United States Court of Appeals
For the First Circuit

No. 00-2124

HEIDI BECKER ET AL.,
PLAINTIFFS-APPELLANTS,

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Plaintiffs-Appellants.

Statement of Subject Matter and Appellate Jurisdiction.

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 to consider this challenge to the legality of the Federal Election Commission's Debate Regulations under the Federal Election Campaign Act, 2 U.S.C. § 441b, the Administrative Procedure Act, 5 U.S.C. § 706, and the Declaratory Judgment Act, 28 U.S.C. § 2201. The Court of Appeals has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered in the District Court on September 14, 2000 (A. 7). The

Notice of Appeal was filed in the District Court on September 15, 2000 (A. 7-8). This appeal is from a final judgment disposing of all claims (A. 250).

Issues Presented.

1. Whether the Debate Regulations adopted by the Federal Election Commission, which permit corporations to use their general treasury funds to sponsor federal candidate debates, violate the Federal Election Campaign Act, 2 U.S.C. § 441b.

2. Whether individual voters have standing to bring an action under the Administrative Procedure Act to challenge the FEC's statutory authority to adopt the Debate Regulations.

Statement of the Case.

This is a lawsuit challenging regulations adopted by the Federal Election Commission ("FEC"), found at 11 C.F.R. §§ 110.13 and 114.4(f) (the "Debate Regulations").[1] The plaintiffs include Ralph Nader, a candidate for the Presidency; his campaign committee; the Green Party, which nominated him; and both committed and uncommitted voters. They contend that the FEC's Debate Regulations are invalid as a matter of law because the Debate Regulations permit

[1] These Regulations are reproduced in the addendum to this brief and in the Record Appendix (A. 22, 28).

corporations to make contributions and expenditures from general treasury funds to sponsor federal candidate debates in violation of the Federal Election Campaign Act ("FECA"). This is thus a lawsuit about the funding of presidential debates, not a challenge to the rules governing participation in debates.

The complaint was filed on June 19, 2000 (A. 4) and was followed by a motion for preliminary injunction, filed on June 29, 2000 (A. 4). The FEC opposed the motion for preliminary injunction and moved to dismiss, asserting that the District Court lacked jurisdiction and that the plaintiffs lacked standing (A. 5, 122-125). The Commission on Presidential Debates, a private corporation created by representatives of the Democratic and Republican National Committees, submitted a brief as amicus curiae, supporting the FEC (A. 6).

The District Court (Saris, J.) heard oral argument on both motions on August 14, 2000 (A. 7). On September 1, 2000, the District Court issued its Memorandum and Order (A. 7, 215-247). Judge Saris denied the FEC's motion to dismiss the claims by plaintiff Ralph Nader, his campaign and the Green Party plaintiffs, ruling that the District Court had jurisdiction to hear this case and that Ralph Nader and his organizational supporters had standing to assert their claims because the Debate Regulations provide the advantage of corporate-sponsored debates to Mr. Nader's leading competitors for the Presidency (Memorandum and Order at 10-19; A. 224-233). Judge Saris found, however, that the individual voter

plaintiffs lacked standing (Memorandum and Order at 19-21; A. 233-235). The District Court denied the plaintiffs' motion for a preliminary injunction, finding that they had not established that the Debate Regulations are invalid as a matter of law (Memorandum and Order at 31, 33; A. 245, 247). The District Judge asked each party to inform the Court whether final judgment should be entered on the existing record (Memorandum and Order at 33; A. 247).

On September 6, 2000, the plaintiffs filed a stipulation that judgment should enter on the existing record, with an attached agreed-upon form of final judgment (A. 248-250). Final judgment in the agreed-upon form was entered in the District Court on September 14, 2000 (A. 250). The plaintiffs' Notice of Appeal was filed on September 15, 2000 (A. 7-8, 251).

On September 18, 2000, the plaintiffs filed a motion for expedited review in the Court of Appeals. The FEC opposed expedited review. On September 26, 2000, the Court of Appeals granted the plaintiffs' motion, ordered expedited briefing, and scheduled oral argument.

Statement of Facts.

FECA prohibits corporations from making any contribution or expenditure in connection with any federal election. 2 U.S.C. § 441b(a). Section 441b(b)(2) defines "contribution or expenditure" in broad terms to include "any direct or indirect payment ... or gift of money, or any services, or anything of value … to

any candidate." Section 441b(b)(2) then articulates three narrow exceptions to this general rule. These exceptions permit corporate funds to be used for (A) internal corporate communications on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders, and executive or administrative personnel and their families; and (C) the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes. 2 U.S.C. § 441b(b)(2).

The FEC, however, has purported to create a "safe harbor" for corporate funding of debates not found on the map drawn by Congress. The FEC's Debate Regulations, 11 C.F.R. §§ 110.13 and 114.4(f), allow a nonprofit corporation to stage candidate debates and to "use its own funds" and "accept funds donated by corporations or labor organizations" for federal candidate debates. 11 C.F.R. § § 110.13(a) and 114.4(f)(1). The Debate Regulations also permit corporations to donate funds to nonprofit organizations qualified under 11 C.F.R. § 110.13(a)(1) to stage debates. 11 C.F.R. § 114.4(f)(3). These Regulations allow corporations to make illegal contributions to support partisan political campaign activity that lies at

the core of the electoral process: presidential debates that showcase and advertise the candidates of the two major parties.[2]

Under the unlawful cover of the FEC's Debate Regulations, the Commission on Presidential Debates ("CPD") – itself a private corporation – has solicited and raised millions of dollars from business corporations to help it stage the presidential debates that it sponsored in 1988, 1992 and 1996, and is sponsoring again this year. In the past two presidential elections, corporate sponsors of the CPD's debates have included Anheuser-Busch, AT&T, Atlantic Richfield, Ford Motor Company, IBM, J.P. Morgan & Co. and Philip Morris Companies, Inc. (A. 90). This year, a similar group of corporations will be sponsoring the CPD's debates with the use of general treasury funds. For example, Anheuser-Busch will reportedly pay $550,000 to underwrite the upcoming presidential debate to be held in St. Louis on October 17, 2000 (A. 90).

The CPD debates are highly partisan, nationally televised events that are watched by tens of millions of American voters (A. 90-91). The debates do not

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[2] The Debate Regulations also allow broadcasters and specified print media to stage debates. See 11 CFR §§ 110-13(a)(2) and 114.4(f)(2). The FEC claims to find authority for these provisions in the "news story" exemption in FECA, § 431(9)(B)(i). See 44 Fed. Reg. 76734-35 (Dec. 27, 1979). The plaintiffs do not challenge these provisions, which have a different constitutionally compelled root than the provisions of the Debate Regulations that allow business corporations to underwrite the costs of debates.

include all ballot-qualified presidential candidates and serve as major political advertisements for the candidates who are invited to participate. On September 26, 2000, the CPD announced that appellant Ralph Nader will not be invited to take part in the presidential debate that is going to be held in Boston on October 3. Only Vice-President Gore and Governor Bush will enjoy the benefits of the massive outlays of corporate funds that will be used to stage that debate.

The appellants represent a wide range of citizens who are aggrieved by the use of vast sums of corporate money to sponsor presidential debates that provide enormous public exposure and electoral advantages to the candidates invited to participate. They include Ralph Nader, the leading third-party candidate for the Presidency; his campaign; national and state political party organizations promoting Mr. Nader's campaign; and voters who support his candidacy or are currently undecided. All of the appellants have been harmed by the illegal benefits that the Debate Regulations allow corporations to confer on the candidates who are permitted to share the debate stage. They seek to vindicate an essential precept of federal election law: that corporations may not use their vast financial resources to tilt the electoral playing field. They do not seek to prevent lawfully funded debates from taking place.

Summary of Argument.

The FEC's Debate Regulations should be set aside because they conflict with the plaint terms of FECA. FECA § 441b prohibits corporations from using their general treasury funds in connection with federal elections. The narrow exceptions to this general rule are limited to internal corporate activity and do not permit the use of corporate funds to stage public debates. The "safe harbor" for corporate debate sponsors created by the FEC cannot be squared with the plain terms of the Act.

The interplay between § 441b and § 431 does not create any ambiguity about whether corporate funds can be used to stage debates. Debates are not "get-out-the-vote" activities. The District Court should not have read § 431 to create a gap in § 441b that could be filled by the FEC. Instead, the District Court should have given force to the specific terms of § 441b and struck down the Debate Regulations.

The FEC's attempt to fill a gap in FECA that does not exist is not worthy of judicial deference. FECA did not give the FEC authority to legislate its own exemptions from the statute's general ban on corporate electoral activity even if the FEC perceives its rule to be "similar" to a statutory exemption. In any event, debates are not similar to "get-out-the-vote activities," and the FEC's interpretation of FECA is unreasonable.

The Individual voters, as well as Ralph Nader and his organizational supporters, have standing to bring this action. The violation of FECA that animates their challenge to the FEC's Regulations is sufficient to confer voter standing.

Argument.

I. THE FEC'S DEBATE REGULATIONS ARE UNLAWFUL AND SHOULD BE SET ASIDE.

The core of the plaintiffs' complaint is that the provisions of the FEC's Debate Regulations that allow corporate money to be used to stage debates are unlawful, and must be vacated, because they conflict with FECA. This facial challenge to the validity of the FEC's Regulations presents a purely legal question. The District Court's determination that the Regulations are valid is therefore reviewable de novo. Clifton v. FEC, 114 F.3d 1309, 1318 (1st Cir. 1997).

The District Court erred, as a matter of law, when it found that the plain terms of FECA do not unambiguously prohibit the use of corporate funds to stage candidate debates and that the Debate Regulations are reasonable "gap-fillers" entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense

Council, 467 U.S. 837 (1984). Its decision should be reversed and the Debate Regulations set aside. [3]

A. The Debate Regulations Are Inconsistent With The Plain Terms Of FECA.

1. Section 441b Prohibits Corporate Funding of Debates.

FECA unambiguously provides that it is generally unlawful for "any corporation whatever … to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. § 441b(a). When it imposed this ban, Congress provided no exception of any kind for corporate contributions or expenditures in connection with candidate debates. Rather, Congress underscored its long-standing concern about the impact of corporate money on federal elections by carving out narrow exceptions to its general prohibition that restrict the direct use of corporate funds to internal communications or "nonpartisan registration and get-out-the-vote campaigns" aimed at the corporation's own stockholders and

[3] When former presidential candidate Ross Perot challenged the Debate Regulations as ultra vires in 1996, the United States Court of Appeals for the District of Columbia Circuit left open the question of whether the FEC lacked the authority to promulgate 11 C.F.R. §§ 110.13 and 114.4(f), inviting a suit, such as this one, under the APA. See Perot v. Federal Election Comm'n, 97 F.3d 553, 560 (D.C. Cir. 1996) (an action challenging regulations implementing FECA "should be brought under the judicial review provisions of the [APA]").

management. 2 U.S.C. § 441b(b)(2)(A) & (B).[4] FECA provides no authority for the use of corporate funds to underwrite the most public events that occur during an election cycle: candidate debates. The FEC's Debate Regulations should therefore be declared to be in excess of the FEC's statutory authority or otherwise not in accordance with law, and set aside under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(2)(A) & (C).

The FEC has attempted to create a "safe harbor" for limitless corporate sponsorship of federal candidate debates that cannot be found anywhere in FECA. The FEC's Debate Regulations provide that a nonprofit corporation "may stage candidate debates." 11 CFR § 110.13(a). When it does so, according to the FEC's regulations, the staging organization not only may "use its own funds," but also may "accept funds donated by corporations" to defray the costs of staging the debates. 11 CFR § 114.4(f)(1). Completing the circle, the Debate Regulations provide that "[a] corporation … may donate funds" to a qualified debate staging organization. 11 CFR § 114.4(f)(3). The Debate Regulations impose no limits on the amounts of corporate money that may be used to stage candidate debates.

[4] Section 441b(b)(2)(C) also allows corporations to make expenditures to administer separate segregated funds to be used for political purposes. This exemption is not pertinent to the issues before the Court, which involve direct contributions or expenditures of corporate general treasury funds.

If a debate meets the FEC's loose regulatory standards laid out in 11 CFR § 110.13, the funds used by a non-profit corporation staging the debate have been deemed by the FEC to be exempt from the "contributions" and "expenditures" regulated by FECA. See 11 CFR §§ 100.7(b)(21) & 100.8(b)(23) (exempting "funds used to defray costs in staging candidate debates"). The Congressional definitions of both "contributions" and "expenditures" in FECA, in contrast, do not exempt funds used for candidate debates. See 2 U.S.C. §§ 431(8)(B) ("contribution") & 431(9)(B) ("expenditure"). The FEC's regulations also purport to exempt from the corporate "contributions" and "expenditures" proscribed by § 441b(a) "any activity which is specifically permitted by part 14" of the FEC's regulations, which authorizes corporate donations to debate staging organizations. See 11 CFR §§ 114.1(a)(2)(x), 114.2(b) & 114.4(f)(3). This exemption is flatly inconsistent with the tightly restricted use of corporate funds permitted by § 441b(b)(2).

The FEC concedes that absent the regulatory "safe harbor" it has attempted to create, FECA would prohibit the donation of corporate funds to a debate staging organization – and the staging organization's use of its own corporate money – as

unlawful corporate contributions to every candidate participating in the debate.[5] The central question before the Court is whether FECA authorized the FEC to create a "safe harbor" for otherwise unlawful corporate contributions and expenditures in its Debate Regulations. The answer is "no." FECA's proscription of the use of corporate money "in connection with" federal elections does not provide any exception for the use of corporate funds to stage federal candidate debates. The FEC does not, and could not, claim that the narrow exemptions articulated by Congress in § 441b(b)(2) permit corporations to use their general treasury funds to sponsor debates. Because the Debate Regulations conflict with

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[5] The FEC's own General Counsel concluded on this basis that there was reason to believe that the CPD had violated § 441b(a) in 1996. The General Counsel reasoned that because the selection criteria used by the CPD to determine who could participate in the 1996 presidential debates did not comply with 11 CFR § 110.13(c), the "CPD [was] not entitled to the protection of the safe harbor created by 11 CFR §§ 100.7(b)(21) and 110.13(c)" (A. 49). While the FEC itself rejected the view that CPD's selection criteria were unlawful, the FEC accepted an essential premise of the General Counsel's analysis – that absent compliance with the Debate Regulations, corporate funding of candidate debates would be a "contribution" to the participating candidates prohibited by FECA. The FEC acknowledged:

> If a corporation staged a debate that was not in accordance with 11 CFR § 110.13, then staging the debate would not be an activity "specifically permitted" by 11 CFR § 100.7(b), but instead would constitute a contribution to any participating candidate under the Commission's regulations.

(continued…)

the explicit language of § 441b, they should be vacated. See Chevron at 842-43 ("[i]f the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

2. Section 431 Does Not Create Ambiguity About Corporate Sponsorship of Debates.

Following the FEC's lead, the District Court side-stepped the plain language used by Congress. The Court found that the limited exemptions for corporate expenditures found in § 441b(b)(2) should be read in tandem with FECA's general definition of "expenditure" in § 431(9)(B)(ii). That section exempts funds used for "nonpartisan activity designed to encourage individuals to vote or to register to vote" from the non-corporate expenditures regulated by FECA. The Court found in the interplay of these two provisions "an ambiguity the plain language of the statute does not resolve" and concluded as a result that the Debate Regulations are not inconsistent with the plain terms of FECA (Memorandum and Order at 22-24; A. 236-238). This approach is mistaken for several reasons.

(..continued)

FEC Statement of Reasons, In the Matter of Commission on Presidential Debates (April 6, 1998) at 4 (A. 71).

First, neither the FEC nor the District Court has asserted that the general prohibitory language in § 441b(a), which forbids corporate contributions and expenditures in connection with federal elections, is ambiguous in any way. There is no dispute that unless corporate expenditures for candidate debates are exempt under § 441b(b)(2), they are prohibited as a matter of law. Both the FEC and the District Court focus on whether the exemption for internal corporate "nonpartisan registration and get-out-the-vote campaigns" in § 441b(b)(2) is ambiguous when read together with the broad exemption for public "nonpartisan activity designed to encourage individuals to vote or to register to vote" in § 431(9)(B)(ii). The FEC has not claimed, however, that staging a candidate debate is a nonpartisan get-out-the-vote activity within the meaning of § 441b(b)(2) or § 431(9)(B)(ii), and there is not a shred of legislative history suggesting that Congress had debates in mind when it carved out an exemption for nonpartisan get-out-the-vote activities. The FEC claims instead that debates are "similar" to such activity and, therefore should be permitted. Section 441b, however, does not provide any basis for excluding "similar" activities from its general ban on corporate contributions and expenditures.

Second, when Congress enacted more specific rules governing the use of corporate funds, it narrowed the general exemption in § 431(9)(B)(ii) for external "nonpartisan activity designed to encourage individuals to vote or to register to

vote" to "nonpartisan registration and get-out-the vote campaigns" aimed at the corporation's own "shareholders and executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(2). The juxtaposition of these two provisions does not suggest in any way a legislative intent to loosen the restrictions on the use of corporate funds in connection with federal elections.

The District Court was nevertheless persuaded by FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), that the restrictive exemption for internal corporate get-out-the-vote activities found in § 441b(b)(2) should be read in tandem with the more permissive exemption in § 431(9)(a)(B)(ii) (Memorandum and Order at 23; A. 237). The Court found that the interplay between these two sections infused FECA with ambiguity that the FEC could exploit to adopt regulations making it lawful for corporations to sponsor debates (id.). MCFL, however, does not warrant such a misguided approach.

In MCFL, the Court determined that §§ 441b and 431 should be read together to ensure that corporations would not be able to avoid constraints on their political activity. MCFL, 479 U.S. at 245-47. This result served the obvious intent of FECA and was consistent with the language Congress used. The issue in MCFL was whether the definition of proscribed corporate "contributions or expenditures" in § 441b, which expressly "includes," but is not limited to, payments to candidates, was intended to capture all contributions and expenditures in

connection with federal elections, even if they were not made to a candidate. As the MCFL Court noted, the use of the word "include" in the definition of regulated corporate expenditures denoted that Congress intended to reach an expansive, undefined list of prohibited acts: "activities not specifically enumerated in [§ 441b] may nonetheless be encompassed by it." MCFL, 479 U.S. at 246 n.3. The Court's reading of § 441b together with § 431 to reach the conclusion that § 441b prohibited all corporate expenditures in connection with federal elections, and not just contributions made to a candidate, was thus consistent both with the words Congress used in FECA and with the underlying purpose of the Act.

There is no parallel here. The exemptions from prohibited corporate expenditures set forth in § 441b(b)(2) are expressed in precise, narrow terms. The permitted forms of expenditure are preceded by a limiting clause. Section 441b(b)(2) provides that prohibited expenditures "shall not include" three specific types of activities. There is nothing in the language of § 441b(b)(2) to suggest that these exemptions are merely illustrative and that the FEC (or the courts) may expand them as they see fit. Neither the language nor the purpose of § 441b justifies the Debate Regulations, and nothing in MCFL overcomes that problem for the FEC.

Instead, the Court should follow the basic principle of statutory construction "that a specific statute … controls over a general provision … particularly when

the two are interrelated and closely positioned," and find that the narrow, internally-focused exemption set out in § 441b(b)(2), rather than the broad exemption in § 431(a)(B)(ii), is controlling on the issue of the allowable scope of corporate expenditures for get-out-the-vote activities. See HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) (holding that a general exemption in the federal income tax statute was not applicable to the plaintiff hospital services organization because the income tax statute also set out specific exemptions relating to hospital service organizations).

Both the FEC and the District Court looked to legislative history that suggests an intent, nowhere reflected in the language of the statute, that the limiting language of § 441b(b)(2) be read together with the general exemption in § 431(9)(B)(ii):

> to permit corporations to take part in nonpartisan registration and get-out-the-vote activities that are not restricted to stockholders and executive or administrative personnel, if such activities are jointly sponsored by the corporation and an organization that does not endorse candidates and are conducted by that organization.

44 Fed. Reg. 76735 (Dec. 27, 1979), quoting H.R. Rep. No. 1057, 94th Cong., 2d Sess. 63-64 (1976) (Memorandum and Order at 6, A. 220).[6] The discontinuity

[6] The legislative history refers to §§ 301(f)(4)(B) and 321(b)(2)(B) of FECA, which have been subsequently recodified as §§ 431(9)(B)(ii) and 441b(b)(2).

between the words Congress used and the legislative history the FEC and District Court rely upon should give the Court pause. But even if this legislative history is credited, it nowhere reveals any Congressional intent to permit corporate funds to be used to underwrite candidate debates. Because corporate contributions and expenditures for candidate debates are unlawful under § 441b(a) in the absence of an exemption, and FECA makes no exemption for corporate sponsorship of debates, the FEC's Debate Regulations are invalid and should be struck down by this Court.

B. The Debate Regulations Are Not Reasonable "Gap Fillers" Entitled to Chevron Deference.

The FEC has not claimed, and the District Court did not find, that the FEC's Debate Regulations are justified by any of the exemptions in § 441b even if they are read in tandem with § 431. Rather, the FEC claims, and the District Court found, that because § 441b does not speak to the "precise question" of whether corporate funds can be used to finance electoral debates, and the agency should be given deference to fill what it perceives to be a statutory gap (Memorandum and Order at 24-26; A. 238-240). The FEC's attempt to fill a gap that does not exist, however, is not entitled to deference under Chevron 467 U.S. at 842. Congress could not, and did not need to, itemize all of the possible uses of corporate funds that it intended to prohibit. Instead, consistent with long-standing federal policy, Congress prohibited all contributions and expenditures of corporate funds, with

three narrowly drawn exceptions having nothing to do with staging public debates. To say that, as a result, FECA has a "gap" on this issue, and therefore that the FEC is entitled to deference when it legislates what it proclaims to be a "similar" exception for corporate-sponsored candidate debates, takes Chevron well beyond its breaking point.

The first step in Chevron analysis is to determine whether Congress has spoken to the "precise question at issue." Strickland v. Maine Dept. of Human Servs., 96 F.3d 542, 546 (1st Cir. 1996). This is a question of law for the Court and not a matter itself calling for deference to the agency's interpretation. Id. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id., quoting Chevron, 467 U.S. at 842. In the present case, Congress has spoken to the precise question at issue – by generally barring the use of corporate funds in connection with federal elections, with limited exceptions that do not cover the staging of candidate debates. There is therefore no "gap" to be filled by the FEC.

The analysis in the present case must take place in light of the overarching principle of FECA – that corporate contributions and expenditures in connection with federal elections are generally prohibited. FECA and its predecessors demonstrate "continuing congressional concern for elections 'free from the power of money.'" United States v. International Union United Auto., Aircraft and Agric.

Implement Workers of America (UAW-CIO) 352 U.S. 567, 570 (1957) (the federal election laws involve "the integrity of our electoral process" and raise "issues not less than basic to a democratic society"). See also FEC v. National Right to Work Committee, 459 U.S. 197, 209 (1982) (§ 441b "reflects a permissible assessment of the dangers posed by [corporations] to the electoral process"). In FECA, Congress created only three very narrow exceptions to the general prohibition on corporate contributions or expenditures. See § 441b(b)(2). Congress did not create an exception that allows corporations to fund debates or invite the FEC to do so. There is nothing ambiguous in FECA about the use of corporate funds to stage electoral debates. It is prohibited by § 441b(a) and Chevron deference should not be triggered in this case.[7]

Even if, contrary to Chevron, this Court were to indulge the FEC and assess whether the agency's interpretation is permissible, as the District Court did, the Debate Regulations should fall because the FEC's interpretation of FECA is unreasonable. Indeed, the FEC does not even claim that Congress made an

[7] Because there is no ambiguity to be resolved or gap to be filled in FECA with respect to the use of corporate funds to sponsor candidate debates, no deference is due the FEC, as it was in FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981) (upholding FEC's interpretation of ambiguous provisions of FECA with respect to agency agreements between national and state campaign committees).

exemption anywhere in FECA for the use of corporate funds to underwrite electoral debates. Instead, the FEC simply proclaims that "[t]he educational purpose of nonpartisan public candidate debates is similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns" (emphasis added). 44 Fed. Reg. 76734. On the basis of this alleged "similarity," the FEC claims legal authority to legislate its own "safe harbor" for corporate expenditures in its Debate Regulations.

The FEC asserts that candidate debates might "stimulate voter interest and hence 'encourage individuals to register to vote or to vote,'" 44 Fed. Reg. 76736, but they cannot fairly be characterized as activities "designed to encourage individuals to vote or to register to vote" or "get-out-the-vote campaigns" within the meaning of FECA §§ 431(9)(B)(ii) or 441b(b)(2). The Conference Committee Report that the FEC has relied upon gives as its example of get-out-the-vote activities "assisting eligible voters to register and to get to the polls." H.R. Rep. No. 1057, 94th Cong., 2d Sess. 63 (1976). That is a far cry from sponsoring a nationally-televised debate, which serves as a critical campaign showpiece for the participating candidates. The FEC has not pointed to any reference to corporate funding of candidate debates in the Committee Report or elsewhere in FECA's legislative history.

Congress did not give the FEC authority to expand its narrow, carefully-articulated exemptions from the general rule barring corporate expenditures in connection with federal elections.[8] The District Court's reliance on U.S. v. Haggar Apparel Co., 526 U.S. 380 (1999), is misplaced (Memorandum and Order at 25-26, A. 239-240). In Haggar, the Court was faced with a statute that invited the enforcement agency to "issue rules so that the tariff statutes may be applied to unforeseen situations and changing circumstances in a manner consistent with Congress' general intent." Haggar, 526 U.S. at 392-93. The applicable statutory provision created a tariff exemption for articles improved abroad "by operations incidental to the assembly process such as cleaning, lubricating and painting." Id.

[8] It would violate the non-delegation doctrine to interpret FECA to give the FEC discretion to legislate its own exemptions from the general prohibition on corporate expenditures in connection with federal elections. See American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1032 (D.C. Cir. 1999), rehg denied in part, American Trucking Ass'ns, Inc. v. EPA, 19 F.3d 4 (D.C. Cir. 1999), cert. granted, Browner v. American Trucking Ass'ns, Inc., 120 S.Ct. 2003 (2000) (no "intelligible principle" for line-drawing; reliance on speculative reasoning). Presumably because Congress did not intend to delegate legislative authority to the FEC, FECA provides no guidance to the FEC about the principles that should govern the creation of "safe harbors" for corporate expenditures never contemplated by Congress. There is no metric to judge whether expenditures permitted by the FEC – such as the expenditures authorized by the Debate Regulations – are sufficiently "similar" to the exemptions articulated in FECA that the FEC, or a reviewing court, can reasonably impute to Congress an intent to authorize the FEC's action. Because the FEC has not claimed, and could not reasonably assert, that its Debate Regulations are authorized by the plain terms of FECA, they should not survive judicial review.

at 386 (emphasis added). The regulations in question provided examples of operations not incidental to assembly, including "permapressing." Id. The Court indulged the agency's claim that its regulation should be reviewed with deference because it "filled a gap" or "defined a term in a way that is reasonable in light of the legislature's revealed design." Id. at 392.

Unlike the statute considered in Haggar, however, FECA does not contain a "gap" or undefined term. Section 441b(b)(2) does not create a general exemption for corporate expenditures and then offer a few illustrative examples, "such as" nonpartisan get-out-the-vote activities, leaving it up to the FEC to adopt rules for situations not covered by the statute. Instead, FECA contains a general prohibition with only a few narrowly drawn, unambiguous exemptions. See §§ 441b(a) & 441b(b)(2). FECA thus leaves no "gap" to be filled by the FEC. Accordingly, the FEC's Debate Regulations must be set aside.

The District Court articulated several additional reasons why the FEC's regulation should be upheld (Memorandum and Order at 27-29, A. 241-243). None is convincing. The District Court emphasized Congressional silence both at the time of the promulgation of the Debate Regulations and thereafter (Memorandum and Order at 27-28, A. 241-242). This reliance on Congressional silence is unwarranted. In recently passing 5 U.S.C. § 801(g), Congress explicitly confirmed that it is inappropriate for courts to draw any inference from

Congressional silence, particularly in the context of an agency's promulgation of a regulation. See 5 U.S.C. § 801(g).[9] Even though § 801 was enacted long after the Debate Regulations were adopted, it codifies what common sense has taught for years – that members of Congress simply do not have the time to consider every regulation that is promulgated by every agency, and that their silence does not signify approval of agency action. The absence of legislative disapproval of the FEC's Regulations should not be interpreted as a Congressional endorsement.

The District Court noted that "FECA neither explicitly nor by implication addresses the funding of debates" (Memorandum and Order at 28, A. 242). But FECA did not enumerate any specific forms of prohibited corporate contributions and expenditures. It prohibited them all, unless they are exempted by the plain terms of § 441b(b)(2). Congress did not need to call out "debates" as a prohibited corporate activity to prevent the FEC from diluting the stringent restrictions of § 441b.

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[9] Section 801(g) provides:

> If the Congress does not enact a joint resolution of disapproval under § 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

Most importantly, the District Court wrongly viewed the Debate Regulations as consistent with the purpose of FECA (Memorandum and Order at 28-29, A. 242-243). The prohibition of corporate contributions in connection with campaigns for federal office is a major pillar of FECA's statutory protection of the integrity of the electoral system. See United States v. International Union United Auto., Aircraft and Agric. Implement Workers of America, (UAW-CIO), 352 U.S. 567, 570 (1957). When reviewing both FECA and analogous state laws, the Supreme Court has consistently recognized "the compelling governmental interest in preventing corruption" that supports "the restriction of the influence of political war chests funneled through the corporate form." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 670-71 (1990) (quoting FEC v. National Conservative Political Action Committee, 470 U.S. 480, 500-501 (1985); see also FEC v. National Right to Work Committee, 459 U.S. 197, 209-10 (1982) (FECA "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," indeed "it is the potential for [disproportionate political] influence that demands regulation"). By permitting limitless corporate funding of candidate debates, the FEC's Debate Regulations clearly violate this bedrock principle.

A consistent line of Supreme Court cases has recognized that "state-created advantages" – such as "limited liability, perpetual life, and favorable treatment of

the accumulation and distribution of assets" – "not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" Austin, 494 U.S. at 658-59 (quoting MCFL, 479 U.S. at 257); see also Mariani v. U.S., 212 F.3d 761 (3rd Cir. 2000) (en banc); petition for cert. filed, 69 USLW 3156 (Aug. 16, 2000) (NO. 00-256) Clifton v. FEC, 114 F.3d 1309, 1312 (1st Cir. 1997); Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 645-46 (6th Cir. 1997); Athens Lumber Co., Inc. v. FEC, 718 F.2d 363, 363 (11th Cir. 1983) (en banc). The Supreme Court has explained why the political advantage of corporations is unfair:

> The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258; see also Austin, 494 U.S. at 659.

In carving out an extremely narrow exception to the prohibitions on corporate funding carried forward by FECA, the MCFL Court enumerated three "essential" characteristics that a non-profit corporation must possess in order to be exempted from § 441b's ban on corporate expenditures. MCFL, 479 U.S. at 263-64 (formed to promote political ideas; without shareholders or members with claims to corporate assets; and independent from business interests); see also

Austin, 494 U.S. at 661-62. The non-profit "staging" organizations authorized by the Debate Regulations clearly lack the most important of these essential characteristics, namely "independence from the influence of business corporations." Austin, 494 U.S. at 664. The Court allowed partisan spending by MCFL, a non-profit corporation, only because it did not accept corporate contributions and therefore could not "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." MCFL, 479 U.S. at 264. In striking contrast, the FEC's Debate Regulations allow business corporations to circumvent the prohibitions of § 441b by "funneling money through" an organization such as the CPD, which "serve[s] as a conduit for corporate political spending." Austin, 494 U.S. at 664.

The FEC's Debate Regulations cannot be justified as a reasonable "filler" of any gaps left by Congress in FECA.

C. This Court Has Not Hesitated To Strike Down Regulations That Are In Excess Of The FEC's Authority Under FECA.

The Court of Appeals has not shied away from invalidating FEC regulations that are unauthorized by or conflict with FECA. See, e.g., Clifton, 114 F.3d 1309; Faucher, 928 F.2d 468 (1st Cir. 1991). In Faucher, this Court struck down an FEC regulation governing the publication of voter guides by corporations because the regulation prohibited issue advocacy. Id. at 472. The Court reasoned that the Supreme Court, in Buckley v. Valeo, 96 S.Ct. 612 (1976) had held that FECA does

not prohibit issue advocacy. Id. at 470. Thus, the Court ruled that 11 C.F.R. § 114.4(b)(5), which allowed corporations to publish voter guides only if they did not take a position on issues, was invalid because it violated 2 U.S.C. § 441b as interpreted by the Buckley Court. Id. at 472.

Similarly, in Clifton, this Court struck down FEC regulations dealing with voter guides and voting record publications. 114 F.3d at 1312, 1317. The FEC regulations barred all non-written contact with candidates regarding both the preparation and distribution of voter guides and their contents. Id. at 1312. Thus, a corporation preparing a voter guide could not even telephone a candidate to ask what the candidate's position on a particular issue was. The Court held that this rule improperly exceeded the scope of FECA's ban on corporate "contributions" or "expenditures." Id.

The First Circuit has observed that in implementing FECA, "[t]he FEC can construe terms but it cannot rewrite the dictionary." Id. That is, unfortunately, what the FEC has tried to do in justifying its Debate Regulations. This Court should determine, as a matter of law, that the FEC's Debate Regulations are unauthorized by FECA and therefore must be set aside under the APA.

II. THE APPELLANTS HAVE STANDING TO CHALLENGE THE FEC'S REGULATIONS.

The Court should affirm the District Court's ruling that Ralph Nader and his organizational supporters have standing to challenge the FEC's Regulations

(Memorandum and Order at 13-19, A. 227-233). Nader and his organizational supporters have been forced to adjust their campaign strategy to compensate for the benefits conferred upon Nader's competitors by the Debate Regulations. This Court has already held that this type of claim is sufficient to confer standing under U.S. CONST. art. III. See Vote Choice, Inc v. DeStefano, 4 F.3d 26, 37 (1st Cir. 1993) (gubernatorial candidate had standing to challenge state campaign finance law that forced candidate to adjust campaign strategy). The District Court was also correct in ruling that Nader and his organizations have standing under a "competitive standing" theory (Memorandum and Order at 17, 19, A. 231, 233).

If the Court does affirm the District Court's ruling that Nader and his organizational supporters have standing, it may be unnecessary for the Court to consider the question of whether the individual voter appellants have standing. However, if it addresses that issue, the Court should hold that the District Court erred as a matter of law when it ruled that the individual voter appellants do not have standing (Memorandum and Order at 19-21, A. 233-235). The decisions of the Supreme Court and other Circuits make it clear that the individual voters have standing to challenge the legality of FEC actions.

A. The Voter Appellants Meet U.S. CONST. art. III Standing Requirements.

U.S. CONST. art. III requires the individual voters to demonstrate that they have suffered an "injury in fact," that their harm is traceable to the Debate Regulations, and that the Court has the power to redress their injury. See FEC v. Akins, 524 U.S. 11, 20, 25 (1998). In the present case, the individual voters have met all these U.S. CONST. art. III requirements.

1. The Voters Have Suffered an Injury in Fact.

In Akins, the Supreme Court recognized that FECA exists for the benefit of voters. 524 U.S. at 20. The Supreme Court "found nothing in [FECA] that suggests Congress intended to exclude voters from the benefits of [its] provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees." Id. The Supreme Court did not limit its holding to "informational injuries" and suggested that because voting is "the most basic of political rights," a voting related injury is "sufficiently concrete and specific" to confer U.S. CONST. art. III standing. Id. at 24-25. The Eighth Circuit has examined Akins and recognized that the "injury in fact" needed for U.S. CONST. art. III standing can be premised solely on a violation of the Act itself. Bloom v. National Labor Relations Board, 153 F.3d 844, 848 n.2 (8th Cir. 1998), rev'd on other grounds, 525 U.S. 1133 (1999). Akins and Bloom make it clear that the voter appellants have U.S.

CONST. art. III standing as voters. The Supreme Court has held that voter standing is not destroyed by the fact that an asserted injury is shared by all voters. See Akins, 524 U.S. at 24. The Court stated that "where a harm is concrete, though widely shared, the Court has found injury in fact." Id. This Court should heed the guidance of Akins and hold that the voter appellants have established an injury in fact.

2. The Harm Suffered by the Voter Appellants is Directly Traceable to the Debate Regulations.

The District Court conceded that the harm suffered by the appellants is traceable to the Debate Regulations (Memorandum and Order at 16-17, A. 230-231). Without the coverage of the FEC's ultra vires Debate Regulations, no debate staging entity would have the legal right to accept corporate funds to defray the costs of the debate. Without corporate funded debates, the voter appellants would not be harmed. Thus, the appellants' harm is directly traceable to the FEC's unlawful regulations. This is enough to show that the Regulations have caused the voter appellants' injury. See Vote Choice, 4 F.3d at 37 ("the statutory provisions, and the Board's implementation of them, caused the harm…").

3. The Harm Suffered by the Voter Appellants is Redressable by the Court.

A declaration that the Debate Regulations are null and void because the FEC adopted them in excess of its statutory authority will remedy the injuries alleged by

the voter appellants. If the Debate Regulations are vacated, debate staging organizations will no longer have a "safe harbor" to solicit and employ corporate funds to stage debates. Should any organization then violate the prohibitions of § 441b by using or donating corporate money to stage debates, the FEC or others would be able, and obliged, to seek enforcement of the law. The District Court properly recognized that the invalidation of the Debate Regulations would redress the harm that propels this lawsuit (Memorandum and Order at 17, A. 231). This is consistent with Vote Choice, 4 F.3d at 37, because the voter appellants seek to invalidate the very regulation that is causing their injury.

B. The Voter Appellants Meet Prudential Standing Requirements.

The APA provides that any "person ... adversely affected or aggrieved by agency action" may seek judicial review. 5 U.S.C. § 702. Interpreting the reach of a similar provision in FECA,[10] the Supreme Court held that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." Akins, 524 U.S. at 19 (citing the APA). Accordingly, the Akins court held that prudential standing exists "when the injury

[10] FECA provides that "[A]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review. 2 U.S.C. § 437g(8)(A).

asserted by a plaintiff arguably [falls] within the zone of interests to be protected or regulated by the statute." Id. at 20. The unlawful use of corporate funds in connection with a presidential election "is an injury of a kind that FECA seeks to address." Id. The District Court properly acknowledged that the purpose of FECA is to prevent the potentially corrupting influence of corporate money in the electoral arena (Memorandum and Order at 18, A. 232). There is no doubt that the individual voters assert injuries that lie within the zone of interests protected by FECA. The Court should affirm the District Court's ruling that Nader and his organizational supporters have standing and reverse the District Court's ruling that the individual voters do not.

Conclusion.

For the reasons stated, the Court of Appeals should reverse the Final Judgment of the District Court and vacate the FEC's Debate Regulations.

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United States Court of Appeals
For the First Circuit

No. 00-2124

HEIDI BECKER ET AL.,
PLAINTIFFS-APPELLANTS,

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Plaintiffs-Appellants.

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Corporate Disclosure Statement.

In accordance with Fed. R. App. P. 26.1, Plaintiff-Appellant Nader 2000 Primary Committee, Inc. states that it is a non-profit corporation which has no parent corporations and has no stock owned by a publicly held corporation.

In accordance with Fed. R. App. P. 26.1, Plaintiff-Appellant Green Party USA states that it is a non-profit corporation which has no parent corporations and has no stock owned by a publicly held corporation.

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