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No. 08-205

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

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* REPRESENTATIVES CHRIS VAN HOLLEN, DAVID PRICE, MICHAEL CASTLE, AND JOHN LEWIS IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

Representatives Chris Van Hollen, David Price, Michael Castle, and John Lewis are Members of Congress from, respectively, Maryland, North Carolina, Delaware, and Georgia. As Members of Congress, they know first-hand the importance of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 441b(b)(2) (2002)) ("BCRA"). Representatives Price, Castle, and Lewis filed an amicus curiae brief in *McConnell v. FEC*, 540 U.S. 93 (2003), urging this Court to uphold this law.[2] Their interest is to inform the Court from the unique perspective of individuals who are both familiar with the effect of money on politics and legislation and deeply concerned about maintaining public trust in our democracy.

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[1] No counsel for a 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 *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

[2] Representative Van Hollen was elected to Congress in 2002, after BCRA passed, but before it took effect.

SUMMARY OF ARGUMENT

Nearly twenty years ago, this Court confirmed that a legislature may constitutionally regulate for-profit corporations' spending of their treasury money on campaigns for public office. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). Congress's authority to target the corrosive effect of unlimited corporate expenditures on campaigns was reaffirmed in *McConnell v. FEC*, 540 U.S. 93 (2003) and, only two years ago, in *FEC v. Wis. Right to Life*, Inc., 127 S. Ct. 2652 (2007) ("*WRTL*"). These decisions are in accord with the belief and expectation held by generations of Americans that they have the power, through their elected representatives, to ensure the integrity of this nation's electoral system. *See United States v. Int'l Union United Auto, Aircraft and Agr. Implement Workers of Am.*, 352 U.S. 567, 570 (1957) ("*UAW-CIO*") (scrutiny of statute proscribing corporate campaign expenditures implicated "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982).

Whether the proper disposition of this case requires overruling *Austin*—and by extension *McConnell*'s upholding of Section 203 of BCRA—therefore implicates "issues not less than basic to a democratic society." *UAW-CIO*, 352 U.S. at 570. Should the Court overturn those precedents, it would displace long-standing legislation (both at the federal level and in those states that have chosen to impose similar restraints) and judicial precedent, and usher in a new era of corporate spending as a dominant force in politics. As Members of Congress, we believe this would engender great popular frustration and cynicism about our political process.

Resolution of the narrow questions presented by Appellant in this case provides no justification for such an upheaval of our electoral system. The Court should abide by its past decisions in which it confronted challenges to Congress's

power to regulate corporate campaign expenditures and declined to entertain broad constitutional questions where narrower grounds for deciding the case existed. Such judicial restraint is especially appropriate here, where the parties and trial court have not fully developed the evidentiary record or arguments that would be crucial to consideration of such a dramatic change to our First Amendment jurisprudence.

ARGUMENT

I. OVERRULING *AUSTIN* AND *MCCONNELL* WOULD TRANSFORM THE CONDUCT OF ELECTIONS IN THIS COUNTRY

A. Such a Ruling Would Usher in a New Era of Corporate Spending as a Dominant Force in American Politics

The dominant role that corporate treasury funds played in the soft money explosion of the 1990s indicates that voiding restrictions on independent corporate expenditures would unleash a flood of unregulated campaign money from corporations, dramatically altering candidate campaigns.

In the years leading up to BCRA, soft money became an increasingly important means of skirting federal campaign finance laws. In 2000, soft money accounted for 54% and 39%, respectively, of total receipts collected by the Democratic and Republican national parties. Ray La Raja, *Sources and Uses of Soft Money*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 83, 86 (Gerald C. Lubenow ed., 2001).

Business interests were the primary source of these funds. *Id.* at 84. In the election years between 1994 and 1998, business interests accounted for 62-64% of the soft money paid to both parties. *Id.* at 87-89. While corporate soft money expenditures remained relatively constant as a

percentage of the totals during this period, in real dollars such spending more than doubled.[3] *Id.*

BCRA ended the soft money era, prohibiting contributions of corporate treasury funds to national party committees. The national parties now rely much more heavily on hard money donations from individuals. Anthony Corrado & Thomas E. Mann, *In the Wake of BCRA: An Early Report on Campaign Finance in the 2004 Elections*, FORUM, June 2004, at 4 (discussing the parties' success post-BCRA in raising money from small individual donors).

We expect that, given the opportunity, many corporations would make vast expenditures from their general treasuries in an effort to influence federal election outcomes, just as they did on a grand scale through soft money spending prior to BCRA's enactment. If this Court overrules *Austin* and invalidates existing restrictions on corporate treasury expenditures, it will open the floodgates of corporate campaign spending and transform our electoral system.

B. Limitations on Corporate Expenditures Are Essential to Our Democracy

We believe that such a dramatic transformation of the electoral process would harm our democracy. As amici who have special expertise with the workings of the electoral process and Congress, we believe that such a flood of corporate money would undermine the integrity of our

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[3] Federal Election Commission data indicates that, between 1992 and 2002, more than two-thirds of soft money paid to the major parties came from organizations. *See Soft Money Backgrounder*, Center for Responsive Politics, http://www.opensecrets.org/parties/softsource.php. The data indicates that total organizational soft money spending over the course of these six election cycles exceeded one billion dollars. *Id.* Based on the data regarding business-interest spending from 1992-1998, one can infer that corporate spending accounted for the vast majority of this amount.

democratic system and public confidence in that system because of corporations' unique characteristics.

Unregulated corporate expenditures would create serious concerns about undue influence for corporate donors. As this Court has found, such corporate expenditures, even if technically independent, are often no less appreciated by the candidate who reaps the benefit.[4] "While the public may not have been fully informed about the sponsorship of so-called issue ads, the record indicates that candidates and officeholders often were. A former Senator confirmed that candidates and officials knew who their friends were and 'sometimes suggest[ed] that corporations . . . make donations to interest groups that run 'issue ads'.'" *McConnell*, 540 U.S. at 128-29. As many current and former Members of Congress and candidates have attested, "[f]ederal candidates appreciate interest group electioneering ads . . . that benefit their campaigns just as they appreciate large donations that help their campaigns." Decl. of Linda W. Chapin submitted in *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C. Sept. 12, 2002), www.campaignlegalcenter.org/attachments/704.pdf; *see also*, *e.g.*, Decl. of Senator Dale Bumpers ¶ 16, www.campaignlegalcenter.org/attachments/702.pdf

[4] In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court concluded, in the absence of any record to the contrary, that independent expenditures by individuals do not have the same corrupting effect as direct contributions. *Id.* at 46-47. The Court subsequently recognized, in *Bellotti v. First Nat'l Bank of Boston*, 435 U.S. 765, 788 n.26 (1978), and *Austin*, 494 U.S. at 660, that a legislature might determine that there is "a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections." *Buckley* preceded the explosion of sophisticated independent expenditures by corporations in recent decades. Consequently, the *Buckley* Court lacked the copious evidence before the *McConnell* Court showing such expenditures' potential influence. *See* Richard Briffault, *Law and Democracy: A Symposium on the Law Governing Our Democratic Process, the 527 Problem . . . And the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 993 (2005).

("Members or parties sometimes suggest that corporations . . . make donations to interest groups that run 'issue ads.' . . . Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation."); Decl. of Joe Lamson ¶ 19, www.campaignlegalcenter.org/attachments/716.pdf ("In my experience as a federal election campaign manager, if you're in a close race and there are interest groups out there helping you with things like broadcast 'issue ads,' you usually appreciate that support.").

Public cynicism about the role of money in the political process runs high. As Senator Kerry noted during debate on BCRA, a national poll found that "[e]ighty-seven percent of voters believe that money impacts Members of Congress, with 56 percent expressing the belief that it affects Members a lot." 147 Cong. Rec. S2948 (daily ed. Mar. 27, 2001). Political contributors share this belief: Senator Feingold reported that seventy-five percent of senior corporate executives surveyed believed that their contributions to Members of Congress influenced legislation. 147 Cong. Rec. S2954 (daily ed. Mar. 27, 2001).

Congress enacted BCRA to restore confidence in our democracy. BCRA's definition of "electioneering communications" closed loopholes that had eviscerated decades-old restrictions on corporate and union expenditures. While imperfect, BCRA is an important bulwark in the battle to instill public faith in our system—one we need now as much as ever. We read every day about scandals that threaten the integrity of our system, from the pay-to-play scandals plaguing our public pension funds,[5] to interest groups'

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[5] Editorial, *The Ever-Deepening Pension Mess*, N.Y. TIMES, May 1, 2009 (describing alleged pay-to-play scandals involving New York State's pension systems)

allegedly offering to sell their influence for a million-dollar payment.[6]

As discussed above, we expect that a decision overturning *Austin* and *McConnell* would lead to vastly increased corporate expenditures in candidate elections. We are gravely concerned about the damage this would do to public confidence in our electoral system and our democracy.

II. THIS COURT HAS, FOR DECADES, PROPERLY EXERCISED JUDICIAL RESTRAINT IN REFUSING TO INVALIDATE LAWS PROSCRIBING CORPORATE CAMPAIGN EXPENDITURES

Austin validated regulations of corporate expenditures in candidate elections that have now been an embedded feature of the American electoral system, at both the state and federal levels, for more than 100 years. *See* Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contributions Cases*, 5 ELECTION L. J. 293, 293 (2006). During this long history, corporate and union interests have repeatedly launched First Amendment attacks on restrictions of their ability to make independent expenditures in federal elections. This Court, however, has never held that limits on spending by for-profit corporations in candidate elections unconstitutionally restrict protected speech. *See UAW-CIO*, 352 U.S. at 589-93; *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 123-24 (1948) ("*CIO*"). Instead, in an unbroken line of precedent, this Court has erected two doctrines—one substantive and one prudential—that demand continued fidelity to *Austin's* holding.

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[6] Andrew Zajac, *Conservative Group Offered to Back FedEx, For a Price*, L.A. TIMES, July 19, 2009 (describing alleged offer by the American Conservative Union to support FedEx's legislative position and "rally [the] grassroots" in exchange for a fee of $2.1-$3.4 million).

A. Corporations Are Properly Subject to Regulation of Their Campaign Spending To Protect Against Unfair and Undue Influence

This Court has repeatedly recognized that the unique characteristics and advantages of for-profit corporations as creations of the state justify regulation of their spending in candidate elections. In *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986), the Court observed that "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *Id*. at 257. In *Austin*, the Court reiterated that and held that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." 494 U.S. at 659, 660; *see also FEC v. Beaumont*, 539 U.S. 146, 154, 155 (2003) (recognizing "the public interest in restrict[ing] the influence of political war chests funneled through the corporate form," and the need to respect the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation") (quotations omitted, alteration in original).

Even in *Bellotti*, the Court recognized that restrictions on such spending in candidate elections could be justified. The Court took special care to make clear that its rationale for invalidating restrictions on corporate expenditures in connection with ballot measures did not extend to restrictions on such expenditures in candidate elections. *Bellotti*, 435 U.S. at 788 n.26.

> [O]ur consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of danger of real or apparent corruption in independent

> expenditures by corporations to influence candidate elections.

Id. Congress made this precise showing in enacting BCRA, as *McConnell*'s record amply indicates. *See* Section I.B., *supra*; *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 622-23 (D.D.C. 2003) (Kollar-Kotelly, J.) ("The [*McConnell*] record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.").

B. This Court's Doctrine of Constitutional Avoidance Is Most Compelling in the Present Circumstances

Amici respectfully submit that, in the present circumstances, it would be rash for the Court to consider overruling *Austin* and that portion of *McConnell* upholding BCRA's Section 203.

Chief Justice Marshall wrote:

> No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.

Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.Va. 1833) (No. 11,558).

This doctrine applies with particular force in the context of challenges to regulation of corporate financial participation in candidate elections. As this Court has repeatedly stressed,

"Congress' 'careful legislative adjustment of the federal election laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.'" *McConnell*, 540 U.S. at 117 (quoting *Nat'l Right to Work Comm.*, 459 U.S. at 209); *Beaumont*, 539 U.S. at 156-57; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) ("[T]he legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we.").[7] Moreover, where, as here, the "integrity of the electoral process" and the "responsibility of the individual citizen for the successful functioning of that process" are implicated, *UAW-CIO*, 352 U.S. at 570, constitutional scrutiny of regulations should not even begin unless such scrutiny is "absolutely necessary to a decision." *Id.* at 590-91 (quotation omitted).

The need for such judicial restraint is at its apex here. At no point prior to this Court's raising the issue did any party offer a reasoned argument that overruling *Austin* or *McConnell* is necessary to decide this case.[8] The court below did not consider the implications of such a step. The parties neither conducted discovery nor created an evidentiary record directed to the broad constitutional questions.

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[7] Congress made extensive efforts in drafting BCRA to comply with this Court's First Amendment precedents. *See*, *e.g.*, *Constitutional Issues Impacting Campaign Reform: Hearings Before the S. Comm. On Rules and Administration*, 106th Cong. (2000) (hearing from over 50 witnesses over seven days); *First Amendment and Restrictions on Political Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999); *see also* 148 Cong. Rec. S2138 (statement of Sen. McCain) (daily ed. March 20, 2002) ("We are acting today to fix a real problem and have made our best effort to do so in a way that will be upheld by the courts.").

[8] Appellant did ask this Court to overrule *Austin*—but not *McConnell*—in its brief, but Appellant chose to abandon this issue below and did not raise it in Appellant's statement of issues to this Court.

Indeed, that the need for this step has not previously been litigated in the case itself implies that the "other points" upon which the litigants have relied, *Ex parte Randolph*, 20 F. Cas. at 254, are sufficient to resolve the case. If the well-settled constitutionality of restrictions on corporate campaign spending is to be reexamined, it should be through an appropriate vehicle, where this Court may benefit from a complete evidentiary record, well-developed arguments by the parties based on that record, and findings and conclusions by a trial court.

From the passage of the Tillman Act in 1907 until *Austin*, this Court repeatedly declined to rule on the facial validity of restrictions on corporate expenditures in elections. The Court's rationale for judicial restraint in those cases strongly counsels against overturning *Austin* or *McConnell* here.

First, in *CIO*, this Court declined to reach the facial validity of statutes that regulated corporate and union contributions and expenditures in connection with federal elections. The Court refused to admit "any duty . . . to pass upon" the facial constitutional challenge "except in cases of logical necessity." *CIO*, 335 U.S. at 110. Acknowledging the "gravest doubt . . . in our minds as to [the statute's] constitutionality," if interpreted as the lower court had, the Court construed the statute narrowly and held that the indictment failed to allege a crime, thereby avoiding the constitutional issue. *Id*. at 121.

In a compelling concurrence, Justice Frankfurter explained that the constitutionality of federal statutes can be decided appropriately only "after full argument in contested cases," for "it is only with the light afforded by real contest that opinions on questions of the highest importance can safely be rendered." *Id*. at 125. Frankfurter contrasted cases where "the issues were formulated so broadly as to bring gratuitously before the Court that for which there is no necessity for decision, or [that] invite formulation of a rule of constitutional law broader than is required by the precise facts

of the situation or the terms of the assailed legislation." *Id*. at 126.

Frankfurter concluded:

> [The] grave constitutional questions [here] . . . come before us not shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of congressional power requires. . . . [T]here [must] be presented to a District Court the most effective and the least misapprehending legal grounds for supporting what Congress has enacted, while at the same time constitutional adjudication is sedulously resisted by presenting to the District Court alternative constructions of what Congress has written so as to avoid, if fairly possible, invalidation of the statute.

Id. at 126-27.

This Court again declined to reach the constitutionality of campaign spending restrictions in *UAW-CIO*, which also involved a challenge to a statute regulating corporate and union contributions and expenditures in federal elections. *UAW-CIO*, 352 U.S. at 590. In doing so, the Court explained that "[t]he impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an Act of Congress unless absolutely necessary to a decision of the case." *Id*. (internal citation and quotation omitted). The Court invoked *Dred Scott* as an example of "the rare occasions when the Court, forgetting the fallibility of the human judgment, has departed from its own practice," noting that such cases "have rightly been characterized as among the Court's notable self-inflicted wounds." *Id*. at 590-91 (internal citations and quotations omitted).

The reasons the Court gave for its judicial restraint are strikingly relevant to the question posed today:

> [T]hese questions come to us unillumined by the consideration of a single judge—we are asked to decide them in the first instance . . . [O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision . . . . Matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface, and in the outcome constitutional questions may disappear.

Id. at 591-92; *see also id.* at 592 (listing questions and issues for trial court consideration that would ultimately aid the Court in addressing the constitutional question).

In these cases, this Court had not yet passed on the constitutionality of regulating corporate or union expenditures to influence candidate elections. Today, the constitutionality of such regulation has been settled for decades. The considerations that militated against reaching the constitutional issue when it remained an open question weigh even more heavily now, as a shift in course would additionally require consideration of *stare decisis*. *See, e.g., WRTL*, 127 S. Ct. at 2704 (Souter, J., dissenting).

Even if this Court were tempted to revisit its own precedents, the Court's earlier words addressing almost identical challenges echo loudly today. It cannot credibly be claimed that "an active clash of views, based upon an adequate formulation of issues," *CIO*, 335 U.S. at 125 (Frankfurter, J., concurring), as to the validity of *Austin* and BCRA's Section 203 has been marshaled on the present record. This is a paradigmatic example of a constitutional issue that would be brought "gratuitously before the Court" and for which there is "no necessity for decision." *Id.* at 126.

As in *CIO*, there has been no development in the trial court of a record and arguments that could "bring [Congress's] powers before this Court as leanly and as sharply as judicial judgment upon an exercise of congressional power requires." *Id.* And, as in *UAW-CIO*, the constitutional issue comes to the Court "unillumined by consideration of a single judge." *UAW-CIO*, 352 U.S. at 591-92.

The Court should adhere to its historic restraint with respect to the constitutionality of Congress's long-standing restrictions on corporate expenditures in elections. This case can be resolved without revisiting the validity of *Austin* and Section 203. Only two years ago, this Court announced a standard to be used for as-applied challenges such as this one. *WRTL*, 127 S. Ct. at 2655 (ad is "functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). The parties have set forth well-developed arguments as to how this case can be resolved within that framework.

We believe that the judgment below should be affirmed. If the Court concludes that the facts at issue here cast new doubts on the facial validity of Section 203 (or *Austin* itself), however, the Court should at most remand for further proceedings that will allow the parties and trial court to develop a comprehensive record relevant to the broad constitutional questions.

Even if the Court suspects that the interests identified in *Austin* may no longer adequately support regulation of corporate expenditures under the First Amendment, or that Section 203 is not sufficiently tailored to advance those interests, any conclusion to that effect should be based on a well-developed factual record. *Cf. Buckley*, 424 U.S. at 26-27 (in holding that the anti-corruption interest justified FECA's contribution limits, noting that modern electioneering methods made fundraising essential and that abuses uncovered after the 1972 elections showed that Congress's

concerns were real). In *McConnell*, the district court had before it over 100,000 pages of evidence, including 12 expert reports and 92 fact witness declarations. These materials addressed, among other things, empirical questions about "corruption, party building, voter turnout, and the impact of BCRA on genuine issue advocacy" and examined "the risk of corruption and the appearance of corruption of federal candidates and officeholders that arises when large financial contributions are made to state and local political parties." Defendants' Witness Designations, *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C. 2002), http://www.camlc.org/attachments/95.pdf. Such evidence was essential to understanding the questions at issue before the Court.

This Court cannot simply rely here on the *McConnell* record, because no party in that case challenged *Austin*. *McConnell*, 520 U.S. at 203. That record does not, therefore, sufficiently address key issues bearing on *Austin's* validity. Moreover, facts relating to political corruption and the role of corporate money in public elections have changed significantly since—and because of—*McConnell*. For example, there has been debate about whether funding through "527 groups" has replaced soft money contributions as a means for corporations to obtain influence with elected officials. *See*, *e.g.*, Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 286 (2004). Such empirical issues would need to be thoroughly developed before the Court considers overturning *Austin* or the portion of *McConnell* that upheld Section 203 of BCRA.

It is this Court's duty to our citizens to consider such a complete evidentiary record before contemplating the step that the Court's question suggests. That is the lesson of this Court's historic treatment of the constitutionality of corporate campaign expenditures. If the Court does not exercise judicial restraint here, it may cause another "self-inflicted

wound," *UAW-CIO*, 352 U.S. at 591 (internal quotation and citation omitted), by reversing a century of legislative policy on an issue that is both central to our system of democratic governance and peculiarly within Congress's expertise.

CONCLUSION

For the reasons set forth above, the Court need not and should not overrule *Austin* or the part of *McConnell* upholding the facial validity of Section 203 to properly dispose of this case.

Respectfully submitted,

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