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CASES.

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.

Motion of New England Council for Leave to File Brief as Amicus Curiae.

Now comes the New England Council and, through its attorneys, moves this Honorable Court, pursuant to Rule 42 of the Rules of the Supreme Court, for leave to file a brief as amicus curiae in support of appellants.

The New England Council was founded in 1925 by the New England governors for the purpose of developing and strengthening the New England economy. The New England Council is financed by membership dues. The membership of the Council consists of approximately 2,000 New England individuals and business entities. These members include banks and other financial institutions, manufacturing concerns, tourist related businesses, civic associations, utilities, segments of the transportation industry, governmental agencies, professional persons and other individuals. The members of the Council range in size from among the smallest to the largest businesses. As a result, the Council is broadly representative of New England and it reflects a wide range of interests within the region.

The New England Council is particularly concerned with the decision of the Supreme Judicial Court of Massachusetts. That decision gives scant consideration to the right of members of the public, including members of the New England Council, to hear debate on an issue — an important element of the tax structure of Massachusetts — which substantially affects the New England economy. The predominant concern of the parties to the case has been and appears to be with the right of corporations under the First Amendment to speak. Little attention has been given to the effect of the decision of the Massachusetts Supreme Judicial Court in abridging the public right to hear vigorous debate on a political matter, including all points of view on a significant political and economic issue having an important impact upon New England. In addition, the New England Council believes that it is patently erroneous to uphold a legislative finding that taxation upon individuals, as an element of the overall system of taxation within Massachusetts, does not materially affect corporations. Finally, a presumption underlying the arguments in the case is that corporations

are opposed to a graduated income tax. This is not necessarily so; corporations may have differing views on the advisability of a graduated income tax or other taxes on individuals.

At this time, when the New England economy is hampered by many adverse factors, including high energy costs, a high unemployment rate, and relatively stagnant business development, it is particularly important for the public to hear all points of view on matters which may affect business decisions and consequently affect the Massachusetts and New England economy. Members of the public are entitled to be informed of the points of view of corporations so as to have an opportunity to be fully informed. This right to hear uninhibited, robust and wide-open debate, guaranteed by the First Amendment, is severely jeopardized by the opinion of the Massachusetts Supreme Judicial Court.

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FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

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

Brief of Amicus Curiae the New England Council in Support of Appellants.

Introductory Statement.

The New England Council, a non-profit corporation which is broadly representative of New England interests, files this brief as amicus curiae in support of the appellants. The New England Council invites this Court's attention to the serious infringement upon the public's right to hear resulting from the enactment by the Massachusetts legislature of the statute in issue. The effect of the statute is to chill public debate upon an issue of great importance. The New England Council fears that if the legislative and judicial action in question were permitted to stand, by logical extension, the legislature could restrict the right of free speech of all forms of corporate organizations, including charities, educational, trade and special purpose associations carrying on their activities as corporations by merely finding that particular matters were not of material concern to them.

The New England Council adopts appellants' description of the opinion and the statute in issue and appellants' statement of the case.

Questions Presented.

The New England Council believes that this appeal presents, in addition to those questions set forth in the appellants' brief, the following issues:

1. Whether the action of the Massachusetts Legislature, as upheld by the Supreme Judicial Court of Massachusetts, infringes upon the right to hear of the recipients of those expressions of corporations prohibited under the statute in issue, Mass. Gen. Laws, c. 55, § 8.

2. Whether corporations have lesser rights to free speech than natural persons.

3. Whether this Court should find as a matter of law that as a part of the overall state mechanism for raising needed revenue, a tax on the income, property or transactions of individuals does materially affect the property, business or assets of corporations.

Summary of Argument.

Any intrusion upon the right of free expression is so dangerous to free and full public debate, particularly upon the right of the minority to attempt to persuade the majority, that this Court should overrule any attempt of state institutions to limit the right of parties to speak and the right of the public to hear. Particular points made in this memorandum are:

1. The right to hear free and unrestrained expression on matters of public concern is paramount. Any restriction upon free expression, however erroneous or disagreeable such expression may be, is abhorrent to the most treasured freedom upon which this country was founded. Even if it were so that matters involving the taxation of individuals do not in fact materially affect business corporations, the public has a right to know the state of mind of business corporations on this subject. If business corporations were to hold the belief that a tax on individuals has a material effect upon them, even if such a belief were erroneous, the public has a right to know because business corporations may act upon their beliefs.

2. No decision of this Court has held that corporations do not have the same rights to free speech as natural persons. On the contrary, the decided cases hold that corporations and natural persons stand upon the same footing.

3. Logical extension of the principles involved in the decision of the Supreme Judicial Court would permit legislative findings which could have the effect of stifling free speech by all forms of corporations on wide ranges of subject matters.

4. The decision of the Supreme Judicial Court, along with the history of the controversy concerning a graduated income tax, appears to presume that corporations would spend

huge sums of money in opposing a graduated income tax. This presumption is not necessarily valid, particularly when it is considered that the statute in question affects not only large, wealthy and publicly held corporations, but it also affects the large number of closely held and family corporations which carry on business within the Commonwealth of Massachusetts. Such corporations are particularly affected by tax on individuals.

5. The legislative finding that a tax on individuals does not affect business corporations is on its face incorrect since taxation of individuals is one element of the scheme for raising revenue of the Commonwealth every element of which affects every other element.

Argument.

I. *Preliminary Statement.*

The New England Council has filed this brief as amicus curiae so as to present to the Court the point of view of a broadly representative New England organization, and particularly, to emphasize the public's right to hear debate on issues substantially affecting the New England economy.

The New England Council was organized in 1925 by the governors of the six New England states for the purpose of working to develop and strengthen the economy of New England. The Council has approximately 2,000 members, both individuals and business entities, from the six New England states. It maintains a principal place of business in Boston, Massachusetts, and its operations are financed by membership dues. The Council is broadly representative and reflects the interests of the region.

The membership of the New England Council is made up of approximately 300 banks and other types of financial institutions, 600 manufacturing businesses, 200 tourist

related businesses, over 75 civic associations, utilities, segments of the transportation industry, governmental agencies, professional persons and other individuals. The businesses represented range in size from among the smallest to the largest.

The New England Council is particularly concerned with the possible extension of the principle, which it would appear has been upheld by the Massachusetts court, that the legislature may make a finding as to what speech has a material effect upon corporations and may restrict the speech of corporations on those matters which the legislature finds to have no material effect. This principle, if upheld, would not necessarily be restricted to business corporations and could be applied to all corporations, including charitable corporations, educational institutions, various special purpose organizations carrying on their activities as corporations, and, possibly, other entities created by the Commonwealth.

II. *The Right to Receive Information.*

The state court failed to consider the right of the public to receive the information which would result from expenditures or contributions by appellants and other corporations. See, Appendix, Jurisdictional Statement ("AJS") 9-15. It is well established that the First Amendment creates the right to receive information in addition to the right to communicate. "The right of freedom of speech and press includes . . . the right . . . to receive, the right to read . . ." *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965). This point was recently emphasized in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), establishing the right of the public to receive advertising information concerning the price of prescription drugs. In so holding this Court stated:

> "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases." 425 U.S. at 756.

The right to receive information has been recognized in a broad range of contexts. In *Procunier* v. *Martinez,* 416 U.S. 396 (1974), this Court recognized the right of individuals desiring to communicate with prisoners to receive the information which would be contained in the writings of the prisoners. In so holding this Court stated:

> "Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication." 416 U.S. at 408-09.

The public's right to receive information has also been recognized in a decision upholding the Federal Communication Commission fairness doctrine which requires television and radio stations to provide reply time to individuals and organizations disagreeing with their editorials. In *Red Lion*

Broadcasting Co., Inc. v. *F.C.C.,* 395 U.S. 367 (1969), this Court stated:

> "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [citations omitted.] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . 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. That right may not constitutionally be abridged either by Congress or by the F.C.C." 395 U.S. at 390.

The First Amendment right to know has also been recognized in the context of preventing censorship of literature. In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), the Court recognized the right of the public to receive foreign literature without the chilling effect of a requirement to register with the post office. This point was re-emphasized in a recent decision by the United States Court of Appeals for the Sixth Circuit which prevented a local school board from banning the discussion of certain books in high school classes and eliminating such books from the school library. *Minarcini* v. *Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976). In *Minarcini* the court relied heavily on *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc., supra,* in finding that the First Amendment protection of the right to know prevented the school district from banning the discussion of various publications in classes. The right to receive information and ideas is "fundamental to our free society" and exists "regardless of"

the "social worth" of the information and ideas.[1] *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969).

The right to receive information is particularly important in situations, as in the instant case, in which the restriction affects political speech. This Court has recognized that "[t]he public interest in having free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." *Pickering* v. *Board of Education,* 391 U.S. 563, 573 (1968).[2] In *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966), the Court stated "[w]hatever 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." Similarly, in *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964), the Court held "speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, . . ." It is with these cases in mind that a district court recently stated, "[f]ree debate on public issues is essential to the survival of the Republic. It hardly needs repeating that such speech should be 'uninhibited, robust and wide-open.' " *Vanasco* v. *Schwartz,* 401 F.Supp. 87, 97 (S.D.N.Y. 1975), *aff'd,* 423 U.S. 1041 (1976). This point was again emphasized in the context of political campaigns in *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1975), where this Court recognized

[1] The "ideas and information" protected in Stanley were obscene films. It would seem that the right to receive word of business corporations' perception of the effect of a tax on individuals would be at least as important as the right to hear obscene matter.

[2] See, *e.g.,* A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

that discussion of political affairs is "an area of the most fundamental First Amendment activities" and "[d]iscussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."

In *Pickering* v. *Board of Education, supra,* this Court held that the First Amendment protected the right of a school teacher to express his opinion on the wisdom of approving a bond issue for educational purposes:

> "On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S. at 571-72.

Similarly, the appellants and other Massachusetts corporations have a special insight into the effect that political choices may have on businesses located in Massachusetts or contemplating expansion in Massachusetts. It is particularly harmful to the public to deprive it of the information which such businesses may wish to give and which may affect the public. Appellants employ a large number of individuals who would be affected by a graduated income tax. They also employ professional economists who have studied the effect of a graduated income tax. AJS. 32-38, 42. The effect that political decisions, such as the institution of a graduated income tax, have on corporations is certainly a matter of concern to voters. Likewise, the corporate perception of such an effect is also of significant public interest. Citizens of Massachusetts, including members of the New England Council, are concerned with the economic impact of

political decisions on corporations which have the resources to provide jobs and strengthen the tax base of the Commonwealth. Therefore, voters have a vital interest in receiving communications from the appellants and other business corporations on issues upon which corporations are willing to expend time and money to communicate their views.

The public's right to receive such information exists regardless of whether the Massachusetts legislature deems that a particular issue has a material effect upon the property, business or assets of corporations. If corporations perceive that the institution of a graduated income tax on individuals will create an unfavorable business climate in Massachusetts that perception may affect their decisions on expanding or even maintaining their operations in Massachusetts. The electorate is entitled to be apprised of the concerns of corporations in order to make informed decisions on public affairs.

Even if it were so that a graduated income tax on individuals would not in fact materially affect the interests of corporations, there would be no justification for preventing the public from hearing the exposition of the point of view of corporations. It is not relevant to First Amendment considerations whether a speaker's views are accurate. In his concurring opinion in *Virginia Pharmacy Board v. Virginia Consumer Council, Inc., supra,* Mr. Justice Stewart drew a distinction between commercial price and product advertising, as to which factual accuracy may be required, and ideological communications, as to which such accuracy need not be required. Mr. Justice Stewart said:

> "Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought — thought that may shape our concepts of the

> whole universe of man. Although such expression may convey factual information relevant to social and individual decision-making, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the 'truth' may be employed to give force to the underlying idea expressed by the speaker. 'Under the First Amendment there is no such thing as a false idea,' and the only way that ideas can be suppressed is through 'the competition of other ideas.' '' 425 U.S. at 779-80.

The public, including members of the New England Council, are entitled to hear ''the competition of ideas'' between the economists representing the appellants and economists with opposing views.[3]

The approach of the Massachusetts legislature in seeking to keep the public in ignorance of the position of corporations on political issues out of fear that the presentation of the corporate point of view will unduly influence the electorate is repugnant to the First Amendment. As the Supreme Court stated in *Virginia Pharmacy Board v. Virginia Consumer Council, Inc., supra*:

> ''There is, of course, an alternative to this highly paternalistic approach. [preventing pharmacists from advertising the price of prescription drugs.] That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is pre-

[3] Compare AJS. 32-38 with AJS. 47-48.

> cisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S. at 770.

To the extent that the decision of the Supreme Judicial Court was premised upon the notion that the relative voices of corporations and private citizens in the electoral process should be equalized, such a position runs contrary to the decision of this Court in *Buckley v. Valeo, supra.* In holding that placing a monetary limit on the amount an individual or group could expend in voicing their views in political campaigns violated the First Amendment, this Court stated:

> "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"'." [citations omitted]. 424 U.S. at 48-49.

Other courts which have considered whether barring corporations from making contributions or expenditures on referendum questions violates the First Amendment have relied in part on the *Buckley* opinion in concluding that such restrictions violate the First Amendment. See, *e.g., C & C Plywood Corp. v. Hanson,* 420 F.Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir., Sept. 29, 1976; *Advisory Opinion on Constitutionality of 1975 PA 227,* 396 Mich. 465, 242 N.W.2d 3 (1976); *Pacific Gas & Electric Co. v. Berkeley,* 60 Cal. App.3d 123, 131 Cal. Rptr. 350 (1976).

The justification which exists for preventing corporations from participating in the election of candidates to public office is inapplicable to campaigns on referendum questions. See, *e.g., Schwartz v. Romnes,* 495 F.2d 844 (2nd Cir. 1974); *C & C Plywood Corp. v. Hanson, supra*; *Advisory Opinion on Constitutionality of 1975 PA 227, supra*; *Pacific Gas & Electric Co. v. Berkeley, supra.*[4] In *Romnes,* the court recognized that the primary reason for prohibiting corporate contributions or expenditures in elections is "to prevent corruption of legislators and other elected officials" and that this rationale was inapplicable to contributions in connection with referenda questions.

> "Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions

[4] Schwartz v. Romnes involved a derivative suit to recover a $50,000 expenditure made by a corporation with respect to a state bond issue submitted for a referendum vote. The court held that the New York statute banning corporate contributions and expenditures for political purposes did not ban contributions in connection with referendum votes because such an interpretation would violate First Amendment rights. In Advisory Opinion on Constitutionality of 1975, PA 227, the Michigan Supreme Court answered questions propounded by the House of Representatives concerning the constitutionality of proposed election laws. The court held that a provision barring corporations from making contributions or expenditures on ballot questions violated the First Amendment. In C & C Plywood Corp. v. Hanson, several corporations brought a suit seeking a declaratory judgment that a provision of the Montana Code which barred corporations from making contributions or expenditures with respect to referendum questions was unconstitutional. The district court held that the statute violated the First Amendment. In Pacific Gas & Electric Co. v. Berkeley, an electric utility sought declaratory relief from the operation of a city ordinance prohibiting corporations from making contributions to influence the outcome of referenda. After finding that the ordinance violated the First Amendment, the court enjoined the enforcement of the ordinance.

> to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights." 495 F.2d at 852-53.

As a result, the court construed a provision of New York law banning corporate contributions not to apply to contributions in support of positions on a referendum so as to find the provision in question constitutional and not an abridgement of First Amendment rights.

> "There is even greater cause for constitutional concern in the present case, for the plaintiff's broad construction of § 460 would proscribe corporate contributions or expenditures for the purpose of communicating its views to the public with respect to an important issue to be decided by the voters and furnishing information that might be of assistance in arriving at that decision." 495 F.2d at 852.

Similarly, the Michigan Supreme Court in issuing an advisory opinion on the validity of proposed legislation to ban corporate contributions in both elections and referenda drew a distinction between referenda and elections, stating,

> "It is our opinion that corporate contributions or expenditures for the purpose of influencing the nomination or election of a candidate may be constitutionally prohibited in order to preserve the integrity of the electoral process. However, we would view the prohibition of corporate contributions or expenditures for the purpose of influencing the qualification, passage, or defeat of a ballot question as an unconstitutional abridgement of freedom of speech and press as guaranteed by art. 1, § 5." *Advisory Opinion on Constitutionality of 1975 PA 227*, 242 N.W.2d at 18.

In reaching this decision the court was concerned with the public's right to hear the corporate point of view. The court stated:

> "It is our opinion that insofar as § 95 interferes with the right of the public to hear divergent views of public importance by prohibiting corporations from making contributions or expenditures for the purpose of communicating its opinion concerning ballot questions, it is violative of Const. 1963, art. 1, § 5." 242 N.W.2d at 19.

In *C & C Plywood Corp. v. Hanson, supra,* the court held that an amendment to the Montana Code which banned corporate expenditures and contributions on ballot questions violated the First Amendment. In so holding, the court identified as a crucial factor "the electorate's right to be informed on public issues; the very essence of self-government and intelligent decision-making." 420 F.Supp. at 1261-62. After considering this factor, the court held:

> "Therefore, . . . the State of Montana cannot constitutionally legislate a direct prohibition on the exchange of ideas and information, involved in one form of the legislative process, merely because the source of the information is a corporation." 420 F.Supp. at 1265.

As these cases show, protection of the public's right to uninhibited, robust and wide-open debate requires reversal of the decision of the Supreme Judicial Court of Massachusetts and a declaration that the statute in issue is unconstitutional as repugnant to the First Amendment.

III. *Corporations Have the Same First Amendment Rights as Natural Persons.*

The proposition that corporations have lesser First Amendment rights than natural persons is not supported

by the decisions of this Court. While a distinction between corporations and natural persons has been drawn under the privileges and immunities clause, no such distinction is applicable to First Amendment rights to political expression.[5]

Grosjean v. American Press Co., 297 U.S. 233 (1936), held that a corporation is a "person" within the meaning of the equal protection and due process clauses of the Fourteenth Amendment. Similarly, *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), upheld a corporate employer's First Amendment rights. In one of the most recent decisions by this Court arising out of the regulation of campaign expenditures, *Buckley v. Valeo, supra*, two of the plaintiffs were corporations.

After having struggled over the years with the question of whether restrictions upon commercial speech were contrary to First Amendment rights, e.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942), this Court has now made it clear

[5] Decisions of this Court, Hague v. C.I.O., 307 U.S. 496 (1939), Western Turf v. Greenberg, 204 U.S. 359 (1907) and Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906), restricting the applicability to corporations of the due process clause of the Fourteenth Amendment, do not decide the issue of whether corporations are entitled to First Amendment protection with respect to political expression. While, in Hague, the American Civil Liberties Union, a corporation, was dismissed as a plaintiff in an action challenging a municipal ordinance as an unconstitutional restriction of the right to free speech, the court dealt only with the privileges and immunities clause in its analysis of the corporation's rights. Neither the Western Turf nor Northwestern National Life Insurance case involved First Amendment claims. The former dealt with a state statute concerning life insurance and the latter with a statute concerning admission to places of public amusement. Pierce v. Society of Sisters, 268 U.S. 510 (1925), relied on by the Massachusetts Supreme Judicial Court, involved a state regulation challenged on the basis of the threat it posed to petitioners' business and patrons and presented no claim as to intereference with corporate rights of free speech. The rationale applied in the above-mentioned cases has been eroded in the context of First Amendment rights by subsequent decisions of this Court reviewed herein.

that commercial speech is protected. *Linmark Associates, Inc. v. Willingboro*, — U.S. —, 45 U.S.L.W. 4411 (May 2, 1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

Several recent lower court decisions, some of which were cited in the preceding section, have determined that corporations have First Amendment rights to express their opinions in connection with matters of political or public significance. See e.g., *Schwartz v. Romnes, supra,* (corporation expenditures on referendum question protected);[6] *C & C Plywood Corp. v. Hanson, supra,* (corporation contributions on public ballot issues protected);[7] *Fram v. Yellow Cab Co. of Pittsburgh,* 380 F.Supp. 1314 (W.D. Pa. 1974) (no basis for claim that First Amendment does not apply to corporations);[8] *Advisory Opinion on Constitutionality of 1975 PA 227, supra,* (corporation expenditures on public ballot questions entitled to protection);[9] *Borough*

[6] Schwartz involved a stockholders derivative suit against directors of a corporation arising from expenditures made by the corporation in connection with a public referendum issue. The court stated that state interests in prohibiting corporate contributions in connection with referenda did not warrant the encroachment on First Amendment rights. 495 F.2d at 852-53.

[7] A provision of the Montana Corrupt Practices Act prohibiting corporate payments and contributions in support of or in opposition to public ballot issues was held unconstitutional on the ground that a state may not prohibit the exchange of ideas and information where the source of the information is a corporation.

[8] Fram involved an action for slander brought against a corporate competitor where the court held that there was no basis for plaintiff's contention that the First Amendment did not apply to corporations. 380 F.Supp. at 1334.

[9] The Supreme Court of Michigan stated in this case that a significant distinction exists between corporate contributions to candidates and corporate expenditures made in connection with public ballot issues and that the latter type of expenditures are entitled to constitutional protection.

of Collingswood v. Ringgold, 66 N.J. 350, 331 A.2d 262 (1975) (speech of corporate entity protected);[10] *Pacific Gas & Electric Co. v. Berkeley, supra,* (ordinance prohibiting contributions by corporations in connection with referendum unconstitutional).[11]

Protection of expression on matters of political and public interest is fundamental. If one entity is prevented from expressing itself solely because it is a corporation, there is grave danger that restrictions upon the free expression of ideas may be applied to other entities. Charities may be limited in their expressions to matters which the legislature deems to be within their charitable purposes; special interest groups receiving contributions and conducting their affairs as corporations may be subjected to legislative determinations as to matters upon which they may appropriately speak; even an organization such as the A.C.L.U. conceivably could be limited in its freedom of expression. The power of the legislature may not be used to silence opposition, to suppress minority viewpoints. Such limitation on free speech cannot be tolerated.

The conclusion by the Massachusetts Supreme Judicial Court that corporations possess certain rights of speech and expression under the First Amendment but that corporate freedom of expression may be limited to political issues materially affecting corporate business, property or assets is contrary to principles established by this Court. Where "core First Amendment rights of political expression" are abridged, the governmental interests supporting

[10] The court upheld the validity of a municipal ordinance regulating commercial solicitation but stated that speech is not unprotected because it is uttered by a corporate entity and because it serves the economic purposes of that entity. 331 A.2d at 270.

[11] The court in Pacific Gas invalidated a municipal ordinance which prohibited corporations from contributing to any committee which attempted to influence the public in connection with referenda issues as a violation of the First Amendment rights of corporations.

such regulation must satisfy "exacting scrutiny." *Buckley v. Valeo,* 424 U.S. at 44. As this Court stated in *Mills v. Alabama,* 384 U.S. at 220, and reaffirmed in *Buckley v. Valeo,* 424 U.S. at 50, "no test of reasonableness can save a state law [abridging First Amendment rights] from invalidation as a violation of the First Amendment. . . ."

IV. *A Tax on Individuals Materially Affects Corporations.*

In enacting Mass. Gen. Laws c. 55, § 8, the Massachusetts legislature presumed that issues related solely to the taxation of individuals do not "materially affect the property, business or assets of the corporations." Similarly, in concluding that Mass. Gen. Laws c. 55, § 8 was valid, the Supreme Judicial Court relied on the lack of "an express finding that the plaintiffs' material interests would in fact be affected by the ballot question." AJS. 14. That conclusion is contrary to the undeniable and self-evident fact that a tax on individuals affects corporations. The ability of corporations to attract qualified executives, the funds available to consumers, monies on deposit in appellants' banks are all matters dealt with in the record. However, no record is needed to conclude that a state's mechanism for raising needed revenue affects all taxpayers and potential taxpayers.

In raising tax revenue, a state or municipality necessarily relies upon various sources. To the extent that a system of taxation generates more revenue from one segment of society, a corresponding reduction results in the amount of revenue which must be raised from other sources. Thus, if a state could raise its needed revenues entirely from taxation of individuals, it could decide not to tax corporations at all. Conversely, if a state were to decide to generate less revenue from the taxation of individuals, the burden of meeting a state's fiscal needs could be shifted

to corporations. It cannot be denied that decisions on the allocation of the tax burden have a material effect on corporations as entities which, as a result of such decisions, may bear greater or lesser degrees of the total tax burden.

In addition, the rate of taxation on individuals would probably affect investment by individuals in corporations. For example, by lowering the tax rates of individuals, the legislature would free additional revenue which could be used for investment, thereby facilitating capital formation in corporations, an important factor for small or medium-sized corporations. Also, small closely held corporations would be affected by the tax rate on individuals because such a tax would affect, among other matters, decisions on payments of dividends or accumulation of capital or, even, the purchase and sale of businesses.

The effect of individual income tax rates on small and medium-sized corporations illustrates an erroneous assumption underlying this case. The case has proceeded on the assumption that corporations oppose the graduated income tax. However, this is not necessarily so. Small corporations or corporations whose shares are held largely by out of state shareholders may welcome the relief from the tax burden imposed upon them by the adoption of a tax system imposing a heavier burden upon individual taxpayers. Corporations owning property may welcome relief from the burden imposed upon them by the property tax if there were heavier reliance upon an income tax on individuals to raise needed state revenue. These are only illustrations of the variety of views that corporations may hold on taxes on individuals. These illustrations are offered to show why corporations should not be prohibited from expressing their opinions on matters affecting the system of taxation of the state within which they function.

The potential impact of individual income tax rates on small corporations and the general effect of such tax rates on incentives for investment materially affect the assets of such corporations. The conclusion of the Massachusetts legislature is contrary to this plain irrebuttable principle.

Conclusion.

It is evident from the record that this case is one more battleground in the ongoing controversy concerning the establishment of a graduated income tax in Massachusetts. The legislature, which has consistently favored a graduated income tax, has attempted to silence what it perceives to be the opposition through the adoption of a criminal penalty for speaking on the subject. This circumstance should not distort the important principles at issue here. The issue is not one of pro-graduated income tax or anti-graduated income tax; the issue is whether a state legislature may silence debate among its citizenry.

The assumption that corporate wealth would be used in opposition to a graduated income tax is simply not correct since that assumption neglects the existence of many diverse types of corporations including small closely-held corporations, family corporations, professional corporations and the like. That any element of the scheme of taxation adopted by a state to raise revenue materially affects all taxpayers and potential taxpayers in the state is uncontrovertible. The record below shows that at least some economists believe a tax on individuals materially affects corporations, and that, whether correctly or not, corporations perceive the tax on individuals as affecting them. These factors and the arguments bearing upon them may operate as a distraction from the fundamental issue in this case — whether there is any justification permitting a state to si-

lence the voice of one of its citizens and, in so doing, to deprive its citizens of the right to hear the opinions, positions and ideas of a segment of the citizenry.

This brief has not dealt with the issue of mootness, an issue briefed at length by the parties. However, the New England Council wishes to invite the Court's attention to the already chilling effect on public debate which the circumstances leading to this case have had, and the dangerous potential, absent a decision in this Court, for further state action attempting to silence voices within the Commonwealth. Under such circumstances, a firm pronouncement by this Court upholding the First Amendment is necessary at this time so as to make certain that action by this or any other state to silence the opposition by making it a crime to speak will not be permitted.

Respectfully submitted,

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