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

BRIEF OF AMICUS CURIAE FIDELIS CENTER FOR LAW AND POLICY AND CATHOLICVOTE.COM IN SUPPORT OF THE APPELLANT ON SUPPLEMENTAL QUESTION

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QUESTION PRESENTED

As per the Court's order entered June 29, 2009, this amicus curiae addresses whether this Court should overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE AMICI[1]

Fidelis Center For Law And Policy ("Fidelis") is a not-for-profit public interest organization that is dedicated to the sanctity of life, religious liberty, marriage and family. In an effort to protect and promote these fundamental rights and institutions, Fidelis engages in public education and public interest litigation.

Fidelis submits this brief on behalf of itself and those who support CatholicVote.org, a nonpartisan voter education program devoted to building a culture that embodies in its law respect for the fundamental rights and institutions described above. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good as seen in light of the Roman Catholic religious tradition. *See* www.youtube.com/catholicvote. Fidelis submits this brief in support of Citizens United because it believes that this Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) has a chilling effect upon speech and undercuts discussion about law and policy in a way that is fundamentally inconsistent with First Amendment jurisprudence.

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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 amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Austin Should Be Overruled Because It Defies The Gravamen Of First Amendment Precedent.

Fidelis Center For Law And Policy respectfully submits that this Court's decision in *Austin v. Mich. State Chamber of Commerce,* 494 U.S. 652 (1990), represents a deeply flawed departure from well established principles of First Amendment jurisprudence. As long ago as *Santa Clara County v. Southern P. R. Co.,* 118 U.S. 394 (1886), this court recognized that corporations were entitled to constitutional protection. About one hundred years later, in *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), this Court extended to corporations the protection provided by the First Amendment, reasoning that "the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *Id.* at 777. *Austin* departed from this obvious truth by embracing the farfetched notion that speech from a particular source (corporate) about a particular subject (views on political candidates) has "corrosive and distorting effects" on public discourse. *Id.* at 660.

Austin contradicts the great weight of First Amendment precedent and should be overruled. First, *Austin* cannot be squared with precedent holding that the First Amendment prohibits laws that burden speech based on the identity of the speaker and content of speech. In *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court struck down a state law requiring

criminals who derived income from works about their crime to pay funds into an escrow account designed to compensate victims. This Court observed that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," noting that "in the context of financial regulation . . . the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id*. at 115.

Austin should be overruled because it imposes a financial penalty on corporate speakers based on the content of their speech, contradicting a principle "so engrained in . . . First Amendment jurisprudence . . . [and] so 'obvious' as to not require explanation." *Simon & Schuster*, 502 U.S. at 115. In this regard, this Court must reject any claim that *Austin* falls outside the rule in *Simon & Schuster* because *Austin* targets speech deemed "corrupt." Although *Austin* purports to focus on "corruption", it looks to nothing more than the identity of the speaker and the content of the speech. Just as only criminals were subject to the regulation at issue in *Simon & Schuster*, only corporations are subject to the regulation here. It is fundamental that government "cannot foreclose the exercise of constitutional rights by mere labels," *see*, *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), and government cannot satisfy its burden of justifying regulation on expressive activity by means of a circular argument which defines the state's interest

with reference to nothing more than the content of the speech that is regulated. *See Simon & Schuster*, 502 U.S. at 119-20; *see also*, *Legal Service Corporation v. Velazquez*, 531 U.S. 533, 547 (2001) (reasoning that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").

Austin cannot be squared with another axiom of First Amendment jurisprudence, i.e., the First Amendment protects speech (regardless of its source) in order to protect the rights of the willing listener. This Court has long recognized that the protection provided to speech by the First Amendment includes the right to listen for "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *See*, *e.g.*, *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982). In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), this Court relied upon a wide array of prior decisions protecting speech with reference to the interests of the willing listener to protect speech about matters of public interest. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57.

Austin defies this axiomatic First Amendment principle. Whereas *Bellotti* refused to ban speech based on the identity of the speaker, because "the inherent worth of . . . speech in terms of its capacity for informing the [listening] public does not depend upon the identity of its source, whether corporation,

association, union, or individual," *Bellotti*, 435 U.S. at 777, *Austin* failed to give this vital interest (or the voters) any credit, approving a per se ban of speech deemed corrupting based on nothing more than its source (corporate) and its content (concerning political candidates). *Austin* should be overruled because it disregarded the willing listener's interest in hearing speech by corporations about political candidates, and more broadly, failed to acknowledge that the First Amendment places responsibility for discerning true from false in the people (not officeholders). *See*, *e.g.*, *Citizens Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) (The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ."); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty . . . but also is essential to . . . the vitality of society as a whole.").

Austin's stripping of First Amendment protection from corporate speech about political candidates is anomalous for another reason: it makes First Amendment protection turn on whether speech implicates economic interests. In *Austin* this Court accepted a claim that "the resources in the treasury of a business corporation . . . reflect . . . the economically motivated decisions of investors and customers," *See Austin*, 494 U.S. at 659, to find a new kind of corruption, "the corrosive and distortive 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.

But the hostility to economic motivations that justifies the total ban on corporate speech authorized under *Austin* is at odds with the longstanding case law converging around that point that speech does *not* lose protection because it can be connected to economic considerations. *See Virginia State Board of Pharmacy*, 425 U.S. at 761-66 (citing a wide variety of cases extending First Amendment protection to speech without regard for pecuniary considerations involved). *Austin*'s definition of corruption is grounded in nothing more than the fact that corporate speech is linked to the economic interests of shareholders. *Austin*, 494 U.S. at 559-60. In this way, *Austin* makes First Amendment protection turn on the link between speech and profit-motive in a manner wholly inconsistent with the great weight of this Court's precedent on point, which has consistently held that speech does not lose First Amendment protection because it is linked to pecuniary considerations.

The per se ban on speech too closely wed to economic motivations blessed by *Austin* gives rise to an irony that provides yet another way *Austin* cuts against the grain of First Amendment jurisprudence. This Court has long recognized that "[w]hatever differences may exist about the interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment

was to protect free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. at 218. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). For this reason, this Court has stated that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco City, Democratic Central Comm.*, 489 U.S. 221, 23 (1989).

Bellotti observed this architectonic principle of First Amendment law by protecting corporate speech about political matters in the interest of informed public discourse, but *Austin* disregards the principle by categorically excluding views about candidates advanced by corporations on the grounds such views are driven by economic motivations. The odd result produced by *Austin*'s animosity toward economic interest is that the First Amendment provides no protection to core political speech by corporations, but it provides greater protection to corporate speech about matters further removed from free speech concerns at the core of the First Amendment – and more tightly wed to economic motivations. *Austin* should be overruled because it inverts the hierarchy of values that lies at the heart of current First Amendment jurisprudence.

Austin also legitimizes an unconstitutional condition that is inimical to First Amendment freedom. As this Supreme Court has long held, "[w]hat the First Amendment precludes the government from

commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). "[T]his principle, known as the unconstitutional conditions doctrine," *see Rumsfeld v. Forum For Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006), has a simple yet compelling rationale: "[i]f the government could deny benefits to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be in effect penalized and inhibited. . . . Such interference with constitutional rights is impermissible." *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 717 (1996). In keeping with this principle, this Court has repeatedly struck down efforts to burden activity protected by the First Amendment, justified by claims that the restriction is simply a condition of eligibility for government benefits. *See, e.g., Board of County Commissioners, Wabaunsee County, Ka. v. Umbehr*, 518 U.S. 668, 675, 680 (1996) (noting that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech," listing cases dealing with "users of public facilities and recipients of small government subsidies . . . " and *citing Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Healy v. James*, 408 U.S. 169 (1972) (access to campus facilities for student meetings and activities); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (government subsidy for private speech).

Austin should be overruled because it amounts to an unconstitutional condition. In *Austin* this Court allowed a total ban on corporate speech about political candidates justified with reference to benefits conferred on corporations by state law. *Austin*, 494 U.S. at 658-59. In so doing, *Austin* endorsed what must be seen as an unconstitutional condition because the benefits of incorporating now come at a price, i.e., shareholders are not free to use their corporate treasury to fund political speech about candidates. Such a result epitomizes the concern that "[i]f the government could deny benefits to a person because of . . . constitutionally protected speech or associations . . . exercise of those freedoms would be in effect penalized and inhibited," *see*, *O'Hare Truck Service*, 518 U.S. 712, 717 (1996), but defies the principle that "[s]uch interference with constitutional rights is impermissible." *Id*. In this regard, it makes no difference that state law gives and federal law takes away because when dealing with constitutional rights of the first order this Court is "not free to discard practical realities." *See Healy*, 408 U.S. at 183; *see also*, *Brentwood Academy v. Tenn. Secondary School Athletic Assoc.*, 531 U.S. 288 (2001) (noting that "if . . . formalism were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling."). *Austin* unconstitutionally justifies forfeiture of fundamental First Amendment rights with reference to benefits extended by law.

In this regard, *Austin* has pernicious and far reaching implications for free speech that will yield a bitter harvest if the decision is left standing. If the conception of corruption legitimated by *Austin* is sound, then government may restrict the First Amendment activity of a vast range of business entities and individuals which receive similar benefits under state law, as so many do. *See* Susan W. Dana, "*Restrictions On Corporate Spending On State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce*," 27 Hastings Const. L.Q. 309, 354-59 (2000) (noting that a variety of business entities receive benefits the same or similar to those extended to corporations). This fear would be a reality for wealthy individuals if it had not been foreclosed by *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008) (striking down the "millionaires amendment"). But the decision in *Davis* simply shows that *Austin* is flawed. For it is painfully clear that *Austin* can only be squared with *Davis* by elevating (corporate) form above substance contrary to this Court's longstanding admonition that when dealing with fundamental rights it must avoid "[d]etermining constitutional claims on the basis of . . . formal distinctions, which can be manipulated largely at the will of the government agencies concerned. . . ." *Board of County Commissioners, Wabaunsee County, Kansas, v. Umbehr*, 518 U.S. 668, 679-80 (1996) (holding that eligibility for government contracts cannot be conditioned on political fealty and citing cases for the proposition that the law must focus on substance not form); *see also Legal Service*

Corporation, 531 U.S. 533, 547 (2001) (holding that Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise). *Austin* should be overruled because it endorses a pernicious principle that can be used to eviscerate the First Amendment rights of all speakers.

More broadly, *Austin*'s effort to justify a gag on corporate speech out of solicitude for dissenting shareholders contradicts the approach this Court takes in other areas of First Amendment law implicating like concerns. In a long line of cases this Court has consistently refused to restrict the expression of some based on the objections of others. In the context of government speech, this Court has recognized that government must be permitted to speak despite the objection of dissenting citizens, *see, e.g.*, *Rumsfeld*, 547 U.S. at 64, because "[w]hen the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy. . . ." *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Behind this principle is the more general one: government must not empower a heckler's veto. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a law that prohibited flag burning); *Cohen v. Cal.*, 403 U.S. 15, 22 (1971); *e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (striking down restriction on transmission of indecent material to persons under 18 on grounds it effectively gave opponents of indecent speech a

heckler's veto); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (striking down regulation empowering board to restrict display of movies deemed sacrilegious).

Austin should be overruled because it defies the principle that government should not use its power to distort private decisions about whether to speak and what to say. Whereas *Bellotti* respects the principle based on a realistic appreciation for shareholder democracy, *see Bellotti*, 435 U.S. at 795, *Austin* gags corporate speech by effectively giving supposedly dissenting members a heckler's veto. *See Austin*, 494 U.S. at 661-63 (justifying gag rule based on reluctance of dissenting members to withdraw from corporation). *Austin* should be overruled because it allows supposedly dissenting members to exercise a heckler's veto – and the result is a total gag of corporate speech about political candidates that is anathema to the First Amendment.

More generally, *Austin*'s singling-out of corporations for disfavored treatment under the First Amendment presents a radical departure from many other strains of First Amendment jurisprudence which treat corporations like other speakers.

- This Court has treated corporations and other speaks alike when evaluating burdens on petitioning protected by the First Amendment. *See BE&K Construction Co. v. NLRB*, 536 U.S. 516, 537 (2002) (employer's unsuccessful retaliatory lawsuit against unions could not serve as a basis for imposition of liability for unfair labor

practices absent a showing that the lawsuit was objectively baseless); *see also*, *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc.*, 508 U.S. 49 (1993) (barring antitrust liability for litigation because suit was both objectively and subjectively baseless); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (lawsuit brought for improper motive cannot be enjoined provided it is not a sham) (1983); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (no personal liability for torts committed by fellow protestors absent specific intent via authorization, direction, ratification of specific tortious activity, incitement of imminent lawless action, or specific instructions to carry out violent acts or threats); *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) (no tort liability for petition to President absent reckless disregard for the truth).

- This court has extended the same First Amendment protection from coerced speech to corporations and other speakers alike. *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 21 (1988) (holding it was a violation of the corporation's First Amendment rights and that the freedom from compelled speech extended equally from individuals to corporations); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) (compelled disclosure of fee arrangement violated First Amendment); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a statute forcing a newspaper corporation to publish editorial replies was a violation of the corporation's First Amendment

rights); *cf. Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (compelled display of "Live Free or Die" violated First Amendment); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943) (state law compelling recitation of Pledge of Allegiance violated First Amendment).

- This Court has treated corporations like other speakers with respect to charitable solicitations. *See*, *Illinois ex rel. Madigan v. Telemarketing Assocs*., 538 U.S. 600, 611 (2003) (noting that "[t]he First Amendment protects the right to engage in charitable solicitation," and extending First Amendment protection to corporations engaged in charitable solicitation); *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 622 (1980) (ordinance that required a permit for charitable solicitations by a non-profit corporation was constitutional); *cf. WatchTower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (citing numerous cases); *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

- This Court has applied the same First Amendment standards for defamatory speech to corporations and others. *See Milkovich v. Lorain Journal Co*., 497 U.S. 1, 14-17 (1990) (same applied to defamation claims involving corporations and other speakers); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (no liability for emotional distress based on protected speech absent heightened showing); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (invalidating statute that allowed punishment for publication of lawfully obtained truthful information where

state law imposed a negligence *per se* standard for liability); *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 256, 283 (1964) (this court determined that a newspaper corporation must act with actual malice to be liable in a defamation suit).

- This Court has treated corporations and individuals alike with respect to commercial speech. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 753 (1976) (focusing on content of the speech and not the identity of the speaker); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 571 (1980) (endorsing a system of prior restraints as an acceptable method of regulating commercial speech to ensure it is truthful, accurate, not misleading); *cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995) ("commercial speech . . . may freely be regulated if it is misleading"); *Friedman v. Rogers*, 440 U.S. 1, 9, (1979) (citations omitted) ("The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely."); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (rule requiring disclosure to ensure information is not misleading is consistent with First Amendment); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992) (informed consent disclosure requirements are constitutional).

These varied lines of precedent illustrate some of the countless ways that *Austin*'s treatment of corporate speech about political candidates defies

long-standing strains of First Amendment jurisprudence that are well rooted in fundamental principles and mutually reinforcing. And what justifies this aberration? Nothing. Rather, *Austin*'s per se ban on certain speech by certain speakers represents a deeply flawed departure from this Court's vigilant service to the First Amendment.

CONCLUSION

As demonstrated above, *Austin* cannot be incorporated (dare we say) into that great body of First Amendment precedent that protects our freedom of speech about issues of public importance. Quite the contrary, *Austin* represents an outlying precedent inimical to the fundamental First Amendment values that have served the common good so well. This Court should use this case to overrule *Austin*.

Respectfully submitted,

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