this appeal.

allowed to intervene herein as parties defendant. These intervening defendants appended to their brief documentation tending to show that the total expended by that committee to promote the graduated tax in 1972 was closer to $15,000, a 100% error. These documents were thus before the Supreme Judicial Court and the parties have, by agreement, reproduced them in the Appendix. (A. 32-36).

The amendment was rejected by the voters by a vote of 1,455,639 to 712,030 in 1972. (A. 25).

Following the decision in *FNB I,* the Legislature, by Chapter 348 of the Acts of 1973, added the word "solely" to Section 7 so that it read:

> No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Subsequently, by Chapter 1173, §4B of the Acts of 1973, the maximum imprisonment penalty and fine for individuals in violation of this Section was increased from six months to one year, and from $5,000 to $10,000 respectively. By Chapter 859, §6 of the Acts of 1974, the Legislature increased the penalty upon corporations for violations of Section 7 to a maximum of $50,000.

By Chapter 151 of the Acts of 1975, effective April 28, 1975, the General Court amended the General Laws by striking out Chapter 55 and inserting in its place a new Chapter 55. The substantive provisions of what was Section 7 are now Section 8. Section 8 is set forth in its entirety, *supra*, at 3-4.

Each of the Appellants intended to expend moneys for paid advertisements in newspapers and other media in an effort to persuade the voters to vote against the proposed 1976 constitutional amendment. (A. 22). The plaintiffs

below contended that Section 8 is unconstitutional on its face and as applied to them. They asserted, and the Attorney General denied, that, being corporations, they cannot communicate their contentions without expending some moneys. (A. 7, 13). Appellants contended that the proposed constitutional amendment would allow a direct new tax to be imposed on personal incomes, and such a tax would materially affect corporate interests. The Appellee agreed that this is the position of the Appellants' management but denied that the corporations' interests would be affected by the proposed constitutional amendment or the imposition of the graduated income tax itself inasmuch as there is a division of opinion among economists as to whether and to what extent such a tax would affect the business and assets of corporations. (A. 17). The agreed facts indicate each of the Appellants' ties to the local economy as follows:

Appellant Banks maintain their headquarters in Suffolk County and engage in the usual business activities attendant upon conducting a commercial banking enterprise. (A. 15). First National has approximately 126,000 individual checking accounts with an approximate balance of $146,000,000. (A. 18). In addition, First National has approximately 137,000 individual savings accounts with a balance of $206,000,000. (A. 18). It is the position of the management of First National that a graduated income tax on individuals would affect its business and property by tending to reduce these individual balances. (A. 18). First National has approximately 209,000 individual loans outstanding with a balance of $227,139,000; it is the position of its management that a graduated income tax would tend to work an adverse effect on the total of these loans. (A. 18).

Merchants has similar individual loans and deposit accounts, in each category its numbers and balances being somewhat less than First National, which is the largest

bank in the area. Merchants' totals in these categories are in the multi-million dollar range, and the management of Merchants shares the view that a graduated income tax would have an adverse effect on these balances. (A. 18).

It is the position of the management of both Banks that a graduated income tax would discourage businesses from settling or remaining in Massachusetts, with a resultant adverse effect on the Banks' industrial loans, deposits and other services. (A. 19). The Banks' interest in the prosperity of the business community is indicated in the following statistics: First National has approximately 6,000 industrial and corporate loans outstanding with a balance of $1,872,000,000; Merchants' balance for similar loans is $569,300,000. (A. 19). First National has approximately 29,000 industrial and commercial deposit accounts with a balance of $897,000,000; Merchants has 14,000 such deposit accounts totalling $358,889,000. (A. 19).

Appellant Banks have no branch offices in any other state, or in any Massachusetts county other than Suffolk. (A. 19).

It is the position of management of Appellant Banks that a graduated income tax imposed on individuals would discourage people of high ranking executive and middle management ability (and thus of high salary potential) from settling or remaining in Massachusetts, with a resultant adverse effect on the Banks' ability to retain such personnel. The Banks, between them, employ over 700 persons whose salaries are $20,000 or more, with the top salaries well in excess of $100,000. (A. 17-18).

Wyman-Gordon's position with respect to how a graduated income tax would affect its business and property is similar to those of the other Appellants. It is a Massachusetts corporation maintaining plants in three communities. It employs 1700 people with an annual payroll of approximately $27,000,000. (A. 20). It presently has 206 em-

ployees earning $20,000 or more. (A. 20). These include executives as well as highly paid technical personnel which are necessary in Wyman-Gordon's business; it is engaged in the business of die forging, utilizing highly sophisticated metal forming techniques. Wyman-Gordon principally serves the aircraft and turbine engine industries. (A. 16).

It is the position of the management of Wyman-Gordon that a graduated income tax would affect its business and property, among other ways, by discouraging executives and engineering and technical specialists from settling or remaining in Massachusetts. (A. 19-20).

It is similarly the position of the management of Gillette that the graduated income tax would adversely affect its business and property by discouraging persons of high ranking executive and middle management ability from settling or remaining in Massachusetts. (A. 20). Gillette is a business corporation with plants in South Boston and Andover, Massachusetts, where it employs approximately 6,000 persons, 857 of whom earn $20,000 or more. (A. 20-21). Gillette's net sales of consumer products in Massachusetts in 1974 were approximately $39,600,000. (A. 21). It believes the graduated income tax might shrink disposable income available for such purposes. (A. 20). Gillette owns tangible property worth $30,000,000 and leasehold improvements worth $1,500,000. (A. 21).

Digital Equipment Corporation ("Digital") is a Massachusetts corporation engaged in the design, manufacture, sales and servicing of computers, and other systems using digital techniques, employing approximately 11,500 persons in 12 Massachusetts locations. (A. 21). It operates in a highly competitive market and it is the position of the management of Digital that a graduated income tax would adversely affect its business and property in that it would impair Digital's ability to attract executive, technical and other skilled professional people to Massachusetts, and

the number of Massachusetts-based employees wishing to relocate to Digital facilities in New Hampshire, Arizona, and elsewhere would increase. (A. 21). Digital presently has 1,207 employees earning $20,000 or more. (A. 21-22).

The boards of directors of all of the Appellants have been notified of the commencement of this action, and three have formally ratified the action. (A. 26).

Forty-one states, including Massachusetts and the District of Columbia, impose income taxes on personal income. Fourteen states, including Massachusetts, do not have graduated income taxes. (A. 26).

Appellants attack Section 8 on equal protection grounds as well as First Amendment and due process grounds. Appellants will argue herein that the statute does not purport to preclude similar expenditures of funds on behalf of trusts, unincorporated associations, charitable corporations, trade unions, partnerships or other forms of business organizations. There are at least 7,500 active Massachusetts business trusts in operation in Massachusetts. (A. 24). The asset and income statistics for 20 of these trusts are set forth at p. 30 of the Appendix; these trusts have total assets of approximately $5,458,901,000 and a gross annual income in excess of $402,829,000. (A. 24). No statistical information with respect to the other 7,480 business trusts is available. (A. 24).

There are also 15,000 partnerships in Massachusetts which earned a total of $1,816,000,000 in business receipts during the year 1972, the last year for which cumulative statistics are available. (A. 24).

There are 2,250 local labor organizations in the State with a membership of 590,625. (A. 24).

Appellants sought a declaration that the statutory prohibition is unconstitutional on its face and as applied to them. Alternatively, Appellants urged the Court to construe narrowly the "materially affecting" proviso so as

to allow expenditures by corporations whose management reasonably believed their business to be materially affected and, as thus construed, to hold that Appellants could expend the desired funds. The court below denied all of plaintiffs' arguments and declared Section 8 constitutional on its face and as applied.

On November 2, 1976, the proposed constitutional amendment was defeated at the polls. (J.S. App. 3 n.6).

The record contains the names and addresses of contributors to the 1972 committee proposing and opposing the graduated tax.[4] There were substantial corporate contributors, but partnerships, unions, charitable corporations and others also contributed. Furthermore, the list of contributors to the committee in favor of the tax would seem to have omitted over 50% of the total. (A. 31-35).

Summary of Argument

I

The action is not moot because it falls into the class of cases "capable of repetition, yet evading review" which, if not heard after the specific dispute has terminated, will never be able to be reviewed. The Legislature has on four separate occasions proposed to the people that the Constitution be amended to allow a graduated income tax. Each time the Legislature votes overwhelmingly in its favor; each time the people vote it down. Accompanying these efforts are the Legislature's repeated efforts to come up with a statute which will effectively keep corporate money out of the referendum campaign on this point. The Massachusetts court's decision approves the exclusionary statute. It is thus a virtual certainty that there will be future graduated tax proposals and that the currently effective

[4] This list of names, being quite bulky, was not reproduced in the Appendix. (A. 31).

statutory barrier to corporate speech will remain an obstacle. These Appellants oppose the tax and will remain opposed; they would speak against it if they could.

Experience shows there will be, at most, a period of 18 months prior to the election within which a declaratory judgment may be pursued. This is in part because the procedure for getting questions on the ballot is very time consuming. Given huge court backlogs and the time required for the normal progression of a case to the level of the Supreme Court, there will never be time to obtain review by this Court early enough to allow Appellants, if successful, to expend moneys for communications in advance of the election. (pp. 18 to 25).

II

Section 8 has been interpreted by the court below as having created two distinct crimes: expending funds for communications to the public as to a ballot question which does not materially affect the corporation and expending funds for communications to the public as to a ballot question which solely concerns individual taxes, regardless of materiality. The Court held, however, that any corporation which proved that a particular ballot question did materially affect its assets could claim First Amendment protection for its speech pertaining to that question. Presumably such a corporation would be free from "both" crimes embodied in Section 8.

Thus limiting First Amendment protection to speech concerning matters proven to be material to the corporate speaker constitutes a prior restraint. This is especially so when the particular ballot question concerns a constitutional amendment pertaining to individual taxes and what the effect upon corporations might be should the amendment pass is a subject upon which economists differ.

Business corporations do have rights of freedom of expression; the message which Appellants wish to convey concerns basic economic and political policies and the public has a First Amendment right to hear it; neither precedent nor logic supports the proposition that such corporate expression of ideas may be forbidden by the criminal law unless the particular message is proven to be of material concern to the speaker. The law serves no compelling or even tolerable state purpose, and as a broad, total prohibition of expenditures or contributions, it is not the least restrictive means to carry out whatever policy might be served. The statute chills expression of basic ideas. Such a law cannot be tolerated under the First Amendment.

At the least, corporate communications ought to be protected where management reasonably believes the corporate interests to be materially affected. (pp. 25 to 60).

III

Due process principles invalidate any criminal statute which forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application. Particular clarity and specificity are required in criminal statutes which restrict expression. The standard in Section 8, whether or not a particular referendum question materially affects a corporation's business, is unconstitutionally vague especially when applied to a ballot question such as is involved in this case. Whether and to what extent a constitutional amendment allowing but not requiring graduated rates on individual income taxes would affect a particular corporation is completely speculative and economists differ among themselves. Although it is a question about which strong opinions are held, it is essentially unprovable one way or the other, dependent as it is upon such factors as what rates might be imposed by future legislatures if graduated rates were to become available. (pp. 60 to 66).

IV

Section 8 violates Appellants' rights to equal protection of the laws in two ways. First, it purports to prohibit corporate expenditures, and thus corporate expression, as to ballot questions solely pertaining to individual taxation but it does not purport even to limit corporate expenditures as to other ballot questions, so long as they materially affect the corporation. This amounts to a classification based upon the content of the expression. Second, it imposes heavy criminal restrictions upon corporations but does not purport to regulate in any way other organizations similarly situated, such as labor unions, trusts, charitable corporations, partnerships and the like.

With respect to each of these classifications strict scrutiny is required because fundamental rights are affected. The court below applied only the rational interest test. No compelling state interest was found, and none exists. The statute is not the least restrictive alternative assuming a compelling purpose was found.

As to the statute's failure to include within its scope unions and other entities similarly situated, there is not even a rational state interest served. A purpose to protect shareholders from *ultra vires* expenditures is not served by a prohibition as to public communications concerning a proposed graduated tax constitutional amendment but not prohibiting communications concerning legislation enacting a graduated tax once the amendment is adopted. Furthermore, some of the unregulated entities have shareholders; their plight concerning *ultra vires* expenditures is ignored, as is the plight of corporate shareholders as to ballot questions other than those solely relating to individual tax questions.

Any state policy to preclude "undue influence" by corporations over the electorate because of greater resources is irrational and constitutionally impermissible under *Buckley v. Valeo,* 424 U.S. 1 (1976). (pp. 67 to 82).

V

Many decisions of this Court invalidate on due process grounds the use of legislatively created irrational presumptions in criminal cases. The proviso in Section 8, that questions solely pertaining to individual taxes shall not be deemed materially to affect a corporation's business, takes the form of a presumption, and it is not a rational one. The Massachusetts court ruled that the proviso was not a presumption but, rather, created a separate new crime. The practical effect, however, is the same. Under the Court's analysis a corporation must affirmatively prove that a particular ballot question materially affects its business in order to be able to spend money to publicize its views. This means, at best, that what is phrased as an irrebuttable presumption in the statute now has the practical effect of a rebuttable presumption. Whether one looks to the actual language of the proviso itself, then, or whether one looks to the practical result of the Court's opinion, the principles underlying this Court's decisions invalidating the use of irrational rebuttable presumptions in criminal cases are applicable here. They mandate reversal. (pp. 82-86).

Argument

I. The Action Is Not Moot

The event precipitating Appellants' request for relief—the placement of a proposed constitutional amendment on the November, 1976, ballot—has ended. Nevertheless, under the standards articulated by this Court, the appeal is not moot.

The appeal falls within that class of cases "capable of repetition, yet evading review" which, if not heard after

the specific underlying dispute has terminated, will never be able to be reviewed by this Court. *Southern Pacific Terminal* v. *ICC,* 219 U.S. 498, 515 (1911). In *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975) (per curiam), the Court set forth, as follows, the two elements which, if found in a case other than a class action, will satisfy the "capable of repetition, yet evading review" doctrine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." The instant case satisfies both elements.

A. *The Same Controversy Will Recur*

Section 8 imposes an outright ban on all corporate expenditures for the purpose of influencing the vote on questions solely concerning individual taxation. The Supreme Judicial Court has ruled that the provision would be invalid only if a corporation has proven that a proposed individual income tax question does in fact materially affect its business. (J.S. App. 14). The Court specifically noted that "reasonable belief" that a proposed question would materially affect a corporation is not sufficient. (J.S. App. 15 n.15). Thus, when Appellants renew their challenge to the statutory prohibition before the next election, it necessarily will entail litigation.

The 1976 election marked the fourth time in recent years that a proposed graduated income tax amendment has been submitted to the Massachusetts voters by ballot question. The Massachusetts Constitution requires that any proposed constitutional amendment pass both houses of the Legislature in two consecutive sessions before appearing on the ballot. Mass. Const., Amend. Art. 48, IV §§4, 5. This procedure was followed in the 1962, 1966, 1972 and 1976

elections.[5] Each time the voters rejected the proposal, but as note five indicates, the Legislature continues by lopsided margins, to place the issue on the ballot. Moreover, several politically influential groups have advocated in the past and undoubtedly will continue to press for passage of a graduated income tax. In fact, a bill now is pending in the Legislature to enact a graduated income tax, and a copy has been filed as Appendix G to Appellants' Jurisdictional Statement. (J.S. App. 49). It would

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[5] In a joint session of the two branches held on May 13, 1959, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1962 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 143 affirmative votes and 118 negative votes. Journal of the Senate 848-51 (1959). It was approved a second time by the Legislature on March 29, 1961, when the proposed amendment received 144 affirmative votes and 121 negative votes. Journal of the Senate 717-20 (1961).

In a joint session of the two branches held on August 30, 1966, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1968 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 188 affirmative votes and 46 negative votes. Journal of the Senate 1678-81 (1966). It was approved a second time by the Legislature on May 10, 1967, when the proposed amendment received 174 affirmative votes and 78 negative votes. Journal of the Senate 1121-23 (1967).

In a joint session of the two branches held on July 2, 1969, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1972 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 204 affirmative votes and 49 negative votes. I Journal of the Senate 1586-90 (1969). It was approved a second time by the Legislature on May 12, 1971, when the proposed amendment received 245 affirmative votes and 20 negative votes. I Journal of the Senate 1290-94 (1971).

In a joint session of the two branches held on August 15, 1973, the Legislature approved the proposed amendment to the Massachusetts Constitution which was on the November, 1976 ballot, and which purported to authorize the imposition of a graduated income tax. The proposed amendment received 199 affirmative votes and 66 negative votes. II Journal of the Senate 2126-29 (1973). It was approved a second time by the Legislature on May 7, 1975, when the proposed amendment received 228 affirmative votes and 41 negative votes. I Journal of the Senate 1409-12 (1975).

take effect upon approval by the voters of a constitutional amendment.

Section 8 imposes a continuing statutory obstacle to spending moneys in opposition to a graduated income tax ballot question.[6] The Attorney General, whether the present incumbent or a successor, will enforce the statute. State policy "is not contingent upon executive discretion." *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974). Unlike the situation in *Spomer* v. *Littleton,* 414 U.S. 514 (1974), Appellants are not challenging the behavior of a particular state's attorney. Even in cases, unlike the present one, where there is no statute which effectively precludes discretion, this Court has been willing to assume that the appropriate authorities would apply the law. *E.g., Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 546 (1976) (case law authorizing prosecutors to seek restrictive orders meant such orders would be sought and thus case not moot).

Finally, there is a reasonable likelihood that the same complaining parties again will be subjected to the same statutory prohibition. All the complaining parties believe that a graduated individual income tax would materially affect their business and all wished to spend funds to oppose the constitutional amendment in 1976. The very fact that they are seeking plenary review before this Court

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[6] Corporate expenditures and contributions for political matters have been prohibited or restricted since 1907. St. 1907 c. 576, §22. In 1938 corporations were allowed to spend moneys as to a ballot question "affecting" the corporate property, business or assets, St. 1938, c. 75, and in 1943 this was revised to require that the question "materially affect" the same. St. 1943 c. 273, §1. *Lustwerk* v. *Lytron, Inc.,* 344 Mass. 647, 652, 183 N.E.2d 871 (1962). This provision compels a demonstration by the corporation of materiality in fact according to the court below. (J.S. App. 11-15). The tailor-made prohibition against graduated income tax expenditures dates from 1972 (J.S. App. 6) and now provides that no ballot question solely concerning individual taxation shall be deemed to have such a material effect.

after the election has passed indicates their continuing purpose to secure the right to expend funds in future elections. Moreover, the record indicates that four of the five Appellants contributed funds in 1972 in opposition to the proposed graduated income tax constitutional amendment which appeared on the 1972 ballot. (A. 19, 20, 21). It may be inferred that they contributed in earlier graduated income tax campaigns. *See Lustwerk* v. *Lytron, Inc.,* 344 Mass. 647, 183 N.E. 2d 871 (1962). Unlike the situations presented in *Weinstein* v. *Bradford, supra,* 423 U.S. at 149 (highly improbable that released convict would once again acquire status of parolee), or *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974) (virtually impossible that final term law school student would once again acquire status of law school applicant), in the instant case there is more than a reasonable probability that the same complaining parties will again believe themselves to be unconstitutionally restricted by Section 8.[7]

B. *The Time Frame Will Preclude Review*

Appellants, in order to avoid "ripeness" problems, may not bring a new action until it is clear that a graduated income tax constitutional amendment will appear on the ballot. *California Bankers Ass'n.* v. *Shultz,* 416 U.S. 21, 72-75 (1974); *O'Shea* v. *Littleton,* 414 U.S. 488, 495-98 (1974). Passage twice through both houses of the Legislature is time-consuming, and experience indicates that the process will not be completed until approximately 18 months prior to the next election. *See* note five, *supra.*

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[7] In the meantime, the offending statute remains on the books, fully enforceable, and works a profoundly chilling effect upon the expression of ideas as to important public issues. Witness the letter recently received by one of the Appellants, Wyman-Gordon Company, a copy of which is appended hereto as Appendix A, concerning Wyman-Gordon's contribution to support a local referendum proposal concerning a civic center for the City of Worcester.

In 1976 Appellants presented their case by means of a statement of agreed facts. The opinion below held that the absence of a finding that these corporations would, in fact, be materially affected by the ballot question was fatal to Appellants' constitutional contentions. Since the Attorney General obviously will not stipulate to this material effect (having prevailed in this case on precisely that point), Appellants will be faced with proving the material effect at trial. The trial and review process cannot be completed within 18 months.[8]

After a trial on the merits, and the issuance of a written decision, these Appellants would face review by the Massachusetts Appeals Court and then the Supreme Judicial Court before an appeal could be taken to this Court. Appellants could under no foreseeable circumstances obtain plenary review before this Court in sufficient time to be able to expend funds in a meaningful fashion in advance of the vote. *E.g., Roe* v. *Wade,* 410 U.S. 113 (1973).[9]

Of course, Appellants' contention on the present appeal is that the imposition of such a burdensome course on the

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[8] In Suffolk County, where the instant case originated, the average time from date of entry to trial in Superior Court is 56 months; the average time in all other counties is 43 months. 19 Annual Report to the Justices of the Supreme Judicial Court 64 (June 30, 1975).

The instant case was commenced in the Single Justice session of the Supreme Judicial Court. This process is quite compatible with a relatively expeditious handling of a case upon an agreed statement. Where the prospect is for a hotly contested trial, presumably consuming days or weeks with the testimony of economic experts on whether and to what extent future individual tax rates may impact on corporate business, the case will be processed through the Superior Court, the trial court of the Commonwealth.

[9] The opinion of the court below indicated that 18 months might have been enough to accomplish a trial on the merits. (J.S. App. 15 n.15). This was in the context of its commentary upon the fact that suit was commenced in 1976 rather than sometime in 1975. The court does not intimate, of course, that a full trial, review by the Supreme Judicial Court, and further review by this Court could be accomplished in that time frame.

exercise of the right to express an economic and political viewpoint is unconstitutional. That issue is presented on the present record. If it is not resolved by this Court now, it will never be resolved.

C. *Election Cases*

This Court, applying the *Southern Pacific Terminal* "capable of repetition, yet evading review" standard, has repeatedly sustained its jurisdiction in election cases although the specific election underlying the action has passed. *E.g., American Party* v. *White,* 415 U.S. 767, 770 n.1 (1974); *Rosario* v. *Rockefeller,* 410 U.S. 752, 756 n.5 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969).[10] "In these cases [individual challenges to state election laws after the elections had taken place] the Court recognized the importance of the issues to candidates and voters who would participate in future elections and accepted jurisdiction under the *Southern Pacific* rationale without reference to the absence of a formal class action." Note, *The Mootness Doctrine In The Supreme Court,* 88 Harv. L. Rev. 373, 388 (1974).

Guidance on the resolution of the mootness question posed by the instant case may be found in this Court's discussion in *Storer* v. *Brown,* 415 U.S. 724, 737 n.8 (1974) (challenge to state election laws relating to placement of independent candidates on the California ballot):

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[10] In those election cases in which mootness claims have been sustained, factors other than the mere passing of the election were determinative. *Brockington* v. *Rhodes,* 396 U.S. 41, 43 (1969) ("limited nature of the relief [mandamus] sought"); *Hall* v. *Beals,* 396 U.S. 45 (1969) (intervening change in state law); *Golden* v. *Zwickler,* 394 U.S. 103 (1969) (Congressman, target of anonymous handbills, elected to bench).

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." [Citations omitted.] The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Appellants submit that under the principles articulated in *Storer,* this action is not moot.

II. The Section 8 Prohibition Is Unconstitutional As A Violation of Freedom of Expression

A. *Introductory Comments*

There is a certain degree of inconsistency in the opinion of the Supreme Judicial Court. As a preliminary matter, Appellants will touch on this point and suggest an interpretation of the opinion which will minimize the constitutional problems inherent therein and present, more simply, what constitutional issues remain.

Plaintiffs below claimed a constitutional right, based on the facts in the case, to expend and contribute moneys to communicate their views to the public on the graduated

income tax referendum question. Appellants attacked c. 55, §8 under the First Amendment. Appellants claimed that the statutory standard as to what communications are forbidden (those concerning questions which do not "materially affect" the corporation) coupled with the statutory proviso or presumption (that questions solely pertaining to individual taxation shall not be deemed materially to affect the corporation) amounted to a statutory prohibition in violation of the First Amendment.

The Massachusetts court held, as a matter of federal constitutional law, that corporations such as Appellants do have First Amendment rights, but that the extent of those rights is limited to communicating as to matters which materially affect the corporation.

> Thus, we hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public.
>
> (J.S. App. 13)

The Court held that if Appellants had proven, as a fact, that the particular referendum question would have a material effect on the corporations, the proviso to the contrary would be "invalid" as to Appellants and would not prohibit the communications Appellants wished to make here. (J.S. App. 11-15). It bears emphasis that this is a full-fledged constitutional holding of the Supreme Judicial Court.

Appellants had also attacked the said proviso (deeming questions pertaining solely to individual taxes to be non-material) under the due process clause of the Fourteenth Amendment. Appellants claimed that the statutory proviso

constituted an irrebuttable presumption whereby the Legislature had, indirectly and improperly, supplied for the jury one of the elements of the crime it had previously created. *See, e.g., Tot* v. *United States,* 319 U.S. 463 (1943). The element thus supplied, Appellants argued, was the ballot question's lack of materiality to the corporate business or assets which was, otherwise, one of the elements the prosecutor would have to prove in order to convict under c. 55, §8. The Court, in denying this claim, ruled that the proviso, despite its form, had not in fact created a presumption as to nonmateriality. Rather, it had created an entirely new crime: the crime of expending corporate funds to express views pertaining to a ballot question solely related to individual taxes. Materiality, or its lack, is not pertinent to this second crime. The Court is explicit in this regard:

> Although §8 as amended may be inelegantly written, it requires the prosecution to prove that: (1) the defendant is a corporation; (2) the defendant corporation made an expenditure; (3) the purpose of the expenditure was to influence or affect the vote; and (4) that the vote was on a question solely relating to the taxation of the income, property, or transactions of individuals.
>
> (J.S. App. 23-24)

Thus the Court, having already held under the First Amendment that corporate communications may only be prohibited concerning those political questions which are nonmaterial to the corporate interests, then went on to "save" a criminal statute by meticulously construing it as forbidding communications concerning a particular kind of question regardless of whether or not the question is material to the corporate interests.[11]

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[11] It is clear, of course, that both of these crimes found by the court to inhere in Section 8 constitute roadblocks to Appellants' proposed communications.

Appellants assume herein that the consistent thread running through the Court's analysis is that the First Amendment provides protection for corporate speech concerning any ballot question if the corporation proves that the question is one which materially affects its business. It is assumed in this brief that the opinion of the Massachusetts court would recognize that if the referendum question at issue here is one which would materially affect the Appellant corporations, they may expend and contribute funds to publicize their views without threat from *either* of the two statutorily created crimes. The statute as thus construed is, Appellants argue, still deficient. If, contrary to this assumption, however, the Massachusetts court's opinion really construes the statute as properly forbidding corporate expenditures even with respect to questions materially affecting corporations, as long as the questions happen to pertain solely to individual taxation, then the statute is even more basically flawed.

B. *The Court's First Amendment Holding and Its Constitutional Infirmities Summarized*

With respect to Appellants' First Amendment argument, the Supreme Judicial Court held as follows:

1. Corporations do have First Amendment rights.
2. Only when a general political issue materially affects a corporation's business, property, or assets, may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public.
3. To take advantage of this constitutional protection a corporation must affirmatively demonstrate that its material interests are in fact affected. A reason-

able belief by management that its interests are materially affected will not suffice.

4. Absent such an affirmative showing, a state criminal statute may effectively and properly prohibit expenditures or contributions, in any amount, for purposes of publicizing the corporation's views.
5. Absent a demonstration of materiality in fact: a compelling state interest need not be found for the statute; strict scrutiny need not be applied; the criminal sanctions imposed need not be the least restrictive alternatives available.

The flaws in the foregoing are the following:

1. The statute, as thus construed, imposes a prior restraint on the expression of political and economic views and brings about an impermissible chilling effect.
2. The opinion ignores the right of the public to hear regardless of whether or not the matter discussed materially affects the speaker.
3. Any statute whose purpose and result is to limit freedom of expression must serve a compelling state interest and survive strict scrutiny. No such analysis was given by the court below. The statute cannot survive such an analysis if made.
4. Such a statute must fail if there are less restrictive alternatives available to serve the state's interest. The court below applied no such test. The statute cannot survive such a test.

C. *Chilling Effect and Prior Restraint*

The portion of the opinion holding that the Legislature created a separate and distinct criminal stricture purporting to forbid corporations from expending moneys to publi-

cize their views with respect to any ballot question solely relating to individual taxation is consistent with the position of the Appellants, as argued below, that the proviso at question here is an absolute prohibition against such expenditures regardless of whether or not an individual income tax question might materially affect a corporation. Appellants contend that the manner in which the prohibition is promulgated is by an impermissible presumption; the court below disagreed and held that the proviso was a separate and distinct prohibition and created a separate crime. The Court did agree with Appellants' contention, however, that the prohibition is absolute and not dependent upon whether or not the proposed tax would materially affect the corporation.[12] (J.S. App. 23-24).

This is attested by the history pertaining to the graduated income tax effort in Massachusetts, which indicates quite clearly the persistent and overriding desire of the Legislature to prohibit, once and for all, the influx of corporate money which the Legislature had seen as thwarting its efforts to achieve a more enlightened tax vehicle. As has been shown above (p. 20 n.5) the Massachusetts Legislature has for many years desired to enact a graduated income tax. Prior to the 1976 ballot proposal the Legislature had three times proposed a constitutional amendment by substantial if not lopsided margins. Each time the voters turned down the proposal by substantial if not lopsided margins. *Id.*

Contributing to the frustration of the Legislature was the fact that corporations had been held entitled to spend moneys to publicize their views. It would appear obvious that the Legislature believed that those views were in opposition to the proposed tax amendment. *See Lustwerk* v.

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[12] The Court reintroduced the concept of the material effect as a constitutional prerequisite for corporate freedom of expression. (J.S. App. 13).

Lytron, Inc., 344 Mass. 647, 183 N.E.2d 871 (1962); *FNB I*, 362 Mass. 570, 578, 290 N.E.2d 526 (1972); and pp. 7 to 9, *supra*. Following *FNB I*, the Legislature amended the statutory proviso to forbid corporate expenditures as to ballot questions pertaining "solely" to individual taxes, and the 1976 proposed constitutional amendment presented by the Legislature to the voters did pertain solely to individual taxes. Meanwhile, criminal penalties increased until, by 1976, $50,000 fines and jail sentences up to one year were authorized. *See* p. 9, *supra*. The purpose of the statute is complete exclusion of corporate funding and the crime created faithfully (and, to date, successfully) carries out the purpose.[13]

The chilling effect which has attended the Legislature's successful and dogged opposition to corporate expression is obvious. The underlying statutory standard—that of a ballot question which materially affects a corporation—is so uncertain, particularly when viewed in the context of a proposed constitutional amendment which would allow but not require a graduated income tax on individuals, as to render foolhardly any corporate management which would authorize corporate expenditures in this area without a court ruling as to materiality. Clearly no corporate expenditures would have been made in previous referendum campaigns without the *Lustwerk* and *FNB I* decisions. The vagueness of the statute is addressed in detail below (pp. 60-66). It must be remembered that *any* corporate contribution or expenditure, no matter how small, to publicize the corporate viewpoint on the ballot question, risks the heavy penalties of the statute if management's view as to the materiality of the question to its business is not accepted by a criminal jury. The expenditure of $2.00 by

[13] It is ironic that the 1976 graduated tax proposal fared no better than its predecessors despite the absence of corporate contributions or expenditures. *See* J.S. App. 3 n.6.

an incorporated corner drug store to make a sign to hang in the window urging passersby not to vote for a graduated income tax referendum question would subject the proprietor to a one-year jail sentence if a criminal jury did not believe that the graduated individual income tax would, in fact, materially affect the drug store's business. This is true under the "materially affect" standard itself.

The proviso which introduced the presumption of nonmateriality as to questions pertaining solely to individual taxes reinforced the chill that the "materially affect" standard itself had brought about. Although the opinion below has held that corporations may free themselves of this proviso if they prove that the graduated tax referendum would, in fact, materially affect them (*see* J. S. App. 12-15), this merely reintroduces in constitutional form the same doubts and ambiguities which attended the phrase when it was merely a statutory concept. While courts have often molded statutes to align with constitutional principles, the Massachusetts court has reversed the process and shaped the Federal Constitution after a very troublesome and uncertain Massachusetts statute. (J.S. App. 13). It is bad as a statutory standard. As a First Amendment standard it is untenable.[14]

The options left to a corporation under the Supreme Judicial Court's ruling are to remain silent, to incur the expense and burden of prevailing in a civil declaratory judgment wherein the corporation must prove as a fact that an amendment to the Constitution allowing for graduated rates on individual taxes would materially affect the corporation, or to defend a criminal complaint based upon the same contention.[15] Silence would probably be deemed the best course by all but the wealthiest and bravest.

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[14] In an antitrust or deceptive business practice statute a somewhat imprecise standard may chill predatory tactics. The chilling of protected expression is quite another matter.

[15] The Attorney General will prosecute. (A. 9, 14).

The procedures followed in the instant case, wherein Appellants sought by means of a statement of agreed facts to raise the issue for a relatively speedy and simple resolution by the court, is obviously not available as a realistic option. Since the right to speak, under the lower court's decision, is dependent upon a factual finding of materiality, and since the Attorney General will clearly not stipulate to such a fact, the question must be determined by a jury after trial. A reasonable belief by the corporation that its material interests are at stake is not enough. (J.S. App. 15 n.15). The record states the obvious: experts disagree as to whether and to what extent a graduated individual tax would affect corporations. (A.17). A corporation, assuming the affirmative burden of establishing what the effect will be and persuading the jury that that effect will be "material" faces an enormous task. Experts must be retained to grapple with, among others, the following issues: if graduated rates are constitutionally allowed, at what level might the Legislature set those rates? what rate increases might be expected in the future? how important are income tax rates in the choice, by middle and upper management personnel and skilled technical people, of where to locate? how important are such people to the particular corporation? does the particular corporation compete with corporations from other states as an employer? which other states? how is the tax climate perceived in those states? Each of the factors set forth in the facts (A. 16 to 22) as indicating a tie between corporations such as these Appellants and the economic and tax climate in Massachusetts would be examined (among others), and experts would sagely opine as to the significance, or lack of significance, of such factors.

The expense and aggravation of such a proceeding constitutes an undue burden upon First Amendment rights. "[E]ven when pursuing a legitimate interest, a State may

not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59 (1973). "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." *Lamont* v. *Postmaster General,* 381 U.S. 301, 309 (1965) (Brennan, J., concurring) (Requirement that an addressee notify the Post Office of his desire to receive mail unconstitutional because almost certain to have a deterrent effect). *See also Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940) (Statute prohibiting solicitation for religious or charitable purpose absent determination by secretary of public welfare that cause is religious or charitable constitutes an unconstitutional restraint, "a forbidden burden upon the exercise of liberty protected by the Constitution") and *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967).

The requirement of a demonstration of factual materiality constitutes a prior restraint upon the expression of ideas and should not be tolerated.

D. *The Holding of the Court Limiting Corporations' First Amendment Rights to Questions Materially Affecting the Corporations Is Error*

In the previous section of this brief Appellants have argued that the combination of the vague standard of materiality, the difficulty of assessing materiality as it pertains to a question such as a proposed graduated income tax, and the Massachusetts court's requirement that corporations earn their right to speak by factually proving such materiality amounts to the imposition of a prior restraint upon the expression of basic political and economic ideas. This would appear to be the most obvious constitutional flaw in the holding below.

Another constitutional error, perhaps equally basic, is contained in the holding that a corporation only has First Amendment protection for speech relating to general political issues when such issues materially affect the corporation's business. (J.S. App. 13). The Court was right in recognizing that corporations have rights of freedom of speech (J.S. App. 12) but wrong in limiting those rights to speech as to matters materially affecting the corporate speaker. To limit the perimeters of corporate free speech to subject matters which materially affect the corporation is wrong in and of itself even without the added burden contained in the ruling that the corporation must factually demonstrate such materiality in order to speak. The limitation is especially offensive when it applies to communications concerning basic political and economic questions before the public. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966).

The messages contemplated by Appellants fall within the core area of First Amendment rights. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). What Appellants intended to do is protected by the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment.[16]

The Appellants are artificial persons and, as such, cannot act or communicate except through the intervention of some medium of expression, which, in turn, necessarily

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[16] At this time it is uncontrovertible that the due process clause of Section 1 of the Fourteenth Amendment prohibits the states from abridging First Amendment rights. *See Gitlow* v. *New York,* 268 U.S. 652, 666 (1925); *Schneider* v. *State,* 308 U.S. 147, 160 (1939); *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940); *Staub* v. *City of Baxley,* 355 U.S. 313, 321 (1958); *Bigelow* v. *Virginia,* 421 U.S. 809, 811 (1975).

requires an expenditure of money. *Buckley* v. *Valeo,* 424 U.S. 1, 19 (1976). The clear wording of §8, buttressed by the holding of the court below, precludes corporate expenditures and contributions and thus corporate speech. The extent of Appellants' First Amendment rights is directly at issue.[17]

1. *Business Corporations Have First Amendment Rights*

The fact that Appellants are corporate entities, rather than individuals, associations, or business trusts does not deny them First Amendment protection.[18] This Court has consistently held that corporations are persons within the meaning of the due process clause of the Fourteenth Amendment, *e.g., Covington & Lexington Turnpike Rd. Co.* v. *Sandford,* 164 U.S. 578, 592 (1896), and, in particular,

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[17] Appellants sought to make their views known only on an issue, not to contribute to the election of a candidate to state office. Since a prohibition on contributions to candidates raises serious First Amendment problems, *a fortiori,* a blanket ban on free trade in ideas must infringe upon First Amendment rights. *Cf. United States* v. *CIO,* 335 U.S. 106, 141, 144-45 (1948) (Rutledge, J., concurring); and *United States* v. *UAW,* 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). As noted by Mr. Justice Rutledge, the Government admitted that the prohibition of expenditures in connection with any Federal election (by labor unions and corporations) by the Federal Corrupt Practices Act "does 'bring into play' the rights of freedom of speech, press and assembly." *United States* v. *CIO, supra,* 335 U.S. at 141. *See generally* Redish, *Campaign Spending Laws and the First Amendment,* 46 N.Y.U. L. Rev. 900 (1971); Lambert, *Corporate Political Spending and Campaign Finance,* 40 N.Y.U. L. Rev. 1033 (1965); and Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis,* 27 Fordham L. Rev. 599 (1958-59).

[18] Cases which question whether corporations are "citizens" within the privileges and immunities clause of Section 1 of the Fourteenth Amendment, *e.g., Western Turf Ass'n* v. *Greenberg,* 204 U.S. 359, 363 (1907), are irrelevant because Appellants are only asserting rights which stem from the equal protection and due process clauses.

that corporations are entitled to First Amendment rights. In *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936), this Court upheld the First Amendment challenge of nine corporations to the constitutionality of a Louisiana license tax, noting that a corporation was a person within the meaning of the equal protection and due process clauses, and that "freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process clause of the Fourteenth Amendment . . . ."[19]

It is clearly established that although a corporation is engaged in a business for profit, it and its expressions are nevertheless entitled to First Amendment protection. *See, e.g., Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-502 (1952); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 266 (1964).

Similarly it is now clear that even the expression of purely commercial speech is afforded protection under the First Amendment. *Linmark Associates, Inc.* v. *Township of Willingboro,* 45 U.S.L.W. 4441 (May 2, 1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376 (1973). It is ironic that as to a certain segment of society the Supreme Judicial Court elevates purely commercial

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[19] *See also, e.g., Pennekamp* v. *Florida,* 328 U.S. at 331 (1946); *United States* v. *CIO, supra,* 335 U.S. at 154-55 (Rutledge, J., concurring), in which Mr. Justice Rutledge observed that "corporations have been held within the First Amendment's protection against restrictions upon the circulation of their media of expression"; *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952); *Kingsley International Pictures, Corp.* v. *Regents,* 360 U.S. 684 (1959); *NAACP* v. *Button,* 371 U.S. 415, 428 (1963); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Lambert, supra* note 7, at 1060, *et seq.*; and Comment, *Control of Corporate and Union Political Expenditures: A Constitutional Analysis, supra* note 7, at 605. *Cf. Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-39 (1960).

speech to a higher plateau of constitutional recognition than speech relating to general economic and political ideas. For many years the United States Supreme Court struggled with the opposite proposition—whether the relationship of the desired speech to a business activity operates to undermine the First Amendment rights of the speaker. *E.g., Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). *Virginia Pharmacy* clearly rejected any suggestion remaining from *Valentine* that commercial speech is not protected. The debate is now turned upside down with a holding that would, in effect, accord a corporation's deodorant advertisement constitutional significance but permit the expression of opinion on a tax law, by a bank, to result in jail sentences for its officers.

Bigelow v. *Virginia,* 421 U.S. 809 (1975), a case which perhaps paved the way for *Virginia Pharmacy,* is instructive. This Court, in invalidating a statute which operated to prohibit an advertisement promoting abortion, pointed out that the advertisement "did more than simply propose a commercial transaction." *Id.* at 822. The Court stressed that the "advertisement conveyed information of potential interest and value to a diverse audience." *Ibid.* The communication was afforded protection at least partly because it did transcend the merely commercial and undertook to convey a somewhat controversial message of some current public import. *Virginia Pharmacy* itself recognized that the particular message in that case, information concerning drug prices (whose suppression hits hardest the poor, the sick, and the aged, 425 U.S. at 763) was of considerable social significance and that, in general, society has a strong interest in the "free flow of commercial information." It is not so much the fact that the seller might make a profit which entitles business communications to constitutional protection. Nor is the identity, or organizational structure of the speaker (*i.e.* corporate versus trust versus

partnership, etc.) important. It is, rather, the public's interest in receiving ideas and information which forms the foundation for First Amendment protection.

2. *First Amendment Rights for Corporations Are Not Limited to Corporations Whose Business Is Communications*

While the bulk of the cases making clear that corporations have First Amendment rights deal with corporations in the communications, entertainment or publishing fields,[20] no case suggests that the First Amendment applies only to such corporations. The opinion of the court below does not, in so many words, say that it applies only to non-media corporations and that media corporations are free of the strictures of c. 55, §8.[21] This distinction must be implicit in the Court's holding, however, since the Court realistically could not contemplate that Section 8 could prohibit expenditures of a corporate publishing company with respect to publication of an editorial on a referendum question unless that question was one which materially affects the publisher. Whether the unspoken assumption is straight constitutional law (*i.e.*, media corporations have broader First Amendment rights) or whether it is statutory con-

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[20] *See* cases cited in n.19, *supra*. *But see Linmark Associates, Inc.* v. *Township of Willingboro,* 45 U.S.L.W. 4441 (May 2, 1977).

[21] The only reference to the problem appears in n.13 of the Court's opinion (J.S. App. 12). There the Court states that no one asserts that the statute "bars the press, corporate, institutional or otherwise from engaging in discussion or debate on the referendum question," and therefore the Court need not opine on such matters. Actually plaintiffs in their attack on the breadth of the statute had pointed out that newspaper editorials would seem to fall within the literal sweep of the prohibition; the fact that no one could seriously contend that the statute could validly proscribe expenditures for such editorials was precisely the point plaintiffs were attempting to make. It is hard to see how the Court could conclude that this consideration is irrelevant.

struction dictated by constitutional considerations (the statute is construed as inapplicable to media corporations in order to avoid constitutional infirmity), the distinction will not stand scrutiny. Full First Amendment protection for corporations is not limited to media corporations, and any limiting interpretation exempting only media corporations will not avoid the constitutional infirmity in the statute.[22]

The key point about the First Amendment is that it protects the right of the listener. As stated in *Time, Inc.* v. *Hill,* 385 U.S. 374, 389 (1967), concerning the right to report on matters of public interest:

> Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

And in *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969), a case not even involving publication of important public information, the Court stated:

> It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . . ." [citing cases] This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. [citations omitted.]

Again, in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969), it is said:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . .

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[22] See *Buckley, supra,* 424 U.S. at 51 n.56, wherein this Court recognizes that exempting the institutional press from a statute limiting political expenditures cannot save the statute from First Amendment attack.

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

The cases decided by this Court make clear that the right of the public to receive and exchange ideas and information of any kind is of vital significance, *e.g., Virginia Pharmacy, supra* (commercial advertising); *Linmark Associates, supra* (real estate sales); *Procunier* v. *Martinez,* 416 U.S. 396, 408-409 (1974) (prisoners' mail); *Smith* v. *California,* 361 U.S. 147, 153 (books); and where the information relates to political and public matters it is the core concern of the First Amendment. *Branzburg* v. *Hayes,* 408 U.S. 665, 725-727 (1972) (dissenting opinion of Mr. Justice Stewart); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269 (1964); *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949); *DeJonge* v. *Oregon,* 299 U.S. 353, 365 (1937); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931); *See also Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Kleindienst* v. *Mandel,* 408 U.S. 753, 762-763 (1972).

Viewed in light of the overwhelming significance to be accorded the right of the public to receive information, especially information of a broad political or economic nature,[23] one thing becomes immediately apparent: it is

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[23] It bears emphasis that the instant case concerns the right to publicize a corporate belief as to a ballot question before the public. There is no question of candidate contributions at issue here. *See Schwartz* v. *Romnes,* 495 F.2d 844, 851 (2d Cir. 1974); *C & C Plywood Corp.* v. *Hanson,* 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir., Sept. 29, 1976; *Pacific Gas & Electric Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

of little or no significance whether the source of the information is a media or non-media source. It is the right to receive the message which counts.

As an example: Appellant The First National Bank of Boston is the largest bank in New England and among the largest in the country. The ebb and flow of the economic and financial tides in Massachusetts form its life blood. A voter in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability to attract new business into the state, might be just as interested in hearing this bank's views on a proposed graduated income tax as, say, the views of *Playboy* magazine, *Sports Illustrated,* or even the editorial staff of *The Boston Globe* on this same subject. Yet these latter entities, being "media" corporations, could claim constitutional immunity from restraints of any kind on the expression of editorial policy, while the Appellant Bank would have to prove an essentially unprovable "material effect" before it could expend even $25 to publicize its views.

Entertainment-oriented business corporations may claim First Amendment protection for the expression of ideas inherent in topless dancing (*e.g., Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975)), the presentation of nude floor shows (*e.g., Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546 (1975)), and sexually-oriented motion pictures (*e.g., Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684 (1959)). Logic would not indicate that the economic views of general business corporations and banks are of an inherently lesser order of constitutional significance. "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ." *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 61 (1976).

If the right of the listener to hear is the paramount concern, the nature of the business of the speaker should be irrelevant. The court below never once alluded to the right of the people to hear, although this point was stressed throughout plaintiffs' presentation, and thereby missed the central thrust of the First Amendment. Not surprisingly, then, the constitutional lines drawn in the opinion are erroneous.

3. *Freedom of Expression Cannot Be Limited to Matters Materially Affecting the Speaker*

If the boundaries of First Amendment protection for speech concerning broad economic matters are not to be drawn between corporations and other entities, nor between media corporations and other business corporations, then no logic can be discerned in drawing the boundary between speech about a topic which materially affects the corporate assets and speech which has no such material effect. If the crux of the protection concerns the listener's right to hear, then it becomes irrelevant how important or unimportant the message might be deemed to be to the corporate speaker. The Constitution protects speech which the speaker deems to be less than vital just as surely as it protects speech which is important to the speaker.[24]

If a business corporation can be forbidden by the criminal law to communicate except as to matters materially affecting its business, may religious corporations be precluded from communicating except as to matters materially affecting religion? May civil liberties unions be forbidden to communicate except as to matters materially affecting civil liberties? May charitable corporations be forbidden to

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[24] *A fortiori* the protection ought to be afforded communications which the corporate management *believes* to concern a matter materially affecting the corporation, even if a jury were to disagree with management's judgment.

express views except as to matters directly pertaining to the objects of their charitable concern? As this Court has on many occasions made clear, the fact that the speaker is engaged in profit-making activity is not the criterion by which to judge whether or not constitutional protections exist. Presumably if business corporations may be made to "stick to business" (as was argued below), then other entities may be similarly circumscribed in accordance with what is perceived to be properly "their business."

If the public good is thought to be served in some way by keeping the activities of corporations and other organizations reasonably close to the purposes for which they exist, that end is served by leaving it to the shareholders or members to pursue whatever avenues are available within the structure of the organization or the applicable civil law. *See Cort* v. *Ash,* 422 U.S. 66 (1975). The heavy hand of the criminal law should not be used to punish the expression of ideas. If a state statute attempts to do so, a constitutional shield comes into play. It is error to assume that the scope of this shield is limited to the narrow concept of "materiality" found in the offending statute itself.

Buckley v. *Valeo,* 424 U.S. 1 (1976), struck down a far less restrictive statute which limited, rather than prohibited, political expenditures. The prevailing parties included not only individuals but nonprofit corporations such as the New York Civil Liberties Union, Inc. This Court recognized in *Buckley* that the freedom of expression of associations as well as individuals is to be protected, in the interests of public debate, and throughout the opinion the broad sweep of First Amendment protection for individuals, associations and groups is emphasized. For example, at 19 it is stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expres-

> sion by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. (Footnote omitted.)

See also Abood v. *Detroit Board of Education,* 45 U.S. L.W. 4473, 4480 (May 24, 1977).

Although there are numerous other grounds urged by Appellants herein, and numerous other issues which are raised by Section 8 and the opinion of the Supreme Judicial Court, it would appear clear that merely the *Buckley, Virginia Pharmacy,* and *Linmark* decisions, in and of themselves, would require reversal in this case.

The court below relied upon *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925), in holding that corporations only have First Amendment protection when speaking as to matters materially affecting the assets or business of the corporation. That case does not support the opinion below or the Attorney General's position. The case did not concern First Amendment rights and, in any event, was decided eleven years before *Grosjean* made clear that corporations, being "persons", do have First Amendment rights through the due process clause of the Fourteenth Amendment. Most importantly, no concept such as the paramount right of the public to receive information concerning important issues was even remotely at issue in *Pierce.* Of course, the decision in *Pierce* held that corporations did indeed have constitutional rights pertinent to the issues in that case, and in no respect is the case contrary to any contention urged by Appellants herein.

E. *Section 8 Cannot Survive the Strict Scrutiny Which Must Be Given It*

1. *Strict Scrutiny Was Not Applied by the Court Below*

Speech in a political or informational context, precisely the type of speech prohibited by Section 8, deserves the

highest degree of protection from governmental restraint.[25] In *Buckley, supra,* 424 U.S. at 14, this Court reiterated that a major purpose of the First Amendment was to protect uninhibited free discussion of governmental affairs. "This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uinnhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964)."

The statute cannot avoid strict scrutiny merely because it prohibits expenditures rather than directly prohibiting speech. In *Buckley,* the Court held that expenditure limitations are direct and substantial limitations on speech.

Because core First Amendment rights are at stake, the statute is not entitled to the usual presumption of validity afforded to legislation. *See Schneider* v. *State,* 308 U.S. 147, 161 (1939). "The presumption rather is against the legislative intrusion into these domains." *United States* v. *CIO,* 335 U.S. 106, 140-141 (1948) (Rutledge, J., concurring). Thus, the constitutionality of the prohibition challenged by Appellants turns on whether the governmental interests advanced by the state in its support can satisfy the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley, supra,* 424 U.S. at 44-45.

The court below clearly acknowledged that this statute operates in an area of First Amendment concerns. The Court states, J.S. App. 10:

> It is clear that an act which limits either contributions or expenditures "operate[s] in an area of the most

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[25] "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve." *Pennekamp* v. *Florida,* 328 U.S. 331, 346 (1946); "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964). See cases cited *supra,* and Hastie, *Free Speech,* 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 428, 442 (1974).

> fundamental First Amendment activities." *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976).

Yet, throughout its First Amendment analysis, the Court did not acknowledge that there was any requirement that it subject the statute to exacting scrutiny, find a compelling interest served by the statute, or examine the statute without the presumption of validity which usually accompanies legislation.

In fact, throughout the First Amendment discussion (J.S. App. 9-21) the court does not even state what it believes the purpose of c. 55, §8 to be. The only reference is the following: "We cannot say that there was no rational basis for this legislative determination." (J.S. App. 14). What this "rational basis" is is not mentioned. This Court has stated, in *Bigelow* v. *Virginia,* 421 U.S. 809, 826 (1975):

> Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

The task which the Massachusetts court failed to perform is thus inescapable. Later portions of the opinion make clear that it was not through mere inadvertence that the Court omitted reference to a duty to render strict scrutiny to §8. When discussing Appellants' equal protection attack the Court states (J.S. App. 22):

> We think that the appropriate standard of review on this issue is not the strict scrutiny that the plaintiffs suggest is apposite but, rather, is the traditional scrutiny involving economic matters.

In sum: an examination of the Court's opinion reveals that the court below failed to apply strict scrutiny, did not find a compelling interest served by the statute, and applied the usual presumption of validity in its analysis, all of which is contrary to principles enunciated by this Court.

2. *Section 8 Cannot Survive Strict Scrutiny*

If the statute is subjected to the rigorous scrutiny required by the Constitution, it must fail. In the first place, a clear statement of just what the purposes of this legislation are has yet to be enunciated, either by the Legislature, the Attorney General, or the court below.[26] In *FNB I* the two justices who reached the constitutional ques- did not believe the purposes to be compelling, 362 Mass. at 587-90, 290 N.E. 2d at 537-39. In any event, as argued below by the defendants, a two-fold purpose is assumed to relate to avoiding the undue influence upon the electorate which might occur if corporate money is allowed to flow into the publicity campaigns either for or against a particular referendum issue, and to precluding corporate money from being spent contrary to the political views of some of the shareholders.

This Court, in *Buckley,* held an analogous but more

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[26] There is not much legislative history concerning the purposes underlying the provision in Section 8 concerning ballot questions. In *Ashley* v. *Three Justices of Superior Court,* 228 Mass. 63, 78, 116 N.E. 961, 966 (1917), *appeal dismissed,* 250 U.S. 652 (1919), it is stated with respect to the statute as a whole: "The whole purpose of the act is to promote and insure the freedom of elections by discouraging the improper influence of elections and the pollution of the ballot by corrupt practices." Corruption, however, cannot be of concern in a referendum ballot. As has been indicated in the discussion above, at pp. 30-31, the exact purpose of the legislative proviso that ballot questions pertaining solely to individual taxes will not be deemed materially to affect corporations is apparently to preclude corporations from attempting to influence voters to vote against a graduated income tax proposal, since the Legislature perceives its efforts to achieve such a tax frustrated by corporate opposition.

limited expenditure regulation unconstitutional. Section 608(e)(1) of the Federal Election Campaign Act, which the Court held unconstitutionally infringed upon First Amendment interests, did not even purport to prohibit all expenditures on political questions. It provided that "[n]o person may make any expenditure . . . relative to a clearly identified candidate which, when added to all other expenditures made by such person during the year . . ." exceeded $1,000. The statute defined "person" broadly to include "an individual, partnership, committee, association, corporation, or any other organization or group of persons." 18 U.S.C. §591(g).

The government in *Buckley* advanced two allegedly significant interests, both of which, the Court held, were not sufficiently compelling to justify limiting public discussion by limiting expenditures. The first was an interest in preventing corruption. The Court held that the independent expenditure limitation failed to stem either the appearance or reality of corruption while heavily burdening core First Amendment expression. *Buckley, supra,* 424 U.S. at 45. Whatever interest in curbing corporate expenditures in order to avoid creating political debts may still be deemed "compelling" in a candidate campaign after the Supreme Court's decision in *Buckley,* such an interest is totally unpersuasive when the object of the expenditures is the discussion of a constitutional amendment. *See Schwartz* v. *Romnes, supra,* 495 F.2d at 852-53; *Pacific Gas & Electric Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *C & C Plywood Corp.* v. *Hanson,* 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir., Sept. 29, 1976. Informational corporate advertisements may influence voters, but the potential of corrupting the electoral process by currying favor with candidates or parties through advertisements of support is absent. *Cf. Schwartz* v. *Romnes,* 495 F.2d 844, 851 (2d Cir. 1974).

The second interest advanced by the government was the desire to equalize the relative ability of individuals and groups to influence the outcome of an election. This interest was rejected out-of-hand:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by §608(e)(1)'s expenditure ceiling. But *the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " ' to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " ... The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. (Citations and footnote omitted) (Emphasis added)
>
> 424 U.S. at 48-49

Section 8 does not merely limit expenditures and contributions by corporations. It totally prohibits them.[27] The interpretation of the court below leaves the total prohibi-

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[27] While this Court in *Buckley* did uphold the $1,000 contribution limitation appearing in the federal act, it did so only as a result of the very strong policy in favor of curbing the fact or appearance of corruption with respect to candidate contributions, 424 U.S. at 26. Since no such policy exists as to ballot question campaigns, and since Section 8 prohibits rather than limits contributions, *Buckley* principles necessitate that Section 8 be held unconstitutional both as respects contributions to referendum committees and direct expenditures.

tion intact as to Appellants or any others who do not affirmatively prove that an individual tax ballot question materially affects them. If "equalizing" the ability of groups to influence the outcome of an election is impermissible, *a fortiori* silencing one element of society is impermissible. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), this Court held that a statute requiring a newspaper to make space available for an advertisement of a political candidate was unconstitutional under the First Amendment. A legislature unable to *require* full discussion of a public issue without unconstitutionally infringing upon First Amendment interests certainly cannot, as the Court pointed out in *Buckley, supra,* 424 U.S. at 50-51, *curtail* debate on public issues.[28] Just as "[t]he legislative restraint involved in *Tornillo* . . . pales in comparison to the limitations imposed by §608(e)(1)" (424 U.S. at 51), the limitation involved in *Buckley* pales in comparison to the absolute prohibition imposed by Section 8.

An essential difference between the prohibition attacked by Appellants in the instant case and the expenditure limitation considered by the Court in *Buckley* is that the former alone encompasses expenditures on non-partisan questions submitted to the public for a vote. Thus the Court, in order to rule in favor of Appellants, need not decide whether *Buckley* forbids any limitation on corporate expenditures relative to *candidates and political parties.*[29] In *Schwartz* v. *Romnes, supra,* 495 F.2d at 844, the court, in order to avoid a statutory interpretation that would infringe upon the First Amendment rights of corporations, narrowly construed a state statute which prohibited corporations from making expenditures for any political

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[28] This Court recognized that *Tornillo* involved a restraint upon the news media but deemed that factor to be irrelevant. *See Buckley, supra,* 424 U.S. at 51 n.56.

[29] *See* n.17, *supra.*

purpose as not prohibiting expenditures for the purpose of communicating a corporation's views on a referendum question. As set forth below, the court's opinion, 495 F.2d at 851, explains why corporations are entitled to greater protection with respect to expenditures and contributions concerning questions before the voters than with respect to partisan political contributions:

> By their very nature referenda, which have dealt principally with constitutional amendments and matters of governmental finance . . . do not lend themselves to those corrupting influences which prompted the enactment of §460. Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest. Although large private companies have undoubtedly been tempted to "buy" the election of political candidates in the expectation of receiving favors if their candidates should be elected, it is difficult to see how such motivation would play any substantial role in an attempt to influence votes for or against a referendum. The public remains completely free to reject the views of the corporate contributor . . . without fear of retribution or non-support by the corporate contributor. The requirement of §320 [analogous to Mass. Gen. Laws c. 55, §22] that the corporation publicly disclose such expenditures minimizes the risk that the public will be misled as to the source of inspiration of the corporately-financed views.

The alternative state interest—a desire to prevent use of corporate funds from supporting or opposing political issues (as opposed to candidates or parties) in opposition to the wishes of stockholders—was not considered in *Buckley*[30] but this interest is not compelling or even plausible, and, as discussed below, there are less restrictive ways a legislature might achieve such an objective. Corporate expenditures or contributions with respect to a proposed constitutional amendment are similar in concept to regular corporate activities in favor of or against the passage of legislation reasonably believed to affect a corporation's interests. No Massachusetts statute purports to forbid corporate lobbying. Stockholders have no extraordinary rights to control, overrule, or prevent a decision to support or oppose the passage of legislation which management deems to affect the best interests of the corporation, whether or not some stockholders may perceive the legislation as in their overall personal best interests.[31] The fact that the focus of the persuasive effort as to a proposed

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[30] In *Cort* v. *Ash*, 422 U.S. 66, 81 (1975), this Court noted that the legislative history of §610 indicated that "protection of ordinary stockholders was at best a secondary concern." Moreover, the protection of minority interests against misuse of aggregated funds would seem to be more acute with respect to labor unions than with corporations. *Cf. Abood* v. *Detroit Board of Educ.*, 45 U.S.L.W. 4473, 4479 (May 24, 1977). Union members are compelled to pay dues, whereas corporate employees do not usually contribute funds to a corporation as a condition of their employment. In addition, corporate shareholders who disagree with the use of corporate funds for political purposes may dispose of their shares or perhaps commence a derivative suit against corporate management for an *ultra vires* expenditure. *Cort* v. *Ash, supra*, 422 U.S. at 81 n.13. Yet Section 8 does not, because of perceived constitutional difficulties, regulate labor unions. *See Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 69 N.E.2d 115 (1946).

[31] There is nothing in the record to indicate shareholder dissatisfaction with the plaintiffs' proposed expenditures. Management of each of the Appellants concluded that the proposed constitutional amendment would adversely affect the corporation. (A. 17). The boards of directors were informed of the suit and three formally ratified its commencement. (A. 26)

change in the law is the public at large rather than individual legislators provides no compelling reason to silence corporations. To permit corporations to expend funds to persuade legislators but to forbid expenditures to persuade the public is absurd; to prohibit either is unconstitutional. *Cf. Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Furthermore, the fact that only one ballot question has been singled out for special treatment undermines the likelihood of any genuine state interest in protecting shareholders. It is not rational to assume that a question dealing solely with individual income tax is the only ballot question likely to concern shareholders.

It is inconceivable that the interests of the state can be held sufficiently compelling to justify the elimination of non-partisan speech which may, and is designed to, assist voters in making their decision.[32] In this case as in *Bigelow* v. *Virginia, supra,* 421 U.S. at 822, Appellants' "First Amendment interests coincided with the constitutional interests of the general public."

In the area of the free exchange of ideas this Court has stricken statutes furthering the "[i]ndisputably . . . strong interest" in maintaining high professional standards, *Virginia Pharmacy, supra,* 425 U.S. at 766, and the "vital

[32] Assuming that some of the State's interests may be justifiable, the Legislature has not even attempted to adopt the least restrictive alternative available. First Amendment rights may never be restricted beyond what is reasonably necessary. *See, e.g., United States* v. *CIO, supra,* 335 U.S. at 146 (Rutledge, J., concurring); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). *See also* Comment, *First Amendment—Corporate Freedom of Speech,* 7 Suffolk U. L. Rev. 1117, 1127 (1973). For example, Section 8 bars, instead of merely limiting, all expenditure on the ballot question at issue. Furthermore, any interest in preventing the use of corporate funds to express political viewpoints contrary to the desires of shareholders might be attempted to be satisfied by requiring a majority vote of shareholders for political expenditures, or perhaps notification to the shareholders. Appellants take no position, of course, as to the constitutionality of any less restrictive alternative.

goal . . . promoting stable, racially integrated housing,'' *Linmark Associates, supra,* 45 U.S.L.W. at 4444. The interests served by §8 are measurably less substantial. *See Buckley, supra,* 424 U.S. at 44-51.

If this Court upholds the blanket ban upon the expression of economic ideas at issue here, the Legislature would feel free to forbid expenditures against other proposed constitutional amendments which it fears may not survive the test of uninhibited debate. The ability of the public to cast a meaningful vote on ballot questions would be markedly diminished and the election result itself would be suspect.[33] Justice Holmes' dissent in *Abrams* v. *United States,* 250 U.S. 616, 630 (1919), best expresses the reason why no statute curtailing debate on a public issue should be allowed to stand:

> If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition . . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment . . . . While that experiment is part of our system I think that we should be eter-

[33] As one commentator has pointed out, ''[w]ide ranging regulation of elections inevitably raises doubts as to the legitimacy of the outcome.'' *Developments in the Law—Elections,* 88 Harv. L. Rev. 1111, 1235 (1975).

nally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

F. *As a Minimum: The First Amendment Should Be Held To Protect Corporate Speech Where, As Here, Corporations Believe Their Material Interests To Be Affected*

As has been shown above, the opinion of the court below is a constitutional opinion construing the First Amendment. From pages 9 to 21 of the Appendix to the Jurisdictional Statement there is set forth the Court's "First Amendment Considerations." The holding, at page 13, is that First Amendment protection is afforded to corporate speech on general political issues only where those issues materially affect the corporation. The statutory proviso, deeming not material those questions which pertain solely to individual taxes, will be "invalid" only as to corporations which have "demonstrated that the proposed amendment does in fact materially affect their business." (J.S. App. 14). This is an interpretation of the United States Constitution, not an interpretation of a Massachusetts statute. As such it is obviously subject to direct review and modification by this Court.

While Appellants can perceive no way in which the opinion of the lower court can survive the constitutional scrutiny discussed above, this Court could reverse the decision of the Massachusetts court on grounds which, while still of constitutional dimension, are somewhat narrower than those urged in some other portions of this brief.

At the very least this Court should hold that the First Amendment does protect freedom of expression for corporations and that, while it may not be clear where the outer boundaries of such protection lie, they at least cover proposed publication of views through expenditures and contributions to oppose a state constitutional referendum question which concerns itself with individual taxation where management of the particular corporations desiring to publicize their views believe the corporations' material interests to be affected and the record does not show such beliefs either to be unreasonable or held in bad faith. A broader holding can be justified in this case, where the subject matter concerns the vital process of access by the public to general political and economic views. Clearly though, the holding suggested above is a minimum if this Court is to continue to safeguard our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964).

The record establishes that each of the Appellants has its roots deep in the local economy and that each has, as well, extensive contacts with individuals and their finances. All of the Appellants have numerous highly skilled and highly paid individuals in their employ (A. 17-18, 20-22); the ability to attract and to keep such individuals obviously may be adversely affected by the tax climate in the state with respect to individuals. Moreover, each of the Appellants has a sizeable payroll (A. 17-18, 20-21); the amount of the take-home pay of individual employees is clearly significant to the Appellant corporations, for example, in salary negotiations and bonus payments. *See Lustwerk* v. *Lytron, Inc.,* 344 Mass. 647, 650, 183 N.E.2d 871, 873 (1962). In addition, the Appellant Banks have huge sums on loan to individuals or in individual deposit accounts (A. 18-19). The amount of after-tax cash available to

individuals would necessarily have an effect upon loan and deposit accounts.

Furthermore, at least one of the Appellants, Gillette, does a huge volume of sales business with Massachusetts consumers. Some $39,600,000 in sales were generated in Massachusetts in 1974 (A. 21). The amount of after-tax dollars available in the state naturally would be of concern to a corporation like Gillette.

The business of the Appellants is, in various ways, inextricably intertwined with the general business climate in Massachusetts. For example, the Appellant Banks, which have no branch offices in any other state (A. 19),[34] have literally billions of dollars on loan to, or in deposit accounts for, industrial and business concerns (A. 18-19). Rightly or wrongly, if the business community deems a graduated income tax as contributing to an unfavorable tax and business climate (*see Lustwerk,* 344 Mass. at 651, 183 N.E.2d at 874), the Appellant Banks, whose interests are tied to those of the business community, will be affected.

The record contains an express finding that "It is the position of the management of plaintiffs that a graduated income tax (and thus the proposed Constitutional Amendment) would adversely affect their business and property." (A. 17). The record then sets forth various ways in which the management of the various plaintiffs believe this adverse effect will occur. (A. 17 to 21). The Appellants' boards of directors were notified of the commencement of this action, and the shareholders of at least one of the corporations were directly apprised of the situation. (A. 26). The belief of these corporations that the graduated tax will materially affect them is stipulated;[35] that the

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[34] This is a requirement of law. 12 U.S.C. §§36, 81. Mass. General Laws c. 168, §5; c. 170, §12; and c. 172, §11.

[35] Obviously by this time the commitment of the corporations to the effort to oppose a graduated tax has been further demonstrated by the decision to press this appeal.

belief is reasonable[36] emphatically emerges from the record.

The Supreme Judicial Court held that a reasonable belief as to the ballot question's material effect is not sufficient to enable corporations to expend or contribute:

> The plaintiffs further argue that all they need show is a "reasonable belief" that the proposed amendment would materially affect them. While such a belief is relevant to the question whether such an expenditure would be ultra vires, cf. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 651 (1962), standing alone it is not relevant to the question presented herein.
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> (J.S. App. 15 n.15)

The court below held that the First Amendment protection for corporate speech is exactly coterminous with the materiality test embodied in the first sentence of c. 55, §8 (J.S. App. 13). Thus, the Court gave the narrowest of interpretations to the First Amendment, holding it applicable only to questions materially affecting a corporation and then only if the corporation *proves* that material effect. At the same time the Court very broadly construed the statute itself, rejecting Appellants' suggestion that to save a statute from constitutional infirmity the Court might narrowly construe the "material effect" phrase and hold that a corporation's reasonable belief that a question would materially affect it would suffice to enable expenditures to be made.

In construing the statutory prohibition very broadly and the First Amendment protection very narrowly the court

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[36] Nowhere in the record is there a suggestion that the management of any of the Appellant corporations is acting other than reasonably and in complete good faith. The common expectation is that officers and directors will act properly and regularly. *See, e.g.*, Jones, *Evidence*, §3.44 (1972), Fletcher, *Corporations*, §4601 (1976).

below has reversed the time-honored practice of courts grappling with sensitive issues in this area.[37] While this Court may not consider itself in a position to render its own narrowing interpretation of this state statute, *see Hynes* v. *Oradell,* 425 U.S. 610, 622 (1976), the Court clearly can free the First Amendment protection from the cramped confines imposed by the Massachusetts court's limiting interpretation. In restoring the First Amendment to more generous dimensions the Court may not feel compelled to outline its precise boundaries. It is respectfully urged, however, that the Court ought at least hold that no matter how the statute is interpreted, it simply cannot be allowed to forbid corporate communications on important public issues which corporate management reasonably believes to have a material effect on the corporation.

III. The Phrase "Materially Affecting Any of the Property, Business or Assets of the Corporation" Fails To Meet the Standard of Definiteness Required by Due Process

A. *Standard of Review Required of Criminal Statutes Affecting First Amendment Rights*

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the Constitution of the United States provides in part: "In all criminal prosecutions, the

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[37] In particular it departed from its own practice in construing this very statute where twice before narrowing interpretations were rendered. *Lustwerk* v. *Lytron, Inc.,* 344 Mass. 647, 183 N.E. 2d 871 (1962); *FNB I,* 362 Mass. 570, 290 N.E.2d 526 (1972) (Opinion of three of five justices).

accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."[38]

Due process requires that the terms of a penal statute be sufficiently clear to warn those subject to it precisely what activities are prohibited. Those portions of Section 8 affecting Appellants are unduly vague because they fail to draw reasonably clear lines between what corporate behavior is criminal and what is not. "Due process requires that all be informed as to what the state commands or forbids" (citation omitted) *Smith* v. *Goguen,* 415 U.S. 566, 574 (1974).

The vagueness doctrine incorporates notions of fair notice or warning. *Id.* at 572. The standard test is whether the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926).

Moreover, when a statute's scope encompasses expression "sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith* v. *Goguen, supra,* 415 U.S. at 573. The "general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Oradell,* 425 U.S. 610, 620 (1976).

Section 8 not only fails to afford Appellants fair notice, but it also fails to provide adequate guidance to prosecutors or to the judiciary.[39]

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[38] As noted earlier, *supra* at 36-37, corporations have been held to be "persons" within the meaning of the due process clause of the Fourteenth Amendment.

[39] *See generally* Comment, *Due Process Requirements of Definiteness in Statutes,* 62 Harv. L. Rev. 77 (1948); Note, *The Void For Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960).

B. *Section 8 Fails To Meet the Required Standard of Definiteness*[40]

Section 8 is unconstitutionally vague and indefinite because it does not indicate what expression and acts are prohibited. *See Herndon* v. *Lowry,* 301 U.S. 242, 259 (1937). Corporations may make contributions or expenditures with respect to ballot questions which "materially affect" "any" of their "property, business or assets." If the particular ballot question is one not deemed to have any effect on the property, business or assets, or if it is deemed to have an effect but not an effect which is "material", then heavy criminal sanctions will be imposed for any corporate expression, concerning that ballot question. The determination as to whether or not the ballot question has such a "material" effect will be made by a jury. Obviously, reasonable people might differ as to whether a particular question is one which would "materially affect" a particular corporation. The record bears out the problem. It is expressly found that "there is a division of opinion among economists as to whether and to what extent a graduated income tax on individuals would affect the business and assets of corporations." (A. 17). If experts differ among themselves, it is hard to see how the standard would be clear to "men of common intelligence." The Supreme Judicial Court, far from construing this phrase narrowly to reduce its threat, has compounded the problem by specifically stating that a reasonable belief as to the material effect is not enough. (J.S. App. 15 n.15). The right to spend money for purposes of communicating ideas is dependent upon a finding that the ballot question *in fact* materially affects the corporation.

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[40] The court below held that §8 created two crimes: spending money as to ballot questions which do not materially affect the corporation and spending as to questions solely concerning individual taxes. Both affect Appellants. The discussion here is as to the first, and is also relevant to the Court's holding that "materiality" is a prerequisite to First Amendment protection. (J.S. Ap. 13).

The ballot question in the case at bar—whether or not the state constitution should be amended to allow graduated rates to be imposed upon individuals—perfectly illustrates the dilemma posed by this vague standard. Does this question "materially affect" Appellant corporations? There would be no effect upon corporations if the amendment passes but the Legislature in fact never uses the power granted to it and graduated rates never are imposed, but it would be years before this "non-effect" could be known. If the Legislature were to utilize its new-found power and enact a very modest graduated tax, perhaps there would be no immediate effect on any corporation. However, if in years to come the degree of graduation increased, it may approach a point where a corporation would lose higher paid management and employees. When would the effect reach a level which would be deemed by the jury to be "material"? Management might think the loss of a single key engineer "material"; the jury might think the effect not material until, say, 15% of the labor force left.[41]

Is "material effect" to be measured in absolute or relative terms? A $5,000 decrease in net income brought about by the graduated tax might be deemed "material" in the sense that it is a large amount of dollars. If it were less than 1% of the particular corporation's net income, however, perhaps it would not be deemed "material" enough by the jury to warrant a corporation's referendum expenditure.

Does "property, business or assets" refer only to assets within Massachusetts? A national corporation may suffer

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[41] Because of the nature of the ballot question, even the Attorney General admitted that proof of materiality in advance of passage and legislative action was impossible. The Brief of the Defendant stated, p. 66:

> This Court would have to engage in pure speculation as to the type of tax, the gradation and the extent of the tax that would be imposed before it could determine whether it would more likely than not have a material effect.

a "material effect" on income generated in Massachusetts, but its consolidated balance sheet may not reveal any material impact.

It is true that there are criminal statutes, notably in the antitrust field, which employ less than precise standards and which have been upheld against attacks on vagueness grounds. *E.g., United States* v. *National Dairy Products Corp.,* 372 U.S. 29 (1963) (Robinson-Patman Act: knowingly selling below cost for purpose of destroying competition). A statute whose major purpose and sole effect is to proscribe the communication of ideas must speak with greater precision. As this Court stated *id.* at 36:

> [T]he approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See *Thornhill* v. *Alabama,* 310 U.S. 88, 98 (1940); *NAACP* v. *Button,* 371 U.S. 415. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable.

Although general terms in a statute may on occasion be made sufficiently definite by reference to the remaining context of the statute itself,[42] or well-settled common law meaning,[43] such techniques are not available to cure the vagueness of Section 8. Moreover, there has been no narrowing interpretation of Section 8 by the courts of the

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[42] *United States* v. *Cohen Grocery Co.,* 255 U.S. 81 (1921).
[43] *Nash* v. *United States,* 229 U.S. 373 (1913).

Commonwealth. Indeed the Supreme Judicial Court admitted that the phrase "materially affects" was vague but did not deem it necessary to resolve the vagueness questions raised by Appellants. (J.S. App. 19). Nor have there been any interpretations by public officials to guide those who might be affected by the statute.

The chilling effect of this statute necessarily limits discussion of the effects of a graduated personal income tax in Massachusetts. *Cf. Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972).

> [I]t has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.
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> *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973)

Appellants in this case have refrained from expending any funds to communicate their ideas on the matter despite the belief of the management of each of the Appellants that the particular referendum question would in fact materially affect them. (A. 22 to 23). The chilling effect has been pronounced.

The very real chilling effect of this vague "materially affecting" standard is illustrated by the letter recently received by Appellant Wyman-Gordon, a copy of which is appended to this brief as Appendix A. The letter, referring to a corporate contribution to a committee supporting a local referendum proposing a city civic center, speaks more eloquently to this problem than a brief ever could.

Since the standard embodied in the statute is vague,[44] and is, if anything, becoming more vague the more often it is construed; since it has the propensity of self-censorship which the First Amendment seeks to avoid; since this propensity has been demonstrably realized in the chilling effect the statute had on these Appellants in the 1976 election; and since "government by referendum" is becoming dramatically more prevalent in recent years and will probably continue to expand;[45] it would seem appropriate to strike the "materially affecting" standard as void on its face. The undesirable self-suppression of socially valuable and protected expression warrants such a holding.[46]

Short of that, it is clear that the statute as applied to these Appellants is unconstitutional. If, contrary to the contention of the Appellants as argued above, this Court were to decide that the statutory standard has any propriety at all in this area, permeated as it is with First Amendment and due process concerns, the Court ought at least rule that a reasonable belief as to materiality on the part of corporate management will suffice to meet the standard, and that on this record these Appellants have in fact met any standard which the Constitution will tolerate.

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[44] The wording of §8 would not, for example, exempt a newspaper or other media corporation from its sweep. Presumably the printing of an editorial supporting a graduated income tax would cost money and the statute would seem to forbid this.

[45] In the November 1976 election there were a total of nine referenda questions before the voters in Massachusetts, dealing with issues such as public power, the rights of women, gun control and other matters.

[46] *See Thornhill* v. *Alabama*, 310 U.S. 88, 96-98 (1940).

IV. The Section 8 Prohibition Is Invalid as an Unconstitutional Denial of Equal Protection of the Laws

A. *Introductory Analysis*

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

It was long ago clearly established that corporations can invoke the guaranty of equal protection of the laws under the Fourteenth Amendment. *See, e.g., Santa Clara County* v. *Southern Pacific Railroad,* 118 U.S. 394, 396 (1886); *Essex* v. *New England Telegraph Co.,* 239 U.S. 313 (1916).

Section 8 denies Appellants the equal protection of the laws for two reasons.

First, the criminal prohibition against expenditures for the purpose of publicizing corporate views on a ballot question which solely pertains to individual taxation does not prohibit other business corporations from expending corporate funds to communicate their views as to other ballot questions, as long as the "materially affecting" test is deemed satisfied.

Second, the criminal prohibition against expenditures for the purpose of publicizing views on referenda questions other than questions materially affecting the spender applies only to business corporations.[47] The statute does not similarly prohibit or restrict labor unions, voluntary associations, such as Massachusetts business trusts, charitable

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[47] The complete text of the statute appears at 3-4. While the statute enumerates various specific kinds of corporations in its text, Appellants believe that the generic term "business corporations" adequately covers them all.

corporations, or limited and general partnerships from communicating their views.

To illustrate: labor unions could spend thousands of dollars of their members' moneys promoting the unions' views as to the proposed graduated income tax constitutional amendment, whereas Appellants must remain silent, and corporations which wish to communicate views on other ballot questions face no presumption against materiality (found in the language of the second sentence of §8) or separate crime forbidding the communication (as the second sentence is construed by the court below). In each respect Appellants have been denied equal protection of the laws.

The discussion above at pp. 46-56 is pertinent to the equal protection analysis.

B. *Strict Scrutiny of Section 8 Is Required Because the Prohibition Impinges Upon Fundamental First Amendment Rights*

Any analysis of whether a statutory classification is a denial of equal protection begins with the question of whether the classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973).

There is no doubt that freedom of political expression is a fundamental right protected by the First Amendment. *Buckley* v. *Valeo, supra,* 424 U.S. at 14. Nor is there any doubt, as discussed in Part II herein, that corporations are entitled to First Amendment protection. Furthermore, the fundamental rights of others to receive communications are affected by this classification even though they themselves are not the subject of the statutory classification. *Cf. Procunier* v. *Martinez,* 416 U.S. 396, 408-09 (1974).

The Supreme Court has applied the strict scrutiny test when the classification is one "affecting First Amendment interests." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 101 (1972) (Anti-picketing ordinance which exempted labor picketing held invalid under the Equal Protection clause). The First Amendment rights at issue in the instant case should be afforded the greatest possible protection because political discussion and the intelligent use of the franchise are at stake. "Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo, supra,* 424 U.S. at 14. *See also United States* v. *UAW, supra,* 352 U.S. at 570.

Because the statutory classification employed by the Massachusetts Legislature touches on a fundamental right, "its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969) (emphasis in original).[48] Furthermore, a legislative enactment subject to strict scrutiny will not be accorded the usual presumption of constitutionality. *See, e.g., Kramer* v. *Union Free School District,* 395 U.S. 621, 628 (1969). In fact, the burden is on the State, not the Appellants, to demonstrate "that [its enactment] has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives, and that it has selected the 'less drastic' means for effectuating its objectives." *San Antonio Independent School District* v. *Rodriguez, supra,* 411 U.S. at 17, quoting in part *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972).

The Supreme Judicial Court recognized that limitations upon electoral expenditures impose "severe restrictions on protected freedoms" and that thus §8 "potentially implicates the First Amendment." (J.S. App. 10). See the dis-

[48] *See also, e.g., Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); *Kramer* v. *Union Free School District,* 395 U.S. 621, 628 (1969).

cussion at 45-48, *infra*. Yet, in its equal protection holding, the Court flatly refused to apply the strict scrutiny required where fundamental rights are at stake. The Court states (J.S. App. 22):

> We think that the appropriate standard of review on this issue is not the strict scrutiny that the plaintiffs suggest is apposite but, rather, is the traditional scrutiny involving economic matters. While we agree with the plaintiffs that where free speech is involved strict scrutiny is required (see *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U.S. 1, 17 [1973]; *Police Dept. of Chicago* v. *Mosley,* 408 U.S. 92, 101 [1972]), we have already concluded that the plaintiffs do not possess First Amendment rights on matters not shown to affect materially their business, property or assets. Our inquiry, therefore, is whether the legislative classification "rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced [are] treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). See *Pinnick* v. *Cleary,* 360 Mass. 1, 27-28 (1971).

There are circular aspects to the Court's analysis. As noted above and earlier in this brief (pp. 45-48) the Massachusetts court clearly and explicitly acknowledges, as it must considering *Buckley* and other cases, that the offending statute operates *in the area* of cherished First Amendment rights. Given this premise, numerous decisions of this Court require strict scrutiny to be applied to the statute to determine whether its purposes are sufficiently vital and compelling. Then the means are to be examined once again with the strict, grudging and skeptical eye required when analyzing intrusions into the area of freedom

of expression. Only if the statute survives this grilling may it continue to carry out the legislative function entrusted it. Strict scrutiny thus describes a *process* called into play when the statute in question operates in a particular area; the process must be utilized to determine whether the statute may survive.

Instead of following this process, the court below, having determined that the statute operates in the First Amendment area, shifted its analysis to the First Amendment itself. There followed considerable discussion as to the abstract rights (or lack of rights) of corporations under the First Amendment. (J.S. App. 11-21). Are the rights derived from "property" or "liberty"? Does the First Amendment give corporations the exact amount of freedom of expression granted to natural persons? How closely must the speech be keyed to corporate assets before it may be considered protected?

It is almost as if the Court applied its strictest scrutiny to the First Amendment itself rather than to this statute. Considering abstract principles of constitutional law, the Court found corporations not entitled to protection for political or economic speech concerning questions not proven to have a material effect on the corporate assets. Then, having arrived at the conclusion that the plaintiffs had no First Amendment rights, the Court returned to the statute itself, noted that "We cannot say that there was no rational basis for this legislative determination" (J.S. App. 14),[49] and held that the statute did not offend the First Amendment.

The Court then used that result to justify the failure to render a strict scrutiny of the statute, its purposes and its methods under equal protection principles.

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[49] As has been noted before, the Court did not purport to describe what this "rational basis" is.

Strict scrutiny is not a label to be announced as applicable or rejected as inapplicable after a court has made a determination as to the substantive constitutional merits. It is the process by which the court should arrive at the constitutional decision in the first place. To invoke strict scrutiny only after determining that there has been a violation of First Amendment principles would render completely moot the familiar equal protection principles referred to above. The Massachusetts court has misconceived its task. Application of strict scrutiny equal protection principles is not dependent upon an actual finding that the challenged statute is unconstitutional under the First Amendment. *See Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Having determined that the statute operated in an area of fundamental rights, the Court should have determined whether or not the classifications embodied in the statute served compelling interests.[50]

C. *The Section 8 Classification Formulated In Terms of the Subject Matter of the Communication Violates the Equal Protection Clause*

As the opinion of the court below makes clear, the language of Section 8 totally prohibits corporations from spending moneys on only one particular ballot question: an individual tax question. (J.S. App. 23-24). On any other ballot question the statute allows corporations to spend moneys if the question materially affects their business, and the prosecutor has the burden of proving nonmateriality as one of the elements of the crime. *See* J.S. App. 23-24. Under

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[50] The instant case is not an isolated instance of the Supreme Judicial Court's emasculating methodology with respect to equal protection principles in the area of freedom of expression. *See Commonwealth* v. *707 Main Corp.*, Mass. Adv. Sh. (1976) 2643, 2649-51, 357 N.E.2d 753; *Commonwealth* v. *Ferro*, Mass. Adv. Sh. (1977) 761, ___ N.E.2d ___.

the language of the statute, therefore, there is a great difference in the treatment of ballot questions directly dependent upon the content of the question.[51]

The statute thus creates an impermissible classification based solely upon the content of speech, a classification which cannot withstand strict scrutiny and one which furthers no rational permissible governmental interest. Certainly, no interest in protecting minority shareholders from the misuse of aggregated funds is plausible when on any question except one relating to the graduated personal income tax, their assumed plight is ignored by the Legislature provided the management of the corporation deems the question to be material. Similarly, the State cannot justify even a rational interest in preventing undue influence on the electorate when only one ballot question is singled out for special treatment.

The only operative distinction between the type of communication attempted to be totally prohibited and the type of communication limited to materiality is the subject matter of the communication. The prohibition against communications with respect to an individual income tax ballot question can stand only if that particular ballot question is clearly more prone to undue influence or shareholder dissatisfaction than any other.

However, the State is not free to make any such generalized assumption. In *Police Department of Chicago* v. *Mos-*

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[51] The Court's First Amendment analysis may lessen the difference somewhat. As noted *supra,* pp. 25 to 28, Appellants assume the Court's opinion would allow a corporation to spend money as to a question solely pertaining to individual taxes if the corporation affirmatively proves its assets materially affected. There may be some doubt as to this. *See* J.S. App. 23-24. Assuming this to be so, however, there is still a vital difference in the consequences of corporate spending depending upon the content of the ballot question. Conviction or acquittal would likely depend upon allocation of the burden of proof where the issues of economic materiality are amorphous.

ley, 408 U.S. 92 (1972), this Court struck down as unconstitutional on equal protection grounds a statute which permitted labor picketing but prohibited non-labor picketing, despite the city's argument that non-labor picketing was more prone to violence. The Court held that a city could not distinguish among picketing and focus on subject matters, as opposed to the abuses which it wished to control. Just as "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject," *id.* at 101, Massachusetts may not vindicate its interest in preventing misuse of aggregated funds by the attempted wholesale exclusion of speech on one subject but toleration of communications on all other subjects deemed material. *See also Niemotko* v. *Maryland,* 340 U.S. 268 (1951).

The only purpose served by the second sentence of the statute is to attempt to ensure that the voters are not exposed to the views of the business community. Such a purpose, as the Court stressed in *Mosley, supra,* 408 U.S. at 95-96, is blatantly impermissible:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."
> (Citations omitted.)

D. *The Statutory Classification Differentiating Corporations From Other Entities Cannot Withstand Strict Judicial Scrutiny*

The State's presumed interests in ensuring an election free from the "undue" influence of wealth and possibly in protecting minority interests against the misuse of aggregated funds are not sufficiently compelling to justify prohibiting Appellants, and other business corporations, from expending any money to express their views on the proposed constitutional amendment while permitting labor unions, voluntary associations such as Massachusetts business trusts, charitable corporations and partnerships, to expend or contribute unlimited sums of money to express their views.[52] The classification is certainly not "necessary to achieve the articulated state goal." *Kramer* v. *Union Free School District, supra,* 395 U.S. at 632. This Court has found a governmental interest in preventing corruption inadequate to justify *limitations* on expenditures with respect to political candidates and held that any governmental interest in preventing "undue" influence (beyond corruption) was improper. *Buckley* v. *Valeo, supra,* 424 U.S. at 48. The statute attacked by Appellants is even less justifiable than the statute challenged in *Buckley;* it totally prohibits, not merely limits, expenditures and contributions and it relates to the expression of opinions concerning a non-partisan issue not involving support of or opposition to political candidates.

The State must prove that "a fair and substantial relation" exists between the classification and the objective. *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). Equally important, the State must demonstrate that the means chosen are precisely tailored to achieve the objective and that there

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[52] There is no Massachusetts statute imposing any kind of "materiality" test upon these other organizations.

are no less restrictive alternatives. *Sugarman* v. *Dougall,* 413 U.S. 634, 642-43 (1973); *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964). That the State cannot possibly do.

Finally, even if a classification is reasonable and there is no less restrictive alternative available, the statute may nevertheless be invalidated if the State interests are not sufficiently "compelling" to override the interest jeopardized by the classification. *See, e.g., Williams* v. *Rhodes,* 393 U.S. 23, 31 (1968); *Shapiro* v. *Thompson, supra,* 394 U.S. at 638; *Kramer* v. *Union Free School District, supra,* 395 U.S. at 632 n.14.

The purposes of the State, assuming such purposes are permissible, could be accomplished by less restrictive alternatives — by limiting the amount corporations could spend to publicize their views with respect to the proposed constitutional amendment,[53] by limiting the dollar amount of contributions by corporations to political committees,[54] or by requiring the consent of a majority of the stockholders of corporations making expenditures or contributions.[55] Prohibiting rather than limiting corporate expression with respect to the graduated income tax question is the broadest possible method of achieving the State's purpose—180 degrees away from the constitutionally mandated least restrictive alternative concept.[56]

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[53] Of course, while this is less restrictive, even this less restrictive alternative would appear to be unconstitutional under *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

[54] Held constitutional in *Buckley, supra,* 424 U.S. at 29. By prohibiting corporations from expressing any views whatever, rather than by limiting the amount such corporations could contribute, it appears as if the Legislature wishes the voters not to have access to the views of the business community. Such a purpose is, of course, impermissible. *Id.* at 48-49.

[55] The present statute would prohibit expenditures even if unanimously voted by the shareholders.

[56] The General Court has already adopted a less restrictive alternative in Mass. Gen. Laws c. 55, §22 which requires disclosure of contributions and expenditures.

E. *The Statutory Classification Differentiating Corporations From Other Entities Fails Rationally to Further the State's Purposes*

Even if the statute did not impinge upon a fundamental right, it must, to be constitutional, rationally further the State's purpose and not constitute an invidious discrimination. *San Antonio Independent School District* v. *Rodriguez, supra,* 411 U.S. at 17. Any judicial scrutiny, strict or relaxed, will invalidate the Section 8 prohibition.

In order to be valid, the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). Section 8 produces a classification based upon no real or substantial differences which have any reasonable relationship to its assumed purposes.

Assuming the doubtful propriety of a State's being interested in preventing "undue influence"[57] (as opposed to corruption) by wealthy interests over individual income tax ballot questions or the discussion of political issues generally, the State's interest is not reasonably furthered by the classification chosen. Wealth, which in large part determines the ability to communicate and the incentive to seek to influence the electorate, are as great with respect to some of those groups excluded from the statutory classification as with respect to those within the classification. For example, as set forth in the Appendix at pp. 24, 30, there are many large and wealthy unincorporated Real Estate Investment Trusts (REITs) organized under the

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[57] The Supreme Court unambiguously rejected the propriety of a governmental interest in balancing voter exposure to political debate in *Buckley, supra,* 424 U.S. at 48-49. *A fortiori,* controlling "undue" influence by silencing one group is impermissible.

laws of Massachusetts,[58] which are not regulated in any way by Section 8. Twenty of these Massachusetts REITs have combined assets of $5,458,901,000. (A. 24). There are more than 7,500 business trusts, including REITs, with transferable shares organized under the laws of Massachusetts. (A. 24). These trusts are in many respects the functional equivalent of corporations — for example, each provides for centralized management, freely transferable shares and, generally, limited liability of shareholders.[59]

In short, a blanket prohibition against a REIT's spending *any* money with respect to an individual income tax question might be unconstitutional for reasons set forth in other sections of the Appellants' brief, but prohibiting only Appellants and other business corporations, and not REITs, cannot be justified on the basis of any difference between these entities. Regardless of whether there are constitutional or other limitations which would preclude including Massachusetts business trusts within the scope of Section 8, it is unconstitutional for the state to include corporations such as the Appellants and exclude Massachusetts business trusts.

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[58] REITs are organized in such a way as to take advantage of various tax benefits under §§856-858 of the Internal Revenue Code, and one requirement is that a REIT be "an unincorporated trust or an unincorporated association," and have 100 or more shareholders. Section 856(a) Int. Rev. Code of 1954, as amended. The primary Federal income tax benefit is that income from real estate and certain other investments can be distributed to shareholders with no tax imposed at the corporate level. *See generally* Aldrich, *Real Estate Investment Trusts: An Overview*, 27 The Business Lawyer 1165 (1972). The author notes that the federal tax treatment "has created its enormous popularity." *Id.*

[59] The choice between operating a business in the form of a corporation or a business trust has usually been determined by tax considerations. The Internal Revenue Code generally treats Massachusetts business trusts as "associations" taxable as corporations for Federal income tax purposes. *See generally* Int. Rev. Code of 1954, as amended, Reg. §301.7701-2, and regarding REITs, *see* Int. Rev. Code of 1954, as amended, §856(a)(3). Thus on the federal level there is usually no difference between operating in the form of a corporation or a business trust.

It is inconceivable that the State can justify, under any standard of rationality designed to prevent the "undue" influence of wealthy interests, a classification which has the effect of including an incorporated neighborhood grocery store, while excluding, for example, the Chase Manhattan Mortgage & Realty Trust, a Massachusetts REIT, which had assets in 1975 of $940,643,000. (A. 30). Not only does a REIT, such as the Chase Manhattan Mortgage & Realty Trust, obviously have greater capacity to communicate its views with regard to the proposed constitutional amendment than the neighborhood grocery store, but it would also appear to have incentive to do so.

The fact that labor organizations are excluded from the class established by Section 8 further undercuts any rationality for the State's purposes of preventing "undue" influences of wealthy interests. Labor unions not only have the wealth to attempt to exert influence upon the electorate, but they also have the organizational manpower to act effectively.[60] Labor organizations have at least as much incentive as corporations to attempt to exert influence with respect to ballot questions concerning individual taxes.[61] "The history of union political actions supplies abundant proof that labor's interest in politics is as old as its interest in the closed shop or the union shop." Brief for

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[60] The record indicates there are 2250 individual local labor organizations in the state with a membership of 590,625. (A. 24)

[61] The complete prohibition against expression of a labor organization's view on any particular ballot question might be as violative of the First Amendment rights of unions as it is of corporations. *See Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 69 N.E.2d 115 (1946). If this Court strikes the prohibition on First Amendment grounds, it need never reach the equal protection question. Assuming the Court does reach the question, however, the classification adopted by the statute cannot stand. Unions, like corporations, can be reasonably regulated. *Id.* at 252-253. "That the State has power to regulate labor unions with a view to protecting the public interest is . . . hardly to be doubted. They cannot claim special immunity from regulation." *Thomas* v. *Collins,* 323 U.S. 516, 532 (1945). *See Abood* v. *Detroit Board of Educ.,* 45 U.S.L.W. 4473, 4480 (May 24, 1977).

AFL-CIO as Amicus Curiae, p. 14, *International Ass'n of Machinists* v. *Street,* 367 U.S. 740 (1961), cited in Lambert, *Corporate Political Spending and Campaign Finance,* 40 N.Y.U. L. Rev. 1033, 1052 n. 86 (1965).

Finally, the State cannot claim a rational basis for its classification exists with respect to prevention of "undue" influence when it excludes general and limited partnerships[62] and charitable corporations, many of which control great wealth, as well as wealthy individuals.

The classification fails to rest upon any difference substantially related to the statute's possible secondary purpose: the protection of minority interests against the misuse of aggregated funds. The management of REITs and other business trusts are similarly centralized. Moreover, there are *always* minority shareholders of REITs, because of the requirements of the Internal Revenue Code that beneficial ownership of a REIT be held by 100 or more persons. Int. Rev. Code of 1954, as amended, §856(a)(5). Furthermore, the minority interests of a REIT deserve significant protection because a REIT may often be effectively controlled by a sponsoring real estate development organization or other sponsor. A distinction which forbids the incorporated corner drugstore, 100% owned by one individual and managed by a Board of Directors consisting of only the sole shareholder, from expressing its views on the proposed amendment while at the same time, in order to protect minority interests against the misuse of aggregated funds, permitting a REIT, held by hundreds of shareholders, to spend thousands of dollars advertising its position with respect to the same question is plainly irrational.

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[62] During 1972, the most recent year for which income statistics are available, the Statistical Abstract of the United States shows that there are 15,000 Massachusetts partnerships, which earned a total of $1,816,000,000 in business receipts. (A. 24).

Nor is it rational to justify the classification on the basis of protecting minority interests while labor organizations are excluded from Section 8. Indeed, this Court has recognized that union members may need greater protection than shareholders against potential misuse of aggregated funds. *Cf. United States* v. *CIO, supra,* 335 U.S. at 135-38 (Rutledge, J., concurring); and *Cort* v. *Ash,* 422 U.S. 66, 81 n. 13 (1975). *See also Abood* v. *Detroit Board of Educ.,* 45 U.S. L.W. 4473, 4479 (May 24, 1977). Labor union members are ordinarily compelled to pay dues as a condition of membership and membership is often crucial to job retention.

Historically, perhaps, it could be argued that it was justifiable for the Legislature in drafting the 1907 predecessor to Section 8 to include only business corporations within its scope. In 1907 corporations arguably represented the major aggregations of wealth.[63] Since 1907, however, labor unions and Massachusetts business trusts (including publicly-held trusts such as REITs), limited partnerships and charitable corporations have been established and prospered, and they now represent significant aggregations of wealth. (A. 24) Thus, whatever rationale may have once existed for the classification has evaporated; the lack of any remaining reasonable basis constitutes a constitutional defect.

As Congress became increasingly aware that unions represented large aggregations of wealth and influence, and thus presented "evils" in the political area similar to those thought to be presented by corporations, the FCPA was amended, in 1943 for the duration of the war, and

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[63] Although, even in 1907, Massachusetts business trusts, partnerships, charitable corporations, and wealthy individuals were commonplace. In this regard, it is interesting to note that early economic regulations were conceived of in terms of regulating "trusts." Witness the "anti-trust" laws and the early "trust busters."

"permanently" in 1947, to include labor organizations. The legislative history has been discussed as follows by Mr. Justice Frankfurter:

> And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process.
> *United States* v. *UAW*, 352 U.S. 567, 578 (1967)

Whether the unfairness in the differences in treatment for essentially similar groups results from changing social and economic conditions which render invalid a classification which was once rational, *e.g., Vigeant* v. *Postal Telegraph Cable Co.*, 260 Mass. 335, 157 N.E. 651 (1927), or whether it results from heightened sensitivity to inequities which have been present all along, *e.g., Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669-70 (1966), it is clear that the irrational pattern of the Section 8 classification cannot stand.

F. *Summary*

The classifications adopted in Section 8 are so arbitrary that the statute represents a clear denial of equal protection of the laws, regardless of which equal protection standard of judicial review is applied.

V. Section 8 Incorporates an Improper Presumption of Fact Concerning the Materiality of Ballot Questions Solely Concerning Individual Taxation Which Is Unreasonable and Violative of Due Process.

Before 1972, c. 55, §7 (the predecessor of §8) purported to forbid corporations from expending or contributing funds to publicize their views as to ballot questions except

as to ballot questions materially affecting the corporations. In 1972 a proviso was added which stated that no question concerning individual taxation was to be deemed materially to affect a corporation and in 1973 the word "solely" was added so that the proviso now reads:[64]

> No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.

Prior to the 1972-1973 amendments, in accordance with principles and authorities acknowledged by the Supreme Judicial Court (J.S. App. 24), the prosecution would have had to allege and prove that the particular referendum question was not one which materially affected the corporation in order to obtain a conviction under Section 8.

The proviso which resulted from the 1972-1973 amendments obviously takes the form of a presumption. At least in form, then, the statutory proviso purported to supply one of the elements which the prosecutor would otherwise have to prove. Whereas before the prosecutor would have had to prove that an expenditure or contribution was made for the purpose of influencing the vote as to a question which did not materially affect the corporation, now the prosecutor would merely have to show that the expenditure was made to influence the vote on a ballot question solely pertaining to individual taxes. From the proven fact (the expenditure was for an individual taxation referendum question) would flow the presumed conclusion (the question is not one which materially affects the corporation). From the wording of the proviso ("no question . . . *shall be deemed* . . . .") and from an analysis of the legislative purpose, which was quite clearly to keep corporate funds

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[64] The history of these amendments is described *supra* at 7-9.

out of graduated income tax referendum campaigns, it would seem clear that the presumption was intended to be conclusive.

Whether conclusive or permissive, this Court has clearly established that the power of a legislature to create presumptions is limited by "due process" restrictions. *Tot* v. *United States,* 319 U.S. 463 (1943); *United States* v. *Romano,* 382 U.S. 136 (1965); *Leary* v. *United States,* 395 U.S. 6 (1969). Where the statute imposes criminal penalties, the state must bear the burden of proving criminal guilt. *In re Winship,* 397 U.S. 358 (1970); *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975).

The test to determine the validity of a statutory presumption used in a criminal statute was stated by this Court as follows:

> [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.
>
> *Leary, supra,* 395 U.S. at 36

When a criminal statute is involved, the courts are particularly strict in examining the logical strength of legislative presumptions. *Bailey* v. *Alabama,* 219 U.S. 219 (1911); *Morrison* v. *California,* 291 U.S. 82, 92-97 (1934). *Compare Yee Hem* v. *United States,* 268 U.S. 178 (1925), *with Turner* v. *United States,* 396 U.S. 398 (1970).[65]

Appellants argued below that a conclusive presumption

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[65] Permanent, irrebuttable presumptions, even in civil statutes "have long been disfavored under the Due Process Clauses . . .", *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973), especially where they place a heavy burden on the exercise of protected freedoms. *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974).

in a criminal case was completely untenable. Even if the presumption were permissive it would violate the standards enunciated in the cases cited above. There being "no rational connection between the fact proved and the ultimate fact presumed," (*Tot, supra,* 319 U.S. at 467), the use of the presumption in this statute does not square with constitutional principles.

The court below held, however, that the proviso, although "inelegantly written" (J.S. App. 23) did not in fact create a presumption as to a previously defined crime. Rather, it created a new and separate (although somewhat related) crime. This new crime constituted expending money to influence the vote as to a referendum question which solely pertained to individual taxation. (J.S. App. 24). Materiality to the corporate business was no part of this newly created crime.

At the same time, however, the Court, in its First Amendment analysis, held that corporations cannot be prohibited from expending funds to communicate their views as to referendum questions which materially affect their assets. If a corporation demonstrated that the individual taxation ballot question materially affected its assets, the proviso would be "invalid" as to that corporation. (J.S. App. 14).

Appellants have addressed the First Amendment infirmities inherent in the Court's approach elsewhere in this brief. For present purposes it should be noted that the result of the statutory amendment and the Massachusetts court's interpretation of the First Amendment protection for corporations has produced the same result which the cases cited above have denounced. Whereas before the 1972-1973 amendment the prosecutor would have to prove nonmateriality in order to convict, after the amendment the corporation has to prove materiality in order to escape conviction. At best, then, the practical effect of the Court's

opinion has been to turn what looks like an irrebuttable presumption into a rebuttable presumption. Cases cited above make clear that irrational rebuttable presumptions have no place in the criminal law.

In short: the proviso looks like a presumption, acts like a presumption, and has the effect of a presumption. The principles embodied in the cases cited by Appellants require that it be stricken as offensive to due process.

VI. Conclusion

The will of the Legislature has been forcefully expressed over a number of years. The Legislature wants corporate money kept completely out of any campaign concerning the desirability of amending the Massachusetts Constitution to provide for graduated personal income taxes. The Supreme Judicial Court in 1962[66] and again in 1972[67] attempted to carry out constitutional principles yet save the statute. This the Court succeeded in doing. In 1976, however, there really was no way to avoid coming completely to grips with the constitutional questions. In this conflict between the Constitution and the will of the Legislature, the Constitution was the loser.

The Supreme Judicial Court in its attempt to "save" this statute was faced with a series of Hobson's choices. As this brief has attempted to show, the statute intrudes into a number of incredibly sensitive areas: freedom of discussion as to basic political and economic principles; the right of the public to hear; commercial free speech; the requirement of clarity and precision in the definition of criminal activity; the right to equal protection of the laws; the right to fairness in a criminal jury trial. Inevitably, any attempt

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[66] *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E.2d 871 (1962).
[67] *FNB I*, 362 Mass. 570, 290 N.E.2d 526 (1972).

to shape the statute to avoid a conflict with one constitutional principle exacerbates its conflicts with other principles. The short answer is that the statute cannot be squared with the Constitution.

Appellants respectfully request that this Court reverse the decision of the Supreme Judicial Court and enter an order that Appellants, based upon the facts shown in this case, may not be forbidden from making direct expenditures or contributions to committees in order to publicize their views as to any ballot question pertaining solely to a proposed graduated income tax for individuals.

Appellants urge, in support of the requested order, that this Court make one or more of the following rulings:

1. That the proviso contained in the second sentence of Section 8 is unconstitutional on its face under First Amendment principles,
2. That the said proviso is unconstitutional, as applied to these Appellants, under First Amendment principles, as a denial of equal protection, and as a deprivation of liberty or property without due process of law,
3. That the first sentence of Section 8, insofar as it purports to forbid business corporations from expending or contributing to publicize their views on referenda questions except as to such questions which materially affect them is unconstitutional on its face under First Amendment principles,
4. That the said first sentence, as applied to these Appellants, is unconstitutional under First Amendment principles,
5. That the said first sentence, insofar as it prohibits corporate spending as to referenda questions but does not regulate in any way referenda spending

of labor unions, trusts, and other similar entities is unconstitutional, as applied to these Appellants, as a denial of equal protection.

Respectfully submitted,

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APPENDIX A

[SEAL]

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
John W. McCormack State Office Building
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March 11, 1977

Edward W. Bettke, Treasurer
Wyman-Gordon Company
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Worcester, Massachusetts 01613

Dear Mr. Bettke:

It has come to my attention that Wyman-Gordon Company made a contribution to "People Who Say Yes To Progress", during the recent referendum campaign in Worcester.

General Laws Chapter 55, section 8 generally prohibits any business incorporated under the laws of Massachusetts or doing business in the Commonwealth from contributing to any committee for the purpose of affecting the vote on any ballot question, *unless that question materially affects any of the property, business or assets of the corporation.* Violations of this section are punishable by a fine on the corporation of up to $50,000 and a fine on any officer, director or agent authorizing the violation of up to $10,000 or imprisonment for one year or both.

The constitutionality of the statute was the subject of a recent suit brought against the Attorney General by a group of Massachusetts corporations interested in making contributions to oppose the graduated income tax amendment. The Supreme Judicial Court held that the statute was constitutional on its face and as applied to these corpo-

rations. The decision has been appealed to the United States Supreme Court, but the statute is currently in effect and will be enforced.

It is not clear to me that the business assets or property of your corporation were potentially "materially affected" by the question and it is my intention to undertake an independent inquiry to determine the legality of the contribution. Your cooperation will expedite that inquiry. If you have counsel, please refer this letter to him or inform me of his identity.

Very truly yours,

(s) THOMAS R. KILEY
THOMAS R. KILEY
Assistant Attorney General
Chief, Elections Division

APPENDIX B

Constitutional and Statutory Provisions

CONSTITUTIONS

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, § 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.