No. 08-205

In The Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTIONS COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL OF *AUSTIN v. MICHIGAN CHAMBER OF COMMERCE* ON SUPPLEMENTAL QUESTION

JOHN D. PIRICH (P23204)
ANDREA L. HANSEN (P47358)
HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Amicus Curiae
222 N. Washington Square, Suite 400
Lansing, MI 48933
(517) 484-8282

RICHARD D. MCLELLAN* (P17503)
GARY GORDON (P26290)
W. ALAN WILK (P54059)
JASON T. HANSELMAN (P61813)
DYKEMA GOSSETT PLLC
Attorneys for Amicus Curiae
201 Townsend Street, Suite 900
Lansing, MI 48933
(517) 374-9181

**Counsel of Record*

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INTEREST OF THE *AMICUS*[1]

The Court scheduled this matter for reargument and asked, in part, whether the Court should overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Michigan Chamber of Commerce, *amicus* herein, ("Michigan Chamber") was the Plaintiff/Appellee in *Austin, supra.* The Michigan Chamber has been subject to the First Amendment speech restrictions of Section 54 of Michigan's Campaign Finance Act (MCL § 169.254) (the "Act") for the nineteen years since the Court's March 27, 1990 decision upholding the complete ban on corporate independent expenditures in support of or in opposition to political candidates.

SUMMARY OF THE ARGUMENT

In Michigan, subsequent to this Court's decision in *Austin*, it continues to be a felony for nonmedia corporations to engage in fundamental First Amendment political speech. Under the Act, a corporation "shall not make a contribution or expenditure" in support of or in opposition to political candidates. MCL § 169.254(1). The State of Michigan applies

[1] The parties' written consents to the filing of this brief have been submitted to the Court. *Amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Section 54(1) of the Act in a manner not only to prohibit corporate contributions and expenditures, but also *independent expenditures* in support of or in opposition to political candidates (hereafter "independent expenditures"). In *Austin*, the Michigan Chamber challenged the constitutionality of this provision, asserting that it was entitled by the First Amendment to make independent expenditures indicating its support for candidates.

Specifically, the Michigan Chamber sought to make a public statement through a one-quarter page advertisement in the Grand Rapids Press to support Richard Bandstra, a candidate for the Michigan House of Representatives.[2] The Michigan Chamber's statement in support of Bandstra would have been an independent expenditure because it was not at the direction or control of, or in coordination with, the candidate committee. Because of the felony provisions of Section 54(5) of the Act, the Michigan Chamber did not publish its statement and initiated the litigation that resulted in the *Austin* decision.

In a dramatic departure from all prior cases addressing the interplay between the government's interest in regulating corruption and the appearance of corruption in the electoral process with corporations' core First Amendment right to express themselves politically, including through independent

[2] *See* appendix to opinion of Kennedy, J., dissenting in *Austin*.

expenditures that do not raise the same concerns as do contributions, the *Austin* Court created a new state interest designed to level the playing field between corporations and all others in the political process.

The *Austin* decision is based on a flawed analysis and creates bad law, discriminating against one speaker and suppressing the speech of corporations in a manner that unquestionably infringes upon fundamental First Amendment rights. *Austin* was wrongfully decided almost 20 years ago. That error should now be rectified by this Court.

ARGUMENT

A. *Austin* Is Inconsistent with Established Supreme Court Precedent and Created Bad Law, Severely Undermining the First Amendment.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized that political speech was "core" First Amendment activity, entitled to the greatest deference and "exacting scrutiny," which requires a regulation to be struck down unless it is narrowly tailored to serve a compelling governmental interest. *Buckley*, 424 U.S. at 44-45. The Court specifically determined that campaign finance regulation constitutes a direct restriction on political speech protected by the First Amendment because limitations on political contributions and expenditures "necessarily reduce the

quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached. This is because virtually every means of communicating in today's mass society requires the expenditure of money." 424 U.S. at 19.

The *Buckley* Court concluded that the "governmental interest in preventing corruption and the appearance of corruption" was not sufficient to warrant the limitation on independent expenditures. Moreover, the Court determined, abuses that might be generated by a large independent expenditure did not pose the same threat of corruption as did large contributions because the "absence of prearrangement or coordination by the expenditure with the candidate or his agent alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidates." 424 U.S. at 47. The *Buckley* Court flatly rejected the concept that government may impose regulations to promote fairness and equality among political participants stating that "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id*. at 49; *see also id.* at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment").

Following *Buckley,* this Court, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), struck down a state statute prohibiting corporations from spending money in connection with a referendum, holding that the scope of First Amendment protection turns on the nature of the speech, not the identity of the speaker. The *Bellotti* Court recognized that political speech is no less valuable "because the speech comes from a corporation rather than an individual." 435 U.S. at 777. Indeed, the *Bellotti* Court specifically concluded that the fear that "corporations are wealthy and powerful and their views may drown out other points of view" cannot justify suppression of corporations' political speech. *Id*. at 789.

In a dramatic shift from the principles set forth in *Buckley* and *Bellotti*, the *Austin* Court upheld a state statute prohibiting all corporations, for-profit and nonprofit, from making any independent expenditures to articulate a corporation's opinion in support or opposition to a candidate. To reach this holding, the Court had to create a new compelling interest to justify this severe restriction on corporations' First Amendment rights, concluding that the State had a compelling interest in forestalling the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Austin,* 494 U.S. at 660.

B. The Outright Prohibition on Independent Expenditures by Corporations Upheld in *Austin* Violates the First Amendment.

Governmental restrictions on content-based speech, including the core political speech at issue here, unquestionably trigger the First Amendment and are subject to a strict scrutiny analysis, thereby requiring the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) ("*WRTL II*"). Given that the prohibition on independent expenditures by corporations suppresses not only who speaks (corporations), but also about what they may speak (candidates), core political speech is clearly at stake.

1. There Is No Compelling State Interest Justifying the Discrimination Against Corporations and Suppression of Their Political Speech.

There is no legitimate basis for suppressing the expression of core political speech based on (1) a corporation's alleged and potential ability to amass great wealth, and (2) the desire to create equality among speakers or to protect members or shareholders of a corporation from political expression that may differ from their own.

a. The potential for corporations to amass great wealth is illogical and does not justify a restriction on core speech.

The conclusion that a corporation's mere potential ability to amass great wealth as a consequence of its corporate form justifies a severe restriction on core political speech is deeply flawed in logic and law. As a threshold matter, there is no requirement that a corporation actually be wealthy, nor is there any requirement that, if a corporation is wealthy, such wealth was accumulated as a consequence of state-conferred benefits, which is the purported justification for this prohibition on a corporation's exercise of its political speech. In fact, the Court failed to distinguish between for-profit and nonprofit corporations, even though nonprofits are required to use their funds to further their underlying charitable, political or social purpose, not to "amass" great wealth. Moreover, to treat similarly for these purposes all corporations regardless of wealth (for example, a publicly held mega corporation in the same manner as a small, closely held corporation or nonprofit ideological corporation) is overly broad and undermines the stated basis for permitting the direct infringement on corporations' First Amendment rights. Most corporations do not amass great wealth, even among for-profits. Nonprofits, by definition, do not and cannot acquire significant treasuries. To penalize the majority based on the potential of a

minority is not a constitutional justification for a direct infringement on core First Amendment rights.

In addition, numerous entities other than corporations, including, for example, limited liability companies and partnerships, are afforded benefits, treatment or other positive consequences for forming in the state (including limited liability, perpetual existence, tax benefits, etc.). Yet the prohibition on independent expenditures applies only to corporations. A corporation should not have to choose between receiving a state-conferred benefit or the ability to exercise its First Amendment rights, particularly where a limited liability company, for example, does not have to make that choice. Nor should the government be able to dole out advantages conditioned upon abandoning the right to express oneself politically.

Further, the potential accumulation of large amounts of money does not necessarily lead to corruption in the political process. Independent expenditures, by definition, cannot be controlled or directed by a candidate, thereby negating any possibility of *quid pro quo* corruption. If an independent expenditure is independent, it cannot possibly corrupt the process. A candidate, in fact, may not even want the support provided by the corporation and deem it harmful to his or her campaign.

b. Political equality is not required by the First Amendment and cannot be required by the government.

Although the *Austin* Court appeared to recognize that it could not require political equality given *Buckley* and *Bellotti's* conclusion that to do so would violate the First Amendment, it attempted to achieve that very result by prohibiting corporations from speaking as a consequence of their potential wealth. The Court justified its conclusion by stating it was not seeking equality but, instead, protecting the members and shareholders, because a corporation might spend money on political matters that they as individuals may not support.

This conclusion is incorrect. A corporation is a voluntary association and its members and shareholders retain their free will and can terminate that relationship at any time. In contrast with, for example, integrated mandatory state bars or union shops, corporation participation is not mandatory. Appellee's attempt to analogize unions with corporations in this context is flawed. *See* Appellee Supp. Brf. at 13. States require thousands of employees to belong to unions and pay dues for that membership. In contrast, the Michigan Chamber, along with all other corporations, is a voluntary organization, for which there exists no state compulsion to join. If a member does not agree with the Michigan Chamber's advocacy, it can simply choose not to renew its membership.

In addition, this reasoning cannot be reconciled with the fact that corporations can spend without restriction on ballot questions, often concerning controversial political issues, regardless of whether supported by its members, shareholders, etc., which the *Bellotti* Court deemed entirely within their First Amendment rights. In fact, corporations can contribute unlimited amounts on ballot questions, as can all other entities or individuals. Likewise, in Michigan, every person or entity other than a corporation[3] can make unlimited independent expenditures. It is irrational to conclude that it is unconstitutional to restrict a corporation from spending unlimited amounts of money on ballot questions regardless of member or shareholder support, but that those same members and shareholders must be protected from a corporation's decision whether to make independent expenditures.

The risk of member or shareholder opposition to independent candidate-related expenditures by a nonprofit is inconsequential. A nonprofit corporation is limited by its articles and bylaws to spending money to support its members' goals and stated purposes for joining the corporation in the first place. Realistically, most members of ideological nonprofit corporations expect the corporation to advocate in

[3] The prohibition on corporations has since been extended to labor organizations and domestic dependent sovereigns under Michigan law. MCL § 169.254.

support of the ideology underlying the nonprofits' interests.

For-profit corporations are likewise limited by the fact that they must make decisions based on what is best for the corporation financially, which benefits the shareholder financially, and is the sole purpose of a for-profit corporation. A shareholder invests in a corporation to make money, not to share its personal political views. A particular member or shareholder's political views are irrelevant to that purpose and he or she can always make contributions and expenditures to support their personal views with their own funds.

2. Restricting All Independent Expenditures by For-Profit and Nonprofit Corporate General Treasuries Is Not Narrowly Tailored.

a. To survive strict scrutiny, the government must prove the restriction is narrowly tailored to further a compelling governmental interest.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. To constitutionally restrict corporate political speech, the government must not only demonstrate a compelling state interest, discussed *supra*, but it must also show that the regulation is narrowly tailored to meet that interest.

McConnell v. F.E.C., 540 U.S. 93 (2003). To demonstrate that a particular law is narrowly tailored, the government must offer actual evidence of a real problem that the law is designed to remedy. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 680 (1994). The subject law must curtail speech only to the degree necessary to remedy that problem and "must avoid infringing on speech that does not pose the danger that has prompted regulation." *F.E.C. v. Mass. Citizens for Life*, 479 U.S. 238, 265 (1986). Akin to bringing a bazooka to a fist fight, the Michigan Legislature's prohibition of all independent expenditures from corporate treasuries is an example of the government choosing "too blunt an instrument for such a delicate task." *Id.*

b. There is no evidence that corporate independent expenditures cause corruption.

A regulation must be "narrowly tailored to the evil that may legitimately be regulated." *F.E.C. v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) (*"NCPAC")*. The *Austin* Court determined that the corporation's "unique state-conferred structure," which has the potential for facilitating the amassing of large amounts of wealth, could lead to an inequality of political influence, thereby corrupting the electoral process as a whole. There was, however, no evidence that this potential harm had actually occurred or that it was even likely to occur, particularly given that most Michigan

corporations are either nonprofit or closely held. The government cannot undertake prophylactic measures absent evidence that corporate expenditures will actually corrupt the process. *Austin* and its progeny embraced an unproven myth that if corporations are allowed to make independent expenditures, corruption of the process will necessarily occur. Repeating that myth for twenty years does not make it true, and any evidence that corporate independent expenditures have or will cause corruption, or even the appearance of corruption, still fails to exist. As noted in Appellee's Supplemental Brief at n.3, less than half the states prohibit the use of treasury funds for electioneering, meaning that in more than half, such expenditures are permitted. There has never been any evidence presented that these more than twenty states have a corrupt or distorted political process as a consequence thereof.

The government must draw classifications based upon reality, not stereotypes. *Craig v. Boren*, 429 U.S. 190, 202 (1976). The "potential danger" of corruption, the amassing of great wealth or the expenditure of funds contrary to the interests of its members or shareholders are insufficient to justify a restriction absent evidence of actual problems. *See, e.g., Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973) (stating that the "sacrifice [of] First Amendment protections for so speculative a gain is not warranted[.]"). The mere possibility that an organization may "potentially" engage in misconduct is not a sufficient reason to ban large

quantities of political expression. Hypothetical harms do not justify infringement on First Amendment freedoms. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

The Michigan Legislature has never provided a record supporting the existence of actual or perceived corruption resulting from corporate independent expenditures and certainly did not demonstrate that any special corruption would result from corporate independent expenditures. Such a showing is necessary to survive constitutional scrutiny. *See Turner Broad. Sys., Inc.*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' ") (internal citation omitted).

In *Austin*, the record reflected no evidence of corruption caused by corporate expenditures. In fact, the record indicates that the State of Michigan's key witness, Edward M. Epstein, political scientist and author of the book "The Corporation in American Politics," acknowledged that there had been no evidence in Michigan that corporate expenditures had a corruptive influence in elections. *Austin*, Joint Appendix at 86a. The Michigan Legislature, therefore, appears to have based its conclusion regarding corruption merely upon a hunch. To restrict speech based upon hunches, hypotheticals, and hyperbole tears the very fabric of First Amendment protections.

c. Prohibiting all for-profit and non-profit corporate independent expenditures is not sufficiently narrowly tailored to pass constitutional muster.

i. Independent expenditures by corporations should be permitted just like independent expenditures by individuals and political committees.

In *Buckley*, this Court struck down the Federal Election Campaign Act's (FECA) limitation on individuals' independent expenditures because this Court found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or give the appearance of corruption. Subsequently, in *NCPAC*, this Court struck down the FECA's limitation on independent expenditures by political committees. *NCPAC*, 470 U.S. at 496. In *NCPAC*, this Court examined whether corruption can taint the political process, stating that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497. This Court went on to differentiate independent expenditures from corruptive political contributions, summarizing *Buckley's* conclusion that "there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate. . . ." *Id.*

Austin assumes that expenditures by corporations might someday be demonstrated to beget *quid*

pro quo corruption. As Justice Scalia acknowledged in *WRTL II*, however, "[t]hat someday has never come. No one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as coordinated expenditures." *WRTL II*, 127 S. Ct. at 2678, n.4 (Scalia, J., concurring in part) (emphasis in original). Just as *NCPAC* determined that limiting independent expenditures by PACs was fatally overbroad in response to the perceived evil of corruption or the appearance thereof, this Court should now overrule the prohibition against corporate independent expenditures. Corporations independently communicating ideas with the public should be encouraged as a fundamental facet of democratic free speech, not condemned as hypothetical corruption. *Austin* should be reversed, allowing corporations the same constitutional protection recognized for individuals and political committees in *Buckley* and *NCPAC*. By failing to craft a solution that is designed to fix a narrow potential problem, the Michigan Legislature's blanket prohibition against all corporate independent expenditures is unconstitutional.

ii. *Austin* censors speech by any corporation operated for-profit or whose members are operated for-profit.

For-profit corporations were given the least amount of First Amendment protection in *Austin*, while nonprofit ideological corporations having no

for-profit corporations as members or shareholders were given the most protection in *WRTL*. The Michigan Chamber is the middle-ground, as a nonprofit ideological corporation with corporate members but, because of *Austin,* has not been afforded the same rights as recognized in *WRTL*. In *Colorado Republican Fed. Campaign Comm. v. F.E.C.*, this Court rejected the FECA's political party independent expenditure limit, stating that "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." 518 U.S. 604, 618 (1996). *Austin*, however, concluded that corporations were not entitled to the same First Amendment protection as others who have the same ability to amass wealth to use for political speech.

Although the *Austin* Court stated that corporate speech is not stifled because corporations can establish separate segregated funds ("SSFs") whose independent expenditures are not limited, SSFs do not provide the same rights as direct corporate speech because SSFs are separate entities whose speech does not necessarily reflect that of the corporation. Indeed, that inherent separateness effectively serves as a muzzle to limit or quash such speech. This Court has held that restricting the "most effective, fundamental and perhaps economical avenue of political discourse" while leaving open "more burdensome" avenues of communication fails to nullify its burden on First Amendment expression. *Meyer v. Grant*, 486 U.S.

414, 424 (1988). The First Amendment protects not only the right of corporations to advocate a cause but also "to select what they believe to be the most effective means for so doing." *Id.*

Because corporations have a constitutional right to engage directly in political speech, forcing them to speak only through an SSF is inadequate. *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980) (this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."). The First Amendment protects not only the right to speak, but also the right to choose the most effective means of doing so. *Meyer*, 486 U.S. at 424 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection.").

Because SSFs cost money, many small or midsize corporations (the majority of corporations in Michigan) cannot afford the cost to create and administer an SSF and are, therefore, blocked entirely from political speech.[4] Even for those corporations that can afford this added expense, it creates an administrative burden to speech, restricts the use of those funds, and often diminishes the message, because it cannot come directly from the corporation. As this

[4] *See* Testimony of Woodward Sidney Smith in *Austin* Joint Appendix at 91a-94a.

Court has explained, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939). In addition, the SSF requirement also diminishes the right of members who wish to support the corporation's advocacy efforts but are prohibited from doing so because they are not among the very small list of persons who may contribute to an SSF.

d. Michigan could easily prevent corruption or "distortion" without censoring corporate political speech.

A less blunt instrument could be used to craft alternative solutions allowing corporations to exercise their First Amendment rights, while still accomplishing the purported goal of preventing theoretical corruption or distortion.

i. Government should regulate, rather than block, corporate speech.

Permitting independent expenditures with reporting requirements prevents corruption using transparency, rather than a gag. Regulation and disclosure of corporate speech provides a more narrowly tailored response to alleged corruption. Reporting mechanisms already are in place in Michigan if corporations are allowed to make independent

expenditures. Section 47 of the Act requires a disclaimer identifying the sponsor of any communication, and Section 51 of the Act mandates disclosure of many other aspects of independent expenditures. MCL § 169.247 and MCL § 169.251. Such a solution permits corporate speech, but identifies and discloses those corporate expenditures.

Permitting independent expenditures with reporting requirements is precisely the type of scalpel required to satisfy the narrowly tailored standard of strict scrutiny, unlike the hatchet employed by the Michigan Legislature. Where such a simple solution exists that both achieves the government's purported purpose of preventing the appearance of corruption, while still allowing constitutionally guaranteed free speech, that solution should be implemented. Absent such a solution, the law fails the strict scrutiny test and must be struck down.

ii. The ban on independent expenditures is not properly tailored toward targeted entities.

If the purpose of restricting corporate speech is to prevent behemoth conglomerates from disproportionately influencing the political process (from "too much speech" as Justice Kennedy stated during oral arguments in *Austin*) then, rather than a complete prohibition on independent expenditures from all corporations, a narrowly tailored approach would be

to prohibit independent expenditures only from those for-profit entities with significant financial resources.

The Michigan Chamber contends that no outright ban on corporate independent expenditures passes constitutional muster. Rather than blocking all corporate expenditures, however, a possible narrowly tailored approach would be to prohibit expenditures only by "large" for-profit entities, by publicly traded companies, by those whose treasury balance exceeds a certain monetary threshold, or those not established for an ideological or political purpose. Instead, the Michigan Legislature prohibited all corporations, regardless of purpose, size, wealth, or even nonprofit status, from direct political speech. Michigan's law should only limit independent expenditures by those with the capability to perpetrate the alleged harm.

Because nearly all businesses in Michigan are small, privately held companies, their ability to exercise "too much speech" is minimal.[5] The risk of corruption by those corporate expenditures is, like the individual independent expenditures analyzed in *Buckley*, insufficient to justify limits, let alone a ban, on such spending. Although it may be easier for the government to limit all speech by corporate entities based upon an amorphous theory of the potential for

[5] In 2008, 63% of Michigan Chamber members employed fewer than 49 employees and 90% employed fewer than 249 employees.

corruption of the process, rather than limiting only that speech that may actually result in corruption, administrative convenience cannot justify an infringement upon fundamental First Amendment speech. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986).

CONCLUSION

Corporations possess the same First Amendment protections as individuals and all other associations of persons. Yet, as a result of *Austin*, only corporations are prohibited from making independent expenditures in support of a candidate. An independent expenditure is, by definition, made without direction or control by a candidate and, therefore, cannot lead to corruption. As such, no compelling state interest justifies a direct infringement on one speaker's rights based on hypothetical and imagined harms. In reality, most corporations do not amass great wealth or make decisions contrary to the interests and views of their shareholders and members.

For the foregoing reasons, the Michigan Chamber submits that *Austin* was decided wrongly, based on flawed logic and analysis, and should be overruled.

Respectfully submitted,

JOHN D. PIRICH (P23204)
ANDREA L. HANSEN (P47358)
HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Amicus Curiae
222 N. Washington Square, Suite 400
Lansing, MI 48933
(517) 484-8282

RICHARD D. MCLELLAN* (P17503)
GARY GORDON (P26290)
W. ALAN WILK (P54059)
JASON T. HANSELMAN (P61813)
DYKEMA GOSSETT PLLC
Attorneys for Amicus Curiae
201 Townsend Street, Suite 900
Lansing, MI 48933
(517) 374-9181

**Counsel of Record*

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