No. 00-256

In the Supreme Court of the United States

RENATO P. MARIANI, PETITIONER

v.

UNITED STATES OF AMERICA AND
FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes various restrictions on the manner in which campaigns for federal office may be financed. The questions presented in this case are as follows:

1. Whether the FECA's prohibition against corporate contributions to candidates for federal office, 2 U.S.C. 441b(a), violates the First Amendment.

2. Whether the FECA's prohibition against making contributions to candidates for federal office in the name of another person, 2 U.S.C. 441f, violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 212 F.3d 761. The findings of fact and opinion of the district court (Pet. App. 29a-184a) is reported at 80 F. Supp. 2d 352. An earlier opinion of the district court (Pet. App. 185a-195a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2000. The petition for a writ of certiorari was filed on August 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a constitutional challenge to provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, that prohibit corporations from making contributions in connection with federal elections, 2 U.S.C. 441b(a), and that prohibit anyone from making contributions in the name of another person, 2 U.S.C. 441f.

a. Congress has long restricted the ability of corporations to make contributions to candidates for federal office. The Tillman Act, passed in 1907, prohibited any corporation from making a "money contribution" in connection with federal elections. Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 864. Congress later extended the ban so that it encompassed corporate donations of "anything of value." Federal Corrupt Practices Act of 1925, ch. 368, Tit. III, §§ 301, 313, 43 Stat. 1070, 1074. The Federal Corrupt Practices Act also made it a crime for a candidate to accept corporate contributions. § 313, 43 Stat. 1074.[1]

Although a ban on direct corporate contributions of money has been in effect since 1907, Congress has permitted individuals affiliated with those organizations to participate in voluntary, joint political activity under the sponsorship of their corporation. Thus, the FECA permits corporations to use their treasury funds to establish and administer a separate, segregated

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[1] The prohibition on corporate contributions was eventually codified at 18 U.S.C. 610, where it remained (as amended in respects immaterial to this case) until 1976. Congress then reenacted the prohibition and eliminated Section 610. See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, §§ 112, 201(a), 90 Stat. 486, 496. The reenacted prohibition is codified at 2 U.S.C. 441b.

political fund and to solicit contributions to that fund from the corporation's stockholders and their families and the corporation's executive and administrative personnel and their families. See 2 U.S.C. 441b(b)(2) and (4)(A)-(C); see also *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 409-410 (1972). Such a fund is a "political committee" under the FECA, see 2 U.S.C. 431(4)(B), and is commonly referred to as a "political action committee" or "PAC." The fund is permitted to make contributions to federal candidates and to make independent expenditures to communicate to the general public the corporation's views regarding federal candidates. See 2 U.S.C. 441b(b).

b. The other provision at issue in this case, 2 U.S.C. 441f, states that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person."[2] Section 441f forms a part of a disclosure scheme that has been in effect for decades. The first federal disclosure law, enacted just three years after passage of the Tillman Act, required certain types of political committees to disclose the names of all contributors of $100 or more and to identify the recipients of expenditures of $10 or more. Act of June 25, 1910, ch. 392, §§ 3, 6, 36 Stat. 823; see *Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam). Subsequent legislation expanded those disclosure requirements. See *id.* at 61-62.

2. During the period relevant to this case, petitioner Renato P. Mariani was the president, treasurer, and 25% shareholder of Empire Sanitary Landfill, Inc.

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[2] The term "person" includes corporations. See 2 U.S.C. 431(11).

(Empire) and Danella Environmental Technologies, Inc. (Danella). See C.A. App. 14 (Compl. ¶ 2); C.A. App. 816 (Indictment). In October 1997, a federal grand jury returned an indictment against petitioner and five other individuals. See C.A. App. 816-875. The indictment charges, *inter alia*, that petitioner caused Empire and Danella employees, business associates, friends, and family to make individual $1000 contributions to a variety of candidates for federal office, and then reimbursed those straw donors with corporate treasury funds. See C.A. App. 822-824, 849-854. Those included approximately $80,000 in contributions to the 1996 presidential campaign of then-Senate Majority Leader Robert Dole, which were made approximately ten days before "a crucial vote in the Senate" concerning proposed legislation that could affect the flow of interstate waste to Empire's landfill located in Pennsylvania. Pet. App. 50a; see also C.A. App. 817-818, 824-826, 850-854. The indictment alleges that those corporate contributions, made in the names of persons other than the true source of the funds, violated 2 U.S.C. 441b(a) and 441f. C.A. App. 822-824, 849-854.

During the same election cycle in which the illegal contributions described above were made, Empire made "soft money" donations to both the Democratic and Republican National Committees. See C.A. App. 876-910; Pet. App. 51a. The term "soft money" generally refers to funds lawfully contributed by corporations and labor organizations from their general treasuries, by federal contractors, or by individuals in excess of the contribution limits set forth in 2 U.S.C. 441a. See 63 Fed. Reg. 37,722 (1998). Soft money, which is not regulated by the FECA, can be used only "for state and local campaign activity or other party committee activities that do not influence federal elections." *Ibid.*; see

also *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.); 2 U.S.C. 431(8)(B). The term "hard money," by contrast, refers to funds intended to be used to influence federal elections and contributed (either directly to the candidate or to a party or other political committee) in accordance with the restrictions of the FECA. See 63 Fed. Reg. at 37,722.

3. Pursuant to 2 U.S.C. 437h, petitioners filed suit against the United States challenging the constitutionality of 2 U.S.C. 441b and 441f. See C.A. App. 13, 27, 28 (Compl. ¶¶ 1, 32-33).[3] The Federal Election Commission (FEC) subsequently intervened as a defendant. See Pet. App. 7a. The criminal charges against petitioner remain pending.

The United States and the FEC moved to dismiss petitioner's constitutional claims as frivolous, and therefore outside the scope of 2 U.S.C. 437h,[4] in light of this Court's decisions in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *FEC* v. *National Conservative Political Action Comm.* (*NCPAC*), 470

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[3] Section 437h provides:

> The [Federal Election Commission], the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of [the FECA]. The district court immediately shall certify all questions of constitutionality of [the FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

2 U.S.C. 437h.

[4] See *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 193-194 n.14 (1981).

U.S. 480 (1985); and *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982). The district court observed that the Court in those cases "recognize[d] *implicitly* the validity of a ban on corporate contributions to candidates for federal elective office," and that "[l]ower federal courts have found that the Supreme Court rulings compel the conclusion that the ban on corporate contributions is constitutional." Pet. App. 192a. The district court nevertheless denied the motions to dismiss. See *id.* at 186a, 195a. The court stated that "neither the Supreme Court nor the Third Circuit has directly decided the validity of the ban on corporate contributions," *id.* at 192a, and that "no court has decided the validity of the ban on corporate contributions as applied in the context of the presently-existing political contribution scheme," *id.* at 192a-193a. The district court subsequently issued a memorandum opinion setting forth findings of fact (*id.* at 48a-178a) and "ultimate factual conclusions" (*id.* at 178a-181a), and certifying various questions of constitutional law for the en banc court of appeals (*id.* at 181a-182a; see 2 U.S.C. 437h (quoted in note 3, *supra*)).

4. The en banc court of appeals unanimously rejected petitioner's constitutional claims. See Pet. App. 1a-28a. The court of appeals agreed with the district court's conclusion that petitioner's challenge to 2 U.S.C. 441b was not frivolous. See Pet. App. 13a-14a. The court observed, however, that the district court's "fact-finding effort sometimes metamorphosed into conclusions regarding the legal issues in this case," and that "[g]iven the unique procedural posture of the case, we need not (and do not) defer to such findings in our analysis." *Id.* at 9a.

The court of appeals stated that it was "compelled to reject [petitioner's] facial challenge to § 441b(a)" in

light of this Court's decisions in *National Right to Work Committee*, *NCPAC*, and *Austin*, *supra*. Pet. App. 22a. The court rejected petitioner's contention that the absence of a ban on corporate donations of soft money renders the prohibition of hard money contributions unconstitutional. The court explained that "Congress might well have concluded that direct contributions from corporate treasuries were more important to regulate than expenditures or contributions made through committees, because hard money can be used by a candidate in more and different ways than soft money." *Id.* at 26a.

The court of appeals also upheld Section 441f's prohibition against making contributions to federal candidates in the name of another person. Pet. App. 26a-28a. The court placed primary reliance on this Court's decision in *Buckley*, which sustained various reporting and disclosure requirements imposed by the FECA. See *id.* at 26a-27a; *Buckley*, 424 U.S. at 60-84. The court of appeals rejected petitioner's contention that Section 441f is unconstitutional because it does not prohibit donations of soft money made in the name of another person. See Pet. App. 27a-28a. The court concluded that "Congress was free to determine that disclosure of hard money donations was the most important form of disclosure, and to limit the regulation to that area." *Id.* at 28a.

ARGUMENT

The en banc court of appeals' unanimous decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly rejected petitioner's challenge to the ban on corporate treasury con-

tributions to candidates for federal office imposed by 2 U.S.C. 441b(a). Section 441b(a) prevents the appearance and reality of corruption by ensuring that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." *National Right to Work Comm.*, 459 U.S. at 207 (citing *United States* v. *Automobile Workers*, 352 U.S. 567, 579 (1957)); see also *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978). Section 441b(a) also furthers the government's interest in seeing that individuals who "pa[y] money into a corporation or union for purposes other than the support of candidates" do not "hav[e] that money used to support political candidates to whom they may be opposed." *National Right to Work Comm.*, 459 U.S. at 208 (citing *United States* v. *CIO*, 335 U.S. 106, 113 (1948)).

In *National Right to Work Committee*, the Court unanimously rejected a First Amendment challenge to solicitation restrictions designed to effectuate Section 441b(a)'s ban on corporate contributions to candidates for federal office. See 459 U.S. at 206-211. The Court's analysis plainly presumed that the underlying ban on corporate contributions is valid, notwithstanding its foreseeable impact on the quantity of funds that candidates can acquire and thereafter utilize for political expression.[5] In *FEC* v. *National Conservative Politi-*

[5] The FECA permits a nonstock corporation to establish a separate segregated fund for campaign expenditures (see pages 2-3, *supra*) and to solicit contributions to the fund from the corporation's "members." See *National Right to Work Comm.*, 459 U.S. at 198 n.1 (quoting 2 U.S.C. 441b(b)(4)(C)). The National Right to Work Committee contended that the FEC had adopted an unduly

cal Action Committee, 470 U.S. 480, 495 (1985), the Court referred to "the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office."

This Court's decision in *Austin* v. *Michigan Chamber of Commerce*, *supra*, further supports the validity of Section 441b's restrictions on corporate contributions. The Court in *Austin* upheld a state ban on corporate independent expenditures that was modeled on a similar prohibition in Section 441b. See *Austin*, 494 U.S. at 655 n.1. Because the Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending," *Nixon* v. *Shrink Missouri Government PAC*, 120 S. Ct. 897, 904 (2000) (quoting *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238, 259-260 (1986)), the Court's decision in *Austin* logically implies

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narrow definition of the term "member." See *id.* at 200-203. This Court upheld the Commission's definition as applied to the facts of the case, *id.* at 205-206, and rejected the claim that the FECA, so applied, infringed the organization's First Amendment rights, *id.* at 206-211. The Court summarized "[t]he history of the movement to regulate the political contributions and expenditures of corporations and labor unions," and it observed that "Section 441b(b)(4)(C) is * * * merely a refinement of this gradual development of the federal election statute." *Id.* at 208, 209. The Court concluded that the statutory scheme "reflects a permissible assessment of the dangers posed by [corporations and labor unions] to the electoral process." *Id.* at 209. The Court's analysis thus reflects approval not only of the FECA restrictions on solicitation for separate segregated funds, but of the ban on corporate treasury contributions that the solicitation limits are intended to effectuate.

that a prohibition on campaign contributions from corporate treasury funds is constitutional.[6]

Petitioner contends (Pet. 19) that Section 441b violates the First Amendment because, in light of the recent increase in "soft money" expenditures, there is no "basis to conclude that the challenged FECA provisions in fact prevent corruption or the appearance of corruption * * * or prevent corporations from having a distorting effect on the political process." But the fact that Congress has not prohibited corporate soft money donations to political parties does not render invalid the restrictions that Congress has adopted. As the court of appeals explained, the requirement that a challenged provision alleviate the targeted harm "in a direct and material way is not a requirement that it redress the harm completely." Pet. App. 25a. This Court has recognized that Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' * * * to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *National Right to Work Comm.*, 459 U.S. at 209 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937));

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[6] The Court in *Austin* held that the expenditure ban was "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." 494 U.S. at 660. The Court found it significant that Michigan's statute "does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds." *Ibid.* Section 441b similarly prohibits direct corporate contributions, while permitting corporations to establish separate, segregated funds that can make contributions to federal campaigns.

see also *Massachusetts Citizens for Life*, 479 U.S. at 258 n.11.

Contrary to petitioner's suggestion (Pet. 19), the practical distinctions between hard and soft money provide ample justification for Congress's decision to treat the two differently. As the court of appeals recognized, "hard money can be used by a candidate in more and different ways than soft money." Pet. App. 26a. Hard money contributed directly to a candidate can be used to support the campaign in any lawful manner the candidate deems fit. See C.A. App. 431; Pet. App. 63a-64a, ¶ 38. By contrast, soft money is given to a political party rather than to the candidate, and "[c]andidates have less control over party soft money expenditures than funds contributed to them directly." *Id.* at 64a, ¶ 39; see also C.A. App. 431. Moreover, the uses to which soft money can lawfully be put are limited. "Unregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute. Any contribution to a party that is earmarked for a particular campaign is considered a contribution to the candidate and is subject to the contribution limitations." *Colorado Republican*, 518 U.S. at 616 (opinion of Breyer, J.) (citations omitted).[7] In light of the candidate's control

[7] Petitioner assumes that the soft money expenditures alleged in his complaint are lawful. But certain of the expenditures that petitioner describes (see C.A. App. 22 (Compl. ¶¶ 22, 23)) raise complex legal issues that have not yet been definitively resolved. There is no need to resolve such issues here (even assuming that it would be proper to do so in this proceeding brought under 2 U.S.C. 437h). Whether or not the soft money expenditures described by petitioner are lawful, the ban on corporate treasury contributions

over the manner in which hard money contributions are spent, and the wider range of uses to which hard money may be put, Congress could reasonably conclude that direct corporate contributions to federal candidates pose a particular risk of actual or apparent political corruption.

b. Petitioner contends (Pet. 21-24) that corporations are constitutionally entitled to make at least some contributions to candidates from their general treasuries. Petitioner relies (Pet. 23-24) on this Court's recognition of the "symbolic expression of support evidenced by a contribution." *Buckley*, 424 U.S. at 21. *Buckley*, however, involved contributions by individuals, not corporations. This Court has recognized that "[t]he differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981); see also *NCPAC*, 470 U.S. at 495 (noting "the special treatment historically accorded corporations"); *National Right to Work Comm.*, 459 U.S. at 209-210 ("The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."); *United States* v. *Automobile Workers*, 352 U.S. 567 (1957); *United States* v. *CIO*, 335 U.S. 106 (1948). In light of the unique concerns posed by the corporate structure, Congress may constitutionally prohibit the

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of hard money in Section 441b(a) is plainly valid under the precedents discussed above.

use of corporate treasury funds for campaign contributions to candidates for federal office.

In any event, this case is not an appropriate vehicle for the Court's consideration of the question "whether the First Amendment requires that, at the very least, modest corporate contributions be permitted." Pet. 24. Petitioner is not charged with making "modest" contributions. He is charged with, *inter alia*, facilitating corporate contributions of $80,000 to a single candidate's campaign, well over the $1000 limit for individuals that was sustained in *Buckley* and reaffirmed last Term in *Shrink Missouri*. See C.A. App. 26 (Compl. ¶ 29); C.A. App. 825, 850 (Indictment).

2. Petitioner's challenge to 2 U.S.C. 441f, which prohibits making a "contribution in the name of another person," also lacks merit. Section 441f prevents circumvention of Section 441b(a)'s ban on corporate contributions (as well as Section 441a's limits on contributions by individuals and political committees) by making it unlawful to launder contributions through conduits and thereby disguise the actual source of the funds. The disclosure promoted by Section 441f also "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67 (footnote omitted). And such disclosure "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67; see also *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 202 (1999). Petitioner's contention (Pet. 19-20) that Section 441f is unconstitutional because it does not

apply to soft money lacks merit essentially for the reasons stated at pages 10-12, *supra*.[8]

3. Petitioner argues (Pet. 25) that the court of appeals "ignored all established precedent" by declining to accord deference to the district court's factual findings. But the court of appeals merely declined to defer to findings that had "metamorphosed into conclusions regarding the legal issues" in the case. Pet. App. 9a. None of the decisions on which petitioner relies (Pet. 26) requires deference to such findings.

Contrary to petitioner's contention (Pet. 26-27 n.16), the court of appeals' decision does not conflict with Fed. R. Civ. P. 52(a). The factual findings at issue in this case generally concern "legislative" rather than "adjudicative" facts. See *Lockhart* v. *McCree*, 476 U.S. 162, 168 n.3 (1986) (Court states that it is "far from persuaded * * * that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here"); see also *Daggett* v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 455-456 (1st Cir. 2000); Fed. R. Evid. 201, Advisory Committee's Notes. Even with respect to adjudicative facts, Rule 52(a) does not invariably bar independent appellate review of the record in First Amendment cases. See *Boy Scouts of Am.* v. *Dale*, 120 S. Ct. 2446, 2451 (2000); *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1038 (1991); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499-501 (1984). Moreover, the district court's factual findings in this case were made

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[8] Moreover, although Section 441f does not apply to contributions of soft money, the laundering of soft money may provide a basis for prosecution under 18 U.S.C. 1001 (1994 & Supp. IV 1998). See *United States* v. *Kanchanalak*, 192 F.3d 1037, 1042-1050 (D.C. Cir. 1999); 11 C.F.R. 104.8(e) and (f).

solely to assist the en banc court of appeals in resolving in the first instance the constitutional questions certified pursuant to 2 U.S.C. 437h. In any event, a finding that soft money and hard money contributions by corporations are identical for purposes of the First Amendment would be clearly erroneous for the reasons discussed above.

4. On October 10, 2000, this Court granted the petition for a writ of certiorari in *Federal Election Commission* v. *Colorado Republican Federal Campaign Committee*, No. 00-191. That case presents the question whether the FECA limits on a political party's coordinated campaign expenditures (see 2 U.S.C. 441a(d)) are consistent with the First Amendment. The respondent in that case does not challenge the FECA limits that generally apply to individuals and to non-party political committees,[9] let alone the longstanding ban on corporate treasury contributions to candidates for federal office. Nor does the respondent in that case suggest that the FECA's disclosure requirements raise constitutional concerns. This Court's decision in *Colorado Republican* is therefore unlikely to affect the proper disposition of the instant case.

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[9] Thus, the respondent in *Colorado Republican* distinguishes this Court's decision in *Shrink Missouri* on the grounds that "that case concerned the type of general contribution limit that was sustained long ago in *Buckley*," and that "[t]he contribution limit sustained in *Shrink Missouri Government* did not impose a burden on the unique relationship between a political party and its candidate comparable to that imposed by [Section 441a(d)]." 00-191 Resp. Br. at 8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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