No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal To The United States District Court For The District Of Columbia

BRIEF OF PUBLIC GOOD AS AMICUS CURIAE IN SUPPORT OF APPELLEE ON SUPPLEMENTAL QUESTION

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INTEREST OF *AMICUS*

Public Good submits this brief as *amicus curiae* in support of Appellee Federal Election Commission.[1]

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through *amicus* participation in cases of particular significance for freedom of speech, consumer protection and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone. *See*, *e.g.*, Brief in support of Petition for Certiorari in *Frazier v. Smith* (cert. pending, No. 08-1351). As an organization with a particular interest in safeguarding free expression, Public Good submits this brief to explain why precedents that uphold the differential treatment of corporate and individual electioneering communications in order to preserve the integrity of the political process are consistent with the protections of the First Amendment.

SUMMARY OF ARGUMENT

The century-old practice of treating election-related expenditures and contributions by business corporations differently from those by individuals does not offend the First Amendment, because the political campaign speech of business corporations is

[1] No counsel for a party authored this brief in whole or in part, and no person, other than *amicus*, its members, and its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

protected principally for the sake of the interest of potential audiences in receiving the communication. Listener interests merit – and have generally received – protection less rigorous than that afforded speakers' interest in self-expression.

The speech of business corporations is not self-expression. Corporations, of course, have no interests of their own in personal self-expression, and their speech is not the self-expression of shareholders, directors, officers, or employees. Therefore, when the integrity of the political process is at stake, the expenditures and contributions of business corporations may be regulated in certain ways that might be unconstitutional if applied to individuals.

The right of individuals to group together to amplify their voices is undisputed. But a business corporation does not serve this function. Advocacy groups remain free to engage in electioneering communications, as long as they decline to accept funding from business corporations. Restrictions on receiving funds from business corporations do not diminish the constitutionally protected reach of advocacy groups' voices; rather, they merely decline to give them special amplification.

ARGUMENT

This Court has explained the constitutionality of campaign finance regulations that treat business corporations differently from individuals on the basis of particularly compelling state interests, either the particular threat of *quid pro quo* corruption – or the appearance thereof –

posed by corporate spending, or the distorting effects on the political process of wealth aggregated through the corporate form independent of public support for the corporation's political views. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 2672 (2007) (*WRTL*) (summarizing earlier cases). These rationales, however, have been called into question. *E.g. id.*, 127 S.Ct. at 2677-79 (Scalia, J., concurring in part and concurring in judgment); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting).

Implicit in the opinions of this Court is another, perhaps sounder, justification: Communication protected primarily for its value to listeners is not protected identically to the self-expressive communication which lies at the core of the First Amendment's protections (hereinafter, "self-expression"). It is this distinction that explains why campaign spending and contributions by publicly traded for-profit corporations (hereinafter, "business corporations") may constitutionally be subjected to different levels of regulation than spending and contributions by individuals or groups organized for political expression and advocacy.

I. CORPORATE SPEECH IS PROTECTED PRINCIPALLY TO SAFEGUARD LISTENERS' INTERESTS.

When this Court first held that corporate speech merits First Amendment protection, it made it clear that the First Amendment interests at stake were those of potential *recipients* of the speech, not those of speakers. Corporate speech is protected to

afford "the public access to discussion, debate, and the dissemination of information and ideas." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). *See also id.* at 777 (corporate speech is protected because of "its capacity for informing the public"); *Pacific Gas & Elec. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (restrictions on corporate speech "limit[] the range of information and ideas to which the public is exposed"); *Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980) (the speech of a business corporation is protected for "the informative value of its opinions on critical public matters").

A. Corporate Speech Is Protected For the Sake of the First Amendment Interests of Natural Persons.

Talk of the constitutional rights of business corporations has always been understood as a legal shorthand for the rights of actual people that might be abridged by certain regulations imposed by government on corporations. This was explicit in the earliest decisions imputing constitutional rights to corporations: The takings clause of the Fifth Amendment, for example, could apply to corporations, because "[t]o deprive the corporation of its property … is, in fact, to deprive the corporators [shareholders] of their property." *Railroad Tax Cases, County of San Mateo v. S. Pac. R.R. Co.*, 13 F. 722, 747 (D. Cal. 1883), *writ dismissed*, 116 U.S. 138 (1885). In contrast, "the prohibition against the deprivation of life and liberty in the same clause of the fifth amendment does not apply to corporations, because . . . the lives and liberties of the individual

corporators are not the life and liberty of the corporation." *Id.* Similarly, some Fourth Amendment protections against unreasonable searches and seizures apply to corporations, because "[a] corporation is, after all, but an association of individuals under an assumed name." *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

When this Court concluded that the First Amendment applies to corporate speech, it employed similar reasoning: "The proper question … is not whether corporations 'have' First Amendment rights…. Instead, the question must be whether [a regulation] abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776.

It is difficult to imagine how corporations could possess First Amendment interests of their own, independent of the interests of natural persons. The high value of freedom of speech is often explained in terms of "protect[ing] the individual's interest in self-expression." *Consolidated Edison*, 447 U.S. at 534 n.2. It makes no sense to attribute such an interest to a corporation itself, independent of its members, owners, or managers. Most relevant here, speech concerning public affairs receives the highest degree of protection because "it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Freedom of speech is protected "to the end that government may be responsive to the will of the people." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). There is no similar constitutional mandate that government be responsive to the will of corporations, nor do

corporations have a constitutional right to participate in the political process. No reasonable theory of democratic government requires that corporations be permitted to vote for candidates for public office. And no democracy has ever permitted it.

B. Corporate Speech Is Not the Expression of the Views of Any Natural Person.

Corporate speech receives First Amendment protection not to protect the expressive interests of shareholders or some other natural persons, but to protect the interests of listeners. *See Bellotti*, 435 U.S. at 777, 783. The speech of a business corporation is not the self-expression of any natural persons: not shareholders, officers, directors, or employees.

When a business corporation speaks on issues of political concern, it is not the shareholders who speak. A shareholder of a typical business corporation that contributes money to Citizens United is hardly more likely than any random member of the public to agree with (or hold any particular opinion about) the political views expressed in *Hillary: The Movie*. Even shareholders who happen to agree with the movie's perspective are unlikely to have chosen their investments to express their political views. *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258 (1986) (*MCFL*) ("The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They

reflect instead the economically motivated decisions of investors and customers"); *Austin*, 494 U.S. at 686 (Scalia, J., dissenting) ("A person becomes a member of … a for-profit corporation in order to pursue economic objectives, i.e., to make money"); Randall P. Bezanson, *Institutional Speech*, 80 Iowa L. Rev. 735, 786 (1995) ("it is likely that few IBM stockholders … consciously purchased shares in the company with an intention that it would serve as an instrument for expressing their own views").

The Court has repeatedly recognized this reality, holding that restrictions on corporate spending in connection with elections may be justified on the basis of the First Amendment interests of shareholders who might disagree with the corporation's political speech. *See FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (government has interest in protecting "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed"); *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) (independent political action committees make corporate political participation possible "without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members"); *MCFL*, 479 U.S. at 260 (need to protect shareholders from business corporations using their money "for purposes that [they] may not support" does not apply to advocacy membership corporation); *United States v. CIO*, 335 U.S. 106, 118 (1948) (1907 law prohibiting corporations from making election-related contributions was motivated in part by idea

that "corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders"). Even criticisms of this rationale for regulating corporate political spending have rested on the premise that shareholders need no protection against corporate political spending, precisely because they know that business corporations pursue profits, rather than expressing shareholders' political views, and therefore they may take actions the shareholders "find politically or ideologically uncongenial." *Austin*, 494 U.S. at 687 (Scalia, J., dissenting). Regardless of whether corporate political speech violates the First Amendment rights of shareholders, it is clear that it does not vindicate those rights—the political speech of a business corporation is not shareholder speech.

Nor is corporate political speech plausibly the political speech of the officers or directors who actually make the decision to spend corporate funds on political speech. To the contrary, corporate officers and directors have no more right to use corporate funds to broadcast their own views than they have to use them for their personal enrichment. *See Corbin v. Corbin*, 429 F. Supp. 276, 281 (M.D. Ga. 1977) ("corporate funds simply cannot be used to meet an officer's personal desires"). Instead, officers' decisions about expenditures of corporate funds are to be guided by their fiduciary obligations to shareholders to pursue corporate profits. *See* Am. Law Inst., *Principles of Corporate Governance* § 2.01(a) (1994, updated 2009) ("a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit

and shareholder gain"); William Meade Fletcher et al., 3A *Fletcher Cyclopedia of the Law of Private Corporations* § 1102 (updated 2008) ("fiduciary relation of … corporate directors and officers to … corporation and its stockholders … forbids any act by them which wrongfully diverts the corporate assets from corporate purposes"). In fact, "fiduciary duty may require corporate managers to authorize speech on behalf of the corporation that differs from their personal views." David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541, 583 (1991).

Still less plausibly could corporate speech be considered the expression of employees. To the contrary, corporate speech may be at odds with employees' political self-expression. *See, e.g., Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733 (Idaho 2003) (upholding company's termination of employee for engaging on own time in political speech and activity opposed to company's interests); *Korb v. Raytheon*, 574 N.E.2d 370 (Mass. 1991) (same).

Thus, the speech of business corporations is not the speech of any natural persons. Though of course it is natural persons who compose and disseminate corporations' speech, they do not do so in order to express their personal views. Rather, the speech of for-profit corporations is constrained by their corporate purpose. The First Amendment was not written to protect the "speakers" of such virtually preprogrammed speech any more than it was crafted to safeguard computers with digital voices. The speech of business corporations is

protected not for speakers' interests in self-expression, but for the interests of potential audiences.

That is not to deny that business corporations have an interest in making certain communications. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001). And it is true that even speakers whose interests are "purely economic" are not "disqualifie[d] from protection under the First Amendment." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976). But communications that do not express the personal views of natural persons are ultimately peripheral to the "freedom of thought protected by the First Amendment." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

II. LISTENER INTERESTS ARE NOT PROTECTED TO THE SAME DEGREE AS SPEAKER SELF-EXPRESSION.

It is an implicit cornerstone of this Court's First Amendment jurisprudence that the rights of speakers to self-expression receive somewhat greater protection than the rights of listeners to receive speech.

In campaign finance law, the primacy of speakers' rights of self-expression explains why restrictions on expenditures to disseminate one's own speech are subject to more exacting scrutiny than are restrictions on contributions to support the speech of another. *See Buckley v. Valeo*, 424 U.S. 1, 25, 44-45 (1976). Both kinds of restrictions burden listeners equally: if an individual is prevented from

contributing a given sum to fund a candidate's communications, listeners are deprived of the same quantity of communication as if the individual were prevented from spending that sum to broadcast her own views. Expenditure limits, however, "impose significantly more severe restrictions on protected freedoms of political expression." *Id.* at 23. Contribution limits entail "only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20-21, because "contributions … involve[] speech by someone other than the contributor." *Id.* at 21. This distinction is irrelevant to listener interests; its significance has to do with the relative burden on self-expression.[2] *See also FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) ("[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do").

[2] It is true that this Court in *Buckley* also considered the impact on listeners, opining that contribution limits would not dramatically decrease the quantity of political speech, because "[t]he overall effect . . . is merely to require candidates … to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id.* at 21–22. But that reasoning does not explain why the reverse is not permissible. Restricting direct expenditures, but not contributions, should similarly not diminish the quantity of speech: people could simply contribute greater sums. The decisive difference is the greater burden expenditure limits place on expressive interests.

Similarly, no published decision calls into question the constitutionality of the prohibition on campaign contributions and expenditures by foreign nationals. 2 U.S.C. § 441e. It is difficult to see how this ban burdens listeners' interest in unfettered debate any less than they would be burdened by a ban on spending by some citizens. But the latter could not pass constitutional muster. The difference can only be that the First Amendment does not protect the self-expressive interests of foreign nationals. *Cf. Mandel v. Kleindienst*, 408 U.S. 753, 762-65 (1972) (recognizing First Amendment interests of those who wished to hear foreign speaker, but upholding visa denial).

The priority of protection for self-expression is reflected in this Court's insistence that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. From the standpoint of listeners' interests, it is hard to see why it would not sometimes be a good thing to suppress one source of information, if doing so would allow the same information, and more besides, to be received from another source. But a speaker's freedom to expressing her views can plausibly be understood as a fundamental aspect of personal autonomy that should not be violated – no matter how benign the intended effects.

The primacy of speakers' interest in self-expression can also be seen in that, under most circumstances, the First Amendment prohibits compelled speech, even when listeners are eager to

receive the communication, whereas the right to speak is protected, even when listeners do not wish to receive the communication. *See, e.g, Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (the First Amendment "shields the man who wants to speak or publish when others wish him to be quiet [and] a concomitant freedom not to speak publicly"). *See also Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 797-98 (1988) (compelled statements of fact burden protected speech as do compelled statements of opinion). But from the standpoint of listeners' interests, compelled speech might often be desirable. Compelled statements of fact would serve listeners' interest in receiving information; requiring various speakers to state their opinions about issues of concern would serve listeners' interest in hearing a diversity of viewpoints. Even if listeners' and speakers' interests were equally protected, it would make sense for the Court to engage in careful balancing to determine when to compel speech for the benefit of listeners. That such balancing is foreign to First Amendment jurisprudence underscores that speakers' right to self-expression receives—and merits—higher protection than listeners' interests in receiving information, ideas, or other communications.

Similarly, it has been persuasively argued that it is precisely because commercial speech is protected principally for the sake of listeners that it is less protected than core expressive speech. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000). *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[b]ecause the extension of First

Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal"); *Va. Bd. of Pharmacy*, 425 U.S. at 781 (Stewart, J., concurring) ("the elimination of false and deceptive claims serves to promote the one facet of commercial . . . advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking").

III. POLITICAL EXPENDITURES AND CONTRIBUTIONS BY BUSINESS CORPORATIONS MAY BE REGULATED IN WAYS THAT WOULD BE CONSTITIONALLY QUESTIONABLE IF APPLIED TO SELF-EXPRESSIVE SPEECH.

In summary, because the political speech of business corporations is protected principally for the benefit of potential audiences, regulation of corporate speech calls for less stringent scrutiny than is required for regulation of speakers' self-expression. "Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment … interests are derived largely from those of … the public in receiving information." *Beaumont*, 539 U.S. at 159.[3] By the same reasoning,

[3] The Court noted that corporate speech is also protected on behalf of the speech and expressive interests of the corporation's members. *Beaumont*, 539 U.S. at 159

while restrictions on expenditures merit more stringent review than restrictions on contributions, within the realm of expenditures generally, corporate expenditures are furthest from the core of political expression. That is why the government's interest in preventing corruption[4] or the appearance of corruption may constitutionally "be accomplished by treating unions, corporations, and similar organizations differently from individuals." *Right to Work*, 459 U.S. at 210-11.

Therefore, this Court's decisions in *Austin* and *McConnell v. FEC*, 540 U.S. 93 (2003), were correct in upholding such differential treatment. *See also Beaumont*, 539 U.S. 146 (upholding ban on direct corporate campaign contributions, as applied to nonprofit corporation); *Right to Work*, 459 U.S. 197 (upholding ban on solicitation of funds for campaign contributions from non-members by political action committee associated with corporation). Indeed, older decisions took for granted the permissibility of restrictions on corporate political campaign contributions and expenditures. *See, e.g., CIO*, 335 U.S. 106.

(citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958)). But that rationale does not apply to business corporations, as it does to incorporated advocacy organizations like the NAACP.

[4] Corruption in this context includes undue influence of concentrated wealth on officeholders' judgment. *Beaumont*, 539 U.S. at 156.

IV. THE RESTRICTIONS OF BCRA ARE CONSTITUTIONAL AS APPLIED TO CITIZENS UNITED.

A. Application of BCRA § 203 to Citizens United Does Not Infringe Rights to Self-Expression.

Constitutionally permissible regulation of business corporations' direct campaign-related expenditures and contributions remains constitutional as applied to expenditures and contributions routed through such entities as Citizens United.

If the communications of the donor corporation are not the speech of its shareholders, officers, directors, or employees, *see supra* Part I.B, still less do communications of the recipient organization amount to speech of those same shareholders, officers, directors, or employees. Therefore, no self-expressive interests of the donor corporation are infringed.

With respect to the recipient corporation, the issue is more complex. It is undisputed that the First Amendment guarantees the right of "like-minded persons to pool their resources in furtherance of common political goals" through an organization such as Citizens United. *Buckley*, 424 U.S. at 22. *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The First Amendment does *not*, however, guarantee to such a group the right to use other people's business investments as a subsidy for its speech, when the investors have not consented.

The members of Citizens United – separate from the organization – are free to circulate a political documentary at any time, as well as engage in any other electioneering communication. Citizens United itself would be free to do the same, if it declined funding from business corporations and labor unions. See 11 C.F.R. § 114.10(c)-(d). Given that Citizens United's acceptance of corporate funding is freely chosen, it is disingenuous for Citizens United to characterize government regulation as an "effort to criminalize Citizens United's political documentary." Reply Brief at 1. Citizens United might be able to broadcast its electioneering communications more widely if allowed unlimited corporate donations,[5] but it is equally true that it could disseminate those messages more widely if it were allowed to receive contributions from, for example, foreign nationals. See 2 U.S.C. § 441e(a)(1)(C)-(2) (prohibiting such contributions). It does not follow that Citizens United's rights are thereby violated.

[5] Citizens United alleges that its speech is like the self-expressive speech in found protected in *MCFL*, 479 U.S. 238, because only a tiny fraction of its funding comes from business corporations. Appellant's Brief at 32. But if that is true, Citizens United's ability to disseminate its message would be diminished only minimally by doing without corporate funding.

B. Because Application of § 203 Does Not Infringe Rights to Self-Expression, It is a Permissible Prophylactic Measure Against Political Corruption.

This Court has repeatedly recognized the constitutionality of "restricting contributions by various organizations [in order to] hedge[] against their use as conduits for circumvention of valid contribution limits." *Beaumont*, 539 U.S. at 155. Even if only very small contributions by business corporations were allowed, a large business corporation could spread small contributions among many non-profit advocacy groups working for or against a particular candidate, and thereby circumvent restrictions intended to limit its ability to exert improper influence.

When no self-expressive interests are at stake, as with spending by business corporations, Congress has greater latitude to determine the appropriate scope of restrictions aimed at preventing circumvention of campaign finance laws. *See Right to Work*, 459 U.S. at 210 ("[W]e accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"). Such deference to Congress is appropriate with respect to restrictions on contributions by "traditional corporations organized for economic gain," but not with respect to similar restrictions on "groups and associations … designed expressly to participate in political debate." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480,

500 (1985). While Citizens United may be a "group designed expressly to participate in political debate," the restriction at issue here concerns contributions to it by "traditional corporations organized for economic gain."

V. IF REGULATIONS OF CORPORATE SPEECH ARE UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED, THERE IS NO REASON TO REEXAMINE *AUSTIN* AND *McCONNELL*.

If this Court nevertheless concludes that the reasons for treating election contributions and expenditures by business corporations differently from those by individuals do not extend to a nonprofit corporation like Citizens United that relies principally on individual contributions, this case is resolved. There is no reason to go further. Judicial modesty counsels against overturning precedent governing constitutionally permissible regulation of *business* corporations, when doing so is not necessary to decide the case.

This case is an inappropriate one for reexamining precedents establishing the permissibility of regulation of election-related communications by business corporations, not only in that, according to Appellants, the corporate funding at issue in this case is so minimal, Appellants' Brief at 5, 7, but also in several other respects: (1) no factual record has been developed concerning the quantity, sources, and effects of corporate funding of either *Hillary: the Movie* or of

Citizens United in general; (2) the case presents an unusual sort of political advertising, near the border of regulable electioneering, in that it concerns a feature-length video made available to viewers who actively seek to receive the communication rather than having it thrust upon them as with typical electioneering advertising, *see* Tr. Oral Arg. at 46 (March 24, 2009); and (3) no factual record has been developed as to whether the implementation of the as-applied standard for section 203 of BCRA, set forth by this Court in *WRTL*, 127 S.Ct. 2652, "impermissibly chills political speech." *Id.* at 2674 (Alito, J., concurring).

CONCLUSION

This Court's precedents distinguishing corporate and individual speech are firmly rooted in bedrock First Amendment doctrine. There is no need, and no reason, to overrule either *Austin* or any part of *McConnell* in resolving this case.

Respectfully submitted,

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