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 NORTHEASTERN LEGAL FOUNDATION AND MID-AMERICA LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Northeastern Legal Foundation ("NLF") and Mid-America Legal Foundation ("MALF") respectfully move for leave to file the attached brief *amici curiae* in this case. Additionally, leave is requested to file the attached brief out of time. NLF and MALF are authorized to state that the Appellants, and the Appellee,

Francis X. Bellotti, assent to the filing of this motion for leave at this time.

NLF and MALF ("Amici") are not-for-profit corporations organized under the laws of Massachusetts and Ilinois, respectively. They were formed to engage, on a politically non-partisan basis, in legal research, study and analysis of the evolving concepts of law on democratic institutions for the benefit of the general public. NLF and MALF seek to represent the public interest in administrative and judicial matters before state and federal authorities. While the interests of NLF and MALF are national in scope, NLF takes a special interest in questions of law which may have a direct effect on the New England region, including Massachusetts.

As public interest organizations with a central concern for the free flow of information to the public, Amici believe that they can provide this Court with additional perspectives on the issues raised in this case.

NLF and MALF consider this case to be of singular importance. It is well established in decisions of this Court that all persons are entitled to exercise their constitutional rights of free speech and association, subject only to those restraints which can be justified by a compelling state interest. The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts, in excepting corporate persons, is wholly inconsistent with this Court's efforts to ensure robust and wide-open debate on political matters and to facilitate the public availability of all viewpoints necessary to make an informed choice on matters of general concern. Acceptance of the novel views of the state court on the constitutional rights of corporate speakers will sub-

stantially diminish the freedoms of not only the individual appellant corporations but all corporate organizations including those of a not-for-profit, public interest or charitable nature, such as Amici.

Furthermore, the sweep of this case, if sustained, has ominous implications for the rights of unincorporated organizations—e.g. labor unions, public interest groups, consumer groups, and the like—to be heard on public issues. The lessons of history tell us that when a fundamental right is taken from one group in society, that right will not be long enjoyed by others; the type of limitation here before us will soon extend itself to others if allowed to stand at all.

The brief *amici curiae* to which this motion is directed sets forth these points in detail and will, we believe, materially assist the Court in appreciating the full impact of the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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WYMAN-GORDON COMPANY,
Appellants,

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FRANCIS X. BELLOTTI, Attorney General, *Appellee.*

BRIEF OF AMICI CURIAE NORTHEASTERN LEGAL FOUNDATION AND MID-AMERICA LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Northeastern Legal Foundation ("NLF") and Mid-America Legal Foundation ("MALF") submit this brief as *amici curiae* in support of Appellants in this case. A motion for leave to file this brief as *amici curiae* is submitted simultaneously with this brief.

THE AMICI AND THEIR INTERESTS

NLF and MALF ("Amici") are not-for-profit corporations organized under the laws of Massachusetts and Illinois, respectively. They were formed to engage, on a politically non-partisan basis, in legal research,

study and analysis of the evolving concepts of law on democratic institutions for the benefit of the general public. NLF and MALF seek to represent the public interest in administrative and judicial matters before state and federal authorities. While the interests of NLF and MALF are national in scope, NLF takes a special interest in questions of law which may have a direct effect on the New England region, including Massachusetts.

As public interest organizations with a central concern for the free flow of information to the public, Amici believe that they can provide this Court with additional perspectives on the issues raised in this case.

NLF and MALF consider this case to be of singular importance. It is well established in decisions of this Court that all persons are entitled to exercise their constitutional rights of free speech and association, subject only to those restraints which can be justified by a compelling state interest. The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts, in excepting corporate persons, is wholly inconsistent with this Court's efforts to ensure robust and wide-open debate on political matters and to facilitate the public availability of all viewpoints necessary to make an informed choice on matters of general concern. Acceptance of the novel views of the state court on the constitutional rights of corporate speakers will substantially diminish the freedoms of not only the individual appellant corporations but all corporate organizations, including those of a not-for-profit, public interest or charitable nature, such as Amici.

Furthermore, the sweep of this case, if sustained, has ominous implications for the rights of unincorporated

organizations—e.g. labor unions, public interest groups, consumer groups, and the like—to be heard on public issues. The lessons of history tell us that when a fundamental right is taken from one group in society, that right will not be long enjoyed by others; the type of limitation here before us will soon extend itself to others if allowed to stand at all.

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *The First National Bank of Boston, et al.* v. *Attorney General, et al.,* is reported at 359 N.E.2d 1262 (1977).

STATEMENT OF THE CASE

At issue here is the validity of a Massachusetts statute which forbids business corporations from expending money to communicate their views to the public on state ballot questions not "materially affecting" their "property, business or assets." MASS. GEN. LAWS c. 55, § 8 (the "Massachusetts statute" or "statute"). The statute places a specific prohibition on corporate expenditures to address ballot questions solely concerning the taxation of individuals, by stating that such questions are deemed not "materially to affect" corporate business. Appellants were barred by these statutory provisions from expending any money in opposition to a graduated income tax referendum recently submitted to Massachusetts voters.

NLF and MALF adopt the statement of the case set forth in Appellants' brief.

SUMMARY OF ARGUMENT

I. The First Amendment protects both the speaker's right to speak and the listener's right to hear. By upholding the Massachusetts statute here challenged, the court below allows the state to deny corporations the opportunity to speak out on matters of general public interest and denies the public the opportunity to be fully informed.

II. The First Amendment protects the right of persons, including corporations, to associate in the furtherance of common goals. By upholding the Massachusetts statute here challenged, the court below allows the state to infringe on protected associational rights.

III. Adoption of the rationale of the court below will facilitate state legislative measures designed to restrict the freedom of speech and associational rights of business corporations as well as other associations that wish to express views on matters of general public interest.

IV. This case is not moot.

ARGUMENT

I. The Massachusetts Statute Here Challenged Violates Appellants' Constitutional Right to Freedom of Speech and the Public's Constitutional Right To Be Fully Informed on All Matters of General Interest.

The constitutional infirmities of the Massachusetts statute are three-fold. It unjustifiably restricts the right of one class of speakers—corporations—to contribute to public debate. It limits the right of the public to receive information. And it grounds this restrictions on the content of corporate speech. Although the legislative prohibitions are directed only toward expen-

ditures of money, this Court has recognized that such limitations directly reduce the extent of expression; effective political speech virtually requires use of expensive media and other forms of communication. *Buckley* v. *Valeo*, 424 U.S. 1, 19 (1976). Spending limitations of the kind adopted by the Massachusetts legislature, therefore, may only be sustained if they avoid suppression of protected communication.

Two of the governing principles in First Amendment analysis are the commitment of this Court to a free flow of information, regardless of the character of the speaker, and reliance on the "marketplace of ideas," not legislative determinations, to decide which viewpoint shall prevail. As Mr. Justice Brandeis eloquently stated:

> "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney* v. *California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Robust and wide-open debate necessitates participation by all interested parties, regardless of their affiliations, as this Court confirmed recently in its decision in *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 175-76 (1976):

> "[T]he participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."

There is no constitutional basis for treating corporate organizations as worthy of lesser protection than other associational groups or individuals. The principle that First Amendment rights are not diminished by the corporate character of the speaker is clearly established by a series of recent decisions in which this Court rejected government-imposed limitations on commercial speech. Specifically, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and more recently in *Linmark Associates, Inc.* v. *Township of Willingboro*, — U.S. —, 45 U.S.L.W. 4441 (May 2, 1977), this Court recognized that the First Amendment serves to protect both the speaker's right to speak and the listener's right to hear, even where a corporation is only disseminating information about products or services. In upholding the Massachusetts statute here challenged, the court below effectively denied interested corporations any opportunity to participate in public debate to which they could make a material and valuable contribution and denied Massachusetts residents the opportunity to be fully informed on a vital political issue.

Although the legislature has focused its attention primarily on corporate participation in debates on issues presented to voters in referenda, similar restrictions could easily be imposed regarding other political and social issues in whatever context they become matters of public concern. Many questions of public policy affect business interests indirectly as well as directly and are certainly an appropriate area for comment by the corporate community.

Additionally, the limitations contained in the Massachusetts statute are directed at the content of the com-

munication. The legislature has drawn the line between permissible and impermissible speech on the basis of the nexus between the issue presented to the voters and the business interests of the speaker. This standard necessarily permits corporate speech on certain topics, but not others, and, therefore, operates as a direct restraint on content. Regulation based on content raises serious constitutional questions:

> "[G]overmental bodies may not prescribe the form or content of individual expression." *Cohen* v. *California,* 403 U.S. 15, 24 (1971).

In *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972), this Court reaffirmed this proposition, stating that:

> "[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."

The Massachusetts legislature overstepped these bounds in enacting the statute at issue here.

The First Amendment has its fullest application where political questions are in debate. The expression of all views regarding general political issues should enjoy the same constitutional protection, without regard to essentially fortuitous factors such as the speaker's organizational structure.

II. The Massachusetts Statute Here Challenged Constitutes a Significant Restraint on Appellants' Constitutional Right of Free Association.

Restrictions or prohibitions on the right of business corporations to engage in political debate infringe on associational rights. It is clear that the right of persons to associate in the furtherance of common goals

is protected by the First Amendment. Although not set out specifically in the Constitution, this Court has found the right of association to be implicit in the rights of speech, assembly and petition which are expressly protected by the First Amendment. *Healy* v. *James,* 408 U.S. 169, 181 (1972). Indeed, freedom of association is closely allied to freedom of speech and, like free speech, has been said to lie ". . . at the foundation of a free society." *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960). This right is particularly critical in the area of public debate on political or other issues of general importance because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958). Freedom of association is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the states. *Bates* v. *City of Little Rock,* 361 U.S. 516, 523 (1960).

To infringe upon constitutionally protected rights, a statutory restriction need not impose a total restraint upon the freedom of an organization's members to associate with one another. It is sufficient for the statute to constitute a "substantial restraint" or a "significant interference" with associational rights. *Kusper* v. *Pontikes,* 414 U.S. 51, 58 (1973). Such freedoms ". . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *City of Little Rock, supra.*

The right to associate may not be denied merely on the basis of corporate status. *NAACP* v. *Button,* 371 U.S. 415, 428 (1963). A corporation is simply one form of associational activity and inherently is no

different from other group organizations, except that it is legally accorded a separate existence independent from its members. As this Court stated in *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906):

> "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."

That a corporation's primary function may be to pursue economic goals should not alter the protections accorded it. This Court recognizes that it would be destructive of the rights of association to prohibit advocacy of corporate viewpoints respecting resolution of business and economic interests. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510-11 (1972).

One effect of the Massachusetts statute restricting the right of business corporations to expend money to express their views on matters submitted to the public is to deny constitutional rights otherwise accorded to corporate stockholders and their representatives solely because of the particular form of association chosen. There is no question that, without meeting the strict tests traditionally applied to limitations on political debate, the Commonwealth of Massachusetts could not prohibit individual persons from expending money to address the wisdom of referenda submitted to the public. *Buckley* v. *Valeo, supra.* Here, however, the Commonwealth is forbidding those same rights to persons who elect to associate together in corporate form. Where the fact of association results in the loss of rights to speak, otherwise protected by law, there is

clearly a "significant interference" with fundamental rights which may be sustained only if the state meets its heavy burden of justification. *Healy* v. *James, supra*, at 189. For the reasons set forth by Appellants at pp. 48-56 of their brief, no such justification exists and the statute cannot be sustained.

III. Affirmance of the Massachusetts Statute Here Challenged May Ultimately Result in a Broad Restriction of the Freedom of Speech and Associational Rights of Individuals Who Associate To Advocate Their Views Collectively.

If government can silence certain speakers on certain issues, in the manner of the Massachusetts legislature, then clearly it can silence other speakers on other issues—as dictated from time to time by caprice or mistaken notions of what serves the public good. Although only business corporations are expressly covered by the Massachusetts statute, the principles articulated in the state court's opinion extend further. It is not business entities alone that elect to operate in corporate form. A wide variety of groups which pursue economic, social, religious, political or ideological goals are corporations. NLF and MALF are themselves incorporated. If this Court sustains the claim that the mere fact of corporate organization limits First Amendment protections, then not-for-profit groups (such as Amici) will be subject to legislative determinations of what matters may legitimately concern them.

If the instant restraints on corporations are permitted, which other organizations will be the likely next targets for this type of legislative restriction? What about partnerships, for example? And could the unincorporated associations—labor unions and others—long remain free to speak on similar public issues?

If the court below is affirmed, state legislatures would be afforded latitude to stifle discussion by any and all groups which oppose their actions. The value and effectiveness of association for the advocacy of political, economic or social values would be substantially crippled—a development which would operate as a significant deterrent to all association, whether in corporate or other forms.

No state should be permitted to interfere with protected associational rights or to determine which groups are appropriate advocates on any particular political, economic or social issue. If it were otherwise, a state legislature could restrict the free flow of information whenever it determines that certain viewpoints are inimical to its perception of the public good. Even if well-intentioned, such restrictions are wholly inconsistent with the requirements of the First Amendment and the functioning of a free and democratic society.

IV. This Case Is Not Moot.

The standard for establishing the existence of a continuing case or controversy was enunciated by this Court in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911): a case or controversy must, at a minimum, be "capable of repetition, yet evading review." Clearly, the distinct likelihood of future Massachusetts referenda, the time constraints inherent in such referenda, and the continuing denial under the Massachusetts statute of the right of business corporations to express their views on such referenda make mootness impossible in this case.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts should be reversed.

Respectfully submitted,

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