

ORAL ARGUMENT SCHEDULED FOR DECEMBER 8, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

American Federation of Labor and
Congress of Industrial
Organizations,
Plaintiff-Appellant

v.

Elaine L. Chao, United States Secretary of Labor,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JOINT BRIEF OF *AMICI CURIAE*
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,
STOP UNION POLITICAL ABUSE, INC.,
REPUBLICAN ISSUES CAMPAIGN, INC.,
AND U.S. UNION WATCH, INC.
IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and *amici* appearing before the district court and this court are listed in Appellant's Opening Brief.

B. Rulings Under Review

References to the rulings at issue appear in Appellant's Opening Brief.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for *amici* are not aware of any related cases.

Dated this 11th day of August, 2004.

Counsel for *amici curiae*.

Raymond J. LaJeunesse, Jr.

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF THE NATIONAL
RIGHT TO WORK LEGAL DEFENSE FOUNDATION**

The National Right to Work Legal Defense and Education Foundation, Inc. (“Foundation”), through its undersigned counsel submits the following certificate of corporate interests and affiliations pursuant to D.C. Cir. Rule 26.1 and Fed. R. App. P. 26.1.

The Foundation is a nonprofit, non-stock corporation chartered under the laws of North Carolina. The Foundation is a charitable tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

The Foundation does not have a parent corporation. D.C. Cir. Rule 26.1(a).

No publicly held company has a 10% or greater ownership interest in the Foundation. In fact, no one has an ownership interest in the Foundation. D.C. Cir. Rule 26.1(a).

Dated this 11th day of August, 2004

Raymond J. LaJeunesse, Jr.
Counsel for *Amicus Curiae* National Right
to Work Legal Defense Foundation, Inc.

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT OF
STOP UNION POLITICAL ABUSE, REPUBLICAN ISSUES CAMPAIGN,
AND U.S. LABOR WATCH**

Stop Union Political Abuse, Inc. (SUPA), Republican Issues Campaign, Inc. (RIC), and U.S. Union Watch, Inc. (USUW) through their undersigned counsel submit the following certificate of corporate interests and affiliations pursuant to Rule 26.1 of the local rules of the U.S. Court of Appeals for the District of Columbia.

I, the undersigned counsel for SUPA, RIC, and USUW, hereby certify that, to the best of my knowledge and belief, the following are parent companies, subsidiaries, and affiliates of SUPA, RIC, and USUW which have outstanding securities in the hands of the public.

SUPA is a non-profit, non-stock Virginia corporation. SUPA is tax-exempt under Section 501(c)(4) of the Internal Revenue Code.

USUW is a non-profit, non-stock Virginia corporation. USUW is tax-exempt under Section 501(c)(3) of the Internal Revenue Code.

RIC is a federal political action committee and non-stock Virginia corporation.

Neither SUPA, USUW, nor RIC have a parent company, subsidiary, or affiliates. No publicly held companies hold any interest in SUPA, RIC, or USUW.

This disclosure is made so that judges of this court may determine the need for recusal.

Dated this 11th day of August, 2004.

Nathan Paul Mehrens
Counsel for *amici curiae* SUPA, USUW, &
RIC

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GLOSSARY

Full Usage:

American Federation of Labor-Congress of

Industrial Organizations

Labor Management Reporting and Disclosure Act

National Right to Work Legal Defense Foundation, Inc.

Republican Issues Campaign, Inc.

Stop Union Political Abuse, Inc.

U.S. Secretary of Labor

U.S. Union Watch, Inc.

Abbreviation:

AFL-CIO

LMRDA

Foundation

RIC

SUPA

Secretary

USUW

The National Right to Work Legal Defense Foundation, Inc., Stop Union Political Abuse, Inc., U.S. Union Watch, Inc., and Republican Issues Campaign, Inc., through their undersigned counsel, respectfully submit this *amici curiae* brief in support of Appellee urging this Court to affirm the District Court's ruling. All parties have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

I. Interest of the Foundation

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violations of their right to work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states.

The Foundation has extensive experience regarding the financial disclosures unions must provide to employees. Through its Staff Attorneys, the Foundation provided legal assistance in the leading cases requiring unions to disclose audited financial information to employees who are compelled to pay union dues or fees as a condition of employment. *See, e.g., Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000); *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997); *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995).

Through the litigation of those and other similar cases, the Foundation's Staff Attorneys have developed a wealth of expertise in reviewing union books and records, and in ferreting out the waste, fraud and corruption that are common in these largely unregulated organizations. *See Harrington v. City of Albuquerque*, ___ F. Supp. 2d ___, 2004 WL 1561178, at *16 (D.N.M. June 30, 2004) ("The National Right to Work Legal Defense Foundation has played a significant role in shaping the law applicable to this case" involving financial information unions must provide as a condition of collecting compulsory dues); *see also Bromley v. Michigan Educ. Ass'n-NEA*, 82 F.3d 686, 696 (6th

Cir. 1996) (commenting on expertise of Foundation-provided expert witness); *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir. 1997), *aff'd*, 523 U.S. 866 (1998) (Foundation-provided expert raised a genuine issue of material fact about the union's financial records). The Foundation submitted comments to the Department of Labor concerning the promulgation of the regulations at issue in this case on February 3, 2003.

II. Interest of SUPA, USUW, and RIC

SUPA is a nonprofit, tax-exempt Virginia corporation dedicated to educating the public regarding issues related to labor organizations' political activities. SUPA works to effectuate changes in laws and regulations that are necessary to protect the rights of freedom of speech and association guaranteed to workers under the First Amendment of the United States Constitution. SUPA works to insure that all political activities and expenditures labor organizations make are funded voluntarily and not from coerced dues deducted from workers' paychecks as a condition of employment. SUPA works with Congress and administrative agencies to enact legislation and regulations to protect workers' rights to: 1) know how labor organizations spend money deducted from their paychecks, and 2) prevent use of their money when they object to causes outside the "core" purposes of labor organizations, such as contract negotiation and grievance adjustment, to further political activities, candidates, and ideals.

SUPA's management and staff have widespread familiarity regarding the issues forming the basis for the Appellant's challenge to the regulation in the United States District Court below, including research and writing on the legal issues involved and public advocacy on those issues. In addition, during the official "comment period" of the challenged regulation, SUPA submitted to the Secretary comments giving substantive analysis of the need for and authority to issue the regulation. Further, SUPA's president is a former labor organization official whose first-hand experience with these issues gives SUPA a unique perspective to enter this case as *amicus curiae*.

USUW is also a non-profit, tax-exempt Virginia corporation that works to keep track of union political activity and educates the public regarding the need for changes that are necessary to protect union members against coerced speech in the form of forced dues that are spent for political purposes objected to by such workers.

RIC works to elect Members of Congress who will uphold and support these rights. RIC is a federal political action committee and non-stock Virginia corporation.

PERTINENT STATUTES AND REGULATIONS

Except for the following, all applicable statutes, regulations, etc. are contained in the Brief for the Federal Appellee. The text of the following statutes and regulations is located in the addendum.

29 U.S.C. § 141

29 U.S.C. § 401

29 U.S.C. § 431

VA. CODE ANN. § 57-1

29 C.F.R. § 403.2

SUMMARY OF THE ARGUMENT

Appellant AFL-CIO sued in the United States District Court to set aside the Secretary's action in promulgating a regulation that made changes to financial reports required of labor unions under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 431, *et seq.* Appellant's primary allegation is that the Secretary exceeded her statutory authority by promulgating such changes.

The Secretary's action in promulgating the challenged regulation was clearly within her authority under the plain language of the LMRDA. Not only was her authority explicit in that act, but the record is replete with examples showing the drastic need for the new regulation. Moreover, the Secretary's action in promulgating the challenged regulation advances the First Amendment right of workers to be free from coerced speech and association through union dues spent in contravention of their rights.

ARGUMENT

I. THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT WAS ENACTED TO PREVENT UNION CORRUPTION

The 86th Congress in 1959 enacted the LMRDA based upon its finding of a need for legislation to eliminate or prevent improper practices by labor organizations that distort and defeat national labor policy. *See* 29 U.S.C. § 401(b)¹ and (c).² John F. Kennedy, then a U.S. Senator from Massachusetts, presented the report of the Senate Committee on Labor and Public Welfare upon committee passage of Senate Bill 1555, S.1555, 86th Cong. (1959), the bill creating the LMRDA. The report stated:

The committee reported bill is primarily designed to correct the abuses which have crept into labor and management and which have been the subject of investigation by the Committee on Improper Activities in the Labor and Management Field for the past several years.

S. Rep. No. 187, 86th Cong., 1st Session., at 2, U.S. Code Cong. & Adm. News at 2324.³

The investigation to which Senator Kennedy referred is the infamous “McClellan Committee” investigation. *See Donovan v. Master Printers Ass’n*, 532 F. Supp. 1140, 1141 (N.D. Ill. 1981), *aff’d*, 699 F.2d 370 (7th Cir. 1977) (“The LMRDA grew out of the lengthy and well publicized McClellan Committee investigations into organized labor in the late 1950’s.”).

¹ 29 U.S.C. § 401(b) Protection of rights of employees and the public

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

² 29 U.S.C. § 401(c) Necessity to eliminate or prevent improper practices

The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act. . . .

³ See also, Robert F. Koretz, ed., *Statutory History of the United States: Labor Organization* 721 (McGraw-Hill 1970).

“The disclosures of the [McClellan Committee] resulting from the investigations conducted by that committee in the labor and management field . . . revealed shocking abuses.” H. Rep. No. 86-741, at 6 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, at 764. These abuses included “a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct.” 29 U.S.C. 401(b).⁴

The LMRDA “was the product of Congressional concern with widespread abuses of power by union leadership.” *Finnegan v. Leu*, 456 U.S. 431, 435 (1982); *see also Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989). It was enacted by Congress “not only to stop and prevent outrageous conduct by thugs and gangsters but also to stop lesser forms of objectionable conduct by those in positions of trust and to protect democratic processes within union organizations.” *United Brotherhood of Carpenters & Joiners v. Brown*, 343 F.2d 872 at 882, 883 (10th Cir. 1965).⁵

One of the primary means that Congress chose to combat abuses of power by union officials was to provide union members with “all the vital information necessary for them

⁴ The House Report on the 1959 Act described some of the problems that Congress found to exist within organized labor:

Some trade unions have acquired bureaucratic tendencies and characteristics. The relations of the leaders of such unions to their members has in some instances become impersonal and autocratic. In some cases men who have acquired positions of power and responsibility within unions have abused their power and forsaken their responsibilities to the membership and the public. The power and control of the affairs of a trade union by leaders who abuse their power and forsake their responsibilities inevitably leads to the elimination of efficient, honest, and democratic practices within such union, and often results in irresponsible actions which are detrimental to the public interest.

H. Rep. No. 86-741, at 6 (1959), *reprinted in* 1 NLRB Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, at 764.

⁵ Malfeasance by union “thugs and gangsters” remains pervasive to this day. The Department of Labor reports that “over the past five years, the OLMS investigations resulted in over 640 criminal convictions. As a remedy, the courts ordered the responsible officials to pay \$15,446,896 in restitution, in addition to debarring them from union service for a combined total of almost ten thousand years.” *See* 68 Fed. Reg. 58374, 58420 (Oct. 9, 2003).

to take effective action in regulating affairs of their organization.” *United States v. Budzanoski*, 462 F.2d 443, 449-50 (3rd Cir. 1972) (quoting S. Rep. No. 86-187, at 9); see also *Musicians Fed’n v. Wittstein*, 379 U.S. 171, 172 (1964) (“The pervading premise of both these titles is that there should be full and active participation by the rank and file in the affairs of the union”). Congress intended to insure that:

A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organization are entitled to a **full accounting of all transactions** involving their property.

S. Rep. No. 86-187, at 8 (emphasis added); see also *U.S. v. Haggerty*, 419 F.2d 1003 (1970); *Rekant v. Rabinowitz*, 194 F. Supp. 194 (1971). Congress believed that “the exposure to public scrutiny of **all vital information** concerning the operation of a trade union will help deter repetition of the financial abuses disclosed by the McClellan committee.” S. Rep. No. 86-187, at 9 (emphasis added). “In some instances, the matters to be reported are not illegal and may not be improper. But only full disclosure will enable persons whose rights are affected, the public and the Government, to determine whether the arrangements or activities are justifiable, ethical, and legal.” *Id.* at 5.

Accordingly, “[t]he primary purpose of the reporting provisions of the LMRDA is to insure disclosure of financial operations of the unions to their members.” *Budzanoski*, 462 F.2d at 450. Only with full, accurate, detailed, and public disclosure of labor organization financial information can union members and the public at large be assured that union officials and staff have faithfully performed their fiduciary duties with regard to members’ dues.

II. THE PRIOR LM-2 REGULATIONS DID NOT REQUIRE SUFFICIENT DETAIL ABOUT UNION FINANCIAL ACTIVITIES TO EFFECTUATE THE LMRDA’S LEGISLATIVE PURPOSE

The LMRDA requires that covered labor organizations file annually with the Secretary a financial report (“LM-2”) signed by its president and treasurer, or corresponding principal officers, containing information in such detail as may be

necessary accurately to disclose its financial condition and operations for its preceding fiscal year. 29 U.S.C. § 431(b). Under the prior LM-2 regulations, labor organizations with annual receipts in excess of \$200,000 were required to file an LM-2 report. 29 C.F.R. § 403.2.⁶

The previous LM-2 form contained fifteen expenditure schedules calling for reporting on assets, liabilities, income, and expenses. The form covers one fiscal year. The bulk of an LM-2 form is comprised of schedule 10, which reports disbursements to employees. Other notable schedules include schedule 12, (Contributions, Gifts, & Grants), schedule 13 (Office and Administrative Expense), and schedule 15 (Other Disbursements).

Even a cursory reading of the old LM-2 form shows that the information disclosed by a labor organization was insufficient to give the average worker an accurate picture of how it spent most of the dues collected from that worker. Large, national labor organizations reported millions of dollars annually in categories that are so vague that no useful meaning could be derived and no clear picture could be gained as to where the money actually went. Huge amounts of dues expenditures were listed under such broad categories as “Other contributions and subsidies to labor organizations.” This problem of vagueness in the reports required of labor organizations was noted by the U.S. District Court for the Eastern District of Pennsylvania in a lawsuit by a union member seeking to gain access to the union’s financial records.

Defendants contend also that plaintiff has not made an averment of just cause. This contention also must be denied. ***The statement: “Other Disbursements \$5852.98” certainly is too vague to mean much to the members as are the other statements.***

Rekant, 194 F. Supp. at 195 (emphasis added).

In short, under the previous reporting regulations, labor organizations were not providing sufficient information for the average union member to know accurately how

⁶ The threshold for filing an LM-2 under the challenged regulation is \$250,000.

his or her dues were being spent. This problem was the basis of the Secretary's action in promulgating the challenged regulation. *See* 68 Fed. Reg. 58374 (Oct. 4, 2003). Due to the great need for revision of the LM-2 form, the Secretary's actions were not only entirely appropriate and well founded, but necessary to better fulfill the "full accounting of all transactions" mandate of the LMRDA. S. Rep. No. 187, 86th Cong., 1st Sess., at 8-9 (1959); 1959 U.S. Code Cong. & Adm. News at. 2324.

III. THE LMRDA'S PLAIN LANGUAGE GRANTS THE SECRETARY THE AUTHORITY TO PROMULGATE THE NEW LM-2 REGULATIONS

The AFL-CIO's principal argument against the new LM-2 regulations is that LMRDA § 201(b), 29 U.S.C. §§ 431(b), does not grant the Secretary the authority to require unions to provide an itemized accounting of major financial transactions. With any such argument, the proper "starting point" is the "language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the plain text of the statute indicates that "Congress has directly spoken on the precise question at issue," then that "is the end of the matter." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also FDA v. Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).⁷

In this case, the plain text of § 201(b) is the "end of the matter" for the AFL-CIO's challenge to the Secretary's regulations. Appellant's entire argument is premised on a grammatically untenable interpretation of § 201(b). When this fallacious interpretation is rejected—as the District Court properly did—the AFL-CIO's case crumbles.

Section 201(b) of the LMRDA states:

Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary

⁷ Even if the language of § 201(b) is considered ambiguous, the second prong of the test set out in *Chevron* provides that the only issue for the reviewing court is to determine if the regulation "is based on a permissible construction of the statute." 467 U.S. at 843; *see also id.* at 844 (a court must defer to a "reasonable interpretation made by the administrator of an agency").

accurately to disclose its financial condition and operations for its preceding fiscal year—

- (1) assets and liabilities at the beginning and end of the fiscal year;
- (2) receipts of any kind and the sources thereof,
- (3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than \$10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;
- (4) direct and indirect loans made to any officer, employee, or member, which aggregated more than \$250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;
- (5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and
- (6) other disbursements made by it including the purposes thereof, all in such categories as the Secretary may prescribe.

29 U.S.C. § 431(b).

The AFL-CIO contends that this language permits only financial reports containing totals of union receipts and disbursements in general categories, and does not permit reports containing itemized disclosure of individual receipts or disbursements.

Appellants' Br. at 12. The AFL-CIO attempts this feat of statutory construction by first construing § 201(b) to require a "financial report" of "financial condition and operations." Appellant then transforms the purported requirement of a "financial report" of "financial condition and operations" into a requirement for a "statement of financial condition" and a "statement of operations." The phrase "statement of operations" is, in turn, further transformed into the phrase "income statement." Finally, having re-written § 201(b) to require a "statement of financial condition" and an "income statement," the AFL-CIO alleges that these are accounting "terms of art" that preclude itemized disclosure.

The AFL-CIO's interpretation of § 201(b) bears no relation to the statute's actual text. Indeed, the fact that the AFL-CIO relies upon such a tenuous and brazenly specious statutory construction is a telling admission as to weakness of its case, and a testament to the strength of the Secretary's authority to issue the new LM-2 regulations.

First and foremost, § 201(b) does not require that unions file “statements” of “financial condition and operations.” Rather, the statute requires unions to file “a **financial report** . . . containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year.” 29 U.S.C. § 431(b) (emphasis added). The generic term “financial report” is broad and easily encompasses a report of itemized disbursements or receipts.

The information that this “financial report” must contain is **not** a statement of “financial condition and operations,” as the AFL-CIO alleges. The phrase “financial condition and operations” does not directly modify the term “financial report.” Section 201(b) requires the financial report to “contain[] the **following information**.” *Id.* (emphasis added). The phrase “following information” is a direct reference to the six types of information listed at §§ 201(b)(1-6), which follow the subsection.

The terms “financial condition and operations” refer only to the minimum level of detail that a union must disclose about “the following information”—*i.e.*, the items listed in §§ 201(b)(1-6). Properly construed, § 201(b) requires a financial report containing the information listed in §§ 201(b)(1-6) “**in such detail as may be necessary accurately to disclose** [the union’s] financial condition and operations for its preceding fiscal year.” *Id.* (emphasis added).

Sections §§ 201(b)(1-6) expressly requires itemized information. In particular, § 201(b)(2) requires a financial report containing “receipts of any kind **and the sources thereof**” (emphasis added). Section § 201(b)(6) requires a financial report containing “other disbursements made by it **including the purposes thereof**, all in such categories as the Secretary may prescribe.” (Emphasis added.)

In short, § 201(b) cannot be construed to require a “statement of financial condition” or a “statement of operations,” which is the basis of the AFL-CIO’s statutory argument. The statute does not require a “financial report” of a union’s “financial condition and operations.” Instead, it requires unions to file a “financial report”

containing the information listed at §§ 201(b)(1-6)—which includes itemized disclosures—“in such detail as may be necessary accurately to disclose its financial condition and operations.” Accordingly, the AFL-CIO’s contentions regarding whether a “statement of financial condition” or a “statement of operations” are terms of art that forbid itemized disclosure is beside the point, as § 201(b) simply does not require a statement of “financial condition and operations.”

The District Court recognized the fundamental fallacy of the AFL-CIO’s argument:

Plaintiff’s emphasis on two discrete phrases in § 201(b), “financial condition” and “operations,” is unpersuasive. Section 201(b) does not require unions to file statements of “financial condition and operations.” Rather, it requires unions to file “a financial report” which contains “information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year.” 29 U.S.C. § 431(b). The phrase “financial condition and operations” does not modify the term “financial report”; it pertains to the word “information.” It establishes a baseline of detail that a union must disclose, at a minimum, about “the following information”—i.e., the items listed in subsections (1)- (6) of § 201(b). . . .

Thus, given the plain language of § 201(b), the AFL-CIO’s assertion that “financial condition” and “operations” are accounting terms of art which prohibit itemized disclosure is irrelevant because the statute requires neither a statement of “financial condition” nor a statement of “operations.”

AFL-CIO v. Chao, 298 F. Supp.2d 104, 112-13 (D.D.C. 2004). This is the proper construction of the text of § 201(b).

IV. THE RIGHT OF UNION MEMBERS TO EXAMINE A UNION’S UNDERLYING FINANCIAL RECORDS UPON A SHOWING OF “JUST CAUSE” IS IRRELEVANT TO THE SECRETARY’S RESPONSIBILITY TO INSURE THAT THE PUBLIC AND MEMBERS ARE GIVEN A FULL ACCOUNTING OF ALL UNION FINANCIAL TRANSACTIONS

The AFL-CIO argues that, because the LMRDA gives individual union members the right, upon a showing of “just cause,” to examine the union’s financial records, Congress must not have intended for detailed financial information to be made available to the public. *See* Appellant’s Opening Br., Argument, Pt. I.C. However, as the District Court correctly pointed out, this right of union members relates to the underlying records that a union uses to generate the figures to be inserted in the report filed with the

Secretary. *Chao*, 298 F. Supp. at 115. The challenged regulation does nothing to bring the actual, underlying financial records into public inspection, but rather requires figures from those records to be disclosed in greater detail. The union member is empowered to file suit to examine the books, 29 U.S.C. § 431(c); however, the actual books are not at issue here—only the information taken from them and filed with the Secretary.

The Secretary’s revision of the reporting requirements in no way affects the independent right of union members to inspect underlying records and, thus, is irrelevant to determining whether the challenged regulation is valid. Instead of conflicting with the members’ right of inspection, the challenged regulation merely provides both the public and individual union members with more information and, especially, serves the statute’s goal that union members should have “all the vital information necessary for them to take effective action in regulating affairs of their organization.” 29 U.S.C. § 431(b).

V. THE CHALLENGED REGULATION IS NECESSARY TO FURTHER WORKERS’ FUNDAMENTAL RIGHTS OF FREEDOM OF ASSOCIATION AND SPEECH

Since the founding of our nation, the right of persons to speak freely and to decide individually which individuals and what organizations with which they wish to associate has been firmly rooted. Thomas Jefferson composed the following statement, later codified as a statute, which is as true today as it was then:

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. *The Virginia Act for Establishing Religious Freedom*, VA. CODE ANN. § 57-1.⁸

Three years after Virginia passed this statute, the 1st Congress on September 25, 1789, proposed the first set of amendments to the Constitution, of which ten were quickly ratified as the Bill of Rights. First in this list is a statement protecting, *inter alia*, the rights of freedom of speech and freedom of association:

⁸ Thomas Jefferson drafted *The Virginia Act for Establishing Religious Freedom* in 1779. It was passed by the General Assembly of the Commonwealth of Virginia in 1786.

Congress shall make no law . . . *abridging the freedom of speech*, or of the press; *or the right of the people peaceably to assemble*, and to petition the government for a redress of grievances. U.S. CONST. amend. I. (Emphasis added.)

Unfortunately, in the 224 years since proposal of the First Amendment, various restrictions on its unequivocally guaranteed rights have been upheld. These First Amendment rights are thus not deemed by the courts to be incapable of restriction, given a “compelling governmental interest.” Most unfortunately, limitations on the associational rights of workers by statutes allowing or imposing compulsory unionism have been upheld by the Supreme Court. *See, e.g., Railway Employes’ Dept. v. Hanson*, 351 U.S. 225 (1956). The *amici* believe that these statutes, if not unconstitutional, are bad public policy for two reasons.

First, forced association with a union *even* for purposes of collective bargaining significantly infringes on “an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit,” *Abood v. Detroit Bd. of Educ.* 431 U.S. 209, 222 (1977). *See Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). Second, the remedy the Supreme Court has devised to protect the right of workers to be free from financially supporting union political, ideological and other nonbargaining activities is a reduction or rebate of monies that may not be lawfully charged to them if they object. As Justice Black long ago recognized, because the unions’ accounting records are “voluminous and complex,” that remedy “promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.” *Machinists v. Street*, 367 U.S. 740, 796 (1961) (Black, J., dissenting).

While thus permitting what the *amici* believe to be a serious and unwise infringement on workers’ First Amendment rights, the Supreme Court has held that only “financial core” activities of a union—*i.e.*, “those germane to collective bargaining, contract administration, and grievance adjustment”—are lawfully chargeable to objecting workers under the First Amendment and the federal labor statutes. Political, ideological

and other activities outside that “financial core” are not statutorily or constitutionally chargeable. *E.g.*, *Communications Workers v. Beck*, 487 U.S. 735 (1988) (under the National Labor Relations Act).

For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State. *Abood*, 431 U.S. at 234-35.

[W]e hold that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 522 (1991).

The right of workers to a limited freedom of speech and association having been decisively established under both statute and the First Amendment, a means and opportunity for such workers to exercise this right intelligently is needed. As discussed *supra*, the challenged regulation increases the amount of information that is readily available to workers who seek to exercise their right to be free of certain coerced speech and association. Under the previous regulation, workers were able to obtain little useful information about the spending habits of unions that they were forced to subsidize, making it difficult for them to be sure that they were not financially supporting speech that they 1) were not legally required to support, and 2) to which they objected.

Without good information, workers are in the dark—making it difficult at best to exercise their statutory and First Amendment rights. Moreover, because even spending for lawfully chargeable representational purposes infringes significantly on workers’ rights, they should be able to determine how much unions are spending on those activities, too. Thus, the challenged regulation is not only a modest positive step in the direction of protecting workers’ rights, but is absolutely necessary to better practical exercise of these rights. Indeed, given the concerns Justice Black recognized, the *amici* believe that the Secretary could have, and should have, imposed more stringent reporting requirements on unions: a lower threshold for itemization of expenses, a requirement that the financial reports be independently audited, and more functional categories, *e.g.*, a

separate category for union organizing, *see Ellis*, 466 U.S. at 451-53 (organizing is not lawfully chargeable).⁹

CONCLUSION

By revising the financial reporting regulations for unions to require more complete reporting, the Secretary has taken a necessary step to protect the statutory and First Amendment rights of workers and has better implemented the language and intent of the LMRDA. Based upon the foregoing, the *amici* respectfully urge this Court to affirm the judgment of the District Court below.

Dated this 11th day of August, 2004.

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⁹ Although the Secretary did not promulgate the new LM-2 regulations to comply with *Beck*, *see* 68 Fed. Reg. 58374, 58395 (Oct. 9, 2003), the functional categories of disclosures the new regulations demarcate do partially overlap with the chargeable and nonchargeable categories often used by unions to comply with *Beck*. *See, e.g., Abrams v. Communications Workers*, 59 F.3d 1373, 1379-81 (D.C. Cir. 1995); *Ferriso v. NLRB*, 125 F.3d 865, 867-70 (D.C. Cir. 1997); *Penrod v. NLRB*, 203 F.3d 41, 46-47 (D.C. Cir. 2000). The Secretary acknowledged that the “information reported in the new Form LM-2 may be helpful to an agency fee payer to evaluate his or her union’s *Beck* compliance” 68 Fed. Reg. at 58395.

RULE 32(A) CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,123 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii) and Circuit Rule 32(a)(2). This word count was provided using the word count function of WordPerfect 10.

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Dated this 11th day of August, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing brief *amici curiae* have been served on the following counsel of record at the following addresses by first class mail, postage prepaid, on this 11th day of August, 2004, and that all counsel required to be served have been served.

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ADDENDUM: TEXT OF PERTINENT STATUTES AND REGULATIONS

TEXT OF 29 U.S.C. § 141

29 U.S.C. § 141. Short title; Congressional declaration of purpose and policy

- (a) This chapter may be cited as the "Labor Management Relations Act, 1947".
- (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TEXT OF 29 U.S.C. § 401

29 U.S.C. § 401. Congressional declaration of findings, purposes, and policy

- (a) Standards for labor-management relations

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is

essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor- management relations.

(b) Protection of rights of employees and the public

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) Necessity to eliminate or prevent improper practices

The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended [29 U.S.C.A. § 141 et seq.], and the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.], and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

TEXT OF 29 U.S.C. § 431

29 U.S.C. § 431. Report of labor organizations

(a) Adoption and filing of constitution and bylaws; contents of report

Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information--

(1) the name of the labor organization, its mailing address, and any other address at which it maintains its principal office or at which it keeps the records referred to in this subchapter;

(2) the name and title of each of its officers;

(3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;

(4) the regular dues or fees or other periodic payments required to remain a member of the reporting labor organization; and

(5) detailed statements, or references to specific provisions of documents filed under this subsection which contain such statements, showing the provision made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other benefit plans, (D) authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the reporting labor organization files with the Secretary the annual financial report required by subsection (b) of this section.

(b) Annual financial report; filing; contents

Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year--

- (1) assets and liabilities at the beginning and end of the fiscal year;
- (2) receipts of any kind and the sources thereof;
- (3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than \$10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;
- (4) direct and indirect loans made to any officer, employee, or member, which aggregated more than \$250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;
- (5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and
- (6) other disbursements made by it including the purposes thereof; all in such categories as the Secretary may prescribe.

(c) Availability of information to members; examination of books, records, and accounts

Every labor organization required to submit a report under this subchapter shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in

addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

TEXT OF VA. CODE ANN. § 57-1

VA. CODE ANN. § 57-1. Act for religious freedom recited

The General Assembly, on January 16, 1786, passed an act in the following words:

"Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens [sic], or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, have established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical, and even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors, for the instruction of mankind; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right; that it tends only to

corrupt the principles of that religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it; that though, indeed, those are criminal who do not withstand such temptation, yet, neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being of course judge of that tendency, will make his opinions the rules of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them:

"Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened [sic], in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

"And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies constituted with powers equal to our own, and that, therefore, to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

TEXT OF 29 C.F.R. § 403.2

29 C.F.R. § 403.2 Annual financial report.

(a) Every labor organization shall, as prescribed by the regulations in this part, file with the Office of Labor-Management Standards within 90 days after the end of each of its fiscal years, a financial report signed by its president and treasurer, or corresponding principal officers.

(b) Every labor organization shall include in its annual financial report filed as provided in paragraph (a) of this section, in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year and in such categories as prescribed by the Assistant Secretary under the provisions of this part, the information required by section 201(b) of the Act and found by the Assistant Secretary under section 208 thereof to be necessary in such report.

(c) If, on the date for filing the annual financial report of a labor organization required under section 201(b) of the Act and this section, such labor organization is in trusteeship, the labor organization which has assumed trusteeship over such labor organization shall file such report as provided in § 408.5 of this chapter.

(d) Every labor organization with annual receipts of \$250,000 or more shall, except as otherwise provided, file a report on Form T-1 for every trust in which the labor organization is interested, as defined in section 3(l) of the Act, 29 U.S.C. 402(l), that has gross annual receipts of \$250,000 or more, and to which \$10,000 or more was contributed during the reporting period by the labor organization or on the labor organization's behalf or as a result of a negotiated agreement to which the labor organization is a party. A separate report shall be filed on Form T-1 for each such trust within 90 days after the end of the labor organization's fiscal year in the detail required by the instructions accompanying the form and constituting a part thereof, and shall be signed by the president and treasurer, or corresponding principal officers, of the labor organization. No Form T-1 need be filed for a trust if an annual financial report providing the same information and a similar level of

detail is filed with another agency pursuant to federal or state law, as specified in the instructions accompanying Form T-1. In addition, an audit that meets the criteria specified in the Instructions for Form T-1 may be substituted for all but page 1 of the Form T-1. If, on the date for filing the annual financial report of such trust, such labor organization is in trusteeship.