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No. 08-205

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEE

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A. Appellant Has Failed To Preserve A Challenge To *Austin*

Appellant expressly abandoned its facial challenge to BCRA Section 203 in the district court; its jurisdictional statement did not cite *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); and its merits brief contained only a two-paragraph argument that *Austin* should be overruled. Appellant nevertheless contends (Supp. Br. 20) that it preserved its current challenge to *Austin* by including in its jurisdictional statement a question as to whether *Hillary: The Movie* was "subject to regulation" under BCRA. Read in its entirety, however, that question did not suggest any assault on *Austin*. See J.S. i (fourth question presented). Rather, appellant asked—and in the corresponding portion of the body of its jurisdictional statement discussed—whether BCRA could constitutionally be applied to a full-length documentary film as distinct "from

the broadcast 'ads' at issue in" *McConnell* v. *FEC*, 540 U.S. 93 (2003). J.S. 26.

Appellant also suggests (Supp. Br. 19) that, because this case falls within the Court's mandatory appellate jurisdiction, appellant was not obliged to comply with the ordinary requirement that it preserve its argument. But the courts of appeals also have mandatory appellate jurisdiction, and they routinely—and appropriately—decline to consider arguments that were waived below or inadequately presented on appeal.

Appellant's extraordinary contention (Supp. Br. 3) that the Court should reach its facial challenge *first*, "even if" appellant could prevail on narrower grounds, is particularly unsound. That course of action would invert this Court's usual practice, which it follows in First Amendment cases as in others: to adjudicate non-constitutional claims before constitutional ones and as-applied challenges before facial ones. *Board of Trs.* v. *Fox*, 492 U.S. 469, 484-485 (1989).

B. *Austin* Is Not An Outlier But Rather Reflects A Core Principle Of Campaign-Finance Law, And It Is Entitled To Full *Stare Decisis* Effect

Appellant characterizes *Austin* as a "jurisprudential outlier" that reflected a "precipitous break with prior precedent" and is in "unmistakable tension with later decisions." Supp. Br. 10. Appellant further suggests (*id.* at 14-15) that *Austin*'s "aberrational" nature deprives it of full *stare decisis* effect. Those arguments are fundamentally wrong.

1. Since 1947, Congress has barred the use of corporate-treasury funds for independent expenditures in federal election campaigns. FEC Supp. Br. 7-8, 16. Far from breaking new ground, the *Austin* Court's recognition that corporate electioneering poses distinctive and serious concerns simply confirmed a congressional judgment incorpo-

rated in federal law for more than 40 years prior to the decision. Indeed, the different treatment of corporations in federal election law has its roots in legislation enacted more than a century ago, the Tillman Act of 1907. In asserting (Supp. Br. 15) that "no considerations of 'antiquity'" weigh against overruling *Austin*, appellant ignores Congress's longstanding efforts to restrict corporate influence in elections.

2. In arguing that *Austin* is inconsistent with the bulk of this Court's campaign-finance jurisprudence, appellant principally relies on decisions that either did not specifically consider *corporate* electioneering, see *Davis* v. *FEC*, 128 S. Ct. 2759 (2008); *FEC* v. *National Conservative PAC*, 470 U.S. 480 (1985) (*NCPAC*); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), or did not involve the election of *candidates* to public office, see *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978). Appellant's reliance on *Bellotti* is particularly misplaced because the Court there explained that its "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." *Id.* at 788 n.26. The Court further observed that various federal statutes addressed "the problem of corruption of elected representatives through the creation of political debts," and that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Ibid.*; see FEC Supp. Br. 8-9. The state statute struck down in *Bellotti* is further distinguishable from BCRA Section 203 because it offered no PAC option and therefore imposed a true *ban* on corporate speech concerning referenda. See 435 U.S. at 768 n.2; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 n.12 (1986)

(*MCFL*) (explaining that the PAC-financing requirement imposed by 2 U.S.C. 441b "is of course distinguishable from the complete foreclosure of any opportunity for political speech that [the Court] invalidated in the state referendum context in" *Bellotti*); pp. 6, 7-8, *infra*.

When this Court has specifically focused on *corporate* participation in *candidate* elections, it has recognized that Congress's longstanding effort "to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982). In *MCFL*, the Court held that a narrow class of nonprofit corporations is entitled to a constitutional exemption from the restrictions imposed by 2 U.S.C. 441b, see 479 U.S. at 259-265, but did not otherwise question Section 441b's constitutionality, see *id.* at 259, 263. In sustaining BCRA Section 203 against a facial First Amendment challenge, the Court in *McConnell* stated that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law." 540 U.S. at 203. And the controlling opinion in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), while holding BCRA Section 203 unconstitutional as applied to the particular corporation-funded advertisements at issue, cast no doubt on Congress's authority to bar the use of corporate-treasury funds for express electoral advocacy or its functional equivalent. See *id.* at 464-481 (opinion of Roberts, C.J.). The Court's decision in *Austin* is thus fully consistent with this Court's other precedents addressing the constitutionality of restrictions on corporate spending in candidate elections.

3. In arguing that *Austin* is entitled to reduced *stare decisis* effect, appellant suggests that the underlying First

Amendment question has somehow remained unsettled because "BCRA § 203 has been subject to repeated constitutional challenges since its enactment in 2002." Supp. Br. 14 (citing *McConnell* and *WRTL*). But even if regulated entities' resistance to a decision of this Court could reduce its precedential force, *this* constitutional challenge to BCRA Section 203—the argument that for-profit corporations' electioneering cannot be regulated at all and that *Austin* was wrongly decided—has never been made to the Court until the two-paragraph discussion appeared in appellant's merits brief. In *McConnell*, the plaintiffs did not dispute that corporations may be barred from using their treasury funds for express electoral advocacy; they asserted only a right to use treasury funds for everything *except* express advocacy. See 540 U.S. at 189-194, 203-209. One nonprofit plaintiff (WRTL) subsequently prevailed in an as-applied challenge to BCRA Section 203, but it likewise did not advocate the overruling of *Austin*.

Thus, until this case reached the Court, the regulated community—while continuing to litigate questions concerning the appropriate test for identifying electoral advocacy and the precise scope of the constitutional exemption granted to certain nonprofit corporations—had acquiesced in *Austin*'s core holding.[1] In short, the principle that corporations may be barred from using treasury funds for independent electoral advocacy is just as settled as the different principle on which appellant relies, that individuals' independent electioneering cannot be restricted.

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[1] Amicus CED's brief suggests (at 11-15) one reason: many CEOs view the current restrictions on corporate electoral spending as preventing a wasteful arms race, in which corporations would have to spend ever more money to compete for influence over public officeholders.

C. The Court In *Austin* Correctly Held That Electoral Advocacy By For-Profit Corporations Raises Special Concerns

For-profit corporations have attributes that no natural person shares. Three characteristics of the state-created business corporation justify the special rule that Congress has applied to those entities for more than 60 years.

1. Corporate speech is speech by proxy, and the individuals who own, fund, or manage a corporation remain free to engage in their own advocacy no matter what restrictions are placed on the corporation. Indeed, they can even band together to do so under the corporate name: business corporations can and do engage in electoral advocacy through their PACs, which ensure that the advocacy is funded only by stockholders and employees who choose to take part.[2] Appellant is therefore simply wrong in characterizing BCRA Section 203 as a "ban" or "prohibition" (Supp. Br. 1, 10) on corporate electoral speech.

2. A business corporation's use of treasury funds for electoral advocacy distorts the political process because the communication does not correspond to the electoral preferences of the individuals whose money is used to fund it. Dissenting in *McConnell*, Justice Scalia alluded to the signers of the Declaration of Independence, who pledged their "*Fortunes*" alongside their "sacred Honor." 540 U.S. at

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[2] More than 1500 business corporations maintain their own PACs, and many more are represented by trade-association PACs. See FEC, *Number of Federal PACs Increases* (Mar. 9, 2009) <http://www.fec.gov/press/press2009/20090309PACcount.shtml>. Various amici suggest that requiring corporations to finance electioneering with PAC rather than treasury funds is unconstitutional because maintaining a PAC is difficult and expensive. But for-profit corporations can use their treasury funds to set up and administer their PACs, see 2 U.S.C. 441b(b)(2)(C); 11 C.F.R. 114.5(b), thereby ensuring that all funds raised for political advocacy can be spent on political advocacy.

255. But John Hancock pledged his *own* fortune; when the CEO of John Hancock Financial uses corporate-treasury funds for electoral advertising, he pledges someone else's. Corporate electoral spending is thus distortive because it converts the resources of individuals into political expression with which they may well disagree—or, otherwise said, because such spending fails to "reflect actual public support for the political ideas espoused by corporations." *Austin*, 494 U.S. at 660.[3]

Even before *Austin*, this Court had recognized the government's interest in protecting corporate shareholders "from having [their] money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208; accord *MCFL*, 479 U.S. at 260. A union member's analogous interest has constitutional stature, see FEC Supp. Br. 13, and the shareholder-protection interest is properly viewed as compelling here. Appellant's conclusory assertion that the interest "is *not* * * * compelling" (Supp. Br. 13) is supported only by a reference to *NCPAC*, but that decision says nothing about the shareholder question, either on the cited page or elsewhere. The PAC option both furthers the shareholder-protection interest and facilitates voluntary advocacy. Willing individuals associated with the corporation can pool their resources for effective electoral advocacy under the corporation's auspices, while unwilling shareholders are protected against the diversion to electoral advocacy of funds they invested for a different

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[3] *Austin*'s reference to "public support" is best understood to refer, not to popularity within the community at large (see U.S. Chamber Supp. Br. 13-14), but to support among those in whose name the message is propagated—*i.e.*, the shareholders whose resources are funding the electioneering.

purpose. The result is both fairer to individual shareholders and less distortive of the political process.[4]

3. For-profit corporations are inherently more likely than individuals to engage in electioneering behavior that poses a risk of actual or apparent corruption of office-holders. See FEC Supp. Br. 9; CPA Supp. Br. 12-14; *NCPAC*, 470 U.S. at 500. The *Buckley* Court's observation that independent expenditures "may prove counterproductive" to the candidate they support, 424 U.S. at 47, has no meaningful application to modern business corporations. An individual may simply wish to add his own views to the debate, and those views may be idiosyncratic or "off message." Business corporations, by contrast, have no beliefs to express, but rather engage in electoral advocacy for purely instrumental reasons. See FEC Supp. Br. 10 n.2; CED Br. 10.

For an independent expenditure to incur a candidate's gratitude (or temper the candidate's hostility, see CED Br. 11-13; Justice at Stake Br. 17), it need only be known to the candidate and perceived to be effective in assisting her

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[4] As appellant emphasizes (Supp. Br. 10, 13-14), the *Bellotti* Court found shareholder protection to be an insufficient justification for the Massachusetts statute at issue there. Public advocacy concerning ballot measures, however, is directed at the "lawmakers" themselves (the citizens) and thus resembles lobbying, a traditional business activity in which shareholders would expect their corporations to engage. Moreover, the likelihood that a shareholder would disapprove of corporate officers' electoral preferences is greater in candidate elections than in referenda, because legislators vote on a variety of measures that have no discernible impact on a particular corporation. The *Bellotti* Court also emphasized the "overinclusiveness" of the Massachusetts statute, noting that it would prohibit even corporate electioneering that shareholders "unanimously" approved. 435 U.S. at 794. By contrast, BCRA Section 203's PAC option ensures that willing shareholders can pool their resources for electioneering under the corporation's auspices.

campaign. Since *Buckley*, both ends have become much easier for an independent-expenditure sponsor to achieve. Now that virtually every campaign advertisement is available online, along with data showing how it is targeted, a sophisticated business corporation can easily make well-publicized efforts that harmonize neatly with a candidate's message, without the need for overt coordination. CPA Supp. Br. 15. The mammoth record compiled in *McConnell* confirmed that, before BCRA, corporations had repeatedly used electioneering advertisements to curry favor with, and gain influence over, federal office-holders. See FEC Supp. Br. 8.[5]

4. Appellant contends (Supp. Br. 11-12) that the restrictions on corporate spending at issue here and in *Austin* are "dramatically underinclusive" because they do not apply to wealthy individuals or media commentary. Corporations, however, reap special state-created advantages that are unavailable to natural persons, and restrictions on individual advocacy comparable to 2 U.S.C. 441b or BCRA Section 203 would impose far greater burdens on First Amendment interests because they would prevent natural persons from spending their own money to disseminate their own ideas. See FEC Supp. Br. 9-10. At the same time, as stated above, the dangers of actual and apparent corruption from corporate electioneering dwarf those arising from individual expenditures.

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[5] Appellant's contention (Supp. Br. 22) that the government must prove a likelihood of corruption with respect to each corporate communication misreads this Court's cases. When the Court has upheld campaign-finance regulation on an anti-corruption rationale, it has never required proof of likely harm at the level of specificity that appellant now demands. See *Buckley*, 424 U.S. at 27-28; accord *WRTL*, 551 U.S. at 464-465, 469 (opinion of Roberts, C.J.).

This Court has previously upheld federal and state electioneering restrictions that distinguish between media commentary and other corporate electoral advocacy. See *McConnell*, 540 U.S. at 208-209; *Austin*, 494 U.S. at 666-668. In so doing, the Court has recognized the special role the press plays in maintaining a vibrant sphere of free expression. See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966). And investors in media corporations presumably understand that their company's business is disseminating content, including electoral and other political commentary, to the viewing public.

D. The Court In *Austin* Correctly Held That Nonprofit Corporations May Be Regulated If They Are Potential Conduits For Electoral Spending By Business Corporations

Appellant asserts (Supp. Br. 12) that, under current law, "individuals of modest means are barred * * * from pooling their resources to fund the political speech of ideologically oriented nonprofit corporations." But if appellant raised its money wholly from individual donations, it would be free under *MCFL* to use those funds for electoral advocacy. FEC Br. 29-32; 11 C.F.R. 114.10. Instead, appellant raised funds to produce *Hillary* from for-profit corporations. J.A. 244a, 251a-252a. Those corporations cannot be allowed to evade the government's compelling interests by funneling their monies through ideological nonprofits like appellant. FEC Supp. Br. 13-15.[6]

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[6] Various amici contend that the *MCFL* exemption should be extended to nonprofits that accept only small amounts of corporate funding. Whatever force that contention might have in particular cases, see FEC Supp. Br. 3 n.1, it is irrelevant to the facial challenge on which this Court requested supplemental briefing. And appellant has neither preserved nor adequately documented an argument that *its* overall corporate funding is so small as to qualify for an as-applied exemption. See FEC Br. 29-30.

Appellant contends (Supp. Br. 11) that Congress cannot prevent nonprofit corporations from being used as conduits for business-corporation electoral spending because it could not preclude *individuals* who receive corporate money from spending it on electoral advocacy. There is ample reason, however, to distinguish between the two situations. A nonprofit corporation can be created quickly and relatively cheaply; given an appealing name, see *McConnell*, 540 U.S. at 197; operated for a single purpose; easily controlled by donors; and terminated when the task is done. Individuals share none of those attributes.

E. If *Austin* Remains Good Law, There Is No Sound Basis For Overruling *McConnell*

Appellant does not contend that *McConnell* should be overruled if *Austin* remains good law. Supp. Br. 21. That reticence is well-advised, because there is no sound basis for drawing a constitutional distinction between express advocacy and its functional equivalent. See FEC Supp. Br. 21.

Some amici contend that *McConnell*—or, more precisely, the two-year-old lead opinion in *WRTL*—has already proved unworkable.[7] Those contentions are unfounded. The FEC has faithfully implemented *WRTL* by adopting easy-to-apply safe harbors, 11 C.F.R. 114.15(b), and by making clear that even advertisements outside the safe harbors are exempt if there is any reasonable doubt about their electioneering nature, 11 C.F.R. 114.15(c). And while appellant asserts (Supp. Br. 17) that "no corporation or labor union would dare opine on a candidate's qualifications without checking with the FEC first," in the short time

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[7] No one contends that *Austin*, which involved an advertisement containing "magic words" of express advocacy, has proved difficult to apply in practice.

since *WRTL*, corporations and other groups using corporate money have spent well over $100 million on electioneering communications claiming exemption under *WRTL*. FEC Supp. Br. 22-23.

CONCLUSION

For the foregoing reasons, as well as those stated in our previous briefs and at oral argument, the judgment of the district court should be affirmed.

Respectfully submitted.

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