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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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QUESTION PRESENTED

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise.[1]

PLF has litigated on behalf of First Amendment speech rights in the contexts of campaign speech, corporate speech, and expressive associations. *See, e.g.*, *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (mem.); *Bd. of Regents, Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); and *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

PLF believes that the First Amendment prohibits government regulation of speech—be it political or commercial, by individuals, associations, or corporations—unless the regulation satisfies strict scrutiny. Critical to the strict scrutiny analysis is identification of the compelling state interest, which PLF believes should be limited to actual evidence of individual corruption. Moreover, PLF believes that corporate speech adds value to our democratic society and should not be treated as a malignancy that the body politic rejects.

SUMMARY OF ARGUMENT

The intersection of this Court's jurisprudence regarding the regulation of political speech during election campaigns and its jurisprudence reflecting wariness of corporate participants in the market of ideas has created an untenable situation in which First Amendment rights are based on fine distinctions applied on an almost ad hoc basis.

There are distinctions between contributions and expenditures (*Buckley v. Valeo*, 424 U.S. 1 (1976)); between contributions to candidates and to ballot propositions (*Bellotti*); between direct and indirect corporate campaign contributions (*Beaumont*); between issue advocacy advertisements and express advocacy/functional equivalent advertisements (*Fed. Election Comm'n v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 127 S. Ct. 2652 (2007); *McConnell*); between individuals and corporations (*Fed. Election Comm'n v. Nat'l Right to Work Comm. (NRWC)*, 459 U.S. 197 (1982)); between business interests and "advocacy groups" (*Fed. Election Comm'n v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986)); and between small advocacy groups and large ones

(*Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)). In the thirty-three years since *Buckley*, the distinctions have grown more numerous and more fine. The parsing and hairsplitting have rendered this area of the law a patchwork of contradictory opinions impacting political speech rights at the core of the First Amendment. Relatively early on, Justice White noted that *Buckley*'s distinction between contributions and independent expenditures had caused the Federal Election Campaign Act's regulations to become a "nonsensical, loophole-ridden patchwork." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 518 (1985). This situation has only grown worse. *See, e.g.*, Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after* Austin, 21 Cap. U. L. Rev. 381 (1992); Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley: *The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. Pa. L. Rev. 31 (2004), *cited in* Lillian R. BeVier, *First Amendment Basics Redux:* Buckley v. Valeo *to* FEC v. Wisconsin Right to Life, 2007 Cato Sup. Ct. Rev. 77, 78 n.9 (*Redux*).

Thus, whether or not this Court *must* overrule *Austin* and *McConnell* to protect Appellant's speech, this Court *should* overrule these decisions to (1) restore "actual quid pro quo" corruption as the sole justification for restricting political speech rights, and (2) acknowledge the value of corporate participation in public debates, including debates during the course of elections. In so doing, this Court can revivify "the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate." *Austin*, 494 U.S. at 679-80 (Scalia, J., dissenting).

ARGUMENT

I

RESTRICTIONS ON CORE POLITICAL SPEECH MAY BE JUSTIFIED ONLY BY ACTUAL EVIDENCE OF QUID PRO QUO CORRUPTION

This Court has held that "contribution . . . limitations operate in an area of the most fundamental First Amendment activities," and such limitations "impinge on protected associational freedoms." *Buckley*, 424 U.S. at 14, 22. Therefore, burdens on contributions may be sustained only if the State demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. at 387-88 (affirming standard of review articulated in *Buckley* in assessing the validity of a Missouri state law imposing a limit on political contributions). *Buckley* held that "the prevention of corruption and the appearance of corruption" is a "constitutionally sufficient justification" for a limit on contributions. *Buckley*, 424 U.S. at 25-27; *see also NCPAC*, 470 U.S. at 496-97.

This Court usually defers to Congress' judgment that corporate political speech is of a type more prone to actual corruption and the appearance of corruption, thus justifying greater regulation than it would countenance for individuals. *See, e.g.*, *NRWC*, 459 U.S. at 210; *NCPAC*, 470 U.S. at 497. But this distinction between natural and corporate persons, and their respective tendencies toward corruption, does not justify this Court's continued acceptance of a campaign

finance regulatory regime that, after more than three decades of attempts, has utterly failed to achieve its stated ends. *See* Bradley A. Smith, *The John Roberts Salvage Company: After* McConnell*, A New Court Looks to Repair the Constitution*, 68 Ohio St. L.J. 891, 900 (2007). The core political speech protections of the First Amendment should be open to all equally—to the millionaire as well as to the grassroots entity that selects the corporate form to facilitate the dissemination of its message.

In the aftermath of Watergate, the Court was understandably concerned about corruption, election law abuses, and the public's subsequent loss of faith in government. *Buckley*, 424 U.S. at 27 n.28. *Buckley* presumed that political contributions can cause corruption or a public perception of corruption, even though no evidence to that effect had been adduced. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1, 18 & n.84 (2001) (*Incorporating Corporate Governance*). *Cf.* Allison R. Hayward, *Revisiting the Fable of Reform*, 45 Harv. J. on Legis. 421, 424 (2008) (observing that much of the account of state and federal regulation of corporate political speech over the last century that the Court has used to uphold corporate speech limitations "is more fable than history"). This presumption allowed the Court to elude questions as to the amount and kind of evidence required to support an allegation of corruption or the appearance of corruption. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 98-99 (1999).

The notion of "corruption" as a justification for corporate political speech restrictions was considerably broadened in *Austin*, 494 U.S. 652. There, "corruption" ceded place to the even more loosely defined phrase, "corrosive and distorting effects." *Id*. at 660. This latter definition expanded the compelling state interest well beyond the *quid pro quo* interest identified only 16 years before in *Buckley*. Under *Austin*'s definition of corruption, it is nearly impossible to discern whether regulation is a permissible attempt to purge corruption from politics, or whether the regulation is an impermissible attempt to equalize influence. *See* Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 851 (1985) (describing corruption as "an 'essentially contested concept,' that is, a concept containing a descriptive core on which users of the concept can agree roughly, but so unbounded and so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible").

Once corruption is perceived beyond the relationship between the contributor and the candidate, the entire electoral process is threatened; corporate speech limitations intensify this threat through their distortion of actual expressive activity. *See* Timothy Sandefur, *What Part of "No Law" Don't You Understand?: Getting Government Out of the Politics Business*, 12 Nexus 135, 145 (2007). "Within this enlarged framework, legislative intent may more easily expand from the eradication of a particular evil, to the eradication of a larger class of evils, and even to the effectuation of some model of a greater good." Miriam Cytryn, Comment, *Defining the Specter of Corruption:* Austin v. Michigan State Chamber of

Commerce, 57 Brook. L. Rev. 903, 937 (1991) (*Defining the Specter*).

Under the *Austin* standard, questions of evidence largely disappeared. After all, if public opinion polls suggest a significant agreement with the premise that "special interest groups" or "corporate" money has a corrosive impact on the political process, then the government can freely regulate speech rights. This does a disservice to the Constitution. *See* Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. Pa. J. Const. L. 783, 815 (2001) ("[I]n no other case of speech regulation has the Court been willing to accept evidence of public perception of a compelling interest, rather than existence of the interest itself, to justify restrictions on expression.); *see also* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 589, 617-29 (1991) (arguing that *Austin* is an unjustified departure from precedent because it redefines corruption as unfairness instead of the appearance or actuality of bribery and this redefinition seems to justify legislative efforts to equalize speech by restricting the voices of certain speakers). This Court has already noted the constitutional peril latent in the *Austin* corruption rationale, which taken to its natural conclusion "would call into question [the Court's] holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all First Amendment rights." *WRTL*, 127 S. Ct. at 2656.

Professor Ronald Levin identifies at least three problems with the Court's reliance on public perceptions of corruption rather than evidence of actual corruption: First, it "invites regulation on too indiscriminate a basis." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 177 (2001) (*Fighting the Appearance*); *see also* Smith, *supra*, at 920. In rough-and-tumble politics, accusations of wrongdoing are flung at any candidate. All fund-raising efforts result in accusations that the candidates are beholden to special interests. Levin, *Fighting the Appearance*, *supra*, at 177 ("The knowledge that a particular type of fund-raising has been drawn into question in an editorial or an advocacy group's press releases is not a reliable guide to deciding whether it should be suppressed."). This shift in focus allows legislators a stronger hand in election regulation, as they need only point to a disproportionate impact and identify the source to justify content based regulation. Cytryn, *Defining the Specter*, *supra*, at 949-50.

Second, reliance on public perceptions means that advocates of "reform" can make wide-ranging accusations of corruption, and then rely on the fact that some people believe the charges as a reason to justify regulation. Levin, *Fighting the Appearance*, *supra*, at 178. *Cf. Austin*, 494 U.S. at 684 (Scalia, J., dissenting) (noting that, pursuant to the appearance of corruption standard, "anything . . . deem[ed] politically undesirable can be turned into political corruption—by simply describing its effects as politically 'corrosive'").

Third, if perceptions of corruption suffice to impose greater regulation, the "reformers" will then simply have more occasions for accusations of

noncompliance. The readiness of the campaign finance watchdogs to cry "corruption!" means that candidates and their campaign staff members who make judgment calls on debatable issues will be under a microscopic scrutiny; this is an untenable situation in real life. *Id.*[2] This Court should require evidence of actual *quid pro quo* corruption to justify infringement on core political First Amendment rights, rather than permit reliance on "gossip and newspaper citations." Robert F. Bauer, *Going Nowhere, Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives*, 51 Cath. U. L. Rev. 741, 758 (2002).

Importantly, there is no evidence that corporations—as an identifiable group—are corrupt or introduce corruption into the political process, at least to any greater degree than individuals.[3] *See, e.g.*,

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[2] In 2005 (the most recent year for which data are available), California's Fair Political Practices Commission (FPPC) reported that it opened over 870 enforcement cases. FPPC, *Year in Review: 2005* at 13, *available at* http://www.fppc.ca.gov/Library/2005annual.pdf (last visited July 24, 2009).

[3] The Court should be careful to distinguish corruption from legitimately effective and persuasive speech.

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Bellotti, 435 U.S. at 790 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)). Even so, corporate contributions cannot guarantee legislation favorable to business interests. The social welfare programs of the New Deal and Great Society, and the current expanding federal regulation of the tobacco and drug industries, were enacted over the objections of (continued...)

BeVier, *Redux*, *supra*, at 112 n.162 (citing sources). Hence, *Austin*'s and *McConnell*'s abandonment of the core political speech protections of the First Amendment, *see* BeVier, *Redux*, *supra*, at 83; Erik S. Jaffe, McConnell v. FEC*: Rationing Speech to Prevent "Undue" Influence*, 2004 Cato Sup. Ct. Rev. 245, 279, was entirely unjustified. For, despite research intended to demonstrate that corporations exert considerable influence in ballot campaigns, *see, e.g.*, Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505, 542-47 (1982); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. Miami L. Rev. 377, 391-406 (1985), the many and varied intangibles influencing any election make it extremely difficult to identify a specific causal relationship between contributions and electoral or legislative events. "How can one prove that voters were overwhelmed by spending, rather than convinced by substantive arguments, other initiative backers, or the inept advertisements for the other side?" Adam Winkler, *Election Law as Its Own Field of Study: The Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1249 (1999); *see also* Jaffe, *supra*, at 289 ("Money only buys speech, which will be effective or not depending on whether voters are persuaded by the message."). The Court should move away from the amorphous standard of "potential corruption" alleged without

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[3] (...continued)
corporate America. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 247 (1998) (*General Motors*).

evidence and demand an evidentiary showing of actual corruption before permitting the government to silence political speech.

II

CORPORATE SPEECH ADDS VALUE TO A DEMOCRATIC SOCIETY

> The First Amendment is first and foremost a denial of government power. It is not a catalogue of favored and disfavored forms of speech. It is by no means a vehicle for rendering a prejudice against profit-motivated speech the supreme law of the land. It leaves to each of us the choice of what and how to communicate and whether to communicate at all. There exists no lawful "preferred" mix of ideas, no required speech or disallowed speech. No free speech and press model is mandated by the First Amendment. Rather, each model is descriptive of that government-free environment mandated by the First Amendment.

Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (Sept. 23, 1991), *available at* http://www.cato.org/pubs/pas/pa-161.html (last visited July 24, 2009). Expressive associations have a long-standing, constitutionally protected role as part of the political process. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). Corporations are one form of expressive association. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion)

("Corporations . . . contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (quoting *Bellotti*, 435 U.S. at 783)). *Austin* acknowledges this proposition for media corporations, 494 U.S. at 667, but makes an inappropriate content-based distinction to give other types of corporations lesser protection. *See id*. Corporations are not an alien force requiring a barrier to protect the political process from its influence. The open political process of a democratic society is the clash of all sorts of different viewpoints, many driven by economic interests and many driven by noneconomic interests. To allow entrenched politicians to pick and choose which among the disparate interests will be hobbled is antidemocratic. *Cf*. Jaffe, *supra*, at 285 (noting the incumbent favoritism of campaign finance laws); Smith, *supra*, at 906-07 (same). The fact that private associations have been a dynamic and sometimes positive influence on politics over our nation's history does not mean that modern economic organizations are not. *See Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) ("Freedom of speech is not good government because it is in the First Amendment; it is in the First Amendment because it is good government.").

Free speech adds three types of value to society: First, free speech bolsters the pursuit of truth. Second, free speech provides a check on other sources of power, thus supporting a stable, progressive, uncorrupt, and responsive democratic government. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."). Third, free speech serves values of self-realization, personal and cultural development, autonomy, and autonomous

decision-making. R. George Wright, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 Tenn. L. Rev. 335, 337-38 (2001). Accordingly, the First Amendment guarantees that citizens may speak, publish, and join together in groups to engage in political activity to try to achieve the substantive ends they deem desirable. Lillian R. BeVier, *Campaign Finance "Reform" Proposals: A First Amendment Analysis*, Cato Policy Analysis No. 282 (Sept. 4, 1997), *available at* http://www.cato.org/pubs/pas/pa-282.html (last visited July 24, 2009) (citing *NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Alabama*, 357 U.S. 449 (1958)). They may attempt to persuade others and to acquire political influence, and the government may not interfere with, punish, repress, or otherwise impede their efforts. *Id.* (citing *Hague v. CIO*, 307 U.S. 496 (1939)). These protections exist not so much because corporate speech as corporate speech is the good. Rather, allowing corporations to speak facilitates the airing of more speech, which *is* a good. *See* BeVier, *Redux*, *supra*, at 108-09.

In *Austin* and *MCFL*, the Court suggested that election-related spending by business corporations is somehow less deserving of protection than speech by individuals or political organizations, *Austin*, 494 U.S. at 659-60; *MCFL*, 479 U.S. at 257, but this criticism is based upon the constitutionally suspect "complaint that [corporations] are wealthy and that it is somehow wrong to use wealth to support political speech." Jaffe, *supra*, at 287; Sandefur, *supra*, at 150-51. Moreover, the proposition is inconsistent with *Buckley* in two ways: First, by justifying regulation with the lack of public support for corporate views, the Court contradicted the central and long-standing *Buckley* rule against the equalization of relative voices, *Austin*,

494 U.S. at 659, even while purporting to leave it in place. *Id.* at 659-60. *See also* Jaffe, *supra*, at 287-88; Smith, *supra*, at 919. Second, *Austin* relied on the grant theory (that a corporation is nothing more than an artifice granted certain benefits by the state) in basing its ruling on the special privileges of corporations. 494 U.S. at 659. This reasoning is not only conclusory, *see* Sandefur, *supra*, at 150, it also raises a troubling implication that incorporation is predicated on unconstitutional conditions. Joo, *Incorporating Corporate Governance*, *supra*, at 80; *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (public school teacher's employment cannot be conditioned on refraining to engage in otherwise constitutional speech).

Corporations add to societal values in numerous ways. *Cf.* Michael Novak, *Toward a Theology of the Corporation* 1 (1981) ("Neither participatory democracy nor capitalism could exist without the corporation."). For example, corporations have become significant engines of charitable giving. *See* Committee Encouraging Corporate Philanthropy, *Giving in Numbers* 4 (2008), *available at* http://www.corporatephilanthropy.org/pdfs/benchmarking_reports/GivinginNumbers2008.pdf (last visited July 24, 2009) (155 surveyed companies donated over $11.6 billion in cash and products).

Moreover, corporations play an important role in diffusing and checking societal and governmental accumulations of power. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1243 (1988) ("Commercial opportunity meant more than just personal independence. Equally important, it guaranteed a balance of economic power in society.").

Viewed in this light, governmental suppression of corporate speech takes on

> potentially ominous implications for avoiding political power's centralization. One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority.

Redish & Wasserman, *General Motors*, *supra*, at 264.

A message's overall nature may change when the messenger changes; similarly, the degree of effectiveness and credibility may change depending on the source. *See Bellotti*, 435 U.S. at 791-92 (stating that the people in a democracy "may consider . . . the source and credibility of the advocate"); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57, 65 ("Many listeners find that the identity of the source affects the worth or at least their evaluation of the speech."). The same statement from different speakers may constitute a different message. As the Court has noted, an "espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board." *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994); Redish & Wasserman, *General Motors*, *supra*, at 257. Corporate speech thus provides both a message and a messenger of value to the bustling market of ideas.

Perhaps most importantly, corporations help the individuals who form them to achieve their fullest human potential. *Cf.* Novak, *supra*, at 37-43

(observing that corporate activity bears the hallmarks of human creativity, liberty, socialization, and insight, among others). Specifically in the context of First Amendment values, corporations provide "individuals the ability to organize in a form that would allow them to engage efficiently in collective action." Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1110-11 (2002); *see also* Jaffe, *supra*, at 289-90 (observing that restrictions on the funding of speech are tantamount to restrictions on speech itself).

These "corporate" goods—especially the good of corporate speech—are in no way undercut by the happenstance that corporations operate with and spend "someone else's money." The corporate form does not enable corporations to accumulate money from their customers. Adam Winkler, *Beyond* Bellotti, 32 Loy. L.A. L. Rev. 133, 158 (1998) ("[T]he business association's form is irrelevant to its ability to attract customers and sell services or products."). As for shareholders and their role in directing corporate speech, this Court has, to be sure, expressed concern that shareholders' disincentives to disassociate from a for-profit corporation are so overwhelming as to implicate the shareholders' First Amendment rights not to associate with expressive activity. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977). But, as Professor Sitkoff explains, the Court's analysis of economic disincentives to disassociate does not comport with reality.

> The minority shareholder who invests in stock for income, which is the precondition to having an economic disincentive to dissociating, is by hypothesis indifferent

> between companies with comparable rates of return. He therefore has no reason not to sell his stock in the politically active company and then invest the proceeds in another company that is not politically active. In contrast, the minority shareholder or member of the incorporated nonprofit political association often faces an incentive not to dissociate because of the shortage of alternatives. There is a thick market for corporate securities; the menu of prospective political associations is less robust.

Sitkoff, *supra*, at 1120 (footnotes omitted). *See also Int'l Ass'n of Machinists & Aerospace Workers v. Fed. Election Comm'n*, 678 F.2d 1092, 1118 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982) (shareholder is not legally or practically obliged "to continue his investment, is not compelled to speak, in violation of his First Amendment right to remain silent" by a statute permitting corporate political action committees). Therefore, the Court's concerns about "disincentives to disassociate" do not provide a sufficiently compelling reason to deny corporate speech full protection to engage in electoral debates. This Court should not hesitate to affirm the enduring importance of corporate speech in our society.

CONCLUSION

Upon reviewing the Court's decisions since *Buckley*, Judge Patricia M. Wald presciently questioned whether the rulings "have any real roots in the values enshrined in the first amendment? Do these fine distinctions contribute more to freedom of association or to mass cynicism about how the electoral system works?" Patricia M. Wald, *Two Unsolved*

Constitutional Problems, 49 U. Pitt. L. Rev. 753, 758 (1988).

The Court's attempt to craft laws restricting political speech in the name of campaign finance reform has seen our precious free speech rights moving further from the strong trunk at the center of the First Amendment to a precarious balance on the outermost branches and leaves. Today, the law of campaign finance exists mostly as a series of distinctions in which the First Amendment protection of free speech grows ever more attenuated. By overruling *Austin* and *McConnell*, this Court may both greatly simplify this area of the law, and reinvigorate the core political speech protections of our democracy.

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