
In The
Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE*
AMERICAN JUSTICE PARTNERSHIP
AND LET FREEDOM RING
IN SUPPORT OF APPELLANT

Cleta Mitchell
Counsel of Record
Michael J. Lockerby
Andrew D. Morton
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street NW, Suite 600
Washington, DC 20007
(202) 672-5300

July 31, 2009

Counsel for Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT.....	4
I. RATHER THAN PREVENT CORRUPTION, <i>AUSTIN</i> HAS CORRODED AND DISTORTED THE POLITICAL PROCESS.....	4
A. The Government Has No Compelling Interest in Limiting Either The Amount of Political Speech or the Quantity of Speakers.....	7
B. Restrictions on Corporate Speech Alone Are Overbroad Because They Apply Regardless of Wealth, Size, or Actual Facts Related to the Speaker	9

- C. Restrictions on Corporation Speech Are Under-Inclusive Because They Exempt Wealthy Media Corporations, Individuals, and Unincorporated Entities..... 11

- D. Neither the Exception for “*MCFL*” Organizations Nor the PAC “Alternative” Is Sufficient to Cure *Austin*’s Constitutional Infirmary..... 15
 - 1. The *MCFL* exception violates the First Amendment by prohibiting all for-profit corporations from expressing their political views 15

 - 2. Political action committees are not a viable option for many corporations and impose undue burdens on corporate free speech 16

II.	BY ALLOWING RESTRICTIONS ON CORPORATE SPEECH, <i>MCCONNELL</i> HAS PERMITTED CIRCUMVENTION OF THE FIRST AMENDMENT ITSELF	18
	CONCLUSION	20

TABLE OF AUTHORITIES**Page(s)****CASES**

<i>Associated Press v. United States</i> , 326 U.S. 1 (1945).....	6
<i>Austin v. Mich. State Chamber of Commerce</i> , 494 U.S. 652 (1990).....	<i>passim</i>
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	4, 5, 16
<i>Davis v. Federal Election Comm’n</i> , 128 S. Ct. 2759 (2008).....	6, 7, 16
<i>Federal Election Comm’n v. Massachusetts Citizens for Life</i> , 479 U.S. 238 (1986) (“MCFL”).....	<i>passim</i>
<i>Federal Election Comm’n v. National Conservative Political Action Comm.</i> , 470 U.S. 480 (1985) (“NCPAC”).....	4, 7, 10, 11
<i>First Nat’l Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978).....	5, 8
<i>McConnell v. Federal Election Comm’n</i> , 540 U.S. 93 (2003).....	<i>passim</i>
<i>Nixon v. Shrink Missouri Gov’t PAC</i> , 528 U.S. 377 (2000).....	15

<i>Wisc. Right to Life, Inc. v. Federal Election Comm'n, 546 U.S. 410 (2006)</i>	9
--	---

CONSTITUTIONAL PROVISION

U.S. CONST. amend. I	<i>passim</i>
----------------------------	---------------

STATUTES, RULES & REGULATIONS

26 U.S.C. § 501(c)(4)	1, 2, 10, 15
Alaska Stat. §§ 15.13.010, .135 (2009).....	n. 3
Ariz. Rev. Stat. Ann. § 16-907 (2008).....	11
Ariz. Rev. Stat. Ann. § 16-919 (2008).....	n. 3, 18
Col. Const. art. XXVIII § 2(8)(b)(II) (2008).....	11
Col. Const. art. XXVIII § 3(4)(a) (2008)	18
Col. Const. art. XXVIII § 3(7)(b) (2008)	19
Col. Const. art. XXVIII § 5 (2008)	n. 3
Col. Const. art. XXVIII § 6 (2008)	n. 3
Conn. Gen. Stat. § 9-613(a) (2008)	n. 3
Conn. Gen. Stat. § 9-613(c) (2008)	n. 3
Fla. Stat § 106.011(1)(a)1.c (2009)	19
Fla. Stat § 106.011(18) (2009)	19
Fla. Stat § 106.071 (2009)	19

Iowa Code § 68A.503 (2009)	17
Ky. Rev. Stat. Ann. § 121.025 (West 2009).....	n. 3
Ky. Rev. Stat. Ann. § 121.035 (West 2009).....	n. 3
Mass. Gen. Laws ch. 55, § 8 (2009)	12
Mich. Comp. Laws § 169.206.6(2)(a) (2009).....	12
Mich. Comp. Laws § 169.254 (2009)	n. 3
Mich. Comp. Laws § 169.255 (2009)	n. 3
Minn. Stat. § 10A.27 (2008)	n. 3
Minn. Stat. § 10A.211B.15(3) (2008).....	n. 3
Mont. Code Ann. § 12-35-227 (2007).....	19
N.C. Gen. Stat. § 163-278.15 (2009).....	n. 3
N.C. Gen. Stat. § 163-278.19(a) (2009)	n. 3
N.D. Cent. Code § 16.1-08.1-03.3 (2009).....	n. 3
N.D. Cent. Code §§ 16.1-08.1-03.5 (2009).....	n. 3
N.Y. C.L.S. Elec. § 14-100	11
Ohio Rev. Code Ann. § 3517.01(17) (LexisNexis 2009).....	11

Ohio Rev. Code Ann. § 3517.082 (LexisNexis 2009).....	n. 3
Ohio Rev. Code Ann. § 3517.105 (LexisNexis 2009).....	11
Ohio Rev. Code Ann. § 3599.03 (LexisNexis 2009).....	n. 3
Okla. Stat. Ann. tit. 21, § 187.7.b(7) (2009).....	12
Okla. Stat. Ann. tit. 21, § 187.8.b (2009)	n. 3, 12
Okla. Stat. Ann. tit. 74, app. § 257:1-1-2 (2009).....	n. 3, 12
25 Pa. Cons. Stat. § 3247 (2009)	n. 3
25 Pa. Cons. Stat. § 3253 (2009)	n. 3
R.I. Gen. Laws § 17-25-10.1 (2009)	n. 3
S.D. Codified Laws § 12-27-1 (2009)	n. 3
S.D. Codified Laws § 12-27-18 (2009)	n. 3
Tenn. Code Ann. § 2-19-132 (2009).....	n. 3
Tex. Elec. Code Ann. § 253.094 (Vernon 2009).....	n. 3
W. Va. Code § 3-8-8 (2009)	n. 3
Wis. Stat. § 11.38 (2008).....	n. 3
Wyo. Stat. Ann. § 22-25-102 (2008)	n. 3

OTHER AUTHORITIES

AMER. TORT REFORM FOUND., White Paper,
Defrocking Tort Deform: Stopping
Personal Injury Lawyers from
Repealing Existing Tort Reforms and
Expanding Rights to Sue in State
Legislatures (2008) 13

U.S. Internal Revenue Service, *Statistics of
Income, Corporation Income Tax
Returns*, Table 732 (“Corporations by
Receipt-Size Class and Industry: 2005”)..... 9

[www.guidestar.org/FinDocuments/2007/132/
630/2007-132630359-049cff52-90.pdf](http://www.guidestar.org/FinDocuments/2007/132/630/2007-132630359-049cff52-90.pdf)..... 16

www.letfreedomringusa.com/about 1

www.opensecrets.org 14

www.triallawyersinc.com 14

BRIEF OF *AMICI CURIAE*
AMERICAN JUSTICE PARTNERSHIP
AND LET FREEDOM RING
IN SUPPORT OF APPELLANT

INTEREST OF *AMICI CURIAE*¹

American Justice Partnership (“AJP”) is a non-profit, Section 501(c)(4) corporation dedicated to reform of the civil justice system at the state level. AJP seeks to educate citizens, public officials, and candidates of the dangers to states’ economic well-being resulting from runaway litigation and excessive damage awards.

Let Freedom Ring (“LFR”) is also a non-profit, Section 501(c)(4) corporation, formed for the express purpose of mobilizing citizens on issues regarding protection of fundamental American values and free enterprise, and educating voters about candidates’ views and votes on its priority issues.²

AJP rarely if ever contributes to political campaigns. LFR never contributes to political candidates. The interest of both AJP and LFR in this case is prompted by the fact that they are subject to restrictions on their right to free speech solely by virtue of the fact that they are incorporated.

¹ This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief.

² See www.letfreedomringusa.com/about.

Unlike its adversaries, AJP is a corporation and therefore subject to state laws restricting its right to express its views on public policy issues. AJP's philosophical opponents include trial lawyers (some of whom have amassed a net worth of millions of dollars) and associations of trial lawyers. Unlike AJP, trial lawyers — both individually and in combination — are free during an election year in *any* state to criticize *by name* candidates for public office at the state level who support caps on punitive damages and other aspects of tort reform. In contrast, AJP would in many states face severe civil — and in some states and circumstances — criminal sanctions if it were even to mention specific political candidates who support (or oppose) its legal reform agenda.

LFR was created to operate within the parameters of the exemption from corporate political speech restrictions established by the Court's decision in *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). LFR is thus permitted to engage in political speech of the type that AJP cannot, but only if it foregoes corporate membership and financial support altogether. To qualify for the *MCFL* exception, LFR cannot even hold meetings at a church, synagogue, or mosque without paying for use of the facility out of fear that otherwise it might be deemed to have accepted an "in-kind" corporate contribution.

Both AJP and LFR were organized under Section 501(c)(4) so that their members could pool their resources and speak in support of a common agenda. AJP and LFR therefore jointly file this

amici brief to seek restoration of their rights to free speech by asking the Court to overturn its prior decisions in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003).

SUMMARY OF THE ARGUMENT

Empowered by the Court’s decisions in *Austin* and *McConnell*, twenty-two states now impose severe restrictions on corporate political activity, including contributions to candidates, expenditures on behalf of candidates, and/or “electioneering communications” (collectively, the “Offending State Statutes”).³ The Offending State Statutes apply to ***all*** corporate political activity — even when undertaken independently from political candidates or their campaign organizations. Under this patchwork quilt of state laws proscribing and restricting corporate political speech, AJP and — to a lesser extent — LFR cannot engage in unrestrained discussion of the issues that they were specifically formed to address. The restrictions that *Austin* has permitted states to enact serve no compelling government interest. Nor can they survive strict scrutiny, because they are both overbroad and under-inclusive. On their face, the Offending State Statutes deny the fundamental right of free speech to AJP and LFR, to their members, and indeed to all Americans who choose to organize, work, and speak through the corporate form. The only one way to right this constitutional wrong is to overturn *Austin* and *McConnell*.

³ Citations to the statutes of these twenty-two states are listed in the Table of Authorities.

ARGUMENT

I. RATHER THAN PREVENT CORRUPTION, AUSTIN HAS CORRODED AND DISTORTED THE POLITICAL PROCESS.

Before *Austin*, the Court's precedents were clear that the "the only legitimate and compelling government interests" sufficient to justify restrictions on protected First Amendment political speech were "preventing corruption or the appearance of corruption." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) ("NCPAC"). By "corruption," the Court meant large contributions to "secure a political *quid pro quo* from current and potential officeholders." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). In *Austin*, however, the Court recognized a compelling government interest in preventing "a different type of corruption in the political arena." 494 U.S. at 660. *Austin* expanded the definition of "corruption" to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.*

By expanding the definition of "corruption," *Austin* narrowed the protections of the First Amendment. And it did so based on a purported government interest that was factually dubious and without legal precedent. As Justice Kennedy observed in dissent at the time, "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative

influence of speakers on elections” is “antithetical to the First Amendment.” *Id.* at 704.

Austin’s expansive definition of “corruption” eviscerated the principle that the First Amendment protects ***speech itself*** regardless of the identity of the speaker. Before *Austin*, the Court found “no support ... for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). The Michigan statute that the Court upheld in *Austin*, however, “discriminates on the basis of the speaker’s identity,” allowing “any person or group other than a corporation” to “engage in political debate over candidate elections” while corporations “must remain mute.” 494 U.S. at 699 (Kennedy, J., dissenting). Before *Austin*, at least, the Court’s “precedents condemn[ed] this censorship.” *Id.*

In *Austin*, the Court accepted a notion that it had previously rejected in *MCFL*, that associations “suddenly present the specter of corruption merely by assuming the corporate form.” 479 U.S. at 263. Before *Austin*, the only “corruption” that the government legitimately could seek to prevent was that caused by campaign ***contributions***. In *Buckley*, the Court thus upheld limits on campaign contributions while reaffirming the principle that spending money to influence elections is a form of constitutionally protected free speech. 424 U.S. at 963-64. By expanding the definition of “corruption,” *Austin* thus excised from the Bill of Rights — at least for corporations — the principle that the First Amendment protects independent expenditures

expressing political speech. In contrast, campaign expenditures by individuals continue to enjoy First Amendment protection as free speech. *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008). By permitting restrictions on corporate free speech that do not apply to individuals, *Austin* had the unintended consequence of depriving individuals of their First Amendment right to “the widest possible dissemination of information from diverse and antagonistic sources.” *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The Offending State Statutes deprive individuals of their right to hear AJP’s message and impair LFR’s ability to communicate its views if it accepts corporate contributions, resulting in the very “corrosive and distorting effects” on the political process about which *Austin* expressed concern. The total censorship to which AJP is subject in many states does not apply to trial lawyers, many of whom can and do accumulate “immense aggregations of wealth.” *Austin*, 494 U.S. at 660. The jury verdicts and other sources of income from which this wealth is often accumulated “have little or no correlation to the public’s support for [trial lawyers] political ideas.” *Id.* Yet the Offending State Statutes allow only one side of the debate to be heard, particularly during the election years in which robust debate matters most. Contrary to the premise of *Austin*, the government has no compelling interest in restricting the amount of political speech or the identity of speakers.

A. The Government Has No Compelling Interest in Limiting Either The Amount of Political Speech or the Quantity of Speakers.

Reversing *Austin* would not undermine the government's ability to protect the political process from "corruption" as that term long has been understood. "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497. Like the Michigan statute at issue in *Austin*, the Offending State Statutes are not intended merely to prevent corruption resulting from the exchange of "dollars for political favors." Rather than being limited to campaign contributions, these statutes also restrict independent expenditures by corporations. As a result, they limit free speech in violation of the First Amendment.

The government has no compelling interest in "protecting" the political process from too much political speech by too many speakers (or too many of the "wrong" types of speakers, such as corporations and labor unions). A campaign finance law that inhibits political speech is particularly invalid when it fails to deal with an identifiable problem of corruption in politics. On that basis, the Court's recent decision in *Davis* rejected Congress' attempt to legislate in the name of "level[ing] electoral opportunities" through the so-called Millionaires Amendment. *See* 128 S. Ct. at 2774.

Rather than setting limits on political dialogue, the First Amendment is intended to facilitate robust debate. The First Amendment

entrusts not the government but rather “the people in our democracy ... with the responsibility for judging and evaluating the relative merits of conflicting arguments.” *Bellotti*, 435 U.S. at 791. The First Amendment allows the people to “consider, in making their judgment, the source and credibility of the advocate.” *Id.* The First Amendment does not permit the government to silence certain advocates “on the basis of the speaker’s identity.” *Austin*, 494 U.S. at 699 (Kennedy, J., dissenting).

Under the First Amendment, a non-profit corporation like AJP has the same right to participate in public policy and electoral debates as individuals and unincorporated entities — for-profit and non-profit alike. Under the First Amendment, other corporations have the right to express their support for LFR’s agenda by contributing financial support. Even if AJP and LFR were for-profit corporations that had accumulated “immense aggregations of wealth,” both would have the same right of free speech as individuals and unincorporated associations at all levels of income and wealth. In this regard, the *Austin* majority cited no authority for the proposition that the First Amendment permits “progressive taxation” of political free speech — including outright confiscation of all corporate free speech.

The Offending State Statutes prevent AJP from engaging in public discussion that is “indispensable to decision-making in a democracy.” *Bellotti*, 435 U.S. at 777. LFR’s free speech is shackled in ways that individuals and unincorporated entities (and media corporations) are not. The restrictions that *Austin* has permitted

states to enact serve no compelling government interest and otherwise do not pass constitutional muster because they are both overbroad and under-inclusive.

B. Restrictions on Corporate Speech Are Overbroad Because They Apply Regardless of Wealth, Size, or Actual Facts Related to the Speaker.

For censorship of corporate speech to survive strict scrutiny, the government must demonstrate that it “furthers a compelling interest and is narrowly-tailored to achieve that interest.” *Wisc. Right to Life, Inc. v. Federal Election Comm’n*, 546 U.S. 410 (2006). Even if the government had a compelling interest in protecting the marketplace of ideas from a “corrosive and distorting effect” caused by “immense aggregations of wealth,” *Austin*, 494 U.S. at 660, banning corporate political speech is not “narrowly-tailored” to accomplish that purpose according to the government’s own data. When the IRS sampled corporate tax returns filed in 2005, it found that 81 percent of corporations had annual revenues of less than \$1 million, and 95 percent had annual revenues of less than \$5 million.⁴ Incorporation alone is no guarantee that an entity will amass “immense aggregations of wealth.” To the contrary, many corporations end up in bankruptcy. In any event, there is no constitutional

⁴ U.S. Internal Revenue Service, *Statistics of Income, Corporation Income Tax Returns*, Table 732 (“Corporations by Receipt-Size Class and Industry: 2005”), available at www.census.gov/compendia/statab/cats/business_enterprise.html.

basis for *Austin's* premise that corporations are demons that must be exorcised from the body politic.

The absurdity of *Austin's* rationale for restricting corporate political speech is demonstrated by the facts and circumstances of AJP and LFR themselves. Both are non-profit corporations. Neither one has accumulated "immense aggregations of wealth." By virtue of Section 501(c)(4), both are prohibited from doing so. AJP's total annual budget for educational and advocacy activity nationwide is approximately \$3 million. LFR conducts events in numerous states across the country, yet operates on a budget of roughly \$1 million. Expenditures of this magnitude by AJP and LFR, made in multiple states, hardly threaten to have a "corrosive and distorting effect" on political debate in those states in which corporations have not been silenced. Like the statute that the Court invalidated in *NCPAC*, the Offending State Statutes are unconstitutionally overbroad:

Even were we to determine that the large pooling of financial resources ... did pose a potential for corruption or the appearance of corruption, [the statute] is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit

neighborhood contributions to publicize their views about a particular Presidential candidate.

470 U.S. at 498.

C. Restrictions on Corporate Speech Are Under-Inclusive Because They Exempt Wealthy Media Corporations, Individuals, and Unincorporated Entities.

Restrictions on corporate speech alone are plainly insufficient to protect the political process from “the corrosive and distorting effects of immense aggregations of wealth.” With the blessing of *Austin*, the Offending State Statutes impose no restrictions on wealthy media corporations,⁵ wealthy associations and other business entities that are not incorporated,⁶ or wealthy individuals. To be heard effectively, individuals with less financial wherewithal must pool their resources. If they seek

⁵ See, e.g., Col. Const. art. XXVIII § 2(8)(b)(II) (exempting “[a]ny editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party” from the definition of “expenditure”).

⁶ See, e.g., Ariz. Rev. Stat. Ann. § 16-907 (political contributions by partnerships permitted and allocated in the name of partner(s)); N.Y. C.L.S. Elec. § 14-100 (limited liability companies treated as individuals and subject to individual, rather than corporate, campaign finance limits); Ohio Rev. Code Ann. §§ 3517.01(17), .105 (independent expenditures by partnerships, unincorporated business organizations or associations, and other non-corporate business entities permitted, subject to disclosures).

to do so by forming a corporation, *Austin* permits them to be silenced rather than heard. Meanwhile, the Offending State Statutes impose no restrictions on individuals like George Soros, Ross Perot, and T. Boone Pickens who have “immense aggregations of wealth” — even if their wealth originally was amassed in a corporation before being distributed to them in the form of profits or distributions.

In states that restrict both corporate contributions and corporate expenditures, the prohibitions of the Offending State Statutes are not limited to public communications regarding candidates. Indeed, corporations are prohibited even from telling their own employees which candidates are sympathetic to furthering the company’s interests — information that may well be of interest and importance to employees in deciding whom to support or oppose at election time.⁷

While silencing AJP solely because it is a corporation, *Austin* leaves voters free to hear the viewpoints of AJP’s political opponents, who are not subject to the same political speech restrictions imposed on AJP. AJP was formed to combat the well-organized efforts of trial lawyers to influence state legislation and policies related to civil justice reform. Personal injury lawyers actively engage in the political process to protect and promote

⁷ See, e.g., Okla. Stat. Ann. tit. 21, §§ 187.7.b(7), .8.b (2009); *id.* tit. 74, app. § 257:1-1-2 (2009); Mass. Gen. Laws ch. 55, § 8 (2009); Mich. Comp. Laws § 169.206.6(2)(a) (2009).

candidates and policies that oppose, repeal, or chip away at tort reform laws.⁸ Trial lawyers are able to use their “immense aggregations of wealth” to engage in unlimited political speech, while AJP and its members are not. For example:

- The American Association for Justice (formerly the Association of Trial Lawyers of America), ranks as the sixth-highest donor to federal candidates and national political parties — across all contributors — over the last two decades (1989-2008).
- Lawyers and law firms as an industry have given the most or the second most amount of federal campaign contributions each cycle for at least the past two decades, giving more than any other industry over that time period.
- In 2008, lawyers and law firms contributed \$232,763,315 to federal campaigns, with 92.5 percent of that

⁸ See, e.g., Amer. Tort Reform Found., White Paper, *Defrocking Tort Deform: Stopping Personal Injury Lawyers from Repealing Existing Tort Reforms and Expanding Rights to Sue in State Legislatures* (2008) (“[P]ersonal injury lawyer groups have contributed substantially to the election of representatives on key legislative committees and to state legislatures as a whole”).

amount coming from individual lawyers.⁹

- Lawyers in tobacco settlement cases received \$30 billion in fees, with \$8 billion going to the lawyers in Mississippi, Florida, and Texas who pioneered the claims. The Florida litigation team was awarded \$233 million per lawyer.¹⁰

Even when not acting as individuals, trial lawyers typically do not organize in the form of corporations. Instead, many law firms are structured as partnerships, limited liability partnerships, professional limited liability companies, and other types of unincorporated entities. Unlike AJP, individual lawyers, law firms, and associations to which they belong can make direct political contributions to and expenditures — in unlimited amounts — on behalf of candidates. This unintended consequence of *Austin* is yet another reason that overturning that decision is necessary to restore the primacy of the First Amendment:

Our First Amendment principles surely tell us that an interest thought to be the compelling reason for enacting a law is cast into grave doubt when a worse evil surfaces in the law's actual operation. And our obligation to

⁹ See www.opensecrets.org.

¹⁰ See www.triallawyersinc.com.

examine the operation of the law is all the more urgent when the new evil is itself a distortion of speech.

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) (Kennedy, J., dissenting).

D. Neither the Exception for “*MCFL*” Organizations Nor the PAC “Alternative” Is Sufficient to Cure *Austin*’s Constitutional Infirmity.

Rather than overturn *Austin*, this Court has carved out various exceptions to the ban on corporate political activity. This effort to address *Austin*’s constitutional infirmities on a piecemeal basis has not cured the fundamental flaws in *Austin*, as demonstrated by the experience of both AJP and LFR.

1. The *MCFL* exception violates the First Amendment by prohibiting all for-profit corporations from expressing their political views.

The *MCFL* exception does not apply to organizations that receive corporate contributions or funding through corporate membership dues. Because AJP’s members are corporations and other for-profit businesses, AJP does not qualify for the *MCFL* exception. In contrast, certain other 501(c)(4) corporations, such as NARAL-ProChoice America (“NARAL”), fall within the *MCFL* exception solely because their membership is comprised entirely of individuals. Whether a 501(c)(4) is comprised of

individuals or corporations bears no rational relationship to the wealth of the organization (again, to the extent that wealth is even a valid basis for restricting free speech). NARAL, for example, reports annual revenues and expenditures of more than \$12 million — more than four times the annual budget of AJP.¹¹ Discrimination among social welfare organizations, based solely on the source of the organization's members and dues, is contrary to the First Amendment as interpreted by *Buckley* and *Davis*, among other precedents.

Unlike AJP, LFR has made the conscious decision to forego corporate support so that it can qualify for the *MCFL* exception. But why should it have to? To qualify for an exception to a ban on corporate political speech that was unconstitutional in the first place, LFR is subject to burdens and restrictions on its free speech that do not apply to individuals, unincorporated entities, or media corporations.

2. **Political action committees are not a viable option for many corporations and impose undue burdens on corporate free speech.**

The FEC would have the Court believe that corporations and labor unions should be relegated to the back of the constitutional bus by exercising their political free speech rights solely within the confines of a political action committee (“PAC”). Regardless

¹¹ See www.guidestar.org/FinDocuments/2007/132/630/2007-132630359-049cff52-90.pdf.

of how many PACs have been organized by large for-profit corporations and labor unions, this “separate but equal” approach to the First Amendment is not a viable option for either AJP or LFR. A PAC is typically used to make direct contributions to candidates. LFR never contributes to candidates, and AJP rarely does so. The primary purpose of both organizations is to make public communications about issues, positions of candidates, and voting records.

Relatively few corporations in the United States have resources approaching those of the Fortune 100. For AJP, LFR, and other small corporations, forming a PAC is not a viable option. PACs can normally solicit only a select “restricted class” (defined by law) consisting of executive and managerial employees or the individual members of an association. A PAC is not a viable option for AJP, whose only members are themselves corporations. A small company or organization lacks the expertise and personnel to manage the administrative burdens of registering and reporting to a state agency multiple times each year. And in Iowa, for example, state law prohibits a corporation from absorbing the administrative, accounting, compliance, and fundraising costs of the company PAC. Iowa Code § 68A.503 (2009). A PAC is a separate legal entity, distinct from the corporation itself. It must maintain a separate bank account, file a separate tax return, and otherwise be a wholly separate legal organization under the law. In short, establishing a PAC imposes administrative and financial burdens on corporations simply to exercise rights of free speech that the Constitution permits them to exercise in their own right.

II. BY ALLOWING RESTRICTIONS ON CORPORATE SPEECH, *MCCONNELL* HAS PERMITTED CIRCUMVENTION OF THE FIRST AMENDMENT ITSELF.

The constitutional defects in *Austin* were compounded when, in *McConnell*, the Court permitted restrictions intended to prevent “circumvention” of the corporate contributions ban through independent spending in support of election campaigns. The federal prohibitions that this Court upheld in *McConnell* have — in a perverse display of “trickle-down unconstitutionality” — resulted in state law prohibitions and restrictions on corporate contributions and expenditures alike. Every state that prohibits corporate contributions directly to candidates also imposes draconian restrictions and prohibitions on corporate political expenditures — even those that are independent of candidates, and often even where no express advocacy is involved. Arizona, for example, allows only political committees (not corporations) to make “independent expenditures,” which are treated as in-kind contributions to candidates even if made totally independently of a candidate. Ariz. Rev. Stat. Ann. § 16-919 (2009). And Colorado is one of at least sixteen other states prohibiting corporate independent expenditures, defined as “express advocacy” for and against candidates, not in coordination with candidates. Col. Const. art. XXVIII § 3(4)(a).

Many states also prohibit corporations from making or contributing to “electioneering communications.” Since *McConnell*, many states have prohibited much more than the radio and

television broadcast advertising regulated by federal law. The speech restrictions include communications made in print advertising, billboards, direct mail, telephone, and even direct delivery by a “person” to a personal residence.¹²

In the name of preventing “circumvention” of prohibitions on corporate contributions, the states have enacted not just parallel — but greatly expanded — prohibitions on any and all corporate expenditures referencing state candidates. Montana, for example, prohibits “all” political expenditures by corporations. Mont. Code Ann. § 12-35-227 (2007). Other state speech restrictions are wholly counter to the Court’s reasoning in *Austin*. Florida, for example, allows corporate direct contributions to candidates *but* imposes severe restrictions on a corporation’s ability to “speak,” requiring a corporation to register as a “political committee” if it makes independent expenditures and requiring the creation of an “electioneering communications organization” to make *any* public communications that reference a clearly identified candidate within 120 days of any election. Fla. Stat. §§ 106.011(1)(a)1.c, 106.011(18), and 106.071 (2009).

Both in theory and in practice, *McConnell* represents an even more radical departure from

¹² In Colorado, for example, “electioneering communications” are communications to voters that unambiguously refer to a candidate that are distributed, broadcast, printed, directly mailed or delivered by hand to residence of individual 30 days before a primary or 60 days before a general election. Col. Const. art. XXVIII, § 3(7)(b) (2008).

prior First Amendment jurisprudence. *Austin* at least paid lip service to the principle that “preventing corruption or the appearance of corruption” is the only constitutionally valid basis for government restrictions on political speech (while expanding the definition of “corruption” to the point where it became barely recognizable). *McConnell* has since recognized a new compelling interest in “avoiding circumvention” of prohibitions that were unconstitutional in the first place.

The result is a regulatory regime in state after state that stifles political participation by non-profit corporate organizations such as AJP and LFR, by for-profit corporations such as AJP’s members, and by for-profit corporations that cannot contribute to LFR without jeopardizing its *MCFL* exception. The entire regime is counter to basic First Amendment principles and must fail.

CONCLUSION

In *Austin*, the Court stepped onto (if not through) constitutionally thin ice by endorsing the notion that restrictions on free speech can and should vary depending upon the identity of the speaker. The resultant censorship of corporate political speech is based upon the constitutionally indefensible position that the government has a compelling interest in silencing the expression of those deemed to be inordinately wealthy. Even if the government had a compelling interest in silencing the wealthy, *Austin* permits restrictions on free speech that are at once overbroad and under-inclusive. Like most U.S. corporations, for-profit and non-profit alike, AJP and LFR have not amassed the

“immense aggregations of wealth” with which the *Austin* majority seemed preoccupied. Silencing AJP while allowing wealthy trial lawyers and associations of trial lawyers to monopolize the legal reform debate does nothing to address the type of alleged “corruption” upon which *Austin* was based.

Under the weight of *McConnell*, the flawed logic upon which *Austin* was resting has simply collapsed altogether. *McConnell* has permitted restrictions to “avoid circumvention” of restraints on corporate free speech that were constitutionally impermissible in the first place. The resultant corrosive and distorting effects on the First Amendment itself can be corrected only by reversing both *Austin* and *McConnell*.

Respectfully submitted,

Cleta Mitchell
Counsel of Record

Michael J. Lockerby
Andrew D. Morton
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street NW, Suite 600
Washington, DC 20007
(202) 672-5300

Counsel for Amici Curiae

July 31, 2009