No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., ET AL.,

Petitioners,

V.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE CAMPAIGN LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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April 4, 2003

QUESTION PRESENTED

Does this case implicate the Court's campaign finance jurisprudence, under which the political branches have broad authority to regulate corporate participation in election campaigns to stem the appearance and reality of political corruption?

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INTEREST OF AMICUS CURIAE[1]

The Campaign Legal Center is a non-profit, non-partisan 501(c)(3) organization established in January 2002 to represent the public interest in strong enforcement of the nation's campaign finance laws. Through its legal staff, the organization participates in the administrative and legal proceedings in which campaign finance and campaign-related media laws are interpreted and enforced. Based in Washington, D.C., the Legal Center is associated with the University of Utah's Campaign and Media Studies Program, created to support inquiry and action on these issues through academic research, conferences, and internship programs. The Legal Center's attorneys are among the counsel to the congressional sponsors of the Bipartisan Campaign Reform Act of 2002 in *McConnell v. FEC,* the litigation testing the Reform Act's constitutionality. In addition, Legal Center counsel are actively engaged as amicus or counsel in many other judicial and administrative matters in support of other litigants seeking rigorous enforcement of the nation's election laws.

Amicus curiae, as an advocate of rigorous campaign finance laws, has a strong interest in the proper interpretation and application of this Court's cases relating to corporate participation in American elections. For decades, the Court has agreed that corporate participation in candidate elections can pose unique risks of corruption, and the appearance of corruption, of our political institutions. Accordingly, the Court has recognized that the political branches have broad authority to regulate corporate contributions to, and independent expenditures in, elections for public office.

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[1] Both parties have granted blanket consent to the filing of briefs *amicus curiae* by letters of consent on file with the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amicus curiae*, their members or their counsel made a monetary contribution to the preparation of the brief.

The Court will soon have the opportunity to apply these and other first principles of campaign finance law in *McConnell v. FEC,* the case testing the constitutionality of the Bipartisan Campaign Reform Act of 2002. Amicus believes the case at bar can, and should, be decided on terms that do not prejudice that future decision.

SUMMARY OF ARGUMENT

This case presents questions involving the proper scope of state authority to define, and to regulate, speech on matters of public interest by commercial actors. Amicus supports respondent's view that the First Amendment's lower level of protection of "commercial speech" is both appropriate and compelled by this Court's precedents. We write separately, however, to urge the Court to decide this case in a manner that does not pretermit its upcoming consideration of separate issues concerning election-related speech by corporations. The campaign finance cases present, as this Court has noted, a "quite different context" from those involving non-campaign speech by commercial actors. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 788 (1978). The Court will soon have the opportunity to consider the campaign finance area in *McConnell v. FEC,* No. 02-0582 (D.D.C. filed Apr. 12, 2002), the case testing the constitutionality of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). The case at bar can, and should, be decided on terms that do not prejudice that future decision.

In particular, it is well-established that the government may regulate corporate campaign contributions and independent expenditures with prophylactic measures that are carefully drawn to serve sufficiently important state interests. Indeed, this Court has affirmed the constitutionality of a flat ban on corporate political contributions and expenditures, with limited exceptions. *See FEC v. Nat'l Right to Work Comm. ("NRWC"),* 459 U.S. 197 (1982); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990); *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986).

Those cases are distinct from the Court's jurisprudence on the First Amendment's protection of speech about public issues by commercial actors. This is true regardless of whether that speech involves matters of public debate, or proposes a commercial transaction, or, as in the case at bar, presents a closely woven fabric of the two. In *Bellotti,* the Court explained that regulation of *corporate speech on issues of public debate* presents different constitutional question than government regulation of *corporate participation in campaigns for elective office.* 435 U.S. at 788. This is, in large part, because the nature of the corporate form implicates unique concerns about political corruption and its appearance. Neither corporate speech that genuinely addresses only issues of the day, nor speech primarily defined by a commercial motive, has generally been thought to raise those concerns.

ARGUMENT

I. THE COURT'S DECISION IN THIS CASE SHOULD NOT AFFECT ITS CAMPAIGN FINANCE JURISPRUDENCE.

This case presents the Court with long-unsettled questions about the proper scope of state authority to define, and to regulate, speech by commercial actors. The Court should address these questions in a manner that does not undercut the well-established power of the political branches to regulate corporate participation in political campaigns – a subject the Court will soon have the opportunity to address again in *McConnell v. FEC,* the case testing the constitutionality of the new Bipartisan Campaign Reform Act.

A. The Court's Cases Establish that Corporate Participation in Candidate Elections May be Regulated to Prevent Political Corruption.

Contributions to political campaigns, as well as independent expenditures in elections, have been considered "political speech" at the center of the First Amendment's protections. *See Buckley v. Valeo,* 424 U.S. 1, 14-16 (1976). While those protections apply to political speech by corporations as well as to individuals, the government may regulate contributions – and, in the case of corporations, expenditures – in elections through measures that are carefully crafted to serve sufficiently important state interests. *See generally Buckley,* 424 U.S. 1; *see also Austin,* 494 U.S. 652.

In the case of corporations, the Court has consistently held that the government may freely regulate, even ban, their participation in candidate elections. *See generally NRWC,* 459 U.S. 197; *Austin,* 494 U.S. 652; *MCFL,* 479 U.S 238. This different treatment of corporations and individuals – who may contribute to candidates in limited amounts, and make independent expenditures in unlimited amounts; *see Buckley,* 424 U.S. 1 – rests on the premise that the very nature of the corporate form presents a unique risk of political corruption. As the Court has explained,

> [s]tate law grants 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 in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.

Austin, 494 U.S. at 658-59 (quotations omitted); *MCFL,* 479 U.S. at 257. The Court has also reasoned that

> [t]he 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.

MCFL, 479 U.S. at 258; *see also Austin,* 494 U.S. at 659.

Government regulation in this area is therefore intended to stem the potentially corrupting influence of large-scale corporate campaign spending on the elected officials who are aided by it. *NRWC,* 459 U.S. at 209-10. This interest in preventing political corruption has long been sufficient to "support the restriction of the influence of political war chests funneled through the corporate form." *FEC v. National Conservative PAC,* 470 U.S. 480, 500-501 (1985); *see also MCFL,* 479 U.S. at 257; *Austin,* 494 U.S. at 659. Indeed, as the Court has explained, "conflict of interest legislation is 'directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." Thus, the governmental interests in preventing corruption and the appearance of corruption "directly implicate the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." *United States v. UAW,* 52 U.S. 567, 570 (1957); *see also Buckley,* 424 U.S. at 26-27; *NRWC,* 459 U.S. at 208.

This Court's cases plainly establish that legislatures have broad power to regulate corporate political speech in the form of direct participation in candidate elections. That authority should not be undermined by a decision on the proper definition of, and constitutional protection for, other forms of corporate speech.

B. The Court Should Continue to Distinguish Between Corporate Participation in Candidate Elections and Other Forms of Speech by Commercial Actors.

Amicus supports respondent's view that speech by commercial actors will often command less vigorous First Amendment protection than other protected expression. This is because such speech serves different values, because regulation of that speech serves different state interests, and because the financial self-interest which underpins commercial speech makes it especially hard to chill. *See generally Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York,* 447 U.S. 557, 562-66 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council,* 425 U.S. 748 (1976); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). We write separately, however, to express the view that regardless of the ultimate decision in the case at bar, the Court should continue its well-established approach of treating government regulation of corporate participation in campaigns for public office as distinct from regulation of other forms of speech by commercial actors.

In *Bellotti,* the Court pointedly noted that government measures aimed at commercial speech on matters of public debate raise entirely different constitutional questions than campaign finance laws regulating candidate elections. There, the Court struck down as unconstitutional a state prohibition on corporate financial participation in a statewide referendum, explaining that

> [t]he overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of *elected representatives* through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on *issues of general public interest* implies no comparable right in the quite different context of participation in a *political campaign for election*

> *to public office.* Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

Bellotti, 435 U.S. at 788 (emphasis supplied). Indeed, the Court has generally upheld restrictions on direct political participation by corporations in candidate elections on the grounds that they are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Austin,* 494 U.S. at 660. This case provides no rationale for changing its carefully-wrought distinction between corporate spending on candidate elections and other political speech by commercial actors.

CONCLUSION

The Court will soon have the opportunity to consider the application of First Amendment principles in the special context of campaign finance law when it hears the pending challenge to the Bipartisan Campaign Reform Act of 2002. Amicus curiae urges the Court to affirm the decision below in a manner that leaves these issues for due consideration in that case.

Respectfully submitted,

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