SECOND CLASS SPEAKERS: A PROPOSAL TO FREE PROTECTED CORPORATE SPEECH FROM TORT LIABILITY

Charles H. Moellenberg, Jr.[*] *and Leon F. DeJulius, Jr.*[**]

In Summer 2008, James Hansen, the Chief Scientist for NASA, proclaimed in a speech before Congress that executives at large oil companies should be placed on trial for "spread[ing] doubt" about global warming.[1] According to Mr. Hansen, "When you are in that kind of position, as the CEO of one [of] the primary players who have been putting out misinformation even via organisations that affect what gets into school textbooks, then I think that's a crime."[2] His solution is to try the executives for crimes against nature and humanity because they have failed to force their corporations to accede to those scientific studies attesting to corporate contributions to global warming.

Mr. Hansen's speech, thankfully, is political theatre and not legal scholarship. Although corporations are at times vilified and often viewed skeptically because of their wealth of resources and supposed influence, any liability, whether criminal or civil, founded on expressing one's ideas, particularly on matters of public concern, is an insidious form of censorship. To protect our liberty, the Supreme Court has held that corporations and their executives have the First Amendment right to speak on commercial and public issues of interest to them, to join together in associations to advocate their views, to petition the government—to "lobby"—for favorable laws and

---

* Partner, Jones Day. Adjunct Professor of Law, University of Pittsburgh School of Law. B.A. 1974, Denison University; M.P.A. 1997, Princeton University; J.D. 1978, Columbia University. Law Clerk to Chief Judge Frank J. Battisti, United States District Court, Northern District of Ohio, 1978-1979; Law Clerk to Judge Nathaniel R. Jones, United States Court of Appeals, Sixth Circuit, 1979-1980.

** Associate, Jones Day. Adjunct Professor of Law, University of Pittsburgh School of Law. BSBA 1998, St. Louis University; J.D. 2002, Notre Dame Law School. Law Clerk to Judge Diarmuid F. O'Scannlain, United States Court of Appeals, Ninth Circuit, 2002-2003; Law Clerk to the Honorable William H. Rehnquist, Supreme Court of the United States, October Term 2003.

The authors thank Aleksandra Jurewicz for her excellent research of case law commentary. All errors and omissions remain those of the authors. The opinions in this article are those of the authors alone and do not represent the views of Jones Day or any of its clients.

1. *The Climate Threat to the Planet: Briefing Before the H. Select Comm. on Energy Independence and Global Warming*, 110th Cong. (2008) (statement of James Hansen, Chief Scientist, NASA).

2. Brian Beutler, *Confusing Politics with Science*, GUARDIAN.CO.UK, June 24, 2008, http://www.guardian.co.uk/commentisfree/2008/jun/24/climatechange.environment.

regulations, and to oppose laws and regulations potentially harmful to their businesses.[3] Indeed, the Supreme Court has ruled that courts have a "special obligation" to protect all citizens from lawsuits premised on protected speech.[4] Corporations and executives, in short, have a constitutionally protected right to question even established orthodoxy.

Unfortunately, however, reasoning similar to Mr. Hansen's has become acceptable in some courts of law and to some public officials. While the Supreme Court has steadfastly protected the rights of corporations and executives to speak out against and to question "politically correct" views of science, economics, or social policy, government actors have ignored these rights, and lower federal and state courts have failed to apply these rules with sufficient rigor. As explained in this Article, some courts have allowed protected speech to be used as a legal cause of torts and have permitted the jury to consider protected speech as a tort itself—similar to the "crimes" suggested by Mr. Hansen. The "crime" for these companies is the promotion of a minority, although honest, view in an unsettled debate.

The failure to protect speech rights, if it persists, would have a lasting effect on the marketplace of ideas. In today's society of information and technology, knowledge and innovation drive public policy, science, and the economy. Many matters of legislative and regulatory interest turn on scientific research. Global warming, energy alternatives, automotive fuel efficiency standards, the health risks of environmental pollutants and toxic substances, and new drug efficacy and pricing are a few examples. Corporations sponsor or conduct research connected with all of these issues, and then rely on their research to support the advocacy of their positions to legislators, regulators, and the general public. Corporations oftentimes are instrumental in proposing solutions and can be unmatched in their well of knowledge, advice, and technical expertise. The First Amendment leaves the credibility and plausibility of the research and proposed solutions to the listeners to determine. That process of public scrutiny is the best insurance against flawed research or importune advice—through either the public or private sector—from becoming the basis for government policy.

When the self-interest of those adversely affected by research or policy recommendations motivates the scrutiny, the public ultimately benefits. That is the wisdom of the First Amendment. Its wisdom applies regardless of

---

3. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762-63 (1976); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

4. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

whether the speaker is a scientist or a corporation that has hired dozens of scientists. Thus, Shell takes out full-page "advertisements" to present "a climate plan for the G8 leaders."[5] It proposes capturing carbon dioxide, making clean hydrogen for transport fuel, and encouraging particular government programs, such as "cap and trade" carbon emissions and global clean technology funds.[6] Likewise, Chevron presents "Energyville" to teach people how to meet growing global demand for energy while preserving the environment and protecting national security.[7] Chesapeake Energy Corporation advertises the benefits of compressed natural gas, both educating the public on what it is and how it can be used to curb our national "addiction" to foreign oil.[8] Turn the page and an advertisement by Vestas touts the benefits of wind technology.[9] The voices are commercial, and the messages can bring profits to corporations and shareholders, but the impact is a meaningful contribution to the information and viewpoints debated to find national solutions to what many believe is one of the most important public policy issues of this generation. That Mr. Hansen disagrees with some companies' messages and ideas does not provide a ground for liability, but instead a platform for additional debate. Stifling debate, as Galileo could attest, suppresses progress, retards discovery and inquiry, and rarely leads to knowledge.

This Article will first review the history and current scope of corporations' First Amendment freedoms in speaking on commercial and public affairs, associating with others, and petitioning the government. It will then discuss a couple examples of the current litigation assault on corporations' exercise of First Amendment-protected activities and the harm that will occur if corporations risk liability by participating in the marketplaces of free enterprise and free ideas. Finally, the Article will suggest some practical guidance for courts, public officials, corporations, and their attorneys in order to preserve and foster the First Amendment freedoms of corporations.

---

5. A Climate Plan for the G8 Leaders, http://www-static.shell.com/static/innovation/downloads/innovation/climate_plan_g8.pdf (last visited Mar. 9, 2009).

6. *Id.*

7. Press Release, Chevron, Chevron and The Economist Group Launch Energyville Game (Sept. 5, 2007), *available at* http://www.chevron.com/News/Press/Release/?id=2007-09-05.

8. The Basics of Natural Gas, http://www.chk.com/naturalgas/pages/basics.aspx (last visited Jan. 9, 2009).

9. Wind Power Solutions, http://www.vestas.com/en/wind-power-solutions (last visited Jan. 9, 2009).

I. CORPORATIONS HAVE FIRST AMENDMENT RIGHTS

The Supreme Court has long held that corporations have constitutional rights. Over a century ago, the Court held that corporations were "persons" protected by the Fourteenth Amendment's Due Process Clause.[10] Through most of the twentieth century, there was little discussion as to whether the First Amendment also extends to corporations. The Court simply applied the free speech doctrines to corporations, assuming that corporations, most commonly media corporations or associational corporations, should be treated like individuals when it comes to First Amendment rights. For example, in *New York Times Co. v. Sullivan*,[11] the Court made clear that the First Amendment protects media corporations' full speech rights and emphasized that "[t]he central commitment of the First Amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide-open.'" In *Red Lion Broadcasting Co. v. Federal Communications Commission*, the Court established the doctrine that broadcast television companies are full First Amendment speakers whose editorial speech could not be regulated absent compelling reason.[12] And, in 1976 in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court struck down as unconstitutional a Virginia regulation that had banned corporate advertising of pharmaceutical prices.[13] Finally, in 1978, the Court explicitly declared that the First Amendment protects the speech of all corporations.[14]

Behind the Court's protection of corporate speech is its recognition that the First Amendment seeks to foster the spread of information and ideas to the public—no matter who is speaking. As the Court has said, "The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[15] Any distinction between institutions and individuals is "irreconcilable with the fundamental First Amendment principle

---

10. Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 396 (1886).

11. 376 U.S. 254, 270 (1964).

12. 395 U.S. 367, 390 (1969); *see also* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that media corporations' free press rights are violated when a state law grants a political candidate the right to equal space to reply to newspaper attacks).

13. 425 U.S. 748, 762-63 (1976).

14. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 (1978); *see also* Robert L. Kerr, *Subordinating the Economic to the Political: The Evolution of the Corporate Speech Doctrine*, 10 COMM. L. & POL'Y 63, 63-64 (2005) (explaining the history of corporate speech).

15. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986).

that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union or individual.'"[16]

Corporate speech rights, as with all speech rights, are not unlimited. Corporations cannot engage in obscenity, commit fraud, or publish fighting words. Corporations are not immune from general governmental time, place, and manner restrictions. Moreover, there are many different types of speech—political speech, commercial speech, and the like—each of which has different tests and burdens that restrict government interference. Corporations may even be treated differently from individuals in some unique circumstances.[17] As explained below, however, the point of this Article is that corporations generally are treated no differently from individuals with respect to three broad First Amendment rights: the right to petition the government, the right to speak out on matters of public concern, and the right to associate with others. Courts and government officials have the duty to protect these rights, just as they presumably would for individual speakers.

A. The First Amendment Protects Corporations' Freedom to Petition the Government

Over sixty years ago, in *Thomas v. Collins*, the Supreme Court recognized that the freedom to petition the government and to assemble peaceably extends to business and economic activity.[18] The Court there reversed a judgment against a union organizer who spoke to an organizing rally without registering under Texas law. In its words, "The grievances for which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."[19] Thus, the Court explained, "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity."[20]

---

16. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 780 (1986) (Brennan, J., concurring).

17. The Court, for example, held that a prohibition on corporations or their associations from using general treasury funds to support or oppose candidates for state office survived strict scrutiny as being narrowly tailored to serve a compelling state interest. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 664-65 (1990). Similar restrictions likely would not have been affirmed if applied to individual contributions. *Compare* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 134-36 (2003).

18. 323 U.S. 516, 531 (1945).

19. *Id.*

20. *Id.*

These rights, as the Court later confirmed, apply equally to corporations that petition the government.[21] As the Supreme Court explained in *United Mine Workers of America v. Illinois State Bar Ass'n*, the right to petition the government "is among the most precious of the liberties safeguarded by the Bill of Rights."[22] As should be self-evident, the right to petition the government is "fundamental to the very idea of a republican form of governance,"[23] and extends to "all departments of government," including federal and state administrative agencies.[24]

Because the right to petition the government would be a "hollow promise" if the government were free to impose direct or indirect restraints on it,[25] the Court held that corporations could not be held liable for their petitioning or "lobbying" activities protected by the First Amendment.[26] This immunity from liability, now known as the *Noerr-Pennington* doctrine, is intended to "protect[] the constitutional right to petition legislatures, governmental agencies, and courts and [to] ensure[] the free flow of information to governmental decision-makers."[27] Consequently, no claim for relief can be "predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement."[28] This is so even when the speech is motivated primarily by self-interest.[29]

These general principles apply in the tort context to protect the right of corporations to advocate corporate-sponsored research to legislators and

---

21. *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

22. 389 U.S. 217, 222 (1967).

23. Stern v. U.S. Gypsum, Inc., 547 F.2d 1329, 1342 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977).

24. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

25. *United Mine Workers*, 389 U.S. at 222.

26. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); *Noerr*, 365 U.S. 127 (1961).

27. Harrah's Vicksburg Corp. v. E.L. Pennebaker, 812 So. 2d 163, 171 (Miss. 2001); *see also* Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 160 (3d Cir. 1988) ("[L]iability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action.").

28. *Cal. Motor Transport*, 404 U.S. at 510. Speech intended to influence the government, at whatever level and whatever branch, is protected, unless that speech is a total "sham." The "sham" exception does not apply when lobbying is done as part of "a genuine attempt to influence governmental action." City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380-82 (1991).

29. *See, e.g.*, Stern v. U.S. Gypsum, Inc., 547 F.2d 1329, 1343 (7th Cir. 1977) ("Nor can it make a difference that the grievance is motivated by financial self-interest. To hold otherwise would at once both deprive government of much of the public input upon which its representative nature vitally depends and 'deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.'" (quoting *Noerr*, 365 U.S. at 139)).

regulators.[30] Petitioning the government cannot be a tort itself or the cause of any tort.[31] In *Senart v. Mobay Chemical Corp.*,[32] for example, the plaintiff contended through a civil conspiracy claim that manufacturers of toluene diisocyanate ("TDI") had formed a trade association to persuade the Occupational Safety and Health Administration ("OSHA") to reject a proposed safety standard concerning TDI. The plaintiff alleged, *inter alia*, that the manufacturers "conspired to 'obfuscate and confuse' scientific findings that supported a more stringent [safety] standard [for TDI]."[33] Part of this "obfuscation," the plaintiff said, was that the trade association argued against the proposed standard based on "inadequate scientific data" and that defendants knew that "a body of scientific evidence" suggested the existing standard was too lax.[34]

---

30. *See, e.g.*, Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006) ("[T]he *Noerr-Pennington* doctrine rests on the First Amendment's guarantee of 'the right of the people . . . to petition the Government for a redress of grievances.'"); *see also* New West, L.P. v. City of Joliet, 491 F.3d 717, 722 (7th Cir. 2007) ("*Noerr-Pennington* has been extended beyond the antitrust laws, where it originated, and is today understood as an application of the [F]irst [A]mendment's speech and petitioning clauses.").

31. Courts have also consistently declined to second-guess the decisions of legislative or regulatory bodies based on what the legislators "might have done" if certain information had been disclosed. *See, e.g.*, Pittson Coal Group, Inc. v. Int'l Union, 894 F. Supp. 275, 278 (W.D. Va. 1995) (granting summary judgment for defendant where plaintiffs alleged that defendant breached a contract by lobbying for federal legislation and persuading Congress to adopt a law that injured plaintiffs, reasoning that "[d]ivining legislative motive . . . from whatever source, is particularly ill suited to judicial resolution"). The United States Supreme Court "has long recognized that judicial inquiries into legislative motivation are to be avoided. Such inquiries endanger the separation of powers doctrine, representing a substantial 'intrusion into the workings of other branches of government.'" S.C. Educ. Ass'n v. Campbell, 883 F.2d 1251, 1257 (4th Cir. 1989) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977)). Permitting tort plaintiffs to argue that statements made or not made while petitioning the government may have contributed to plaintiffs' alleged injuries would contravene the basic legal principle that juries are not allowed to "second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process." Lewis v. Brunswick Corp., 107 F.3d 1494, 1505 (11th Cir. 1997).

Aside from the constitutionality of such evidence, allowing tort plaintiffs to argue that their alleged injuries were caused, in whole or in part, by the actions that government regulators might have taken had a lobbyist made different statements or provided different information would require a jury to engage in speculation that is insufficient to establish causation. *See* Zepik v. Tidewater Midwest, Inc., 856 F.2d 936, 942 (7th Cir. 1988) ("The causal connection between a defendant's [failure to provide information to a government regulatory agency] and a plaintiff's injury is too remote and speculative to satisfy generally applicable standards of causation in fact or proximate causation."); *see also* Silver v. Nat'l Presto Indus., Inc., 884 F.2d 1393 (6th Cir. 1989) (holding that plaintiff's theory that if defendant had provided information to Consumer Product Safety Commission that entity "would have taken remedial measures that would have prevented the injuries in this case [was] too attenuated and speculative to establish the requisite causal connection").

32. 597 F. Supp. 502 (D. Minn. 1984).

33. *Id.* at 504.

34. *Id.*

The district court granted defendants' motion to dismiss what it characterized as plaintiff's "novel" conspiracy claim.[35] Upholding the freedom to associate, the court first noted that "[p]ersons combining to achieve goals which they have a legal right to seek . . . do not conspire."[36] The court then reasoned that the corporations' attempt to persuade OSHA to reject regulations was "clearly permissible as First Amendment rights." The court summed it up: "In short, plaintiffs assail defendants for taking a particular view in a scientific debate and for trying to retain a regulatory standard which defendants preferred. Not only do these actions not constitute torts, they are protected by the First Amendment."[37]

Likewise, in *National Industrial Sands Ass'n v. Gibson*,[38] a group of sandblasters who allegedly contracted silicosis asserted claims against a trade association (NISA) and its members, which had opposed a regulatory ban on the use of silica sand. Plaintiffs offered two letters from the trade association to its members to influence OSHA standards and regulations. The court, citing *Noerr-Pennington*, stated that "petitioning the government for redress on matters of concern to a party is a freedom protected by the Bill of Rights in the federal constitution" and concluded that "such actions—including letters reporting the progress of these activities . . . are a legitimate exercise of the right to influence government action. They demonstrate no unlawful purpose or means . . . ."[39]

The corporate right to petition the government often intersects with other core speech rights as well. The *Noerr-Pennington* doctrine, for example, extends to safeguard collective efforts of groups and organizations to influence government action.[40] As the Supreme Court has said, "[I]t would be destructive of rights of association and petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests."[41] The First Amendment right to petition government, thus, merges with the right of association to prevent the imposition of liability on either a group or individual members of the group when they speak to the government.

---

35. *Id.* at 503.
36. *Id.* at 505.
37. *Id.* at 506.
38. 897 S.W.2d 769 (Tex. 1995).
39. *Id.* at 774.
40. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).
41. *Id.*

The Supreme Court's ironclad protection of the right to petition the government has stood the test of time and has never been seriously questioned. It serves as a sturdy foundation for protecting corporations' rights to associate and to speak to the public and its representatives in government.[42]

B. The First Amendment Protects Corporations' Freedom to Engage in Research and Debate

Closely related to a corporation's right to petition the government is its freedom to speak and to participate in the public debate. In the 1970s, the Supreme Court began to address expressly corporate speech rights. In the 1976 case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court struck down a Virginia regulation that had banned the advertising of pharmaceutical prices as unconstitutional.[43] There, an individual Virginia resident, a non-profit corporation (Virginia Citizens Consumer Council, Inc.), and the Virginia State AFL-CIO sued the State Pharmacy Board.[44] The plaintiffs claimed that the First Amendment entitled them "to receive information that pharmacists wish[ed] to communicate to them through advertising and other promotional means, concerning the prices of such drugs."[45]

The Court first addressed whether these "listeners" had any constitutional rights at all.[46] As the Court explained, its previous cases found such a right: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to

---

42. As always, the First Amendment demands lawful activity in order to have its protection. In *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981), the court affirmed summary judgment to defendant American Pharmaceutical Company against a conspiracy claim complaining that American had petitioned State Pharmacy Boards to enact certain regulations. The court found that "American cannot be held liable . . . for damages resulting from its genuine and legitimate attempts to secure governmental action, whether through financing lawsuits, lobbying legislatures, or petitioning administrative bodies." *Id.* at 268. In reaching this conclusion, the court had noted, "A different case would result were it shown that state board members were bribed by American, or met in an unlawful fashion with its officers, or were otherwise induced by American, *by means other than legitimate lobbying and publicity*, to take action against mail order houses. Evidence of this sort does not appear on the record." *Id.* at 266 (emphasis in original).

43. 425 U.S. 748 (1976).

44. *Id.* at 753 & n.10.

45. *Id.* at 754.

46. *Id.* at 756 ("The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.").

its source and to its recipients both."[47] Accordingly, the Court held, "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees."[48]

The Court then addressed the constitutional right to advertise and held that the First Amendment protects even purely commercial speech.[49] The Court explained that even speech that has an economic component to it unquestionably falls within the First Amendment. For example, "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another, . . . [because it] is 'sold' for profit, . . . [or because] it may involve a solicitation to purchase or otherwise pay or contribute money."[50] The Court went on to state that "[n]o one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden."[51] The Court explained once more that purely economic interests of the speakers are not disqualifying; speech for the corporate employer and employee in the context of labor relations, for example, had long been protected.[52]

The content of the speech, accordingly, did not justify its exclusion from the First Amendment. In many instances, "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[53] Indeed, in a "predominantly free enterprise economy . . . it is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."[54] Rather than suppressing speech in a benevolent effort to

---

47. *Id.*

48. *Id.* at 757.

49. The Court had previously suggested in a non-corporate context that "commercial speech" was outside the protection of the First Amendment. In *Valentine v. Chrestensen*, 316 U.S. 52 (1942), the Court upheld the validity of a law prohibiting the distribution of commercial handbills. While concluding that the Government could not prohibit all handbills, the Court unanimously suggested that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." *Id.* at 54; *see also* Breard v. Alexandria, 341 U.S. 622, 642 (1951) (upholding a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions because "[t]he selling . . . brings into the transaction a commercial feature"). In *Virginia State Board of Pharmacy*, the Court expressly "rejected" that view of the First Amendment. 425 U.S. at 760.

50. *Virginia*, 425 U.S. at 761 (citations omitted).

51. *Id.* at 761-62.

52. *Id.* at 762.

53. *Id.* at 763.

54. *Id.* at 765.

protect consumers, the government should "open the channels of communication" and let consumers make educated decisions for themselves.[55]

The Court expanded these speech rights in 1978. In *First National Bank of Boston v. Bellotti*,[56] the Court held that corporations have the right to make campaign contributions to defeat a state political referendum:[57] "If the First Amendment protects the right of corporations to petition legislative and administrative bodies, there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity."[58]

The unmistakable premise of facilitating a free flow of information and dynamic debate rang in the *Bellotti* opinion, this time in permitting a corporation to participate in the election debate over a Massachusetts referendum on graduated personal income taxes: "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'"[59] The Court concluded that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate."[60] Any "danger that the people cannot evaluate the information and arguments advanced by appellants . . . is a danger contemplated by the Framers of the First Amendment."[61]

Following *Bellotti* in 1980, the Court made clear in *Central Hudson Gas & Electric v. Public Service Commission*[62] that, when corporations discuss

---

55. *Id.* at 770.

56. 435 U.S. 765 (1978).

57. Following *Bellotti*, the Court has held that some restrictions on a corporation's participation in political elections pass the relevant scrutiny and therefore do not offend the First Amendment. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 134-36 (2003). This Article does not address corporate speech in the political context or the unique government interests in that context. The premise of this Article is more basic: Corporations have the right to speak and courts have a duty to protect that right.

58. *Bellotti*, 435 U.S. at 791 n.31 (citations omitted).

59. *Id.* at 790.

60. *Id.* at 791.

61. *Id.* at 792. A dissonant view comes from the Supreme Court only in the arena of corporate support for political candidates. In that arena, the Supreme Court majority has expressed grave skepticism about the risk of corporations abusing their resources to dominate political campaigns of candidates, concluding that "there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 678 (1990).

62. 447 U.S. 557 (1980).

issues of public concern separate from a commercial transaction, their speech is entitled to full constitutional rights. There, the Court examined a New York Public Service Commission regulation banning all advertisements that promoted electricity use based on the finding that New York state lacked sufficient electricity supply to meet consumer demand and that national energy policy favored conservation. The Court enunciated a four-part test for examining restrictions on commercial speech, permitting government regulation of commercial speech that is neither misleading nor related to unlawful activity only if a substantial interest justifies regulation, and the regulation is in proportion to that interest and carefully designed to achieve that goal.[63] The Court, however, distinguished non-commercial speech, indicating that corporations "enjoy the full panoply of First Amendment protections for their direct comments on public issues" as opposed to those comments made in the context of commercial transactions.[64] As the Court has explained in the defamation context, while there is "no constitutional value in false statements of fact,"[65] "[under] the First Amendment, there is no such thing as a false idea."[66] The Court continued, "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[67]

Later that year, the Court confirmed corporations' right to speak on all matters of public concern. In *Consolidated Edison*, the Court held that the electric company's First Amendment right was violated when the New York Public Service Commission prohibited the inclusion in monthly electric bills of inserts expressing the company's opinions and viewpoints on controversial issues of public policy, such as nuclear power.[68] The Court explained that the regulation struck at the heart of the freedom to speak because, by advocating the use of nuclear power, Consolidated Edison participated in the public debate on an issue of public interest and importance.[69] Because the state action was neither "a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest," the Court, relying on *Bellotti*, struck down the regulation as invalid.[70]

---

63. *Id.* at 564-65.
64. *Id.* at 563 n.5.
65. Gertz v. Robert Welch, Inc., 418 U. S. 323, 340 (1974).
66. *Id.* at 339.
67. *Id.* at 339-40.
68. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 541 (1980).
69. *Id.* at 535.
70. *Id.* at 544.

Six years later the Court held that corporations have a right *not to* speak. In *Pacific Gas & Electric*, a regulation required utilities to include inserts in their billing envelopes asking users to join a non-profit utility consumer advocacy group. There was no increased cost to the utilities: The consumer group was required to pay for the printing costs and there would have been no increase in postage. Nonetheless, the Court held that the regulation was an unconstitutional infringement of speech as it could compel the utility to respond to the consumer group or tailor its statements in response. The Court held, "For corporations as for individuals, the choice to speak includes within it the choice of what not to say."[71]

Unsurprisingly courts have consistently applied these rules, even when public health is at issue. The Supreme Court has affirmed the right of corporations to advertise legal products such as cigarettes and alcohol.[72] The consequences of speech in influencing behavior, even if unhealthy and disfavored, cannot be grounds for suppression. So long as the product is legal, the Court has concluded that the government has no interest in "keeping people ignorant" and that corporations have a "protected interest" in communicating such information.[73] When non-commercial speech is at issue, First Amendment protections for health and medical issues are more, not less, important.[74] As Justice Frankfurter has explained, "For society's good . . . inquiries into these problems, speculations about them, stimulations in others of reflections upon them, must be left as unfettered as possible . . . . Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge."[75]

---

71. Pac. Gas & Elec. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986).

72. *See, e.g.*, Lorillard Tobacco v. Reilly, 533 U.S. 525 (2001); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996); Rubin v. Coors Brewing, 514 U.S. 476 (1995).

73. *Lorillard Tobacco*, 553 U.S. at 571, 582; *see also* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 574-75 (1980) (Blackmun, J. concurring) (explaining that the Court has consistently invalidated laws that deprive consumers of information because they are "covert attempt[s] by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice").

74. Sweezy v. New Hampshire, 354 U.S. 234, 262-63 (1957); *see also* Reuber v. United States, 750 F.2d 1039, 1059 (D.C. Cir. 1985) ("There is no question that the . . . corporate defendants, disagreeing with the conclusions or methodology of Reuber's Study, were free [under the First Amendment] to publicly state their position."); Dow Chem. Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) (holding that the constitutional protection afforded by the First Amendment "extends as readily to the scholar in the laboratory as to the teacher in the classroom"); Henley v. Wise, 303 F. Supp. 62, 66 (N.D. Ind. 1969) (observing that the First Amendment protects "the right of scholars to do research and advance the state of man's knowledge").

75. *Sweezy*, 354 U.S. at 262.

Thus, in *Sims v. Tinney*,[76] the federal district court made short work of plaintiff's claim that a rival chiropractic medical association had "conspired" to violate plaintiff's civil rights by advertising and advocating legislation adverse to plaintiff's interests. The court first held that "the activities complained of constitute the exercise by the defendants of their rights of free speech and of petition to public bodies and public officials, which are protected by the First Amendment . . . ."[77] The court concluded, "[W]here the healing arts and public health are concerned, there is an enhanced public interest in the free and unfettered discussion of the issues and circulation of relevant educational and informational materials."[78]

As the Supreme Court has made clear, the public would lose the benefit of vigorous debates that advance and clarify health and safety issues if manufacturers, trade associations, and research institutes could be held liable for expressing their opinions. "Debate on public issues will not be uninhibited if the speaker must run the risk [of liability for his opinions]."[79] "[A] chilling effect on the research, development, and exchange of scholarly ideas is repugnant to the First Amendment."[80] Even *if* a corporation said something that science later disproved, "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[81] In order to preserve unfettered debate, the Supreme Court has held that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes . . . freedom of inquiry . . . ."[82]

In sum, claims asserting that corporate defendants advocated "a particular view in a scientific debate and [tried] to retain a regulatory standard that

---

76. Sims v. Tinney, 482 F. Supp. 794 (D.S.C. 1977), *aff'd*, 615 F.2d 1358 (4th Cir. 1979).

77. *Id.* at 800.

78. *Id.*; *see also* Libertelli v. Hoffman-La Roche, 7 Med. L. Rptr. 1734, 1736 (S.D.N.Y. 1981) (stating that "[i]nformation about medical matters is sufficiently important to the public interest to warrant application of [the actual malice] standard" before liability may attach for publishing false medical information).

79. Garrison v. Louisiana, 379 U.S. 64, 73 (1964).

80. *Henley*, 303 F. Supp. at 67.

81. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

82. Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (citations omitted); *see also* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, 391 U.S. 563, 573 (1968) ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech clause of the First Amendment . . . ."); Bond v. Floyd, 385 U.S. 116, 136 (1966) ("The central commitment of the First Amendment . . . issues should be uninhibited, robust, and wide-open.'" (quoting *N.Y. Times*, 376 U.S. at 270)).

defendants preferred . . . are protected by the First Amendment."[83] The First Amendment recognizes not only the absolute freedom to argue one's viewpoint to the government, but also that "[t]he history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge."[84] Today's "truth" is tomorrow's next example of scientific fallacy.

C. The First Amendment Protects Corporations' Freedom of Association

The Supreme Court has firmly protected the right of corporations to associate with others, to speak, to petition the government, and to promote their economic interests. "[T]he right of association is a 'basic constitutional freedom."[85] "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas" is protected by the First Amendment.[86] Indeed, the "freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[87]

The Court, thus, has called for the "closest scrutiny" to defend the freedom to associate: "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[88] Even "[m]embership, without more, in an organization engaged in illegal advocacy" is constitutionally protected.[89] "A number of complex motivations may impel an individual to align himself with a particular organization. It is for that reason that the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's illegal goals."[90]

---

83. Senart v. Mobay Chem., 597 F. Supp. 502, 506 (D. Minn. 1984).
84. Dennis v. United States, 341 U.S. 494, 550 (1951) (Frankfurter, J., concurring).
85. Buckley v. Vale, 424 U.S. 1, 25 (1976).
86. NAACP v. Alabama, 357 U.S. 449, 460 (1958).
87. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).
88. *NAACP*, 357 U.S. at 460.
89. *Id.* at 224-25.
90. *Id.* at 266 n.16; *see also* Healy v. James, 408 U.S. 169, 185-86 (1972) (rejecting government sanction against an individual due to association with an "unpopular organization").

The Supreme Court has left no doubt that First Amendment protection for association extends to prevent civil liability. In *NAACP v. Claiborne Hardware Co.*,[91] the NAACP and its members organized a boycott of white merchants in Port Gibson, Mississippi. The purpose was to coerce observance of civil rights. While most NAACP members boycotted peacefully, some participated in violent, criminal activity and incited others to engage in violence.[92] The trial court found the NAACP's field secretary liable based on a record purporting to show pervasive violent conduct and speeches encouraging illegal activity.[93] The NAACP was held liable because it did not repudiate its field secretary's actions.[94]

In overturning liability, the Supreme Court established a number of important principles that have broad application. Only persons who participate in illegal activities, or incite them, can be held liable.[95] The First Amendment safeguards the non-violent, lawful activities of persons and organizations in which they are members.[96] Because concerted action includes both unlawful conspiracies and protected assemblies, courts must take great care in preserving First Amendment-guarded conduct and speech.[97]

The Supreme Court also acknowledged the power of association: Freedom of association is important to the right of the people to make their voices heard. One voice can be lost or squelched; a group packs much more punch.[98] The speech need not meet standards of political acceptability, so long as it is peaceful.[99]

Finally, the Court held that the mix of protected with unprotected speech and activity calls for a "precision of regulation" to ensure that civil liability is not imposed on constitutionally protected speech or association.[100] The

---

91. 458 U.S. 886 (1982).

92. *Id.*

93. *See id.* at 887, 902-06.

94. *Id.* at 893.

95. *Id.* at 933-34.

96. *Id.* at 915.

97. *Id.* at 926-27; *see also* Scales v. United States, 367 U.S. 203, 229 (1961) ("[A] similar blanket prohibition of association with a group having both legal and illegal aims" would raise "a real danger that legitimate political expression or association would be impaired.").

98. *Claiborne Hardware*, 458 U.S. at 907-08. The Court recognized the essential power of association to advocate a viewpoint earlier in *Buckley v. Valeo*, 424 U.S. 1, 22 (1976), when it allowed donations to groups because they "enable[] like-minded persons to pool their resources" to accomplish civil, economic, political, or charitable goals that would otherwise be unattainable.

99. *Claiborne Hardware*, 458 U.S. at 911. Of course, unprotected speech such as libel, fighting words, and obscenity is not protected.

100. *Id.* at 916 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

analysis starts with the unassailable rule that the government may not "impose liability on an individual solely because of his association with another."[101] Liability must rest on the individual's own conduct and words. Therefore, the individual's intent must be judged by the "strictest law" so that an individual who sympathizes with the legitimate aims of an organization and who does not intend to accomplish those lawful aims through illegal action, such as violence, is not punished because others engage in unlawful, unprotected conduct in which he does not participate.[102] The Court articulated a stringent standard for assessing liability: "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."[103] Instead, "[f]or liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[104] Of course, the individual can still be held liable for unlawful conduct that he authorized or incited.[105]

Applying these First Amendment-required principles to the facts of *Claiborne Hardware*, the Court held that evidence of regular attendance and participation at NAACP meetings was insufficient to hold the NAACP and its field secretary liable, despite the field secretary's incendiary speeches to provoke the boycott.[106] There was insufficient evidence that the NAACP or its field secretary authorized, ratified, or directed the unlawful violence.[107] There was no evidence that the NAACP had any unlawful aims.[108] Those persons who committed violence were not the NAACP's agents simply because they attended NAACP meetings and shared certain goals.[109] Therefore, the Supreme Court held that neither the NAACP nor its field secretary had a legal duty to repudiate the violent actions of other members: "A legal duty to 'repudiate'—to disassociate oneself from the acts of another—cannot arise unless, absent the repudiation, an individual could be found liable for those

---

101. *Id.* at 918-19; *see also* United States v. Robel, 389 U.S. 258, 265 (1967) (terming "guilt by association" impermissible).

102. *Claiborne Hardware*, 458 U.S. at 919 (quoting Noto v. United States, 367 U.S. 290, 299 (1961)).

103. *Id.* at 920.

104. *Id.*

105. *Id.* at 920 n.56.

106. *Id.* at 924.

107. *Id.*

108. *Id.* at 925.

109. *Id.* at 925 n.69.

acts."[110] As the Court explained, "[C]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."[111] The essential "precision of regulation" not only confined the particular persons who could be held accountable, but also dictated that any damages be strictly limited to the direct consequences of only unlawful, violent activities.[112] Damages could not be levied for the harm resulting from protected, lawful conduct.[113]

These same principles have been applied to corporate associations. In *In re Asbestos School Litigation*, then-Judge Alito wrote an opinion granting an extraordinary writ of mandamus and dismissing a conspiracy claim alleged against Pfizer based on its membership in the Safe Building Alliance ("SBA").[114] Plaintiffs had alleged that Pfizer joined an ongoing conspiracy to sell asbestos products without warnings.[115] They further asserted that the SBA was distributing misleading information to minimize the dangers of asbestos in schools and to cause schools either not to abate the asbestos in their buildings or to use cheaper abatement methods in order to limit damages.[116] While the Third Circuit agreed that the allegations, if true, might support a claim for fraudulent misrepresentation, it found the evidence of its SBA membership insufficient to tie Pfizer to any conspiracy to defraud.[117] Plaintiffs' evidence against Pfizer consisted of its membership in the SBA, its contributions of $50,000 to the SBA, and its attendance at some meetings.[118] No evidence established an actual agreement to sell asbestos products without warnings or to conceal the manufacturers' alleged knowledge of the dangers of asbestos.[119]

The Third Circuit relied on *Claiborne Hardware* to hold that Pfizer could not be held liable for the alleged wrongful conduct of the SBA or other members "unless it can be shown that Pfizer's actions taken in relation to the SBA were specifically intended to further such wrongful conduct."[120] The

110. *Id.*
111. *Id.*
112. *Id.* at 918.
113. *Id.* at 916-17.
114. *In re* Asbestos School Litig., 46 F.3d 1284, 1286-87 (3d Cir. 1994).
115. *Id.* at 1286.
116. *Id.* at 1287.
117. *Id.* at 1290 n.4.
118. *Id.* at 1290.
119. *Id.* at 1292.
120. *Id.* at 1290.

court held that Pfizer's contributions and participation could have been done to advance protected activities:

> A member of a trade group or other similar organization does not necessarily endorse everything done by that organization or its members . . . .
>
> . . . Attendance at a meeting of an organization does not necessarily signify approval of *any* of that Association's activities. And, even if the attendance at issue here could reasonably be interpreted as an expression of general approval of the SBA's goals, it unquestionably could not rationally be viewed as sufficient to show that Pfizer specifically intended to further any allegedly tortious and constitutionally unprotected activities committed by the SBA or its other members.[121]

The Third Circuit then held the extreme remedy of a writ of mandamus to be appropriate in order to provide breathing space for the exercise of First Amendment rights, to avoid the irreparable injury that would result from even a minimal period of losing a First Amendment freedom, and to prevent the chilling of First Amendment rights that would come for Pfizer and others if Pfizer were forced to stand trial because it joined and participated in a trade association.[122] According to the court, "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection."[123] The court held that forcing corporations to stand trial based on such evidence, "if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them."[124]

While not specifically addressed by the Supreme Court, the Third Circuit's approach is consistent with the equally broad protection given to corporations and their trade associations to petition the government for redress and to engage in the debate over scientific and other important public policy issues.[125]

---

121. *Id.* (emphasis in original).

122. *Id.* at 1294-95.

123. *Id.* at 1294.

124. *Id.*

125. In a later decision, the Third Circuit similarly dismissed claims of conspiracy and concerted action against product manufacturers, but denied a motion to dismiss claims of fraudulent misrepresentations premised on statements made at medical seminars by manufacturers' paid consultants. *In re* Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 792 (3d Cir. 1999).

D. Summing Up the State of Play

The current state of First Amendment law can be stated in several (undoubtedly over-simplified) principles:

- Corporations enjoy the First Amendment freedoms to petition the government, associate with others, and speak freely. These rights extend to commercial, economic, and public concerns. These rights inure to both for-profit and not-for-profit corporations.
- Corporations may act in their self-interest without forfeiting their First Amendment protections.
- Corporations may express unpopular positions or ideas and challenge accepted orthodoxy and government policies without losing their First Amendment freedoms.
- Liability cannot be premised on protected speech, and protected speech cannot be the cause of any tort. Liability may not be imposed because speech is effective.
- There is no such thing as a false opinion or idea.
- Corporations have the right to join, donate to, and participate in organizations. Membership in an organization is not sufficient to impose liability. Instead, to justify liability, the plaintiff must demonstrate that the organization itself possessed unlawful goals and that the corporation had the specific intent to further those goals.
- Corporate speech, association, and lobbying make an important contribution to the marketplace of ideas, serve as a valuable check on government, and are essential to both our democratic system of government and our free enterprise economy. The listener is entitled to hear, if not be enriched by hearing, corporate viewpoints. The listening public should be trusted, cannot have too much speech, and is able to decipher the truth from the static.

II. COURTS AND OTHER GOVERNMENT ENTITIES HAVE IGNORED FREE SPEECH DOCTRINES IN ADJUDICATING AND PURSUING TORT LIABILITY

Some courts and other state actors have been inconsistent, if not lax, in recognizing and protecting the broad application of First Amendment freedoms to alleged corporate torts. Most of the Supreme Court's cases have occurred in the context of prior restraints, particularly of the news media—restrictions on corporations or individuals from speaking in the first instance. *Claiborne Hardware*[126] and *Noerr-Pennington*[127] are notable exceptions. The opinions tend to be doctrinal, focused on developing or applying tests in their particular contexts. These tests do not easily transfer to the tort arena: How is strict or intermediate scrutiny to apply when a generally

126. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

127. *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

applicable tort is premised on speech activities? Many courts, accordingly and correctly, have simply determined whether speech is protected and, if so, precluded liability.

Some courts, however, have become confused and have failed to intercede promptly to preserve First Amendment speech from the attack of tort claims. The mere expense of defense and risk of crippling liability can chill corporate speech—which is itself a litigation goal in some cases. Some political officials are now taking advantage of the reluctance of some courts to protect corporate speech rights and have chosen to ignore corporate speech rights entirely, either for political or legal expedience, by seeking to impose massive tort liability on corporate defendants. Although the claims use traditional tort labels, they are anything but ordinary in their attacks on constitutionally protected speech as a basis for liability.

A. Kivalina v. ExxonMobil Corp.

One such case where public officials have failed to observe the protection of the First Amendment for corporate entities is *Kivalina v. ExxonMobil Corp.*[128] The Native Village of Kivalina and the City of Kivalina have brought a lawsuit against numerous power, coal, and oil companies for contributing to global warming.[129] They assert that the companies, through their association with trade organizations and their funding and use of experts who questioned scientific need to reduce greenhouse gas emissions, created, contributed to, and maintained a public and private nuisance, and conspired to "create a false scientific debate about global warming in order to deceive the public."[130] The alleged "conspiracy" is based on expressing a "false" opinion on global warming and joining or contributing to organizations which challenged the theory of global warming and presented evidence that "[made] scientific judgments seem uncertain."[131]

To support their allegations, the plaintiff governments assert that the defendants used organizations to fund skeptical scientists who allegedly were less credentialed than some of their peers and "regularly publish[ed] their marginal views expressing doubts about numerous aspects of climate change

---

128. Compl., Kivalina v. ExxonMobil Corp., 2008 WL 594713 (N.D. Cal.) (No. CV 08-01138 SBA). In the interest of full disclosure, Jones Day, the authors' law firm, represents one of the defendants in this litigation. Neither of the authors, however, has worked on the case.

129. *Id.* at ¶ 1.

130. *Id.* at ¶¶ 250, 264, 269.

131. *Id.* at ¶¶ 192-93.

science in places like the *Wall Street Journal* editorial page, but rarely, if ever, in peer-reviewed scientific journals."[132] The skeptics, moreover, were "offered up to numerous mainstream, unsuspecting, news outlets as scientific experts in order to sow doubt among the public about global warming."[133] One organization, Information Council on the Environment, allegedly "undertook radio advertising blitzes and mass mailings that attacked the proponents of global warming and used unscientific tactics like calling attention to small geographic regions with temperature trends that ran against the overall warming as somehow disproving global warming."[134] Other groups such as the George C. Marshall Institute undertook studies that challenged global warming and published a book by a "long-time [global warming] contrarian."[135] Still another group, Greening Earth Society, issued a newsletter that detailed anti-climate change views but only included the "work of a few scientists" and "notorious climate skeptics."[136]

The government entities specifically target various activities of the Global Climate Coalition ("GCC"), which received funding from some defendants and with which some of defendants' executives are associated. The government entities argue that GCC attempted to "subvert the debate on global warming" by questioning scientific studies regarding the "need to reduce greenhouse gas emissions."[137] GCC allegedly raised concerns regarding the unemployment that would result from emissions regulations and promoted potential benefits of increased carbon dioxide such as increased crop production.[138] In addition, the GCC allegedly "drafted a primer on the science of global warming for GCC members" enumerating "contrarian" arguments and theories, and listing a "counter-argument" for every one of them.[139] In short, according to the government entities, the defendants should be held liable because "the GCC and individual members have provided public platforms for the handful of scientists who are skeptical of the consensus that there is a human influence on Earth's climate."[140] The government entities even castigate the defendants for quitting the GCC in 1997 when "the growing

132. *Id.* at ¶ 191.

133. *Id.*

134. Compl. ¶ 194, Kivalina v. ExxonMobil Corp., 2008 WL 594713 (N.D. Cal.) (No. CV 08-01138 SBA).

135. *Id.* at ¶¶ 216-19, 228.

136. *Id.* at ¶¶ 229-30.

137. *Id.* at ¶¶ 197, 203.

138. *Id.* at ¶ 204.

139. *Id.* at ¶ 205.

140. Compl. ¶ 210, *Kivalina*, 2008 WL 594713.

scientific and public consensus regarding global warming forced a number of GCC supporters to reconsider the negative public relations implications of their involvement in a group that was increasingly recognized as a self-serving anti-environmental group."[141]

The government entities also allege that ExxonMobil was the "leader" of this conspiracy because it contributed $16 million between 1998 and 2005 to forty-two different organizations that challenged global warming.[142] The further alleged misconduct of Exxon includes such activities as "Exploiting Scientific Studies," "Denying the Consensus on Global Warming," "Funding Critics of Global Warming," and "Denying the Effects of Global Warming on the Arctic."[143]

The defendants have filed a motion to dismiss the complaint, based in part on their First Amendment freedoms. Defendants argue that, like in *Consolidated Edison*, they should be shielded from liability under the First Amendment because it protects those who express "controversial" views on matters of public concern such as global warming.[144] "The First Amendment protects expression, be it of the popular variety or not."[145] Moreover, the attack on the corporations' associations, contributions, and membership in various organizations that disagreed with or challenged established orthodoxy violates the basic premise of *Claiborne Hardware*: A defendant may not be civilly liable for associating with groups unless the groups have an illegal aim, and the defendant specifically intended to further those illegal aims. Under the First Amendment, it is no crime to express one's opinion or advocate for a desired result, even if purely selfish, particularly when those opinions address

---

141. *Id.* at ¶ 209.

142. *Id.* at ¶ 231.

143. *Id.* at ¶¶ 236-48. The complaint also asserts that Exxon itself engaged in misleading or false advertising. *Id.* at ¶ 240. If the government entities can establish that Exxon's speech was purely commercial speech *and* that its speech was objectively false or misleading—as a matter of fact and not opinion or representing merely a minority view—its speech would be considered unprotected under current Supreme Court precedent. *See, e.g.*, Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 563-64 (1980). Several Supreme Court justices, however, seem to believe that commercial speech needs additional protections. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 US. 525, 571 (2001) (Kennedy, J., concurring); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring). Moreover, additional problems such as causation would still likely bar any liability as there is no indication from the complaint that the government entities were directly damaged by these particular advertisements. As explained *infra*, Part IV, the Court should address these First Amendment concerns at the earliest stage to ensure that protected speech is not impermissibly used as a basis for liability.

144. Motion of Certain Utility Defendants to Dismiss Plaintiffs' Civil Conspiracy Claim at pt. II.A.2, *Kivalina*, 2008 WL 594713.

145. Boy Scouts of America v. Dale, 530 U.S. 640, 660 (2000).

issues that are matters of public concern. The motion to dismiss is awaiting judicial decision.

The governments' allegations are troubling under the First Amendment, and they therefore warrant close, immediate judicial scrutiny. The allegations do not appear to be based on objectively false statements—indeed, the debate over global warming, its cause, its effect, and its policy solution, continues as of the date of this Article. Some media sources have announced that "2008 was the year man-made global warming was disproved" because of strong and statistically confirmed evidence that global warming may not be happening.[146] On December 11, 2008, the U.S. Senate Minority Committee on Environment & Public Works released a report stating that more than 650 prominent international scientists disagree with the global warming theory and continue to question a "scientific consensus" on this issue.[147] The Report provides that "[s]cientific meetings are now being dominated by a growing number of skeptical scientists."[148] NASA's Goddard Institute for Space Studies studies, moreover, recently disputed the steady increase in air temperatures because "the hottest decade of the 20th century was not the 1990s but the 1930s" and "the meteorological December 2007 to November 2008 was the coolest since 2000."[149] In fact, global temperatures are still dropping, and in 2008 "temperatures fell below their 30-year average."[150] Some have argued that Antarctic sea ice in 2008 "reached its highest level since satellite records began in 1979."[151]

Pointing out that a lively scientific debate persists over global warming, despite its lack of political correctness in some circles, is not to suggest that global warming, in fact, has been disproved or that global warming may not present a threat. Our point is more basic: Should the courts resolve that controversy? Should the courts penalize a corporation or any citizen for expressing a viewpoint on that issue? The First Amendment answers these

---

146. *See* Christopher Booker, *2008 Was the Year Man-Made Global Warming Was Disproved*, DAILY TELEGRAPH, Dec. 31, 2008, *available at* http://www.telegraph.co.uk/comment/columnists/christopherbooker/3982101/2008-was-the-year-man-made-global-warming-was-disproved.html.

147. *See* STAFF OF S. MINORITY COMM. ON THE ENV'T AND PUB. WORKS, 110TH CONG., MORE THAN 650 INTERNATIONAL SCIENTISTS DISSENT OVER MAN-MADE GLOBAL WARMING CLAIMS (2008), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=83947f5d-d84a-4a84-ad5d-6e2d71db52d9.

148. *Id.* at 2.

149. *See* Christopher Booker, *Global Warming: Reasons Why It Might Not Actually Exist*, DAILY TELEGRAPH, Dec. 30, 2008, *available at* http://www.telegraph.co.uk/earth/environment/globalwarming/4029837/Global-warming-Reasons-why-it-might-not-actually-exist.html.

150. *Id.*

151. *Id.*

questions: Public officials have a constitutional obligation not to allow litigation to serve as a tool to silence scientific debate and to prevent well-informed participation in public policy-making, and courts should intercede when public officials falter in this responsibility. Further, courts are neither competent to declare that one scientific view is "false," nor are they permitted by the First Amendment to impose liability based on honest scientific opinion. Tort liability should not stifle creativity, scientific advancement, controversial debate, or the freedoms we sometimes take for granted. There must be room to explore scientific issues and engage in debate without fear of liability. As the Supreme Court has noted, First Amendment rights "are fragile enough without the additional threat of destruction by lawsuit."[152]

B. Rhode Island v. Lead Industries Association

The threat of a lawsuit, such as in *Kivalina*, may induce some corporations to sit on the sidelines of the public debate, but the debate, and consequently policy makers and the public, suffer. The authors recently experienced one court's abject failure to protect corporate speech rights in a similar public policy lawsuit.[153]

In 1999, the Rhode Island Attorney General sued a select number of historical producers of lead pigments, alleging that these producers contributed to a public nuisance created by the presence of lead paint in private dwellings across the State. To prove his case, the Attorney General alleged in his complaint and later introduced evidence at trial of each manufacturer's association with a trade organization, promotional activities, and lobbying through the trade organization of government officials. This evidence, according to the Attorney General, proved that each former lead pigment producer contributed to the public nuisance by creating and fostering a market for lead pigments that would not have existed but for defendants' actions.

An immediate problem with the Attorney General's theory of the case is that it was premised almost entirely on the defendants' constitutionally protected speech. Although there has been over twenty years of litigation against the former manufacturers of lead pigment, there is no indication that

152. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 931-32 (1982).

153. *See* Rhode Island v. Lead Indus. Ass'n, No. 99-5226, 2001 WL 345830 (R.I. Super. Ct. Apr. 2, 2001); *see also* Santa Clara v. Atl. Richfield Co., No. CV788657 (Santa Clara County Super. Ct. filed Mar. 23, 2000); Ohio v. Sherwin-Williams, No. 07-CV-044587 (Franklin County Super. Ct. filed Apr. 2, 2007).

the former lead pigment manufacturers acted improperly. There has never been a finding that the former lead pigment manufacturers intentionally misled consumers or falsely advertised their product. Lead pigment manufacturers did not hide research or concoct false results. And, at all times that the manufacturers made and promoted the allegedly nuisance-creating lead pigments and lead-containing paints, they were legal products.[154] Nonetheless, the trial court denied defendants' multiple motions to protect their speech conduct and permitted the Attorney General to present his case to the jury based on defendants' speech. The Court also denied defendants' request for jury instructions limiting the use of the evidence.

Over objection, the Attorney General thus was allowed to introduce substantial evidence at trial concerning defendants' association with the Lead Industries Association ("LIA"), a trade organization of which defendants were members at different times,[155] and the LIA's lobbying and petitioning

154. While American public health officials and physicians had been aware that ingesting lead was hazardous to human health, paint, which was never intended to be ingested, was not thought to be a health hazard to residents until the mid-twentieth century. Indeed, in the early twentieth century, paint specifications—including those by federal, state, and local governments—oftentimes required that paint contain a minimum percentage of lead pigments. *See, e.g.*, NATIONAL BUREAU OF STANDARDS, TECHNICAL INFORMATION ON BUILDING MATERIALS FOR USE IN THE DESIGN OF LOW-COST HOUSING: FEDERAL SPECIFICATION PAINT PIGMENTS AND MIXING FORMULAS (Sept. 15, 1936); U.S. GOVERNMENT REVISES MIXED PAINT SPECIFICATIONS, 1 LEAD at 5 (Mar. 1931) (In 1931, the federal government's master specifications for white paint increased the minimum percentage of white lead from 45 percent to 60 percent.). Some states even passed laws regulating the labeling of "lead paint" to ensure that consumers were not deceived into purchasing inferior, "adulterated" paint that contained only minimal or no lead. GEORGE B. HECKEL, THE PAINT INDUSTRY: REMINISCENCES AND COMMENTS 321-24, 371 (1931) (North Dakota passed the first such law in 1905, followed by numerous other states.).

Intact, well-maintained architectural lead paint, even today, is not considered to be a health hazard, but lead paint that is not maintained and that is permitted to deteriorate into dust may pose a health hazard to children. *See* EPA Lead; Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1206, 1229 (Jan. 5, 2001) (codified at 40 C.F.R. pt. 745) ("The [Environmental Protection] Agency does not believe that intact paint can generate significant amounts of lead-containing dust."); CENTERS FOR DISEASE CONTROL, MANAGING ELEVATED BLOOD LEAD LEVELS AMONG YOUNG CHILDREN: RECOMMENDATIONS FROM THE ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION 17 (2002), *available at* http://www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm ("Direct and indirect exposure of children to leaded paint that has deteriorated because of deferred maintenance is likely the major factor in the increased risk for EBLL associated with poverty and living in older housing."). Based on this changing medical knowledge, the federal government banned lead-containing paints for architectural uses in the 1970s. None of the alleged speech activities occurred after the federal government banned lead-containing paints.

155. The State promised when seeking the admission of LIA evidence that it would show that the LIA was defendants' agent. After the jury heard mountains of LIA evidence, however, the trial court ruled that the LIA was not defendants' agent. *See* Transcript of Oral Argument at A3486-3492, *Lead Industries*, 2006 WL 691803 (No. PB/99-5226). While the court told the jury that it could not impute the LIA's actions to defendants, it did not strike the vast majority of the LIA evidence and did not instruct the jury on how it

activities.[156] Plaintiff introduced evidence about the LIA's alleged attempts to fight individual diagnoses of lead poisoning, to combat the substitution in paints of other materials for lead, to influence the medical community, to promote the use of lead pigments and paints, and to convince governmental organizations themselves to use lead paint.[157] Undoubtedly, one function of the LIA, which represented miners, smelters, refiners, and product manufacturers, was to protect and foster the market for lead, including understanding lead toxicity and commenting on unwarranted or unsubstantiated claims of toxicity through scientific research.[158]

One State expert witness also testified extensively about the LIA's "unending battle" with "state and federal regulations or legislation" outside of Rhode Island.[159] He further testified about the LIA's efforts to repeal a 1949 Maryland law concerning the use of lead on toys, stating,

> The LIA says that it was part of an agreement to get a piece of legislation that had been passed in Maryland in 1949, to get that legislation which had severe penalties for the use of lead on toys and children's furniture that had lead on it without—that did not have a label. There were severe penalties, even—even prison, for people who violated the law. And [the LIA] was part of an agreement to get that law repealed.[160]

The witness provided similar testimony about the LIA's alleged resistance to regulations in New York, Chicago, and other places around the country.[161] No evidence suggested, however, that the LIA, much less any defendant, acted

---

should consider the associational evidence. *Id.* at A3490-3491, 4081-4082. Further, even after this ruling, the court allowed a State expert witness to testify regarding the LIA's campaigns promoting the use of lead pigments and paints. *Id.* at A4136-4145, 4186-4191. Other than to punish defendants for the LIA's past conduct, the State never articulated any permissible purpose for this evidence.

156. Curiously, before trial, the Rhode Island Superior Court, citing the *Noerr-Pennington* doctrine, ruled that "the State, its counsel and its witnesses shall not be permitted to present any evidence or make any references in testimony, questioning, or argument to the Defendants' legislative and/or advocacy and speech and efforts as a basis for imposition of liability on the Defendants." Lynch v. Lead Indus. Ass'n, No. 99-5226, at A. 306.001 (R.I. Oct. 31, 2005) (order granting motion *in limine*). This ruling, however, was never enforced at trial, despite defendants' repeated objections.

157. Transcript of Oral Argument, *supra* note 155, at A3421-3444, 3448-3451, 3456-3482, 3497-3507, 3552-3554, 3653-3658, 3668-3670, 3676, 3682, 3691-3692.

158. There is no indication that the LIA manipulated this scientific research. *See, e.g.*, Wright v. Lead Indus. Ass'n, No. 1896, at 8 n.10 (Md. Ct. Spec. App. Oct. 21, 1997) (unreported decision) ("We are hesitant to even dignify the Wrights' charges that the lead industry manipulated in some fashion research facilities of such institutions as the Johns Hopkins University and Harvard University, with requests to conduct research into these issues.").

159. Transcript of Oral Argument, *supra* note 155, at A3586.

160. *Id.* at A3762.

161. *Id.* at A3585-3595, 3686, 3761-3764.

dishonestly or that its opposition to proposed regulation was a sham for some ulterior purpose.

In closing argument, the Attorney General's counsel cast guilt on defendants for merely belonging to and associating with the LIA:

> [W]hat the State is saying is that if you don't agree with your industry organization, get out or speak out or do something different. Don't continue paying your dues. Don't keep funding the programs. Don't keep going to the meetings. Don't keep serving on the board of directors, don't keep serving on committees . . . . Not a one, not a single one of these defendants said stop it. Not a single one of them said, not a single one of them, quit the LIA to protest their conduct.[162]

Furthermore, the Attorney General emphasized that the former manufacturers should be held liable because of the LIA's petitioning activities. For example, his counsel argued that "the primary reason that lead paint remained legal for as long as it did was because economic forces fought hard to keep it legal."[163] The Attorney General pointed to the petitioning activities and exclaimed that "part of their scheme, their plan, was to sell lead as long as they could, was to ensure that they could keep selling lead without prohibition and without restriction. That was their plan."[164] The Attorney General's counsel then denounced the LIA's opposition to "[s]tate and county and municipal legislation" in other States.[165] The jury was urged to use the petitioning evidence to find liability. In February 2006, the jury found three former manufacturers liable in public nuisance based largely on these constitutionally protected activities, subjecting the defendants to potentially billions of dollars in abatement costs.

In denying the motion for a new trial, the trial court gave short shrift to defendants' First Amendment arguments. The court refused to acknowledge that (1) liability premised on defendants' association with the LIA and failure to repudiate the LIA's speech was inconsistent with the Supreme Court's ruling in *Claiborne Hardware*; and (2) the companies' right to belong to the LIA, to pay membership dues, and to participate in the LIA falls within the heart of the associational freedoms protected by the Constitution. The Attorney General's argument that defendants were required to speak out against, and to disassociate from, the LIA turns the First Amendment on its head. The Attorney General did not try to prove that the LIA had an illegal

---

162. *Id.* at A5167; *see also* A2504-2507, 3426-3441.
163. *Id.* at A5154.
164. *Id.* at A5173.
165. *Id.* at A5174.

purpose, that any company joined knowing the illegal purpose, or that the company had the specific intent of furthering that unlawful purpose, as the First Amendment requires.[166]

The trial court recognized only that "[s]ome of counsel's statements regarding membership in the LIA were improper," holding that its earlier instruction to the jury that the LIA was not defendant's agent cured any prejudice.[167] The court, however, impermissibly failed to identify the limited purpose for which the LIA evidence could be considered. This failure itself conflicts with *Claiborne Hardware Co.*, in which the U.S. Supreme Court reversed the Mississippi Supreme Court and held that the evidence, counsel's argument, and jury instructions must adequately define the conduct upon which damages could be imposed under the First Amendment.[168] Compounding this error, the Rhode Island trial court refused to issue a specific instruction to advise the jury of defendants' associational rights.[169]

Furthermore, the LIA's activities themselves are constitutionally protected: Conducting research, speaking out on public health issues, and petitioning government and regulatory agencies are all core First Amendment rights. The trial court's reasoning that "the evidence demonstrated that the particular defendants had knowledge of the LIA's lobbying activities . . . had knowledge of the harmful effects of lead, and continued to sell and promote lead"[170] was a wrong-headed justification. The government has no interest in preventing corporations from creating a market for a legal product through their constitutionally protected activities.[171] As a federal court of appeals explained in affirming the exclusion of *Noerr*-protected evidence, "to admit [this evidence] even for a limited purpose of [rebutting testimony] was to expose the jury to the danger of considering that proof for improper purposes."[172] Moreover, the court never explained how defendants' knowledge of the LIA's activities had any relevance to their continued sales and marketing efforts. The only possible link is that defendants were guilty by association with the LIA.[173]

---

166. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919 (1982).

167. Rhode Island v. Lead Indus. Ass'n, No. 99-5226, 2007 R.I. Super. LEXIS 32, at *206.

168. *Claiborne Hardware*, 458 U.S. at 917-18.

169. *See Lead Industries*, No. 43, at A. 5569 (Ds' Proposed Instr.).

170. *Id.*

171. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 580-82 (2001); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978).

172. City of Cleveland v. Cleveland Elec. Illuminating Co., 734 F.2d 1157, 1164 (6th Cir. 1984).

173. This was precisely the argument advanced in the Attorney General's closing argument, which condemned the former manufacturers for opposing lead paint legislation. In addition, the Attorney General's

Finally, even if it deemed petitioning evidence to be passably relevant, the trial court failed to give the limiting instruction that the U.S. Supreme Court has held must be given whenever petitioning evidence is admitted in a jury trial. As part of the *Noerr-Pennington* doctrine, a "trial court is required [as a matter of federal constitutional law] to instruct the jury that petitioning conduct is entirely lawful" where evidence of a constitutionally protected activity is before a jury.[174] *Pennington* itself held that, where petitioning evidence is admitted for some permissible purpose, "the jury should have been [so] instructed."[175]

In July 2008, over two years after the jury verdict and almost a decade after the case was filed, the Rhode Island Supreme Court unanimously reversed the jury verdict.[176] The court held that the Attorney General had never alleged a valid public nuisance claim sufficient to pass a motion to dismiss. Unfortunately, the court did not address defendants' First Amendment arguments, missing the opportunity to instruct trial courts on the importance of examining and protecting speech rights at an earlier stage of litigation.

---

evidence and argument did not concern merely what the defendants knew about the LIA's activities; it concerned the activities themselves. Neither the Attorney General nor the trial court mentioned the supposed purpose of that knowledge until after the trial was completed. The Attorney General's articulated purpose—that Defendants opposed legislation as part of their "scheme" to continue selling lead paint (*see* Transcript of Oral Argument, *supra* note 155, at A. 1573-74)—is the same use of evidence that the U.S. Supreme Court deemed impermissible in *Pennington*: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." United Mine Workers of Am. v. Pennington, 381 U.S. 670 (1965) (emphasis added).

174. U.S. Football League v. Nat'l Football League, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

175. *United Mine Workers*, 381 U.S. at 671. The Attorney General initially agreed to the need for a limiting instruction in order to escape a motion *in limine*, then opposed the defendants' proposed jury instruction at trial. Defendants asked the court to instruct the jury that "[defendants] have a constitutionally protected right to lobby for their interests, to communicate with legislators or regulators about their interests, and to petition the government in furtherance of their interests." Rhode Island v. Lead Indus. Ass'n, No. 47, at A. 5571 (Ds' Proposed Instr.). But, the trial court denied that and other instructions aimed at informing the jury about defendants' First Amendment rights.

The trial court relied on *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1196 (8th Cir. 1982), and *Cipollone v. Liggett Group, Inc.*, 668 F. Supp. 408, 411 (D.N.J. 1987). A. 387 (Rule 50/59 Op. at *94). However, in *Alexander*, the Court of Appeals used the petitioning evidence to reverse the trial court's finding, so there was no possibility that a jury would consider the evidence for an improper purpose. In *Cipollone*, the district court denied only a motion *in limine* to preclude all introduction of petitioning evidence, saving for a later date questions of relevance, prejudice, and the like. The court in no way intimated that the evidence could be admitted without a limiting instruction. Neither decision permitted the use of petitioning evidence before a jury without the constitutionally required limiting instruction.

176. Rhode Island v. Lead Indus. Ass'n, 951 A.2d. 428 (R.I. 2008).

III. FAILURE TO PROTECT CORPORATE SPEECH WOULD HARM OUR DEMOCRACY, LIBERTY, AND ECONOMY

Why does it matter that some courts have failed to recognize corporate speech rights? Quite simply because corporations have ideas, expertise, experience, talent, resources, and at times influence that will suffer if their speech can be twisted into a basis for a claim of massive civil liability. Even one case may be sufficient to convince some corporations that could contribute to the public debate to stay silent for fear of later, unintended consequences.

Not only do corporations, just like labor unions and political parties, help individuals attain their own personal and economic goals, but "[b]ecause of their expertise, resources, and incentives, corporations are uniquely suited to provide the electorate with information that will make it more informed as to many of the socio-economic issues facing the nation."[177] And "[i]n a democratic society, the public interest can be fulfilled only if debate on matters of public concern is unfettered from government restrictions."[178] Professor Martin Redish put the questions well and answered them cogently and concisely:

> Who, one reasonably could ask, has a greater interest in what actions the government takes with regard to the economy than corporations, whose very survival may well turn on the success or failure of those actions? Who possesses more firsthand knowledge and expertise on issues relevant to potential governmental regulation of private economic activity? To exclude corporate expression from the scope of the free speech clause, then, would be unwisely to shut out from public debate a substantial amount of relevant, provocative, and potentially vital information and opinion on issues of fundamental importance to the polity.[179]

In short, as the Supreme Court has explained, "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate and the dissemination of information and ideas'" that the First Amendment seeks to foster.[180]

---

177. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 248 (1998).

178. Ronald Collins, Mark Lopez, Tamara Piety & David Vladeck, *Corporations and Commercial Speech*, 30 SEATTLE U. L. REV. 895, 910 (2007).

179. Redish & Wasserman, *supra* note 177, at 235-36.

180. Pac. Gas & Elec. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

In today's society, many speakers are corporations, and corporations encompass a wide spectrum of diverse interests. Most newspapers and media organizations are corporations. Many non-profit organizations, such as private universities, churches, advocacy groups, and charitable entities, are organized as corporations. The world would be a far different place if these corporations lost their right to free speech or could be held liable based on their speech. Simply based on the corporate form, the government could punish these organizations for talking about certain subjects, expressing certain viewpoints, or even from criticizing the government. But for what reason? "[A]ssociations do not suddenly present the specter of corruption merely by assuming the corporate form."[181] Can we honestly say that the Catholic Church, for example, has nothing to add to the marketplace of ideas? That society would be better if the government could silence the Catholic Church, among others, on issues such as abortion or morality?

Nor is there an inherent reason to exclude corporations from speaking. Corporations represent the interests of their shareholders and are in the best position to speak for those individuals on issues that will affect their economic interests.[182] Although some might discredit corporate speech as biased,[183] some personal interest imbues all speech. For example, corporations engage in scientific research to determine the viability or safety of new drugs or energy sources. That the research was funded by a corporation does not make the results of good, well-reasoned research less valuable. A cure for cancer and the research underlying it would be just as beneficial to mankind if developed by a corporation, such as a hospital research center or university, rather than a government or government-sponsored research. To be sure, federal funding of research is no guarantee that the researcher's self-interest, whether for more funding, tenure, or publicity, will not taint the data collection, analysis, and interpretation.[184] Moreover, a blanket rule that would prohibit or impose liability based on the corporate nature of the speaker unfairly impugns the

181. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 711 (1990) (Kennedy, J., dissenting) (quoting FEC v. Mass. Cit. for Life, 479 U.S. 238, 263).

182. Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1116 (2002).

183. *See, e.g.*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626 n.17 (2008) ("Because this research was funded in part by Exxon, we decline to rely on it.").

184. NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE 15 n.15 (Brent Garland ed., 2004); Laura E. Ellsworth et al., *Let the Data Speak Equally to All: The Increasing Importance of Raw Data in Litigation and a Proposal for Principles Governing the Production, Protection, and Use of Raw Data in the Litigation Context*, 6 A.B.A. SEC. MASS TORTS 2, 5 (2008).

integrity and professionalism of the scientists and researchers who actually conduct the research.

In fact, corporations, like other persons outside of government, have a critical role to play in keeping the government honest, fair, and informed. "Although the government may seek to assure that businesses perform fairly and effectively, businesses must likewise assure that the government performs honestly, prudently, and efficiently. There is no better way to achieve this goal than through the power of speech."[185] "To eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate."[186] Pinning liability solely on corporations and corporate speakers and researchers for honest mistakes, while giving legal protection to those who accept government money, would have the opposite effect. Rather than serving as a check on government power, the First Amendment could be used as a blunt instrument to silence critics.

That corporations sometimes promote a minority view on issues of public concern or publicize controversial scientific research is all the more reason to safeguard them from liability. "Established" orthodoxy, particularly that which is funded and promoted by the government, has little risk of suppression, for it is often echoed by the masses. It is the view of the minority, those who challenge the government and conventional thinking, who must be protected. As Professor Redish aptly concludes, government restrictions of corporate speech can be viewed as an "ominous" attempt to centralize power.[187] According to Redish, "One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority." Thus, excluding corporate speech from the protections of the First Amendment "would almost inevitably have a detrimental impact on the most fundamental values underlying the protection of free speech."[188]

The failure to protect corporations from tort liability is also likely to have practical consequences. As the Supreme Court has held, the First Amendment

---

185. Redish & Wasserman, *supra* note 177, at 261-62 (quoting MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: LAW, POLITICS, AND GOVERNMENT EXPRESSION IN AMERICA 161 (1983), and Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 541 (1985)).

186. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 694 (1990) (Scalia, J., dissenting).

187. Redish & Wasserman, *supra* note 177, at 264.

188. *Id.* at 264.

not only has value to the speaker who expresses himself, but also has "tremendous value to [the] audience."[189] As one commentary explained, "[W]ith respect to commercial information about their own products, corporations are not only the best situated parties for purposes of providing the information, but in fact may be the only parties so situated."[190] If plaintiffs are able to impose liability based on a corporation's speech or petitioning activities, corporations are unlikely to speak out or engage in public debates. Corporations would have no incentive to engage in scientific research to develop or promote their products if their research could be grounds for liability if later scientific advances prove the theories wrong.

Imagine, for example, if a prescient corporation in the 1960s had promoted nuclear power as a clean energy source that was good for the environment and would leave a smaller "carbon footprint" than traditional natural gas or coal energy. The corporation joined associations, spoke on the benefits of the nuclear power, pushed government funding for nuclear power plants, and resisted restrictive, costly regulation (at times pushed behind the scene by coal companies). As a result of the corporation's advocacy, nuclear facilities were built, including Three Mile Island. Under the Rhode Island Superior Court's reasoning, the corporation could be held liable in public nuisance for the clean up of Three Mile Island as the company contributed to the creation of demand for nuclear power—even though everything it said was honest and important information on an issue of public concern.

Suppose again that a coal company in the wake of Three Mile Island condemned nuclear power as dangerous and bad for the environment, promoted coal as a safe energy source, and lobbied the government for increased funding and lower regulations on the coal industry. These efforts again were successful as the use of nuclear energy waned in the United States and natural gas and coal production increased. Under the Rhode Island Superior Court's reasoning, these companies now risk a lawsuit because they contributed to the increased demand for coal energy and therefore helped to "cause" global warming.

No matter what position a company takes, it would risk liability depending on largely unknown consequences decades later. Although commercial speech, product advertisements, and product research are relatively robust, corporations have much to add to the public discourse on

189. *Developments in the Law—Corporation and Society: Free Speech Protections for Corporations: Competing in the Markets of Commerce and Ideas*, 117 HARV. L. REV. 2272, 2293 (2004).

190. *Id.* at 2294.

matters of public concern that is much more fragile. Why would any corporation want to affirmatively contribute to the debate and risk liability in such circumstances? The chilling effect on honest scientific research, involvement in the public debate, participation in associations, and participation in the legislative process could be real and substantial. None of this should suggest that intentionally false or fraudulent scientific research or advertisements should be protected, and the Supreme Court has indeed long held that those actions are beyond the First Amendment's protection. Nevertheless, the First Amendment has always provided for the protection of honest mistakes. If corporate speech, including associating in trade organizations or debating proposed regulations, can be a basis for liability and judged on present-day standards, fewer products, less innovation, and less wisdom in regulation are likely.

IV. PROPOSED SOLUTION: INCREASED JUDICIAL VIGILANCE AND HEIGHTENED LEGAL STANDARDS

So what should be done to ensure that courts and government actors protect corporate speech rights? Public officials and other plaintiffs cannot be counted on to police themselves in drafting and presenting their tort claims. As with any legal solution, the primary protection must rest with the litigants and lawyers. Lawyers should recognize and raise constitutional concerns early and devise a cogent strategy to protect their clients' rights. Oftentimes, particularly in state-law, mass-tort claims, the Constitution is at best an afterthought, and the defense efforts and strategies are focused on defeating the particular elements of the claims. Lawyers should not overlook the Constitution and should raise the issues early and often. A court understandably will be skeptical of an eleventh-hour motion to postpone trial based on the First Amendment if hearing about these rights for the first time. Only by raising the constitutional issues consistently through the litigation do lawyers stand a realistic chance of protecting their clients' First Amendment rights.

The litigants themselves bear responsibility too. In this day of ever-tightening budgets, clients may be tempted to forgo the expense of litigating these complex speech issues. Such a short-sighted strategy will only lead to far more serious problems down the road in ways that clients may not recognize. If left unchecked, a corporation would have no idea what statement, research, or association could later be used against it as a premise of liability decades later, and it will eventually become hesitant to speak out on issues of interest. No one knows what opportunities corporations will miss when that

occurs. And when the plaintiffs are public officials, sworn to uphold the Constitution, or government bodies representing the public interest, they must live up to their responsibilities, not just to give lip service to First Amendment rights, but to serve and protect those rights. This involves listening to corporate defendants and taking their assertions of First Amendment rights seriously, even if they disagree with them. Political expedience or the need for financial resources should not lead public officials to deny constitutional rights.

Certainly courts have a vital role as well. As the Supreme Court has explained, courts have a "special obligation" to ensure that liability is not premised on protected speech activities.[191] This means not only that the courts should be receptive to First Amendment arguments, but also that they should affirmatively inquire into the basis of liability at the outset of a lawsuit and seek to carve out and strike allegations and claims based on constitutionally protected speech. Motions to dismiss, to strike, and for summary judgment should be encouraged and carefully considered.[192] For those claims and allegations implicating First Amendment-protected speech and conduct that survive summary judgment to proceed to trial, the courts should exercise careful control over evidence and arguments, and then instruct the jury on a party's First Amendment rights. Courts should not accept plaintiffs' representations that they will be able to demonstrate the speech is unprotected, but should hold them to their initial burdens through an offer of proof before presenting arguments and evidence to the jury. Recent, highly publicized instances of corporate fraud and intentional misconduct should not taint all corporate speech or justify courts looking the other way.

Most of all, the Supreme Court should become involved. The Court should clarify the scope of corporate speech in the context of tort liability other than defamation. The majority of the Court's opinions regarding corporate speech have involved prospective restrictions on speech. Courts have exhibited confusion in applying these principles to the highly contentious tort arena, and clear guidelines are needed. Only the Supreme Court can provide the necessary, national clarity to protect corporate speech.

The Supreme Court should also take the opportunity to impose heightened pleading requirements similar to those required for fraud claims to ensure at the earliest stage of the litigation that the lawsuit is not premised on protected

191. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

192. The New Jersey Supreme Court, for example, already provides such a procedure for defamation cases. *See, e.g.*, Rocci v. Ecole Secondaire MacDonald-Cartier, 755 A.2d 583, 588 (N.J. 2000); Dairy Stores, Inc. v. Sentinel Publ'g Co., 516 A.2d 220, 236 (N.J. 1986).

speech. As courts have recognized, protracted litigation alone threatens to chill speech.[193] By forcing plaintiffs to plead their claims with particularity, courts will be able to assess the allegations and claims and alleviate the burden of litigation on defendants. In the fraud context, the Supreme Court has recognized that these heightened standards guard constitutionally protected speech and permit the courts to separate out truly fraudulent conduct.[194] Such standards would serve a similar purpose when corporate torts are based on speech activities and would allow a meaningful review by the court at the earliest stage of litigation.

Plaintiffs, particularly state actors in public nuisance litigation, should be forced to demonstrate that their lawsuits do not depend on or impose liability for any constitutionally protected speech. Just as appellate courts must conduct an independent inquiry to determine whether the nature of the communications is of constitutional significance,[195] so too should trial judges examine complaints that seek to base liability, even in part, on speech. The Supreme Court should emphasize that trial judges must be skeptical, at each stage, of claims based not on actions but speech. Heightened standards and judicial scrutiny would sensitize litigants, counsel, and the courts to the importance of protecting First Amendment freedoms.

The measures are simple, but the rights are fundamental. Protecting corporate speech from tort liability is a constitutional priority.

193. Gertz v. Robert Welch, Inc., 418 U. S. 323, 340 (1974) (warning that overly stringent liability for false or misleading speech can "lead to intolerable self-censorship"); Time v. Hill, 385 U.S. 374, 389 (1967) ("Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'"); Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also In re* Asbestos, 46 F.3d at 1291; R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 31 (1st Cir. 1999) ("[W]hen First Amendment values are at risk, courts must be especially sensitive to the danger of self-censorship.").

194. Illinois v. Telemarketing Assocs., Inc., 538 U.S. 600, 617-19 (2003).

195. Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 505 (1984).