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No. 08-205

In the
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMITTEE,

Appellee.

On Appeal from
the United States District Court
for the District of Columbia

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of free expression on political issues. The Center is led by John Eastman, Dean of the Chapman University School of Law, and the Honorable Edwin Meese III serves as the honorary chair. The Board of Advisors for the Center includes a number of distinguished academics such as Hadley Arkes, Henry Jaffa, Douglas Kmiec, and John Yoo—just to name a few.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The Center believes the issue before this Court is one of special importance to political freedom protected by the First Amendment.

SUMMARY OF ARGUMENT

"Congress shall make no law . . . abridging the freedom of speech, or of the press." The courts have agreed that at a minimum this restriction on congressional power prohibits attempts to criminalize criticism of the party in power. Amicus submits that it also prohibits attempts to criminalize speech on issues and candidates based on the identity of the speaker. Unequal distribution of wealth, concentration of media power, and negative campaigning existed since the founding of the republic. Yet there is no evidence that the First Amendment was originally understood to authorize Congress to prohibit speech related to an election based on any of these factors.

ARGUMENT

I

THE TYPE OF MESSAGE AT ISSUE IN THIS CASE—PORTRAYING AN ELECTED OFFICIAL IN A NEGATIVE LIGHT—FOLLOWS A LONG-STANDING PRACTICE IN AMERICAN POLITICS STRETCHING BACK TO THE ELECTION OF 1800

The appellee brief for the United States describes the content of the movie at issue as a negative portrayal of then Senator (now Secretary of State) Clinton, attacking her character and fitness for office. Appellee Brief at 19-20. In this, Secretary Clinton is in good company. American elections have

rarely been defined by genteel discussion of philosophical issues. For instance, the presidential election campaign between John Adams and Thomas Jefferson, featured full-throated attacks of the type few politicians would dare make in today's elections. One newspaper noted that if Jefferson were elected, "Murder, robbery, rape, adultery and incest will all be openly taught and practiced, the air will be soaked with blood, and the nation black with crimes." Richard Scher, *The Modern Political Campaign: Mudslinging, Bombast, and the Vitality of American Politics* 31 (1997) (quoting the Connecticut Courant). Another writer published:

> Can serious and reflecting men look about them, and doubt that if Jefferson is elected, and the Jacobins get into authority, that those morals which protect our lives from the knife of the assassin—which guard the chastity of our wives and daughters from deduction and violence—defend our property from plunder and devastation, and shield our religion from contempt and profanation, will not be trampled upon and exploded?

Id.

Adams too was the target of attacks with one writer describing him as a "fool, hypocrite, criminal, and tyrant . . . his presidency was one 'continued tempest of malignant passions.'" *Id.*

The rhetorical attacks continued unabated after the election. The famous duel between Alexander Hamilton and Aaron Burr was purportedly sparked after Burr read a letter in a newspaper; a letter attributed to Hamilton characterizing Burr as "a

dangerous man, and one who ought not to be trusted with the reins of government" Douglas Ambrose & Robert Martin, *The Many Faces of Alexander Hamilton: The Life and Legacy of America's Most Elusive Founding Father* 10 (2006).

This Court has noted that these "negative campaign" advertisements have continued throughout the history of the republic. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 n.14 (1964). Yet Congress' one early attempt to regulate speech about office holders met with an immediate outcry that the regulation was contrary to the First Amendment.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February, 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794)." *New York Times Co.*, 376 U.S. at 275.

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id.* at 274. The particular evil in the Sedition Act, according to the Virginia General

Assembly, was that it was "'levelled against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id.*

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times Co.*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have of the original understanding of the First Amendment's speech and press clauses. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

In this case, the Court is again confronted with an act of Congress that is "leveled against the right of freely examining public characters and measures, and the free communication among the people

thereon." This law does not seek to regulate the content of the communication, as was the case with the Sedition Act, but instead regulates who may speak.

II

CONTROL OF MEDIA AND CONCENTRATION OF WEALTH ARE NOT NEW PHENOMENA

This Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), identified a new compelling interest to justify government prohibition of free speech. Previously, the Court had recognized the prevention of corruption or the appearance of corruption as "'the only legitimate and compelling government interests thus far identified for restricting campaign finances,'" *Austin*, 494 U.S. at 658 (*quoting Fed. Elections Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). In addition to the concern over quid pro quo corruption that may occur with direct contributions, this Court in *Austin* also found compelling restrictions on independent election expenditures to combat "a different type of corruption in the political arena: 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.* at 660. Although the use of "immense aggregations of wealth" by individuals to influence elections are also unrelated to the "public's support" for the political message, the Court in *Austin* apparently limited this interest to restrictions on corporate expenditures. The *Austin* Court permitted the state to extend the prohibition

on independent expenditures to a nonprofit expressive corporation if the corporation received contributions from business corporations—without regard to whether those contributions were made possible by "immense aggregations of wealth." *Id.* at 660 (citation omitted).

This restriction on political speech is not supported by the original understanding of the First Amendment. Uneven distribution of wealth is not a new phenomenon, nor is the use of wealth to broadcast an individual's political sentiments. In the founding era, the methods of communicating political ideas were much more limited. This served to emphasize differences in wealth as political partisans used their wealth to fund newspapers that would further their political viewpoint. Jerry W. Knudson, *Jefferson and the Press* 2-4 (2006); Shannon E. Martin & Kathleen Hansen, *Newspapers of Record in a Digital Age* 21 (1998). Thomas Jefferson funded the National Gazette as a means of publicizing the "republican" viewpoint on politics, while Alexander Hamilton founded the New York Evening Post to help publicize his political point of view. Knudson, *supra*, at 2-3.

Even with this dominance of the channels of available communication, Congress' one attempt to regulate the press in that era—the Sedition Act—was widely understood to violate the First Amendment. There was no suggestion that Congress had the power to regulate newspapers because they were funded by individuals who had managed to accumulate more wealth than others (whether from business transactions or from inheritance) and there is no suggestion that the First Amendment allows

regulation in order to ensure that the amount spent on a message is proportional to the public support for the viewpoint.

The Report on the Virginia Resolutions notes the purpose of the First Amendment is to maximize the information made available to the electorate. *New York Times*, 376 U.S. at 275 n.15. "The value and efficacy of this right [of electing public officials] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id.* (citation omitted). The goal was to design "a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular." *Austin*, 494 U.S. at 693 (Scalia, J., dissenting).

In contrast to the founding era, access to mass communication is readily available to individuals and groups of limited means. Anyone with access to a computer and the internet has the opportunity to add their voice to a debate and have their voice heard throughout the nation. No longer is the means of mass communication held in the hands of the few who choose to use their wealth to support their personal political viewpoint. If there was no basis for regulating speakers in the founding era in order to "equalize" rather than "maximize" political debate, there is even less of a reason to do so today. The rationale of *Austin* cannot stand as a matter of original understanding of the First Amendment.

CONCLUSION

Elections have rarely been polite affairs in American History. Yet the First Amendment was designed to maximize information available to the public. The Founders were interested in ensuring that the government had no power to censor political debate. The Court's decision in *Austin* does not serve that goal and the decision should, therefore, be overruled.

DATED: July, 2009.

Respectfully submitted,

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