

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 REPLY BRIEF FOR APPELLANT

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Appellant remains accurate.

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**SUPPLEMENTAL REPLY BRIEF
FOR APPELLANT**

The government's supplemental brief is tantamount to a confession of error.

The government banned Citizens United's Video On Demand distribution of *Hillary* on the strength of its asserted interest in preventing corporations from deploying "immense aggregations of wealth" to "influence unfairly the outcome of elections." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660, 669 (1990).

But now that the Court has expressed a willingness to reexamine that rationale, the government, astoundingly, has abandoned it. *Nowhere* in the government's supplemental brief will the Court find any mention of the "different type of corruption"—"the corrosive and distorting effects" purportedly accompanying any corporate or union participation in electoral politics—on which both *Austin* and *McConnell* relied. 494 U.S. at 660; 540 U.S. 93, 205 (2003). Indeed, the very word "distortion"—so prominent in *Austin*—now seems to have fallen out of the government's vocabulary altogether; it appears not once in the government's supplemental brief.

The government now attempts to reinvent *Austin* and the pertinent portion of *McConnell* as supported by two different governmental interests—prevention of actual or apparent *quid pro quo* corruption and protection of dissenting shareholders—that this Court already has rejected as insufficient to justify suppression of electoral expenditures. *See Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976) (per curiam); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

This is an insupportable reading of those decisions. And the government concedes as much when it argues that “[t]he Court did not decide in *Austin* or *McConnell*” whether “preventing actual or apparent corruption provides a constitutionally sufficient justification for prohibiting” corporate electioneering. FEC Supp. Br. 11.

Moreover, the interests the government seeks to substitute for its anti-distortion rationale are manifestly inapplicable to the government’s suppression of *Hillary*. Citizens United has no shareholders, and neither the government nor its *amici* have advanced any remotely plausible theory as to how Video On Demand distribution of *Hillary* actually or apparently corrupted President Obama or Vice President Biden. Even to articulate a theory of *quid pro quo* corruption arising out of *Hillary* is to deride it.

Why would the government abandon the anti-distortion rationale in favor of two rationales that cannot apply to Citizens United and its speech? Why, after resisting *any* enlargement of the *MCFL* exception (*see* FEC Br. 30-32), would the government now, upon reflection, suggest that its one-corporate-dollar-and-you’re-in-prison rule (11 C.F.R. § 114.10) violates the First Amendment as applied to entities that receive “*de minimis* sums from corporate donations or business revenue” and even offer that Citizens United “would appear to be” such an entity? FEC Supp. Br. 3 n.1.

The answer is obvious and disturbing: The government will surrender Citizens United’s as-applied challenge if doing so will shield *Austin* and *McConnell* from scrutiny and enable the FEC to invoke those decisions to suppress political speech another day.

This Court should not take the bait. As the government’s failure even to articulate (much less defend) it vividly illustrates, *Austin*’s anti-distortion rationale is bankrupt. And the interests the government has rushed into the breach are equally infirm. In the absence of a “constitutionally sufficient justification for prohibiting . . . corporate . . . independent electioneering” (FEC Supp. Br. 11), *Austin* and the pertinent portion of *McConnell* should be overruled.

I. THE GOVERNMENT’S CRIMINALIZATION OF CORPORATE POLITICAL SPEECH CANNOT SURVIVE STRICT SCRUTINY.

A. The government acknowledges—as it must in view of *Buckley* and *NCPAC*—that independent political speech generally does not create a material risk of actual or apparent *quid pro quo* corruption. See *Buckley*, 424 U.S. at 47-48; *FEC v. Nat’l Conservative Political Action Comm.* (“*NCPAC*”), 470 U.S. 480, 497 (1985). The government contends, however, that “electoral advocacy by for-profit corporations poses distinct risks” of *quid pro quo* corruption. FEC Supp. Br. 6. It claims that the “nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption” and that the *McConnell* record “indicated” that, indeed, “corporate spending on candidate-related speech, even if conducted independently of candidates, had come to be used as a means of currying favor with and attempting to influence federal office-holders.” FEC Br. 9, 11.

The government’s epiphany that it is only the political speech of “for-profit corporations” that poses “distinct risks” of corruption surely comes as welcome news to America’s labor unions, whose political

speech has been criminalized for nearly as long as that of America's corporations. But in seeking to hobble only for-profit corporations in the competition of political ideas, the government merely compounds its error, transmogrifying both BCRA § 203 and 2 U.S.C. § 441b into measures the authoring Congresses would not conceivably have enacted. See *Buckley*, 424 U.S. at 108 (statute should be facially invalidated where it is "evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not").

But this Court need not decide whether the government's apparent admission that it lacks a basis for suppressing union political speech overcomes the normal presumption of severability of unconstitutional applications, because the distinguishing features of for-profit corporations asserted by the government are not, in fact, distinct at all.

1. The government alleges that for-profit corporations are uniquely likely to seek to corrupt officeholders with independent expenditures because "[t]he economic stake of corporations" in legislation "generally dwarfs that of any set of individuals" and because, where the game is "pay to play," for-profit corporations are more likely than others to be able to afford the "ante." FEC Supp. Br. 9. But it is hardly just for-profit corporations that have significant stakes in pending legislation: Consider, for example, the interest of a multi-millionaire in estate tax reform, or the interest of an author in a proposed extension of the copyright term.

And while it is true that some for-profit corporations have great amounts of wealth at their disposal, most of the several million corporations in the

United States lack the financial wherewithal to corrupt officeholders. In that sense, corporations are reflective of America's individuals: While the government is doubtless correct that most individuals cannot afford officeholders' "ante," the 2008 election cycle demonstrates that many can. See Campaign Finance Institute, Individual Donors of \$75,000 or More to Federal 527s, at http://www.cfinst.org/interest_groups/pdf/np527/527_08_24M_Table3.pdf (the 139 largest individual donors to federal 527s contributed more than \$62 million).

The government also argues that for-profit corporations are uniquely likely to corrupt legislators because they are "artificial persons" who can use their perpetual life to "amass great wealth" that can be deployed in the form of corruption-inducing independent expenditures. FEC Supp. Br. 9. But *MCFL* entities and PACs are no less "artificial" and their lives are no less perpetual, yet this Court has held—and the government accepts—that independent expenditures by such entities pose no threat of *quid pro quo* corruption. See *FEC v. Mass. Citizens for Life* ("*MCFL*"), 479 U.S. 238, 256 (1986); *NCPAC*, 470 U.S. at 497. If, as the government seems to assume, the First Amendment protects only a "natural person's ideas," then it is not just the speech of for-profit corporations that is at risk (*but see Bellotti*, 435 U.S. at 795), but also that of *MCFL* entities (*but see MCFL*, 479 U.S. at 263), PACs (*but see NCPAC*, 470 U.S. at 501), and, indeed, political parties (*but see Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (plurality opinion of Breyer, J.)).

2. The government's efforts to backstop its assertions with "indicat[ions]" from the *McConnell* record are equally flawed. Even on the government's

telling, the *McConnell* record “indicated” not *quid pro quo* corruption, but rather that “federal officeholders and candidates were aware of and felt indebted to corporations . . . that financed electioneering advertisements on their behalf.” FEC Supp. Br. 8. But *McConnell* itself recognized that “mere political favoritism or opportunity for influence alone is insufficient to justify regulation” of electoral speech. 540 U.S. at 153. Indeed, the “fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [campaign supporters] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.” *NCPAC*, 470 U.S. at 498.¹

Perhaps sensing that “indications” of “influence” might be an insufficient basis upon which to criminalize political speech, the government argues that it is entitled to a remand for additional “evidentiary proceedings” so that it might convince members of Congress to admit that they made *quid pro quo* exchanges with corporate campaign supporters—or perhaps extorted “protection” payments from corporations in the form of electoral expenditures. Yet, if *Austin* and *McConnell* are still controlling, the remand would be meaningless; the government would seek and obtain summary judgment as it did below.

¹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), says nothing to the contrary. While “mere . . . favoritism” toward a campaign supporter is perfectly acceptable in legislative and executive branch settings (*McConnell*, 540 U.S. at 153), comparable “favoritism” toward a judicial campaign supporter is constitutionally intolerable in light of the due process guarantee of judicial “neutrality.” *Caperton*, 129 S. Ct. at 2260.

But the government is not entitled to a remand in any event. It is axiomatic that “[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured”; it must “point to record evidence of legislative findings” supporting its proffered compelling interest. *Colo. Republican*, 518 U.S. at 618 (plurality opinion of Breyer, J.) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (ellipses in original)). Perhaps unsurprisingly, the government is unable to point to any congressional finding that corporate expenditures result in the corruption of legislators. And the experience of the 26 States that currently permit corporations to make unlimited independent expenditures in state elections (*see* U.S. Chamber Supp. Br. 8 & n.5) suggests strongly that no such finding is in the offing: The government is unable to point to a *single* incident in any of those jurisdictions where a corporation used independent expenditures to solicit *quid pro quo* favors.

B. Alternatively, the government contends that prohibiting corporate independent expenditures is necessary to “protect the individuals who have paid money into a corporation . . . for purposes other than the support of candidates.” FEC Supp. Br. 12. The government points to no congressional finding that even remotely suggests that this was actually one of Congress’s objectives in enacting FECA or BCRA. *But see Colo. Republican*, 518 U.S. at 618 (plurality opinion of Breyer, J.) (strict scrutiny requires analysis of the government’s actual objective, not *post hoc* rationales). In any event, *Bellotti* explicitly rejected protecting a “dissenting shareholder’s wishes” as a justification for suppressing corporate political speech. 435 U.S. at 794 n.34.

Thus, just as dissenting party members must “protect” their own views either through the procedures afforded by party by-laws, or by leaving the party (*see N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 799 (2008)), dissenting shareholders must “protect” their own views, either by invoking the “procedures of corporate democracy” (*Bellotti*, 435 U.S. at 794), or by selling their shares. And, in fact, forty members of the S&P 100 allow shareholders to do just that through policies that require full disclosure of the corporations’ political activities in order to facilitate shareholder oversight. Center for Political Accountability, Political Disclosure Hits 60 Companies (Mar. 24, 2009), at <http://www.politicalaccountability.net/index.php?ht=display/ArticleDetails/i/1890/pid/1883>.

C. The government also fails utterly to show that restrictions on corporate independent expenditures are narrowly tailored to its asserted objectives. Restricting the speech of *all corporations* (except *MCFL* entities and members of the institutional media) is not remotely necessary to mitigate the “distinct risks” assertedly inherent in the electoral advocacy of *for-profit corporations*.

Certainly, the “protection” of dissenting shareholders does not require prohibiting the speech of corporations like Citizens United that have no shareholders, or the speech of the vast majority of U.S. corporations that have only one shareholder (who presumably does not dissent from her own views). And likewise, banning *all corporations* from making independent expenditures is not remotely necessary to address the “distinct risks” supposedly posed by “[t]he nature of business corporations.” FEC Supp. Br. 6, 9.

The government cites its fear that nonprofit corporations could become “conduits” for the speech of business corporations. But the government’s speculation that some nonprofits might be used in this manner is hardly an adequate justification for banning nonprofit corporations funded predominantly by individuals from engaging in political speech (as the government now—quite belatedly—seems ready to admit). If business corporations are the concern, the narrowly tailored response would be legislation that prohibits those entities alone from directly or indirectly funding campaign expenditures.

D. Tellingly, the principal defenders of the anti-distortion rationale are those who have the most to gain by corporations’ continued silence: incumbent politicians. *See generally* DNC Supp. Br.; McCain Supp. Br.; Van Hollen Supp. Br. According to the DNC, for example, it would be inappropriate to reject *Austin*’s anti-distortion rationale because the “relationship of corporation to government” is currently “an all-consuming topic in American politics” and overruling *Austin* “would alter, much to the favor of one class of participants, the very terms on which this great national debate is being conducted.” DNC Supp. Br. 2. The irony in this argument is impossible to miss: The anti-distortion rationale—which is nominally premised on *equalizing* the relative voice of participants in the political process—is now being invoked as a basis for completely *excluding* corporations from a political debate about their future place in society. Far from equalizing political speech, it is *Austin* itself that has distorted political discourse by silencing some of the Nation’s most important economic actors and ideological activists.

Moreover, there is absolutely no indication that permitting corporations to participate in this politi-

cal dialogue would overwhelm the voices of other participants. The government is unable to point to any evidence that corporations dominate or otherwise “distort” the political process in the 26 States that permit corporate independent expenditures. *See supra* pg. 7. And, on the federal level, it is telling that in 2008—after this Court had held that corporations may spend unlimited funds on electioneering communications authorized under *WRTL II*—political parties and PACs still spent *25 times* more than corporations on electoral advocacy. *Compare* FEC Supp. Br. 17, *with id.* at 22.

* * *

Ultimately, the government’s refusal to defend *Austin*’s anti-distortion rationale is tantamount to a concession that the decision was “badly reasoned” and is in need of reconsideration. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Because the government has failed in its effort to shore up that decision by proposing alternative grounds for prohibiting corporate independent expenditures, *Austin* should be overruled. And because the government has pinned the fate of *McConnell*’s facial validation of BCRA § 203 on its defense of *Austin* (FEC Supp. Br. 19), *McConnell* too must fall.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR REVISITING AND OVERRULING *AUSTIN*.

Unable to formulate a persuasive—let alone compelling—justification for the criminalization of corporations’ core political speech, the government ultimately retreats to a series of prudential considerations that purportedly militate in favor of leaving *Austin* and *McConnell* on the books. None of those

purely discretionary factors is a sufficient basis for allowing those wrongly decided cases to stand.

The government and its *amici* resort repeatedly to the fact that the federal government has regulated corporate campaign contributions since 1907 and corporate independent expenditures since 1947. *See, e.g.*, FEC Supp. Br. 7, 16. But, when it comes to restrictions on core political speech, longevity is no substitute for a compelling governmental interest. *See, e.g., Republican Party v. White*, 536 U.S. 765 (2002).

Moreover, the reliance interests identified by the government and its *amici* are decidedly overblown. Many of the States that currently restrict corporate independent expenditures had enacted their restrictions *before* this Court held for the first time in *Austin* that the anti-distortion rationale is a sufficient basis for prohibiting corporate independent expenditures. *See* J.S. at 16 n.13, *Austin* (No. 88-1569). Similarly, the fact that Congress, in reliance on *Austin*, may have expended legislative resources when enacting BCRA cannot itself insulate that decision's unconstitutional holding from re-examination. *See, e.g., W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), even though States had explicitly relied on that decision to enact classroom pledge-of-allegiance requirements).

The government contends that this case is an inappropriate one in which to undertake that re-examination because Citizens United is an ideologically oriented organization funded almost exclusively by individuals and thus a “distinctly atypical corporation.” FEC Supp. Br. 2. It is the *government*, however, that has placed *Austin* squarely at issue by sub-

jecting Citizens United to the same speech restrictions as those applicable to more “typical,” for-profit corporations.

Finally, it is sheer hyperbole for the government’s *amici* to suggest that a decision overruling *Austin* or *McConnell* “could threaten the Court’s legitimacy.” McCain Supp. Br. 12. As the government itself emphasizes (at 5), *Austin*’s anti-distortion rationale was not challenged in *McConnell*. This Court has therefore never had occasion to examine whether *Austin* was correct to depart from this Court’s prior campaign finance jurisprudence. Rejecting that decision’s utterly inadequate rationale for impairing corporations’ fundamental First Amendment freedoms—and the unworkable campaign finance framework it has generated—could only bolster this Court’s standing as the final bulwark against governmental abridgment of constitutional rights.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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