No. 02-403

In The
Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN TAXPAYERS ALLIANCE

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INTEREST OF AMICUS CURIAE[1]

The American Taxpayers Alliance (ATA) is a nationwide, non-profit organization dedicated to government reform through grassroots organization, public education and discussion of issues and is exempt from federal income tax under Internal Revenue Code section 501(c)(4).

The issue at stake in this case is of direct concern to ATA and its donors. ATA does not have an affiliated political action committee, nor does it have members from whom it could solicit under the Federal Election Commission's solicitation rules. Therefore, ATA has a strong interest in expressing the collective voice of its donors through direct contributions to candidates.

SUMMARY OF ARGUMENT

The command of the First Amendment directly engages the non-profit organization's raison d'etre in this case because the non-profit organization's sole or primary function is to aggregate the advocacy voices of its members through communication and expression. Yet, the Government and amici argue that corporate structure, wholly unrelated to the evil sought to be prevented, trumps First Amendment concerns.

For ease of a bright-line test, the Government has imposed a broad prophylactic rule on all corporations,

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1 All parties have consented to the filing of this brief *amicus curiae*, as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its donors, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

whether for-profit or non-profit, and by doing so, has turned a blind eye to the structural, functional and constitutional differences that exist between corporations. These differences are constitutionally significant; there is no compelling or sufficient interest in treating a non-profit corporation akin to a voluntary political association in the identical manner as a for-profit, wealth-amassing corporation.

In light of the great differences between non-profits and for-profits, and in particular, the similarities of § 501(c)(4) corporations to voluntary political associations, corporations of the former sort cannot constitutionally be treated like those of the latter for purposes of the broad prophylactic rule. A corporate contribution ban is unconstitutional as applied to non-profit organizations that meet an *MCFL*-type test.

ARGUMENT

What should not get lost in the background of this case is that, first and foremost, non-profit organizations are groups of individuals that have associated for some social purpose, and are not simply some abstract, soulless commercial corporate entity. It is the rights of these associated individuals which the Constitution ultimately seeks to protect.

It cannot be disputed that associations do good things. Not only do they perform acts of charity; educate; shape and define values, policies, and culture; and lessen the burden of government, they serve to amplify the voices of individuals. Within this role, they are also concentrations of power which can buffer, or stand up to, the power of the

majority, other interest groups, and the state. In short, they are an important part of our democratic structure.[2]

Concern exists today about whether non-profit organizations will be able to continue to play their very important role in our representative democracy. Recent legislative activity, such as the Bipartisan Campaign Reform Act of 2002, severely restricts and burdens the speech of non-profit organizations. And, until the court of appeals found the prophylactic ban at issue here unconstitutional, the advocacy speech of nonprofit organizations in the form of contributions was silenced.

I. The Structural And Functional Differences Among Corporations Are Constitutionally Significant.

While the ban on corporate contributions at issue here treats all corporations the same, the fact is that not all corporations are created equal. Despite sharing corporate form, there remain significant structural and functional differences among corporations.

A. Non-profits advance important purposes which are not served by the private or public sectors.

The Government, in relying upon a broad prophylactic rule, makes no serious effort to consider variations in corporations, how corporations may differ in

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2 For this reason, non-profit associations are often referred to as the "Independent Sector," the "Third Sector," or the "Non-Profit Sector." This sector should be distinguished from the public sector (governmental bodies) and the private sector (proprietary organizations).

form or function, much less how such distinctions are relevant to a First Amendment analysis. Zechariah Chafee, Jr. pointedly observed that "[t]he men who propose suppressions, in Congress and elsewhere, speak much of the dangers against which they are guarding, but they rarely consider the new dangers which they are creating *or the great value of what they are taking away*." Zechariah Chafee, Jr., Does Freedom of Speech Really Tend to Produce Truth?, in THE PRINCIPLES AND PRACTICE OF FREEDOM OF SPEECH 334 (Haig Bosmajian ed., 1971) (emphasis added). The broad prophylactic corporate contribution ban has taken away a part of the unique role nonprofit advocacy groups play in our political life.

In the 1830s, Alexis de Tocqueville marveled at the special role nonprofits play in America's political life:

> As soon as several Americans have conceived a sentiment or an idea that they want to produce before the world, they seek each other out, and when found, they unite. Thenceforth they are no longer isolated individuals, but a power conspicuous from the distance whose actions serve as an example; when it speaks, men listen.
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> Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial association in which all take part, but others of a thousand different types – religious, moral, serious, futile, very general

> and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books. . . . [I]f they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Alexis de Tocqueville, 2 Democracy in America 512-13 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840). Tocqueville's oft quoted description of America's heterogeneous and continuously expanding sector remains pertinent today and highlights the special role non-profits continue to play in our representative democracy.

The expressive association, of which Tocqueville wrote, can be exercised in a number of ways. The simple act of associating can in and of itself be a form of expression. Americans donate money to charities, purchase magazine subscriptions and buy Girl Scout cookies simply to say something. Sometimes, this type of expression is not enough. Americans join clubs, associations and groups to coordinate and amplify their voices with those of others to make their common voice a more effective expression of their views. Unlike the purchase of magazines or cookies, sometimes we associate not just for altruistic means, but to influence public policy and get something done. As Justice Harlan noted, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v.*

Alabama, 357 U.S. 449, 460 (1958).

Associations serve another important purpose in American society. As the Court observed in *Dale*, the freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). Not only do associations facilitate individual expression, they serve as a bulwark against an ambitious majority. As one scholar noted, associations "are the hedgerows of civil society." Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841, 1853 (2001). Associations are the "critical buffers between the individual and the power of the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984); *see also* Peter L. Berger & Richard John Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond, in To Empower People: From State to Civil Society*, 145, 148 (Michael Novak ed., 1996) ("[Voluntary associations] stand between the private world of individuals and the large, impersonal structures of modern society. They 'mediate[]' by constituting a vehicle by which personal beliefs and values could be transmitted into the mega-institutions."). Associations are also the "laboratories of innovation" that clear out the civic space needed to "sustain the expression of the rich pluralism of American life." Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. at 1853 (quoting Berger & Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond, in To Empower People: The Role of Mediating Structure in Public Policy* 36 (1977)); see also *Roberts*, 468 U.S. at 622 (noting that associations are "especially important in preserving political and cultural diversity and in shielding dissident expression

from suppression by the majority."). "Most of the major reforms in American Society . . . have originated in this nonprofit sector." Lester M. Salamon, *America's Nonprofit Sector: A Primer* 9 (1992).

Support of the non-profit sector, which serves all of these important purposes, would seem to be beyond reproach because support of pluralism and diversity is the very hallmark of American representative democracy. "'E Pluribus Unum' is not a zero-sum game . . . . [T]he national purpose indicated by the unum is precisely to sustain the plures," and leads not to "balkanization" but to a stronger unum through the creation of "imaginative accommodations." Berger & Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond, in To Empower People: The Role of Mediating Structure in Public Policy* 41-42 (1977). Yet, the prophylactic rule at issue here, rather than recognizing the non-profit sector's different, yet important, functions, indiscriminately lumps the non-profit sector with the private sector in its complete ban on contributions.

B. Non-profits, although sharing corporate form with for-profits, are otherwise structurally different.

America's non-profit sector is but one segment of a large group of organizations. In 1998, there were 27.7 million organizations (businesses, tax-exempt organizations, and governmental entities) in the United States, of which, 1,626,000 were non-profits (all IRS-designated tax-exempt organizations). The New Nonprofit Almanac IN BRIEF 7 (visited Feb. 7, 2003) http://www.independentsector.org/PDFs/inbrief.pdf. And within the non-profit sector, § 501(c)(3), § 501(c)(4) and

religious congregations comprised 1.2 million organizations, of which 140,000 were § 501(c)(4) organizations. *Id*. Although non-profits comprise only 5.8% of the total number of organizations in the United States, *id*., they are treated identically to all other corporations for purposes of the contribution ban.

Within the non-profit sector are many types of organizations, whose purposes are various and diverse. Section 501(c) of the Internal Revenue Code lists no more than 25 classifications of nonprofits, s*ee* 26 U.S.C. § 501(c), and nonprofits may also qualify under sections 501(d), (e), and (f), and section 521(a). However, the sine qua non of nonprofits which qualify for tax exempt status under the Code, is the nondistribution constraint, that profit cannot inure to the personal benefits of any of their members. The Code provision under which an organization chooses to seek exemption defines its range of permissible activities and purposes, but the kinds of purposes for which nonprofits form are typically divided into two general categories: "public benefit organizations" and "mutual benefit associations."

"Public benefit organizations" generally are comprised of § 501(c)(3) and § 501(c)(4) organizations. Section 501(c)(4) of the Internal Revenue Code exempts from tax civic organizations and nonprofit organizations "operated exclusively for the promotion of social welfare." I.R.C. § 510(c)(4)(A) (2001). The only statutory restriction in the Internal Revenue Code on the activities of a social welfare organization is a proscription on the use of the net earnings of the organization for the benefit of any private individual. § 501(c)(4)(B).

A social welfare organization satisfies the Treasury Regulation's requirement that it be operated exclusively for the required exempt purpose "if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community." Treas. Reg. § 1.504(c)(4)-1(a)(2)(i) (1990). Organizations whose activities primarily benefit their membership are not eligible for exemption under § 501(c)(4). *See, e.g.*, Rev. Rul. 80-107, 1980-1 C.B. 117 (shareholder organization to promote industry interests is not social welfare organization); Rev. Rul. 77-111, 1977-1 C.B. 144 (organization to stimulate business to remedy economic declines is not charitable because major benefits accrue to the businesses).[3] Nor is any organization operated primarily for the promotion of social welfare if it is carrying on a business with the general public in a manner similar to organizations which are operated for profit. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1959). Furthermore, the "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." Treas. Reg. § 1.504(c)(4)-1(a)(2)(ii) (1990). Revenue Ruling 81-95 nonetheless holds that as long as an organization that is exempt from tax under § 501(c)(4) is "primarily engaged in activities [that] promote social welfare," lawful participation in political campaigns is permitted.[4] Rev. Rul. 81-95, 1981-1 C.B. 332. This Ruling

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3 In this respect, a § 501(c)(4) organization, like North Carolina Right to Life, is distinguishable from the Michigan Chamber of Commerce in *Austin*. The Michigan Chamber of Commerce is a § 501(c)(6) organization formed to promote the common good and interests of the Michigan business community, Brief for Appellee at 4, *Austin*, 494 U.S. 652 (1990), and was comprised of approximately 8000 members, seventy-five percent of which were for-profit corporations. Brief for Appellant at 4, 12, *Austin*, 494 U.S. 652.

4 IRS General Counsel Memorandum 38,264 (Jan. 30, 1980) questions

based its conclusion, in part, on legislative history of the enactment of section 527 of the Code, which suggests that § 501(c)(4) organizations may engage in political activities. S. REP. NO. 93-1357, 93d Cong. 2d Sess. 29 (1974), reprinted in 1975-1 C.B. 517, 533. Therefore, a § 501(c)(4) organization may intervene in political campaigns, as long as this activity is not its "primary" activity.[5]

II. The First Amendment Requires Looking Beyond The Corporate Form To Determine Whether A Non-Profit Corporation Is Similar To A Voluntary Political Association And Therefore, Does Not Have The Potential For Unfair Deployment Of Wealth For Political Purposes.

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whether under the Federal Election Campaign Act it is lawful for an incorporated non-profit organization to make political contributions. "Illegal activities are the antithesis of activities that promote social welfare. Stated otherwise, the common good and general welfare of the people of a community is the cornerstone of the social welfare concept and illegal activities cannot be said to benefit the community." Gen. Couns. Mem. 38,264 (Jan. 30, 1980).

5 Political activities of organizations exempt under the purpose specific mutual benefit provisions of the Internal Revenue Code, *e.g.* § 501(c)(6) organizations, are not similarly limited under the Code. It is this unrestricted political activity, as well as the mission of providing services primarily or exclusively for a limited membership, that distinguishes nonprofit organizations operating under these sections from social welfare organizations and charities that qualify for tax exempt status under §§ 501(c)(3) and 501(c)(4).

A. *MCFL's* rationale, which does not elevate form over substance, is equally applicable here.

An association must merely engage in expressive activity to be entitled to the protections of the First Amendment. *Dale*, 530 U.S. at 655. As described above, a non-profit organization's activities, by their very nature, lie at the heart of the First Amendment.

The prophylactic ban at issue elevates form over substance. Simply because of an organizational feature wholly unrelated to the evil sought to be corrected, non-profits are prohibited from speaking through direct contributions. Yet the Court in *MCFL* recognized that First Amendment scrutiny cannot focus on form alone, noting that "[r]egulation of corporate political activity . . . has reflected concern not about the use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes." *FEC v. Massachusetts Citizens for Life, Inc.*, (*MCFL*) 479 U.S. 238, 259 (1986). Therefore, the First Amendment requires that this Court go beyond the corporate form and examine non-profits' relevant features to determine whether, irrespective of their corporate form, they have the potential for unfair deployment of wealth for political purposes.

The court of appeals recognized the critical distinction between for-profits and non-profits and used this Court's decision in *MCFL* as its starting point. The court of appeals noted that nonprofits possess "several characteristics . . . that make them special purveyors of political speech," and "[a]s a consequence, nonprofit advocacy organizations play a distinctive role in the political scheme." Pet. App. 6a.

The court provided an illustrative, but certainly not exhaustive, list of the types of vital expressive activities of nonprofit advocacy organizations that "help empower citizens to make informed political choices." Pet. App. 7a. The court of appeals correctly concluded that the rationale of the Court in *MCFL* is equally applicable in this case. Pet. App. 25a. The court stated that it sought "to respect the Supreme Court's basic pronouncement in *MCFL* on the role that nonprofit advocacy groups play in our political life." Pet. App. 26a.

B. Applying *MCFL* factors, it is clear that § 501(c)(4) organizations are like voluntary political associations, and therefore, do not pose any threat of corruption.

For purposes of constitutional scrutiny, one needs to identify and evaluate nonprofits' relevant features, and compare and contrast them to other kinds of corporations. It may be less useful to lump all nonprofits together than to be able to recognize how even nonprofits differ.[6] An examination of the differences among corporations and the similarities between § 501(c)(4) organizations and voluntary political associations demonstrates that a broad prophylactic rule is not justified even under a more lenient level of scrutiny. The Court should find that § 501(c)(4) organizations, by their very structure and purpose, do not per se pose any threat of corruption, or in the alternative, use the features set out in *MCFL* and applied in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

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6 At issue in this case is the ability of a § 501(c)(4) corporation to make direct contributions to candidates. As such, ATA will not specifically address whether a complete contribution ban as applied to other non-profit corporations is unconstitutional.

The *Austin* Court found that the potential for corruption which Michigan sought to eliminate was related to the corporate form itself. That is, the economic advantages of incorporation – limited liability, perpetual life, etc. – provided the potential for abuse of the electoral process. *Austin*, 494 U.S. at 658-60. The underlying basis was that the state granted corporations these advantages to facilitate economic success. Thus, the argument goes, when corporate resources, which are facilitated by state-conferred advantages, are put to political use, it has the potential to distort the political process. Consequently, because all corporations enjoy these advantages, the Court dismissed the Chamber's argument that the Michigan statute was overinclusive because it applied to all corporations, regardless of accumulated wealth or size. *Id*. at 660, 666. Instead, the Court used the features set out in *MCFL* to test whether the Chamber, a § 501(c)(6) corporation posed the threat that the statute sought to eliminate. *Id*. at 661-64.

The First Amendment dictates that restrictions on speech be no more than is necessary to combat the problem being addressed. The prophylactic ban as applied to non-profits is not tailored to meet the Government's interest. Using the features set out in *MCFL* and applied in *Austin*, it is clear that the complete contribution ban goes too far as applied to § 501(c)(4) corporations, which share the features of voluntary political associations. [7]

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7 It has been argued that the *MCFL* test is unpredictable and subject to biased and arbitrary application; therefore, the federal tax code classifications of nonprofit corporations should be used as a means of identifying those nonprofits whose speech may not, as a constitutional matter, be permissibly restricted. *Developments in the Law – Political Activity of Nonprofit Corporations*, 105 Harv. L. Rev. 1656, 1674

The concern that nonprofit corporate organizations have the potential to use the advantages of incorporation to obtain an unfair advantage in the political marketplace is not relevant with respect to § 501(c)(4) organizations. For an organization to qualify under § 501(c)(4), its political activity must not be its primary purpose, *i.e.*, it must be insubstantial. A § 501(c)(4) organization must be engaged in activities that promote social welfare.[8] This requirement reduces the danger that the organization would unfairly dominate the political arena or distort public discourse. *See Austin*, 494 U.S. at 658-59 (quoting *MCFL*, 479 U.S. at 257) (stating that the advantages of corporate status permit corporations to use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"). Furthermore, a § 501(c)(4) organization's political activity must be consistent with its primary purpose, social welfare. These limits placed on a § 501(c)(4) organization's political activities by the tax code neutralize any potential "unfair advantage in the political marketplace" resulting from the organization's corporate form. Furthermore, as shown above, the non-profit sector also operates as a ballast *against* the corporations of the private

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(1992). The more successful a non-profit organization is at advocating its members' voices, the more likely that these arbitrary applications will be used by opponents to punish it, leaving only the wealthy, who can sustain legal costs, to compete in the political process.

8 To the extent that a non-profit organization is multi-purpose, that is, providing goods, services or facilities to its members and the general public in addition to advocacy activities, Amicus does not take a position on whether a complete ban on their advocacy and voice through contributions is constitutionally permissible. However, it is clear that regardless of whether the Government is justified in prohibiting speech in the former case, it is not permitted to ban this speech by expressive, ideological, or advocacy associations.

sector.

The argument that nonprofits possess economic power by virtue of their tax exemptions does not justify a complete ban on contributions by nonprofits. Some have argued that the tax exemption serves to compensate nonprofit organizations for the difficulties they face in raising capital. Henry B. Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835, 877 (1980); Henry B. Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 558 n.191 (1981). Many non-profits incorporate because of the shield of limited liability, especially in light of the abrogation of the charitable immunity doctrine in the states. In this respect, an association faces a difficult choice in these litigious times – have the ability to make contributions or incorporate and receive limited liability.

The fear of corruption of the political process by "the corrosive and distorting influence of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," *Austin*, 494 U.S. at 660, likewise is no concern regarding § 501(c)(4) organizations. First, very few § 501(c)(4) organizations have any great wealth. Second, membership in a § 501(c)(4) organization is voluntary and contributions are given *because* of the non-profit's advocacy voice. No member or donor has an economic stake in the organization and therefore continued association is based on support for the organization's agenda and speech.

In contrast, the *Austin* Court found that members of a § 501(c)(6) organization might choose to remain members,

notwithstanding political differences, merely to enjoy the nonpolitical benefits of membership. *Austin*, 494 U.S. at 663. In this respect, the Court determined that members of the Chamber, a § 501(c)(6) organization, had more in common with shareholders of a business corporation than members of a § 501(c)(4) organization. *Id.*

Although it is possible to require that non-profits have a policy of not accepting contributions from business corporations, as shown above, the tax code requirements imposed on § 501(c)(4) organizations reduce the danger that such organizations will serve as conduits for corporate contributions. Moreover, contribution limits also undercut this justification for a prophylactic ban.

The availability of using a separate segregated fund to speak is not a practical option for all § 501(c)(4) corporations. Many § 501(c)(4) organizations do not have members which meet the definition of members for purposes of the FEC solicitation regulations. It is usually too cumbersome and expensive to have members with voting rights and membership meetings. So, for many § 501(c)(4) organizations, membership is ceremonial or symbolic at best. If there is no membership structure, as is the case with many, if not most, § 501(c)(4) corporations, the organization can only solicit PAC contributions from its officers and executive administrative personnel, which normally would number less than ten individuals.

In sum, mere incorporation does not "present the specter of corruption." *Austin*, 494 U.S. at 711 (Kennedy, J., dissenting) (quoting *MCFL*, 479 U.S. at 263). The substantial differences between non-profits and for-profits constitutionally dictates a differential treatment despite their

mere similarity of corporate form.[9]

III. Our Representative Democracy Depends Upon A Strong Non-Profit Sector And A Broad Prophylactic Ban Hinders The Ability Of Non-Profits To Fully Perform Their Role.

Not only is it constitutionally problematic to treat the private sector and the non-profit sector alike, the strength of our democracy demands that non-profits' speech be encouraged, rather than prohibited. Tocqueville queries, "Is that just an accident, or is there really some necessary connection between associations and equality." Tocqueville, 2 Democracy in America at 514. Tocqueville finds that representative democracy is dependent upon a strong non-profit sector, in part, because of its stabilizing influence:

> Feelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another. I have shown how these influences are reduced almost to nothing in democratic countries; they must therefore be artificially created, and only associations can do that.

Id. at 515-16. He concludes,

> Among laws controlling human societies there is one more precise and clear, it seems to me, than all the

9 Although for-profits and non-profits may share the corporate form, the similarity often ends there. Most states have a separate incorporation statute for non-profits.

> others. If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.

Id. at 517. Not only is the prophylactic ban unconstitutional for its failure to recognize the critical distinctions between for-profit and non-profit corporations, the ban hinders the ability of associations to fully contribute to the political debate and thereby foster our democratic system.

Finally, associational activity should be encouraged, rather than prohibited, because it protects citizens from overreaching by the government and its counterpart in the private sector – the large corporation. Lumping the non-profit sector with the private sector removes this balancing or stabilizing influence against overreaching by the other two sectors.

The non-profit sector is at a critical juncture in America. The prohibition at issue here, along with the burdensome restrictions in the Bipartisan Campaign Reform Act, have chipped away at the non-profit sector's important role in our democracy. Because of an organizational feature wholly unrelated to the evil sought to be corrected, the Government has imposed a broad prophylactic rule. Rather than treat the non-profit sector the same as the private sector simply for ease of a bright-line rule, the Court should examine the constitutional differences between the two.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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