

No. 08—205

IN THE
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

**BRIEF OF THE CENTER FOR POLITICAL
ACCOUNTABILITY AND THE CAROL AND LAWRENCE
ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH AT
THE WHARTON SCHOOL AS *AMICI CURIAE* IN SUPPORT
OF APPELLEE ON SUPPLEMENTAL QUESTION**

Michael T. Liburdi
James A. Ahlers
PERKINS COIE
BROWN & BAIN P.A.
2901 N. Central Avenue
Phoenix, Arizona 85012
(602) 351-8000
mliburdi@perkinscoie.com
jahlers@perkinscoie.com

Karl J. Sandstrom
Counsel of Record
Andrew H. Werbrock
PERKINS COIE LLP
607 14th Street N.W.
Washington, D.C. 20005
(202) 628-6600
ksandstrom@perkinscoie.com
awerbrock@perkinscoie.com

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT..... 4

I. OVERTURNING *AUSTIN* AND *MCCONNELL* WILL DRAMATICALLY ALTER THE CAMPAIGN FINANCE LANDSCAPE 4

A. Corporations’ Ability to Amass Capital Will Distort the Political Process 5

B. Profit Maximization Promotes Unrestrained, Indiscriminate Political Spending 8

C. Corporate Centralized Management Facilitates Rent-Seeking Behavior by Managers 12

II. CORPORATE POLITICAL SPENDING PROHIBITIONS ARE THE ONLY MEANINGFUL SAFEGUARDS AGAINST CORRUPTION 14

A. Coordination Rules Cannot Isolate Independent Expenditure Committees..... 14

B. Objecting Shareholders and Directors Cannot Check Corporate Political Activity	16
III. THE COURT SHOULD NOT REVERSE ITS DEFERENCE TO CONGRESS.....	19
CONCLUSION	21

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Austin v. Mich. Chamber of Commerce</i> , 494 U.S. 652 (1990)	passim
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	14
<i>Colo. Republican Fed. Campaign Comm. v.</i> <i>Fed. Election Comm’n</i> , 518 U.S. 604 (1996)	16
<i>Fed. Election Comm’n v. Beaumont</i> , 539 U.S. 146 (2003)	17, 19
<i>Fed. Election Comm’n v. Nat’l Right to Work</i> <i>Comm.</i> , 459 U.S. 197 (1982)	19, 20
<i>McConnell v. Fed. Election Comm’n</i> , 540 U.S. 93 (2003)	passim
<i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937)	19
<i>Shays v. Fed. Election Comm’n</i> , 414 F.3d 76 (D.C. Cir. 2005)	15
<i>United States v. United Auto. Workers</i> , 352 U.S. 567 (1957)	5
<i>U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter</i> <i>Carriers</i> , 413 U.S. 548 (1973)	19, 20

<u>Statutes and Regulations</u>	<u>Page(s)</u>
2 U.S.C. § 431(17)(B)	14
2 U.S.C. § 441a(a)(7)(B)(i)	14
2 U.S.C. § 441b	passim
2 U.S.C. § 441c(a)	6
2 U.S.C. § 441e(a)	6
2 U.S.C. § 441i(a)	6
34 Stat. 864	6
11 C.F.R. § 109.20	14
11 C.F.R. § 109.21	14
11 C.F.R. § 109.21(c)	15
11 C.F.R. § 109.22	14
11 C.F.R. § 109.23	14
<u>Other Authorities and Sources</u>	<u>Page(s)</u>
40 Cong. Rec. 91	5, 20
40 Cong. Rec. 96	5
Rajesh K. Aggarwal et al., <i>Corporate Political Contributions: Investment or Agency?</i> , Jan. 30, 2007	13, 18

<u>Other Authorities and Sources</u> <u>(cont.)</u>	<u>Page(s)</u>
Richard L. Berke, <i>Enron Pursued Plan to Forge Close Ties to Gore Campaign</i> , N.Y. TIMES, Feb. 18, 2002	13, 14
Aaron Bernstein, <i>When Political Giving Doesn't Pay: Investor Groups Want Greater Board Oversight and Disclosure of the Political Contribution Process</i> , DIRECTORSHIP, June 1, 2008	13, 17
Robert Bryce, <i>Exxon, Big Oil Profits Evil Only Until You Weigh Their Tax Bills</i> , U.S. NEWS & WORLD REP., Feb. 11, 2009.....	8
Campaign Finance Institute, <i>Party Independent Spending Soars</i> , Nov. 11, 2004	16
Ronnie J. Clayton et al., <i>Enron: Market Exploitation and Correction</i> , FINANCIAL DECISIONS, Spring 2002	9, 13, 14
Michael J. Cooper et al., <i>Corporate Political Contributions and Stock Returns</i> , Oct. 24, 2006	9
Jeanne Cummings, <i>Investors Seek Clarity on Campaign Giving: Pressure Grows on Corporations to Improve How They Disclose and Track Political Donations</i> , WALL ST. J., Apr. 5, 2006	18

<u>Other Authorities and Sources</u> <u>(cont.)</u>	<u>Page(s)</u>
Colin Diamond et al., <i>New Media and Retail Shareholder Participation</i> , BLOOMBERG LAW REPORTS, Apr. 6, 2009.....	17
Fred Emery, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON (1995).....	11
Fed. Election Comm'n, Summary Report for ExxonMobil Corporation Political Action Comm. (C00121368), 2007-08 Cycle.....	7
Sanjay Gupta and Charles W. Swenson, <i>Rent-Seeking by Agents of the Firm</i> , 46 J. L. & ECON. 253 (April 2001).....	13
Carrie Johnson, <i>Enron's Fastow Gets 6 Years: Finance Chief's Sentence Reflects His Help Convicting Lay, Skilling</i> , WASH. POST, Sept. 27, 2006.....	14
Marianne Lavelle, <i>Exxon's Profits: Measuring a Record Windfall</i> , U.S. NEWS & WORLD REP., Feb. 1, 2008.....	8
Neil A. Lewis, <i>A Conservative Organization is Accused of Offering Help in a Labor Dispute for a Price</i> , N.Y. TIMES, July 17, 2009.....	10
Jeffrey A. Miron, <i>Campaign Finance Regulation</i> , LIBRARY OF ECONOMICS AND LIBERTY, Jan. 2, 2001.....	15

<u>Other Authorities and Sources</u> <u>(cont.)</u>	<u>Page(s)</u>
Robert E. Mutch, CAMPAIGNS, CONGRESS, AND COURTS (1998)	6
<i>The Nation: The High Price of Higher Milk Prices</i> , TIME, June 10, 1974	10
Louise Overacker, MONEY IN ELECTIONS (1932)	6
<i>Scandals: A Record of Corporate Corruption</i> , TIME, Feb. 23, 1976	10
Susan Schmidt and James V. Grimaldi, <i>Nonprofit Groups Funneled Money For Abramoff</i> , WASH. POST, June 25, 2006	11
R. Jeffrey Smith, <i>The DeLay-Abramoff Money Trail</i> , WASH. POST, Dec. 31, 2005	11

STATEMENT OF INTEREST

The Center for Political Accountability (“CPA”) and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania (“The Zicklin Center”) submit this supplemental brief as *amici curiae* in support of the Appellee.¹ *Amici* refer the Court to, and incorporate by reference, the statement of interest set forth in their prior *amici* brief submitted on the merits in this case.

SUMMARY OF ARGUMENT

The ability of corporations to amass capital, focus on maximizing shareholder value, and centralize management has contributed immensely to the nation’s economic well-being. For more than a century, Congress and state legislatures have recognized that those same attributes, which are the engines of economic growth, may have a corrosive impact on the functioning of our democratic institutions. The ability to accumulate capital enables corporations to deploy immense, tax-advantaged resources in pursuit of their political objectives. Focusing on maximizing shareholder value allows corporations to disregard the larger societal and economic consequences of their political engagement. Centralized management vests in managers near complete power to engage in rent-seeking behavior through political channels.

¹ CPA and The Zicklin Center submit this brief pursuant to the written consent of the parties. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than CPA and The Zicklin Center has made a financial contribution to its preparation or submission.

Over the last century, a series of political scandals involving corporations has led Congress to recognize that the economic advantages of the corporate structure pose a danger in the political realm. Congress, along with numerous state legislatures, has chosen to limit corporate influence in elections. The law does not ban all corporate political activity, but requires corporations to play under the same rules as other actors in the process.

The question before the Court is whether those legislative efforts should be thwarted. In asking whether *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), or *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003),² should be overruled, the Court asks whether the historic and widely shared judgment of our elected officials, who have first-hand knowledge of the dangers posed by unlimited corporate political spending, should be set aside. It will be those elected officials who will be asked to resist, using the legally limited campaign resources at their disposal, the political pressure that will accompany unlimited corporate political spending.

Austin and *McConnell* recognize that corporations, created by the state, are capable of amassing billions of dollars, some of which can readily be made available for political purposes. One example illustrates how overturning *Austin* and *McConnell* would fundamentally rework our campaign finance system. In the last election cycle, ExxonMobil, the nation's largest corporation, raised

² To the extent that it addresses Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b.

\$950,434 in voluntary political contributions from its employees and shareholders. During that same election cycle, ExxonMobil's profits were \$85 billion, or more than 560 times the amount raised by all corporate political action committees ("PACs") combined. ExxonMobil need only use a very small percentage of those corporate funds to secure a politically favorable legislative landscape.

Restrictions on coordination provide one check against unlawful independent expenditures by corporations. But these restrictions alone are inadequate, in part because corporations can achieve their political ends without legally coordinating their activities. Officeholders are well aware that a massive influx of independent expenditures by a single corporation could determine their fate at the ballot box and will feel compelled to weigh that corporation's interests heavily when they conflict with less organized and less funded interests that must operate under the limitations of existing campaign finance law.

Incumbent federal officeholders currently enjoy a nearly twenty-to-one advantage over challengers in the receipt of corporate PAC contributions. This advantage will only be magnified if corporations are able to reward their legislative allies with unlimited spending from corporate coffers. It stands to further close the political marketplace to competition.

Experience shows us the impact unrestrained corporate political spending will have on corporate behavior. Slashing restraints on corporate spending will generate internal and external pressures on corporations to engage in unrestrained political spending that may bear little or no relation to

shareholder value. Corporations will feel compelled to keep up with their competitors, particularly in the face of a shakedown by elected officials who write the laws and regulations that corporations must follow on a daily basis. Managers will engage in rent-seeking behavior, spending corporate funds for personal gain or to advance management's personal political preferences. Most important, political spending will be used to secure and maintain unwarranted competitive advantage in regulation with severe consequences on the openness, dynamism, and operation of markets.

The Court should not lightly set aside the well-reasoned, long-standing, and broadly shared judgment of legislators that unchecked corporate political spending corrupts our politics and distorts our economy.

ARGUMENT

I. **OVERTURNING *AUSTIN* AND *MCCONNELL* WILL DRAMATICALLY ALTER THE CAMPAIGN FINANCE LANDSCAPE**

The corporate structure allows economic activity to be organized efficiently to pursue private profit. The ability to amass capital, centralize management, and focus on maximizing shareholder value enables corporations to contribute immensely to our nation's economic success. Congress and numerous state legislatures have recognized that these same attributes can compromise our democratic institutions and distort our market economy. The ability of corporations to accumulate capital puts at

their disposal quantities of money and influence that dwarf all other available sources of political contributions. The focus on maximizing profit leads corporations to seek to reduce economic competition and to privatize public goods through political action. Finally, centralized management enables corporate managers to engage in rent-seeking political behavior.

A. Corporations' Ability to Amass Capital Will Distort the Political Process

President Theodore Roosevelt's message to Congress in 1905 recognized the central role that corporations assumed in American life: "The corporation has come to stay, just as the trade union has come to stay. Each can and do and has done great good. . . . But each should be sharply checked where it acts against law and justice." 40 Cong. Rec. 91. Against this backdrop, and given his own experience with corporate political spending, President Roosevelt urged Congress to take action:

All contributions by corporations to any political committee for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes [T]he national and the several State legislatures [should] forbid any officer of a corporation from using the money of the corporation in or about any election

40 Cong. Rec. 96 (*partially quoted in United States v. United Auto. Workers*, 352 U.S. 567, 572 (1957)).

The oversized role that corporations played in the financing of the presidential elections of 1896, 1900, and 1904 compelled President Roosevelt to action. Every major trust had contributed at the urging of political “bosses” such as Mark “Boss” Hanna. Standard Oil alone gave \$250,000 to the presidential campaigns in 1896 and 1900. Louise Overacker, *MONEY IN ELECTIONS* 107 (1932). President Roosevelt’s 1904 campaign accepted \$150,000 from companies controlled by J. P. Morgan and \$100,000 from Standard Oil, along with corporate money from International Harvester, Bethlehem Steel, and General Electric, among others. Robert E. Mutch, *CAMPAIGNS, CONGRESS, AND COURTS* 3 (1998). A former Republican national party treasurer explained “that corporations had furnished 73.5 percent of the 1904 presidential campaign fund.” *Id.*

Congress responded by enacting legislation prohibiting corporate spending in federal elections. *See, e.g.*, Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (the Tillman Act); *see also* 2 U.S.C. § 441b(a). Today, as a result of an unbroken series of amendments strengthening the limits on corporate funds in campaigns, candidates, political parties, and political committees may not raise money from corporations, nor may corporations make independent expenditures.³ Corporations must participate in the political process under essentially the same rules as other actors in the process by forming separate

³ Candidates, political parties, and PACs can only raise money through limited contributions from individuals, permanent residents of the United States, and non-governmental contractors. *See* 2 U.S.C. §§ 441c(a), 441e(a), 441i(a).

segregated funds, commonly referred to as PACs, which may solicit and accept voluntary contributions from corporate employees and individual shareholders. 2 U.S.C. § 441b(b)(2)(C). PACs are an important, but not dominant, source of political funds.

Overturing *Austin* and *McConnell* would radically change campaign financing. Throwing open the process to corporate treasury funds – a mix of domestic and foreign monies, earnings from government contracts, and general profits – would undermine the system of limited, voluntary contributions. All political committees, including candidate committees, derive their funds from individuals.⁴ Without restrictions on corporate political spending, it stands to reason that lawmakers would seek to level the playing field by repealing the restrictions on candidate, party, and other political committees, opening the system to the very corruption that current law seeks to contain.

The financial resources controlled by a single large corporation dwarf the funds available to all other electoral participants combined. As noted earlier, in the last election cycle, ExxonMobil's PAC raised \$950,434 in voluntary political contributions from its employees and shareholders.⁵ All corporate PACs combined raised a total of approximately \$150

⁴ A controlling shareholder could use corporate funds to make a political expenditure, a dissenting minority would first need to receive a taxable dividend.

⁵ Fed. Election Comm'n, Summary Report for ExxonMobil Corporation Political Action Comm. (C00121368), 2007-08 Cycle.

million for contested congressional races. By stark contrast, ExxonMobil's profits during the same period were \$85 billion,⁶ or over 560 times the amount collected by all corporate PACs. A fraction of ExxonMobil's profits from a single year would be sufficient to fundamentally alter the terms of legislative debate over serious national issues.

There is no reason to believe that the imbalance in resources will not impact campaign financing, candidate and party platforms, legislation, and market efficiency.

B. Profit Maximization Promotes Unrestrained, Indiscriminate Political Spending

The drive to maximize shareholder profit leads corporations to seek to prevent or reduce competition, to privatize public goods, and to minimize taxation. Corporations often pursue these goals without regard for the larger societal or economic costs of their success.

A 2006 study of PAC contributions found that, for some firms, political spending pays handsomely:

⁶ Robert Bryce, *Exxon, Big Oil Profits Evil Only Until You Weigh Their Tax Bills*, U.S. NEWS & WORLD REP., Feb. 11, 2009, available at <http://www.usnews.com/articles/opinion/2009/02/11/exxon-big-oil-profits-evil-only-until-you-weigh-their-tax-bills.html> (last accessed July 28, 2009); Marianne Lavelle, *Exxon's Profits: Measuring a Record Windfall*, U.S. NEWS & WORLD REP., Feb. 1, 2008, available at <http://www.usnews.com/articles/business/economy/2008/02/01/exxons-profits-measuring-a-record-windfall.html> (last accessed July 28, 2009).

[O]ur results imply that firms participate in the political system not from the standpoint of consuming a patriotic consumption good . . . but rather from the standpoint of creating positive net present value investments.

Michael J. Cooper et al., *Corporate Political Contributions and Stock Returns*, Oct. 24, 2006, at 24, available at <http://ssrn.com/abstract=940790> (last accessed July 28, 2009). The specific benefits derived from political spending may include favorable tax treatment, winning government contracts, the imposition of tariffs or penalties on competitors, and favorable regulatory changes. *Id.* at 5. Even when the benefits are unclear, a corporation may feel obligated to make political expenditures to keep up with competitors who are doing the same.

It is advantageous for ABC Corporation to invest in lobbying for regulations that secure its market position while harming that of its rival, XYZ Corporation. Given the size and scope of the regulatory structure in Washington, failure to engage in such activity can be detrimental to a firm's long term survival.

Ronnie J. Clayton et al., *Enron: Market Exploitation and Correction*, FINANCIAL DECISIONS, Spring 2002, at 13.

Recently, news surfaced that the non-profit American Conservative Union ("ACU") allegedly offered political support to FedEx in a clash with UPS over labor legislation, in exchange for a \$3.4

million contribution to ACU. Neil A. Lewis, *A Conservative Organization is Accused of Offering Help in a Labor Dispute for a Price*, N.Y. TIMES, July 17, 2009, at A10. When FedEx declined ACU's offer, the organization's chairman allegedly threw his support behind UPS. *Id.* If *Austin* and *McConnell* are overturned, ACU could use corporate money secured in this manner to support its own preferred candidates.

In the years following Watergate, investigators uncovered illegal corporate campaign contributions to President Richard Nixon's re-election committee, including payoffs involving corporations subject to heavy regulation. The Watergate Special Counsel's report documents how major corporations discovered that political spending was in their financial interest. Examples of illegal corporate contributions include \$150,000 from defense contractor Northrop Corporation, \$100,000 each from Gulf, Phillips, and Ashland oil companies, and \$55,000 and \$40,000 from American Airlines and Braniff Airways, respectively. *Scandals: A Record of Corporate Corruption*, TIME, Feb. 23, 1976, available at <http://www.time.com/time/magazine/article/0,9171,918067-1,00.html> (last accessed July 28, 2009). Another political payoff at that time involved the largest dairy farmer's association, Associated Milk Producers, Inc., which "pledge[d] more than \$2 million . . . in return for higher milk prices and other favors." *The Nation: The High Price of Higher Milk Prices*, TIME, June 10, 1974, available at <http://www.time.com/time/magazine/article/0,9171,911381,00.html> (last accessed July 28, 2009).

One of the most serious examples of political payoffs involved International Telephone & Telegraph (“ITT”). At the time, ITT was under investigation by the Justice Department for antitrust violations. In exchange for a \$400,000 contribution to help finance the 1972 Republican presidential convention, President Nixon saw to it that the Department of Justice dropped its investigation. See Fred Emery, *WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON* 101 (1995).

The money trail does not always run in a straight line. As this Court noted in *Austin*, even non-profit organizations can exploit their status to amass corporate funds, thus enabling them to circumvent the restrictions on corporate political expenditures. See *Austin*, 494 U.S. at 664. The sordid tale of convicted lobbyist Jack Abramoff and his many powerful political allies illustrates the “laundering” of corporate money at its most egregious. Extensive investigations into Abramoff’s dealings revealed how he secretly routed clients’ funds to politicians through willing tax-exempt organizations. See, e.g., Susan Schmidt and James V. Grimaldi, *Nonprofit Groups Funneled Money For Abramoff*, WASH. POST, June 25, 2006, at A1; R. Jeffrey Smith, *The DeLay-Abramoff Money Trail*, WASH. POST, Dec. 31, 2005, at A1.

Striking down *Austin* would remove restraints against conduit spending, effectively eliminating any restriction on corporate political uses of treasury funds. Indeed, the United States Chamber of Commerce (“Chamber”), writing as *amicus curiae* on the merits for Citizens United, has declared its

intention to spend millions on electioneering communications (“ECs”) if allowed to mask corporate donor identities. (Chamber Br. at 6, 12).⁷

What is more consequential, individual firms will spend politically, as they have done historically, to maximize each firm’s own profits, at times to the detriment of the overall economy and the health and well-being of the nation.

C. Corporate Centralized Management Facilitates Rent-Seeking Behavior by Managers

Political giving is not always motivated by profits; it may also be a matter of private rent-seeking. Empirical research reveals that corporate managers frequently engage in political spending for personal gain, under the guise of benefiting the corporation.

An alternative reason why companies may donate is that, while companies do not have political preferences per se, their managers do. In this view, political donations need not be associated with firm performance and, in fact, subtract from firm value as they represent a cash outflow with no corresponding benefit to the firm’s shareholders. *The political donations are a form of perquisites*

⁷ The Chamber reports spending \$15.7 million on ECs in 2008. Biannual EC reports filed with the FEC show total corporate EC expenditures of \$119.5 million in 2008. The Chamber was the largest spender with \$24.3 million total, including \$8.6 million for a Chamber sub-entity called “Americans for Job Security.” These figures were compiled by the FEC at the request of CPA and The Zicklin Center.

*consumption for the firm's managers,
one that is often not transparent or
visible to shareholders.*

Rajesh K. Aggarwal et al., *Corporate Political Contributions: Investment or Agency?*, Jan. 30, 2007, available at <http://ssrn.com/abstract=972670> (last accessed July 28, 2009) (emphasis added).⁸

A 2006 survey of public company shareholders commissioned by *amicus* CPA found that 73 percent of respondents believe that corporate political giving is undertaken to advance corporate managers' private political agendas. Aaron Bernstein, *When Political Giving Doesn't Pay: Investor Groups Want Greater Board Oversight and Disclosure of the Political Contribution Process*, DIRECTORSHIP, June 1, 2008, available at <http://www.politicalaccountability.net/index.php?ht=display/ArticleDetails/i/1416/pid/188> (last accessed July 28, 2009).

Enron was renowned in the corporate world for its adept political "investments." See Ronnie J. Clayton et al., *supra*, at 13. In 1999 and 2000, Enron hedged its risks by giving \$426,500 to the Republican party and \$362,000 to the Democratic party. Richard L. Berke, *Enron Pursued Plan to Forge Close Ties to Gore Campaign*, N.Y. TIMES, Feb. 18, 2002, at A1. Enron also gave \$250,000 to the Republican National Convention's host committee and hired a

⁸ A common example of rent-seeking involves corporate managers spending corporate funds to influence personally beneficial tax changes. See generally Sanjay Gupta and Charles W. Swenson, *Rent-Seeking by Agents of the Firm*, 46 J. L. & ECON. 253 (April 2001).

Democratic strategist to help with “Democratic political outreach in the 2000 presidential election.” *Id.*

The company itself gained from these donations initially (*see* Clayton, *supra*, at 13-15), but as the company’s profits declined precipitously, executives such as Ken Lay, Jeffrey Skilling, and Andrew Fastow continued to reap the personal financial benefits obtained with shareholders’ funds. *See, e.g.*, Carrie Johnson, *Enron’s Fastow Gets 6 Years: Finance Chief’s Sentence Reflects His Help Convicting Lay, Skilling*, WASH. POST, Sept. 27, 2006, at D1.

Private rent seeking sacrifices shareholder value to the financial and political agendas of corporate managers. The practice will only increase if this Court removes existing restraints on corporate political spending.

II. CORPORATE POLITICAL SPENDING PROHIBITIONS ARE THE ONLY MEANINGFUL SAFEGUARDS AGAINST CORRUPTION

A. Coordination Rules Cannot Isolate Independent Expenditure Committees

Coordination defines the line separating independent expenditures and contributions to candidate committees. *See* 2 U.S.C. §§ 431(17)(B), 441a(a)(7)(B)(i); *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), 11 C.F.R. §§ 109.20-109.23. Any coordination between independent expenditure and campaign committees could render the expenditure a

contribution. *See Shays v. Fed. Election Comm'n*, 414 F.3d 76, 97 (D.C. Cir. 2005).

Should corporations be able to conduct independent expenditure campaigns, the Federal Election Commission's coordination rules will not be enough to prevent corruption. Even with tight regulation, "tacit coordination" between independent expenditure campaigns, run by seasoned political consultants who know how to execute a successful independent expenditure campaign, and candidate committees is easier than one might suspect:

[T]acit coordination is easy. Those making independent expenditures can hire the pollsters and political consultants who work for a candidate's campaign, or mutual friends can guide "independent" expenditures in the direction desired by a candidate.

Jeffrey A. Miron, *Campaign Finance Regulation*, LIBRARY OF ECONOMICS AND LIBERTY, Jan. 2, 2001, available at <http://www.econlib.org/library/Columns/Mironcampaign.html> (last accessed July 28, 2009).

Sensitive to the associational interests that arise, the Federal Election Commission's coordination rules only prohibit coordination with respect to specific expenditures. 11 C.F.R. § 109.21(c). More general offers of support do not transgress the rules. Corporate representatives will have no difficulty under the rules conveying the objects of a corporate political spending program.

Even with more tightly drawn coordination rules, independent expenditure committees could effectively assist a candidate without any direct,

overt lines of communication between the two. Instead, tacit coordination arises when the independent expenditure committee hires former candidate staffers, including both political and congressional staffers, pollsters or public relations firms shared with the candidates, or by simply repeating the candidate's message.

Even if the coordination rules were up to the task, they would be insufficient to guard against the most pernicious form of corruption. Both bribes and extortion can corrupt the legislative process. Extortion is the greater danger, however, because it often leaves no trail. Nothing is given; the threat is sufficient. The threat of massive independent spending will often be sufficient to secure the regulatory forbearance or action sought.⁹

B. Objecting Shareholders and Directors Cannot Check Corporate Political Activity

Corporations are not proxies for their shareholders. While corporate managers may spend freely with expectations of reaping shareholder returns, or of simply avoiding political backlash, shareholders and directors themselves are much

⁹ Similar is the expansion of political parties' role in elections following *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), which demonstrates the broad ramifications to the campaign finance landscape that follow from a change in independent expenditure rules. See Campaign Finance Institute, *Party Independent Spending Soars*, Nov. 11, 2004, available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=55> (last accessed July 28, 2009).

more skeptical of the value of corporate political involvement. See Aaron Bernstein, *supra*. Yet shareholders and directors often cannot effectively voice their dissent.

The views of a large public corporation and its individual officers or managers do not mirror those of shareholders and employees, who often represent a diverse cross-section of the public. Though many individual shareholders and directors vocally oppose questionable uses of corporate funds, they lack the means to significantly influence corporate political spending decisions. The vast majority of stock in the United States – approximately 66 percent – is owned by institutional investors. See, Colin Diamond et al., *New Media and Retail Shareholder Participation*, BLOOMBERG LAW REPORTS, Apr. 6, 2009, at 1.¹⁰ Consequently, it is highly unlikely that aggregate corporate political spending represents the collective will of the individual or beneficial shareholders.

The voluntary contributions that a corporate PAC receives from its shareholders and employees are a more accurate measure of support of the corporation's political program. They operate under the same legal constraints as other players in the process, thus avoiding the distorting effects of the "state-conferred corporate structure that facilitates the amassing of large treasuries," which preoccupied the Court in *Austin*. *Austin*, 494 U.S. at 660.¹¹

¹⁰ Keeping with their fiduciary responsibility, institutional investors hesitate to express their political preferences.

¹¹ See also *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 163 (2003) ("The [PAC] option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of

When corporations make political expenditures without knowing how or why those expenditures yield benefits, political spending is at best a costly gamble.¹² Many corporations and active shareholders recognize that better corporate governance is associated with lower levels of political donations. See Aggarwal et al., *supra*, at 2. It may be this concern that has shareholders wanting more internal controls over corporate political giving. CPA's 2006 poll of shareholders shows that "[m]ore than 90% of respondents backed more disclosure and 84% wanted board oversight and approval of such giving." Jeanne Cummings, *Investors Seek Clarity on Campaign Giving: Pressure Grows on Corporations to Improve How They Disclose and Track Political Donations*, WALL ST. J., Apr. 5, 2006, at A4 (reporting on CPA's shareholder poll).

The Court's other concern in *Austin*, conduit spending by corporations, also impairs the ability of shareholders and directors to effectively monitor corporate political activity. The use of conduits obscures the amount of corporate political contributions and their true nature and purpose. Shareholders and directors cannot act as a check on such potentially criminal behavior by their

some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure.").

¹² Indeed, corporations frequently make political donations without even knowing exactly where the money is going. See Jeanne Cummings, *Investors Seek Clarity on Campaign Giving: Pressure Grows on Corporations to Improve How They Disclose and Track Political Donations*, WALL ST. J., Apr. 5, 2006, at A4.

corporations if the campaign finance system allows corporate donors to operate in the dark.

III. THE COURT SHOULD NOT REVERSE ITS DEFERENCE TO CONGRESS

Congress and state legislatures, acting at the behest of voters, have identified corporate political spending in candidate elections as a threat to our electoral processes. In *Federal Election Commission v. National Right to Work Committee*, this Court held that the “careful legislative adjustment of the federal election 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.” 459 U.S. 197, 209 (1982) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937)) (second citation omitted) (emphasis added). The Court acknowledged the “actual and apparent corrupti[ve]” effects of corporate money on elections and the political system, and “accept[ed] Congress’s judgment” and upheld the challenged limitation on corporate PAC solicitations. *Id.* at 209-10; accord *Beaumont*, 539 U.S. at 155.

This Court has recognized efforts to instill public confidence in government, even when doing so involves First Amendment interests. One example is *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), which upheld political prohibitions on certain executive agency employees. *Id.* at 564-65. The Court balanced the employees’ First Amendment interests against the government’s interests in promoting merits-based public employment. *Id.* at

557; *see also id.* at 567 (“Neither the right to associate nor the right to participate in political activities is absolute. . . . Nor are the management, financing, and conduct of political campaigns wholly free from governmental regulation.”) (footnote and citations omitted); *see also Nat’l Right to Work Comm.*, 459 U.S. at 207-08 (“[W]e conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b.”).

* * *

As President Roosevelt reminded Congress:

The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign—that is, to the Government, which represents the people as a whole—some effective power of supervision over their corporate use.

40 Cong. Rec. 91. This holds true in both the economic and political marketplaces.

Competition in the political marketplace is inextricably linked to competition in the economic marketplace. A competitive marketplace is an open, dynamic, and efficient one. When corporations are able to secure through politics what they cannot achieve through economic competition, oligopolies and monopolies result, which may pose as great a detriment to our economy as corruption is to our body politic.

These time-honored principles are no different today than they were at the turn of the 20th century. Our nation's leaders have always understood the dangers that unchecked corporate political spending pose to our democracy and market economy. Answering this Court's question, *Austin* and *McConnell* should be affirmed.

CONCLUSION

Respectfully submitted,

Michael T. Liburdi	Karl J. Sandstrom
James A. Ahlers	<i>Counsel of Record</i>
PERKINS COIE	Andrew H. Werbrock
BROWN & BAIN P.A.	PERKINS COIE LLP
2901 N. Central Avenue	607 14th Street N.W.
Phoenix, Arizona 85012	Washington, D.C. 20005

Counsel for *Amici Curiae* the Center for Political
Accountability and the Carol and Lawrence
Zicklin Center for Business Ethics Research at
the Wharton School

July 30, 2009