

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 *AMICUS CURIAE*
AMERICAN INDEPENDENT BUSINESS ALLIANCE
IN SUPPORT OF APPELLEE
ON SUPPLEMENTAL QUESTION**

—◆—
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QUESTION PRESENTED

Whether, for the proper disposition of this case, the Court should overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002.

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INTEREST OF *AMICUS CURIAE*¹

The American Independent Business Alliance (AMIBA) is a U.S. non-profit organization helping communities design and implement programs to support independent locally-owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA also engages in public education to raise awareness of the economic, civic, environmental and cultural importance of community-based enterprise.

AMIBA supports 65 affiliates (community organizations) across 31 states and has helped many more cities and towns with programs to support their local independents. AMIBA's affiliates represent approximately 15,000 independent businesses covering virtually every sector of business, many of which face direct competition from chains and other large corporations. Many large corporations have converted their economic power into political favors that extract subsidies from taxpayers, stifle enforcement of anti-trust laws, create legal tax evasion opportunities, and other rules that disadvantage small business and the constituents of AMIBA affiliates. AMIBA maintains that enabling corporations to further increase their

¹ Pursuant to Rule 37.6, counsel for *Amicus* state that they authored this brief, and that this brief was not authored by counsel for any party. No person or entity other than *Amicus* and its counsel made a financial contribution to this brief. Consent to the filing of briefs *amicus curiae* has been granted by counsel for appellee, as indicated on this Court's docket. A letter of consent by appellant has been filed with this Court.

political power would harm the political process and undermine genuine market competition. Political freedom and the dignity of citizens are threatened far more by treating corporate entities as if they were real citizens than by upholding common-sense, democratically enacted rules limiting participation by for-profit corporations in electoral campaigns. AMIBA therefore urges that this Court should not overrule its decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), nor the portion of *McConnell v. FEC*, 540 U.S. 93 (2003), upholding Section 203 of the Bipartisan Campaign Reform Act of 2002 as facially valid.



SUMMARY OF ARGUMENT

This Court's decisions in *Austin* and *McConnell* both are premised on the long-standing recognition that "the special characteristics of the corporate structure require particularly careful regulation" with respect to corporate participation in the electoral process. *FEC v. Nat'l Right to Work Committee* ("*NRWC*"), 459 U.S. 197, 209-210 (1982). The request to overrule those decisions purports to bring into play not merely the question whether and under what conditions non-profit, expressly ideological corporations require First Amendment protection for the use of corporate funds in elections, but whether the deployment of huge corporate treasuries amassed through for-profit activities may ever be treated differently from individual citizen participation in

electoral campaigns. Supplemental Brief for Appellant at 3, 6-9. Accordingly, the wisdom of overruling those decisions must be evaluated by understanding the structure and role of large, publicly traded corporations and the implications of according these artificial entities the same protections for electoral participation that are enjoyed by citizens.

The governance system of such corporations is highly successful for the pursuit of profit, making them important instruments in the economic sphere. But the very factors that make the corporate form an effective instrument of wealth accumulation are the factors that make it inappropriate for corporations to claim the full panoply of First Amendment protections for political speech and participation that are enjoyed by natural persons. Because of the way corporations are structured, corporate speech does not express the political views of any individual or group of individuals associated with the corporation. Moreover, the constraints that drive a corporation's political speech – the requirement that corporate actions all must be calibrated toward profit – directly undermine the notion that a corporation can be a free participant in the marketplace of ideas. And precisely because a corporation enjoys significant state-created economic advantages designed for the narrow purpose of furthering wealth-accumulation, corporate participation in candidate campaigns promotes market entrenchment and corrupts the political marketplace in a fundamentally undemocratic manner.



ARGUMENT

THE COURT SHOULD NOT OVERRULE *AUSTIN* OR *MCCONNELL* BECAUSE BOTH DECISIONS PROPERLY RECOGNIZE THE FUNDAMENTAL DIFFERENCES BETWEEN CORPORATIONS AND INDIVIDUALS WITH RESPECT TO FIRST AMENDMENT PROTECTIONS FOR PARTICIPATION IN ELECTORAL CAMPAIGNS.

A. Because Corporate “Speech” Is Legally Constrained and Does Not Reflect Views of Any Citizen, Business Corporations Do Not Have a Legitimate Claim to First Amendment “Expressive” Protection as Speakers in the Marketplace of Ideas.

An understanding of the structure and role of large, publicly traded companies confirms the wisdom of the long-standing distinction that Congress, the states and this Court have drawn between electoral participation by individuals and electoral participation by state-created, for-profit corporations.

Publicly traded corporations are among our most important institutions for wealth accumulation. State law structures business corporations to enable them to accumulate large quantities of capital in order to create jobs and produce useful goods and services.

Corporations are regulated internally largely by state law fiduciary duties that require the various people working for them (employees, managers and other agents) and their governing board of directors

to act in the corporation's interest as defined by state law. Critically, state law demands that managers use corporate funds to act in the interest of securing financial return. *See, e.g., Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

Because a business corporation's speech is the result of legally imposed fiduciary duties, corporate speech cannot be said to express the autonomous political views of any individual or group of individuals associated with the corporation, whether as shareholder, manager, customer, or employee.

Corporate advocacy certainly does not reflect the political views of shareholders (many of which, in any event, are themselves highly regulated legal entities rather than autonomous human citizens). Indeed, corporate law generally bars shareholders from directing business decisions of the corporation. *See, e.g., Spiegel v. Buntrock*, 571 A.2d 767, 772-73 (Del. 1990) ("A basic principle of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."); Securities Exchange Act Rule 14a-8(i), 17 C.F.R. § 240.14a-8(i) (listing numerous grounds on which corporations may exclude shareholder proposals from proxy statements). Thus, if a corporation deploys corporate funds in electoral campaigns, the business decision on how best to deploy such funds is

not dictated by the political views of any individual shareholder or group of shareholders, but instead is determined by management.²

² Electoral spending to enhance shareholder profit cannot be deemed shareholder speech merely by adopting the fiction that shareholders abandon all interests apart from profit maximization when they become shareholders:

[O]ne might say that whatever else shareholders want in the rest of their lives, surely they all want higher share values. But human shareholders who are also neighbors or employees or customers or friends may have other commitments beyond an extra nickel in the quarterly dividend. Even on purely economic issues, since shareholdings in this country are not only wide but shallow, many shareholders will find that their basic interests are aligned more with employees, stability or customers than with the highest possible value for their shareholdings: a decrease in your phone bill is likely to be worth more to you than the commensurate drop in the price of the telephone company shares held by your pension fund. Only foreign shareholders with little connection to the American economy or politics beyond their shareholdings approximate this conventional image of a shareholder always interested in higher stock returns.

* * *

The humans who stand behind the shares have various and conflicting goals, as all people do: they want their shares to increase in value, of course, but they may also want decent jobs for their kids or neighbors, attractive and safe cities, a clean environment, and other things that, from time to time, conflict with the increase in value of their shares. The corporate law system eliminates all these conflicting goals, leaving the agents with a simple and clear directive: maximize shareholder value.

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But that does not mean that corporate political participation can be understood to express the political views of corporate officers. A corporate officer would be violating her fiduciary duty to shareholders if she permitted her own political views and interests to determine how she spends corporate general treasury funds. *Corbin v. Corbin*, 429 F. Supp. 276, 281 (M.D. Ga. 1977) (corporate funds “cannot be used to meet an officer’s personal desires”).

Moreover, the fiduciary duty to deploy corporate funds in the interest of the corporation does not even mean that a corporate officer may direct corporate electoral spending according to her understanding of the political views of shareholders (even assuming such preferences could be determined in any practical manner). The duty of the corporate officeholder is to maximize corporate profit, not to represent shareholder preferences regarding candidates for office. Corporate managers have neither the right nor the ability to determine how the real human citizens behind their shares would balance corporate profits against other individual or social goals.

Nor is there any credible argument that corporate political speech can be thought to express the political views of employees or customers, either individually or as a group. While those groups are the

Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 Iowa L. Rev. 995, 1036-37, 1040-41 (1998) (hereafter, “Greenwood, *Essential Speech*”).

primary source of any successful corporation's funds, neither has the ability to direct corporate electoral speech. Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 Conn. L. Rev. 379, 411-412 (2006); Greenwood, *Essential Speech*, at 1052.

In short, corporate speech is the result of officials acting in accord with their legally imposed duties, without reflecting the commitments of any individual citizen or group of citizens. Corporate campaign expenditures are the result of fiduciary law and bureaucratic imperative, not of expression by any of the people affiliated with the corporation.

Consequently, the individualistic, anti-majoritarian aspects of First Amendment protections are completely inapplicable to corporate electoral spending. First Amendment protections against majoritarian enactments have as an important goal the protection of free expression and individual autonomy as key attributes of the dignity of citizens. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (noting that "right to express any thought, free from government censorship" is necessary "to assure self-fulfillment for each individual" as well as "to permit the continued building of our politics and culture"); *Cohen v. California*, 403 U.S. 15, 24 (1971) (First Amendment places "the decision as to what views shall be voiced largely into the hands of each of us," not only to promote a "more perfect polity," but also "in the belief that no other approach would comport with the premise of individual dignity and choice

upon which our political system rests.”); Thomas I. Emerson, *Toward a General Theory of the First Amendment* 4-7 (1966). Because corporate speech in furtherance of the corporation’s legally imposed function is not the expression of anyone’s individual autonomy or dignity, this key rationale for First Amendment protection is unavailable as a basis for judicial intervention on behalf of corporate electoral participation.

B. Corporate Electoral Participation Interferes with Republican Self-Government, Contrary to the First Amendment’s Political Goals.

It is not merely the absence of individual expression when a corporation speaks, but also the absence of any choice about the goals that a corporation may pursue through its electoral spending, that differentiates corporate political participation from that of individuals or other organizations. Publicly traded business corporations are legally structured to be effective in economic markets. To be economically effective, they must act with a single voice toward a single goal – profit maximization – while setting aside the value conflicts that drive politics. *Dodge v. Ford Motor Co.*, 170 N.W. at 684 (“the discretion of the directors is to be exercised in the choice of means to attain that end [the profit of the stockholders], and does not extend to a change in the end itself”); *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979) (corporate expenditures not directed to enhancement of shareholder profit constitute “waste” of corporate

assets); Am. Law Inst., 1 Principles of Corp. Governance § 2.01 (1994) (corporate action should be directed “with a view to enhancing corporate profit and shareholder gain”). Thus, before the corporation enters the political arena, its choice of possible *electoral* goals has been narrowed by law to only one: the enhancement of corporate earnings.

For this reason,

corporations entering the political sphere cannot be conceptualized as groups of citizens. Unlike groups of citizens, who must always debate the proper and shifting balance of conflicting values, corporations will pursue a single value to the detriment of all others. . . . The goal – increasing the value of the shares – is set and debate is restricted only to the technical issue of the best means to reach this destination[.]

Greenwood, *Essential Speech*, at 1052.³

³ Even when a corporation engages in activity related to the public welfare or for other reasons not directly business-related, a business-related motive for the conduct generally is required. See, e.g., *Union Pac. RR Co. v. Trustees, Inc.*, 329 P.2d 398, 401 (Utah 1958) (concluding that corporate directors would not have made contribution to non-profit organization “if they were not confident that their company, presently and directly . . . , would receive a quid pro quo as the resultant of good will engendered by contributions”); *Gilbert v. Norfolk & W. Ry. Co.*, 171 S.E. 814, 815 (W. Va. 1933) (“Consistent with the general rule that a private business corporation is carried on primarily for the profit of its stockholders, . . . it has, nevertheless, been generally held that such corporations may, *for the ultimate benefit of the*

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Corporate electoral speech thus differs fundamentally from the electoral speech of citizens. Of course, individuals may sometimes participate in politics with a single-issue focus. They may decide to base their electoral decisions solely on a candidate's position on abortion, or on the environment, or health policy, and citizens often vote their business interests – but no individual is required by law to do so. Even the most single-minded individual may, in theory, be persuaded to embrace broader or different goals by other participants in the political marketplace. In contrast, publicly traded business corporations are legally bound to use their resources to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.⁴

corporation itself translated into profit, use the funds of such corporation for purposes which might appear directly to be charitable and humanitarian.”) (emphasis added); *see also* Am. Law Inst., 1 Principles of Corp. Governance § 2.01, comment f (commenting that most corporate conduct undertaken for legal, ethical, public welfare, humanitarian, educational, or philanthropic purposes is usually “consistent with economic self-interest”).

⁴ This analysis does not apply to a not-for-profit corporation formed explicitly to represent citizens in a political controversy. When organizational funding comes from donations or mission-related revenue rather than purely commercial sales of a product or service, the organization is fairly viewed as an “amplifier” for the speech of its (human) donors. *McConnell v. FEC*, 540 U.S. at 136. As with any organization, non-profits will simplify and change the views of their donors. *See*, Robert Michels, *Political Parties: A Sociological Study of the*

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Citizens participating in electoral debate, moreover, not only make their own judgments, but spend their own money. Corporate managers spend money that is not their own while setting aside their own judgment as to the ultimate merits of the political position they take. In effect, they act as agents for a legally mandated profit-maximization principle, not any human principals. Greenwood, *Essential Speech* at 1041.

Because of these fundamental differences between an individual's participation in the electoral arena, and the participation of an artificial entity that is structurally and legally incapable of independently choosing the goal for its electoral advocacy, *Austin* and *McConnell* were correct in understanding that judicial intervention to protect the latter is not warranted in every circumstance where it might be justified to protect the former. See *California Med. Assoc. v. FEC*, 453 U.S. 182, 201 (1981) ("The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by

Oligarchical Tendencies of Modern Democracy (Eden and Cedar Paul trans., Hearst's Intl. Library Co. 1915) (describing how the views of leaders diverge from those of their supporters in the "iron law of oligarchy"). However, unlike publicly traded for-profit corporations, non-profit managers are managing funds donated specifically for the corporation's cause – not accumulated due to economic activity. This Court's precedents appropriately distinguish between the two. *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238, 260-61 (1986).

Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process”); *NRWC*, 459 U.S. at 210-11 (restriction on solicitation by non-profit, noncapital stock corporation for contributions to campaign committee permissible even though “governmental interest in preventing both actual corruption and the appearance of corruption . . . [was] accomplished by treating unions, corporations, and similar organizations differently from individuals.”) (emphasis added); *Pacific Gas & Electric Co. v. Public Utilities Comm’n of California*, 475 U.S. 1, 35 (1986) (Rehnquist, J., dissenting) (“The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.”)⁵

⁵ This case involves federal legislation challenged under the First Amendment. This makes it a particularly inappropriate vehicle to reconsider *Austin*, which arose under the Fourteenth Amendment and raises federalism issues not present here. Corporate due process rights are generally attributed to *Santa Clara County v. Southern Pac. RR Co.*, 118 U.S. 394 (1886), although the relevant ruling appears only in the Reporter’s summary of oral argument and is entirely unreasoned. See Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* 106-108 (2002). No subsequent case has offered a reasoned explanation of how the language, structure or intent of the Fourteenth Amendment can be extended to protect corporations. Linguistically, while corporations are “legal persons” for some purposes, the plain meaning of “person” in the Fourteenth Amendment is human

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Requiring corporations to use segregated funds raised from like-minded officers and shareholders for electoral participation, instead of using the corporation's general treasury funds – the requirement upheld in *Austin* and *McConnell* – enables individuals to associate for electoral goals that serve the corporation if they find those goals worthy of support. It accomplishes this, moreover, without enlisting the use of for-profit corporate general treasury funds for electoral expression that the shareholders, bondholders, customers or employees who created those funds may not support. *See NRWC*, 459 U.S. at 208 (noting that restrictions on corporate or union electoral participation “protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed”); Adam Winkler, *McConnell v. FEC*, *Corporate Political Speech*,

beings: only humans are “born or naturalized,” U.S. Const. amend. XIV, § 1, and only humans qualify as “persons” for the Amendment’s Apportionment Clause, U.S. Const. amend. XIV, § 2. Moreover, the first modern business corporate laws barely predate the Twentieth Century. It is implausible that the original intent of the Civil War Amendments (or the First Amendment) was to radically restrict future citizens’ ability to regulate a legal form that did not yet exist in its modern form. Perhaps recognizing *Santa Clara*’s weakness, the earliest cases following it permitted legislative classifications based in part on corporate status. *See Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 29 (1889); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-210 (1888); *Home Ins. Co. v. State of New York*, 119 U.S. 129, 133 (1886).

and the Legacy of the Segregated Fund Cases, 3 Elec. L. J. 361 (2004) (noting long tenure of doctrine upholding segregated fund requirement for corporate and union political participation).

The arguments set forth above also show why the rights of listeners do not provide an adequate basis for judicial intervention to promote corporate general treasury spending in electoral campaigns. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), relied on the rights of listeners in the political marketplace in striking down a ban on corporate spending in a referendum campaign. But reliance on the rights of listeners should not be a sufficient basis to ignore the critical differences between corporations and individuals when it comes to participation in electoral campaigns. Nothing in *Bellotti*, which addressed a complete ban on any corporate spending on the state referendum in question – even through a separate segregated fund – suggested that the First Amendment might bar the century old ban on direct corporate participation in federal election campaigns. See Tillman Act, 1907, ch. 420, 34 Stat. 864; see also Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159; 2 U.S.C. § 441b. The right of individuals as individuals to direct their own political expenditures on electoral activity remains a compelling basis for requiring the use of segregated funds for corporate electoral participation.⁶ As Justice

⁶ In addition, for all the reasons noted earlier, the “volume” of corporate speech – its ability to be heard in the political
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Brennan, a champion of the First Amendment, noted in *Austin*, “A’s right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication.” 494 U.S. at 675 (Brennan, J., concurring) (quoting Victor Brudney, *Business Corporations and Stockholders’ Rights under the First Amendment*, 91 Yale L. J. 235, 247 (1981)).

C. Corporate Participation in Candidate Campaigns Promotes Market Entrenchment, Contrary to First Amendment Goals of Self-Governance.

Corporate assets result from prior success in the economic marketplace and the special privileges of state corporate law.⁷ Corporate decision-makers will

marketplace – has no relation to the level of commitment any individual may have to the speech. When a citizen’s individual spends funds in the electoral arena, the expenditure requires a personal sacrifice that presumably reflects the citizen’s genuine commitment to some electoral goal. Not so in managerially controlled business corporations; if managers believe in good faith that the corporate interest will be promoted by spending corporate money, they must do so, regardless of their, or anyone else’s, views of a fitting electoral goal.

⁷ See, e.g., *MCFL*, 479 U.S. at 258 (“The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”); *Austin*, 494 U.S. at 658-59 (“State law grants

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use those assets to promote law that will grant the firm advantages in the next iteration of that marketplace. Incumbents, in other words, will seek to protect their incumbent privilege. This is as dangerous in the economic sphere as in the political sphere. The political First Amendment should protect the right of the people to control their institutions, even highly useful ones such as successful business corporations – not the ability of those institutions to escape political control. In a market economy, companies ought to compete based on their products and services, not the electoral clout corporate funds can buy, and the First Amendment should be no bar to the regulation necessary for vibrant economic competition.

The record before this Court in *McConnell* amply demonstrated the potential for the appearance and reality of electoral corruption created by corporate spending on electioneering communications in particular. *McConnell v. FEC*, 251 F. Supp. 2d 176, 623-24 (D.D.C. 2003) (Kollar-Kotelly, J.). The problem of corruption is closely analogous to the equally serious problem of incumbent protection.

Our market system depends on competition and innovation. Those goals are threatened if the successful businesses of the last generation are allowed

corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources”).

(by this Court) and required (by state fiduciary law and market pressures) to use their accumulated wealth to elect politicians who can be counted on to enact laws to protect the incumbent corporations from upstart innovators. When one company can obtain special tax or regulatory treatment that its closely held competitors cannot, the free market itself suffers.⁸ If we are to remain a democracy and if our

⁸ For example, family farmers and ranchers not only are handicapped by subsidies flowing to agribusiness, but also by non-enforcement of antitrust law. As a result, more than 83% of the beef packing industry nationally is controlled by four corporations (and the concentration typically is more extreme in any individual market, often leaving ranchers at the mercy of packers). Mary Hendrickson and William Heffernan, *Concentration of Agriculture Markets*, April 2007, available at <http://civileats.com/wp-content/uploads/2009/05/2007-heffernanreport.pdf>. Similarly, tax loopholes benefiting many multi-state chains allow them to legally evade income taxes, thus penalizing the majority of independent competitors that operate within a single state. Shifting income across states through paying rent or licensing fees to subsidiary shell corporations is one such example perpetuated by corporations' existing political influence. Pallavi Gogoi, *Wal-Mart Courts State Politicos: A new report shows that Wal-Mart has jacked up political contributions in states where it wants to reduce its tax bill*, *Business Week*, October 26, 2007. The Wall Street Journal reported that Walmart Stores Inc. avoids half its statutory income tax obligation by exploiting such loopholes. Jesse Drucker, *Wal-Mart's State Tax Evasion Ploy: Paying Rent to Itself*, *The Wall Street Journal*, Feb. 1, 2007. Such problems will only be compounded if this Court interprets the First Amendment to ban limits on the fiduciary obligations of corporate executives to use corporate treasury funds in electoral campaigns.

economy is to succeed, it is essential that the law structure the market and not the other way around.

Since the end of the *Lochner* era, this Court has recognized that Congress and the states, not the Court, are the appropriate bodies to determine the fundamentally political question of exactly where the economic marketplace ends and the political one begins. For all the reasons set forth here, the people acting through their elected representatives should retain the right to ensure that corporate electoral spending reflects the choices of individuals, through laws that require such spending be made through segregated PAC funds rather than from general treasury funds.



CONCLUSION

The Court should not use this case to overrule *Austin* or the relevant portion of *McConnell*. The judgment of the district court should be affirmed.

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Respectfully submitted,

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