No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,
Appellant,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional

[1] This brief is filed with the written consent of all parties. Appellant filed a letter of consent with this Court, and Appellee consented in writing to the filing of this *amicus* brief. 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.

analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF THE ARGUMENT

1. After the Judicial Revolution of 1937, this Court assured Americans that a lower level of scrutiny for economic liberties would not lead to violations because an open political process would allow all to advocate how Congress should direct tax resources and regulate commerce. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). That assurance must again match reality with the repeal of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

2. *Austin*'s "anti-distortion" rationale is deeply flawed and badly out of step with this Court's line of speech cases.

3. *Austin*'s other interest, protecting minority shareholders unwilling to fund corporate messages, is a matter of corporate governance, and cannot trump the First Amendment rights of the majority.

4. The pedigree of the corporate activity ban is weak in regard to the banning of independent expenditures. Robust corporate and union political activity exists in several of America's best governed states, and this Court has, until *Austin*, treated independent expenditure bans with considered caution and a healthy skepticism.

5. A clear and workable standard and return to first principles can be achieved by drawing the line at

independence and leaving for another day the constitutionality of corporate or union *contribution bans* (rather than *contribution limits*). Drawing the line at independence would accord precedent and cure *Austin*'s many improper implications, most notably its unnerving treatment of media corporations.

6. The Court should not permit the compelled disclosure of "genuine issue advocacy," even if it falls with the statutory definition of "electioneering communication." *See Federal Election Comm'n. v. Wisconsin Right to Life, Inc*., 551 U.S. 449 (2007) (*WRTL II*). If this Court correctly repeals *Austin*, however, BCRA §§ 201 and 311 should be invalidated. The disclosure of corporate or union independent expenditures (express advocacy) can be achieved in a workable manner, under the Federal Election Campaign Act, of 1971 (as amended) to further "informational" interests. *See Buckley v. Valeo*, 424 U.S. 1, 81 (1976).

ARGUMENT

To properly dispose of this case, and prevent an unending train of tenuous exemptions to a corporate and union expenditure ban built of faulty assumptions, this Court should repeal *Austin* and, in doing so, repeal that portion of *McConnell v. FEC*, 540 U.S. 93 (2003) that upheld § 203 of the Bipartisan Campaign Reform Act (BCRA), Pub. L. 107-155, 116 Stat. 81 (2002), a hopelessly overbroad funding prohibition for "electioneering communications." 2 U.S.C. §§ 441b(b).

Additionally, the three ads the government stipulated are issue advocacy under *Federal Election Comm'n. v. Wisconsin Right to Life, Inc*., 551 U.S. 449 (2007) (*WRTL II*) should not be subject to compelled disclosure under BCRA §§ 201 and 311. *Amicus* will

not address the overbreadth of BCRA § 203, but will confine its brief to the question of *Austin*'s overruling.

I. CORPORATE POLITICAL SPEECH IS AN INTEGRAL PART OF DEMOCRATIC LIFE AND THE CONSTITUTIONAL REGIME ESTABLISHED BY THIS COURT IN *CAROLENE* PRODUCTS

In our constitutional system predicated upon the sovereignty of the People, the most essential function of the First Amendment is to preserve the public's right to discuss the qualifications and conduct of their elected representatives in order to exercise their right to self-government. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (First Amendment has "fullest and most urgent application" in context of elections). "It is therefore important—vitally important—that all channels of communication be open to the [people] during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *U.S. v. UAW-CIO*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting).

Prior to the Civil War and for many decades thereafter, government played a minimal role in the economy. During this period, the Court reviewed alleged violations of economic and civil rights on the same plane. David N. Mayer, *The Myth of Laissez Faire Constitutionalism: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L. Q. 217, 228-248 (2009). As economic regulation grew in the late 19th and early 20th century, the Court sought a new paradigm of review, famously summarized in footnote 4 of *United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4 (1938), which suggested that "exacting

scrutiny" would be applied only to alleged violations of civil liberties, while economic liberties would be protected in "political processes, which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.*[2] ("[L]egislation which restricts those political processes . . . is to be subjected to more exacting judicial scrutiny under the general prohibitions of the [First and] Fourteenth Amendment[s] than are most other types of legislation.")

But if such fundamental political processes are allowed to be prohibited by the very government to which they are directed, then the promise of political checks as adequate substitutes for constitutional checks rings hollow. The Constitutional regime since *Carolene Products* presumes that individuals—whether organized in a corporation, a partnership or an unincorporated group, or speaking individually—may not be lightly shut out of the political process. It is in such instances that exacting scrutiny most urgently applies. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

Rather than protect the speech of unpopular groups of citizens (corporations), as promised in *Carolene*, this Court instead has adopted a highly questionable history of "reform" recounted by Justice Frankfurter in *United States v. UAW-CIO*, 352 U.S. 567 (1957) (*Auto Workers*); *see also* Allison R. Hay-

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[2] *See, e.g., Gonzales v. Raich,* 545 U.S. 1, 33 (2005) (rejecting commerce clause challenge and suggesting resort to "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress"); *Daniel v. Family Sec. Life Ins. Co.,* 336 U.S. 220, 224 (1949) (rejecting due process challenge and holding that the "forum for the correction of ill-considered legislation is a responsive legislature.").

ward, Revisiting *The Fable of Reform*, 45 HARV. J. LEGIS. 421 (2008) (discussing political opportunism unmentioned in the history of reform recounted by Justice Frankfurter). It has since used that questionable interpretation of history to justify deference to the legislature in precisely the area where *Carolene*'s footnote 4 assured citizens that scrutiny would be greatest.

Justice Frankfurter's review of the history of "reform" led him to the conclusion "that aggregated capital unduly influenced politics." *Auto Workers*, 352 U.S. at 570-71. But "unduly" compared to what? Indeed, there is an instrumentalism in "reform." Various reformers have long believed that campaign finance reform is the one reform that makes all other reforms possible. *See e.g.* J. Skelly Wright, *Politics and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609, 618-19 (1982) (campaign finance reform is needed to obtain "windfall profits tax on oil companies, hospital cost containment, . . . a superfund for victims of toxic chemicals, or any other legislation that affects powerful interests"); *see also* Mark Schmitt, *Mismanaging Funds: How Small Dollar Fundraising Can Save Campaign Finance Reform*, DEMOCRACY: A JOURNAL OF IDEAS, Spring 2004, *available at* http://www.democracyjournal.org/article2.php?ID=6516&limit=0&limit2=1500&page=1 ("After several years on Capitol Hill working on education, urban development, welfare reform, and taxes, I became convinced that we were spinning our wheels. . . . [C]ampaign finance would be the reform that made all other reforms possible.")

This Court assured Americans that its lower level of scrutiny for economic liberties would not lead to

violations because an open political process would allow all to advocate how Congress should direct tax resources and regulate commerce. *Carolene Products*, 304 U.S. 144, 152 n.4 (1938). That assurance must again match reality. "'If [this Court] chooses to tap . . . the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (citation omitted). All Americans, including those who have joined together in common enterprise using the corporate form, must be allowed to speak.

II. *AUSTIN'S* ANTI-DISTORTION RATIONALE IS BADLY OUT OF STEP WITH FREE SPEECH JURISPRUDENCE

The "corruption" discussed in *Austin* is not that of *Buckley*, where the Court held that Congress may enact reforms that diminish legislative *quid pro quos* or their appearance. *Buckley v. Valeo*, 424 U.S. 1 (1976). Rather *Austin*'s "corruption," known as the "anti-distortion" rationale, is the supposedly "corrosive and distorting 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." *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

When reduced to its essence, *Austin*'s anti-distortion premise is that some persons domiciled permanently in the United States, and bound by its laws, can be banned from its political processes because their speech, left unchecked, might persuade others.

Despite the protestations of its majority opinion, *Austin*'s concern for "distort[ions]" and "corrosi[on]" merely decries the absence of relatively equal resources for speech, and has nothing to do with preventing "corruption" of candidates and officeholders as the Court has elsewhere defined it. In short, *Austin* advances a rationale "wholly foreign to the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 49 (1976); *see also Davis v. FEC*, 554 U.S. __, 128 S. Ct. 2749 (2008), and should be repealed.

Austin's other anti-distortion prongs fare no better, and combining them accomplishes little. *See Austin*, 494 U.S. at 680-81 (Scalia, J., dissenting). The concern for "immense aggregations of wealth" on the "political process" is overinclusive, underinclusive and, therefore, poorly tailored. If aggregations of wealth were the harm to be hindered, wealthy individuals and unincorporated associations would be included in the ban—though they are not, *see Buckley*—and corporations that possess less "immense" aggregations would escape the prohibition entirely. Yet, they do not. *Austin*, 494 U.S. at 680-81 (Scalia, J., dissenting). Why should an individual who has amassed wealth through the corporate form be able to spend it by withdrawing it from a corporation? The *Buckley* and *Davis* opinions affirmed the right of even wealthy individuals to deploy wealth in the political marketplace, though the individuals presumably earn their wealth in the economic marketplace. *Buckley*, 424 U.S. at 49-50; *Davis*, 128 S. Ct. at 2771-72. Just as there is no reason to prohibit the independent individual or unincorporated association, there is no reason to prohibit the independent corporate speaker.

It is true that state law grants corporations special advantages, "[b]ut so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies." *Austin*, 494 U.S. at 680-81, (Scalia, J., dissenting). Even for substantial advantages, the government cannot demand in exchange the forfeiture of First Amendment rights. *Speiser v. Randall*, 357 U.S. 513 (1958).

Finally, there is no reason why campaign expenditures should match popular support for the ideas expressed—quite the opposite: change is often brought about by intensity and determination. "[C]orrelati[ng]" quantities of speech to "public support" has no basis in our constitutional system. *Buckley*, 424 U.S. at 48-49. It is not popular ideas that are in urgent need of expression. Indeed, this Court should, "reject any argument" that corporations "and their views are not of importance and value to the self-fulfillment and self-expression of their members." *Austin*, 494 U.S. at 711 (Kennedy, J., dissenting).

Even if, as this Court has held, a PAC's speech reflects the actual support of its individual members, *Austin*, 494 U.S. at 660-61, the fact remains that the PAC is not the corporation. Not only does the funding ban sacrifice the corporation's speech rights for no discernible benefit to the PAC members, valuable voices are lost to the political debate. Indeed, in *Austin* itself, the Michigan Chamber of Commerce offered a unique voice, "speaking as the voice of the larger Michigan business community, rather than a narrow group of businesses, a corporate PAC, or an individual. No substitute existed for the Chamber's unique position and voice. Thus, a law

intended to restrict certain voices perceived to 'dominate' the debate merely kept a highly relevant voice from being heard." Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform*, 150 (2001).

In its Supplemental Brief, the government all but abandons the "anti-distortion" rationale of *Austin*, arguing instead that independent spending by corporations is inherently corrupting. Supplemental Brief of Appellees at 8-9. In doing so, the government launches an uninvited frontal assault on *Buckley*'s core distinction between contributions and independent expenditures, 424 U.S. at 45-46, one reaffirmed regularly, *see Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996). The Court asked, in this case, for supplemental briefing on overruling *Austin*—not *Buckley*. Any claim that corruption exists in independent expenditures, contrary to *Buckley*, would seem, at a minimum, to require some basis in evidence which is not in the record here. If the government's case truly relies on overruling *Buckley*, the government must lose.

III. PROTECTING THE INTERESTS OF MINORITY SHAREHOLDERS CANNOT TRUMP MAJORITY SHAREHOLDERS' FIRST AMENDMENT RIGHTS

As the government argues, this Court has held in *Austin* and elsewhere that the bans on corporate or union expenditures and contributions have "always done further duty in protecting 'the individuals who have paid money into a corporation or union . . . from

having that money used to support political candidates to whom they may be opposed.'" *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 154 (2003), quoting *Federal Election Comm'n. v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *see also Austin*, 494 U.S. at 663.

The protection, however, of minority shareholders unwilling to fund certain messages urged by the majority should be a matter of corporate governance, not campaign finance law. Corporations, for example, fund a wide variety of speech, including gifts to museums that may run controversial exhibits, theatre companies that perform controversial plays, and universities that invite controversial speakers. States may wish to alter their corporate laws to protect minority interests, but they may not simply demand that the majority of shareholders who wish the corporation to engage in speech of one kind or another be silenced. *See United States v. UAW-CIO*, 352 U.S. 567, 596 (1957) (*Auto Workers*) (Douglas J., dissenting). ("Perhaps minority rights need protection. But this way of doing it is, indeed, burning down the house to roast the pig. All union expenditures for political discourse are banned because a minority might object").

IV. THE PEDIGREE OF THE POLITICAL ACTIVITY BAN IS EXAGGERATED, PARTICULARLY IN REGARD TO INDEPENDENT EXPENDITURES

The government maintains that the corporate political activity ban enjoys a long and noble pedigree, with "corporate money in electoral politics" first banned "more than a century ago." Supp. Brief of Appellee, at 7. This pedigree is neither strong nor

noble in the banning of independent expenditures, but rather weak and spotty.

The original statute of which the government speaks did not ban corporate independent expenditures, but only direct contributions to candidates. *Id*. Nor was it noble in origin: it was sponsored by a racist South Carolina Senator, "Pitchfork Ben" Tillman, who depised the corporations that opposed his agrarian, segregationist agenda. Stephan Kantrowicz, *Ben Tillman and the Reconstruction of White Supremacy* (2001).

It is true that in 1947 the Taft-Hartley Act renewed the contribution ban and also barred both corporations and unions from using their treasury funds for 'expenditure[s]' on federal elections. Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159. The very next year, however, this Court expressed skepticism that Congress intended to ban a wide swath of political expenditures, noting that the term "'expenditure' was added to eradicate the doubt that had been raised as to the reach of 'contribution,' not to extend greatly the coverage of the section." *United States. v. CIO*, 335 U.S. 106, 122 (1948). Indeed, union attorneys at the time interpreted the earlier contribution ban of the Smith-Connally Act as not covering expenditures, even *coordinated* expenditures which, functionally speaking, are indirect contributions. *See Smith, supra*, at 28.

The *CIO* Court was "unwilling to say" that Congress "intended to outlaw" independent publications to the membership and "d[id] not think § 313['s ban] reache[d] such a use of corporate or labor organization funds." *CIO*, 335 U.S. at 123-24. Justice Rutledge noted in dissent that the Court held "the section inapplicable" to independent expenditures

"because applying [the ban] to this type of expenditure would raise 'the gravest doubt' of the section's constitutionality." *CIO*, 335 U.S. at 131 (Rutledge, J., dissenting).

Nine years later, in *Auto Workers*, the Court acknowledged that Congress probably intended, with Taft-Hartley, to ban independent speech by corporations and unions. 352 U.S. at 589. Justice Frankfurter, writing for the majority, cited every possible basis for ennobling the reform movement by detailing its alleged history. *See* Hayward, *supra*, 45 HARV. J. LEGIS. 421 (2008). Still, the Court refused to consider the constitutionality of an outright ban on independent expenditures. *Auto Workers*, 352 U.S. at 590-94.

Some 39 years after Taft-Hartley, this Court recognized that the Auto Workers Court had acknowledged Congress' intent to ban independent corporate or union expenditures to the public, but did not address the constitutionality of the overall expenditure ban. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 247-48 (1986) (MCFL). Rather, the Court invalidated the ban on narrower grounds, as-applied to what is now known as the "MCFL" corporation. *Id.*

Thus, this Court never before *Austin* (1990) recognized any basis for banning independent political speech. Where the Court once went well out of its way to dodge the thorny issue of independent speech bans in *Auto Workers* and *CIO*, or to avoid reaching it on other grounds in *MCFL*, in *Austin* it ratified for the first time a statutory reach *beyond* contributions and coordinated expenditures to ban independent communications made by corporations and unions. 494 U.S. at 659. The Court should undo this unwise ratification and restore the principal that indepen-

dent political speech is protected for all speakers save government.[3]

V. *AUSTIN* CAN BE REPEALED AND REPLACED WITH A STANDARD THAT IS WORKABLE, IN ACCORDANCE WITH PRECEDENT, AND CURES *AUSTIN*'S IMPROPER IMPLICATIONS

A. The workable standard and meaningful distinction found in every case from *CIO* in 1948 through *Buckley* in the mid-1970s to the *Randall* opinion of today, *Randall v. Sorrell*, 548 U.S. 230 (2006) (expenditure limits unconstitutional), is that independent political speech is to be protected for all speakers save governments. This standard can easily be restored by repealing *Austin* and *McConnell*, the only exceptions to the standard.

It important to note, first, that the government lacks an evidentiary basis for banning corporate or union independent expenditures. Such expenditures in the several states suggest that corporate and union participation in politics increases the depth of voter knowledge and, far from corrupting the political process, coincides with some of the best governed states in the nation. Twenty-eight states and the District of Columbia allow not just corporate independent expenditures, but direct corporate contributions to candidates, apparently with no deleterious effects. Jan Witold Baran, *Election Law Primer for Corporations*, p. 287 (5th ed. 2008). These include

[3] Nothing in *Buckley* limited to individuals the Court's discussion of independent expenditures and their inability to corrupt candidates and officeholders. The *Buckley* holding should, therefore, apply equally to independent expenditures of groups that avail themselves of the corporate form. *Austin*, 494 U.S. at 682 (Scalia J., dissenting).

Utah, Virginia, and Washington, which were recently rated the best governed states in the nation. PEW'S CENTER ON THE STATES & GOVERNING MAGAZINE, GRADING THE STATES 2008 (2008), *available at*: http://www.pewcenteronthestates.org/gpp_report_card.aspx.

Second, it is of no consequence that the anti-distortion and minority-shareholder-protection interests of *Austin* have justified bans on corporate contributions in other opinions beginning with *United States v. CIO*, 335 U.S. 106, 122 (1948). The constitutionality of corporate *contribution bans* (as opposed to the constitutionality of corporate *contribution limits* already upheld for all entities in *Buckley*) is a question not before the Court in this case.

Indeed, in *Federal Election Comm'n. v. Beaumont*, 539 U.S. 146 (2003) the Court held that, "quite aside from war-chest corruption, . . . restricting contributions by various organizations hedges against their use as conduits 'for circumvention of [valid] contribution limits.'" *Id*. at 155, (quoting *Federal Election Comm'n. v. Colorado Republican Federal Campaign Comm*., 533 U.S. 431, 456, and n.18 (2001)). But "circumvention" is not a problem in independent expenditures. Corporate and union contributions to candidates and political party committees will remain banned or, perhaps in a future case, subject to applicable limits.[4] *See* 2 U.S.C. §§ 441b & 441a.

[4] It would seem that speech egalitarianism, "anti-distortion," or "war-chest corruption" does not justify contribution bans (over contribution limits) any more than it justifies bans on independent expenditures. The "less rigorous review" the Court gives to contribution restrictions, *see Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377 (2000), may lead to the conclusion that corporate contribution *limits* prevent *quid pro quo* corruption and better protect associational rights than do bans. Nonethe-

Coordinated expenditures still will be treated as contributions. *See* 2 U.S.C. §441a(a)(7)(B) & (C).

Third, this Court's upholding of corporate-solicitation bans for nonprofit and for-profit corporations, alike, in *Federal Election Comm'n. v Nat'l Right to Work Comm.*, 459 U.S. 197 (1982), also is no barrier to repealing *Austin*. The workable standard to be drawn in this case is not between for-profit and not-for-profit corporations. Rather the standard is between independent political expenditures and direct or indirect political contributions. *Beaumont,* 539 U.S. at 163-64 (Kennedy, J. concurring) (voting to uphold a ban on contributions by non-profit corporations while rejecting the anti-distortion and minority-shareholder-interest rationales found in *Austin* and other cases.)

B. The line between independent expenditures and direct or indirect contributions has proven workable for at least thirty years. *See Buckley*, 424 U.S. at 45-46. Moreover, the line would accord the long-held principal that corporations enjoy the same speech rights as other entities. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("If the speakers here were not corporations, no one would suggest the State could silence their proposed speech. It is . . . speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation.") It would accord the principle that speech jurisprudence turns on the nature of the speech in question and not on the iden-

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less, the Court should leave for another day the constitutionality of corporate and union contribution bans in the absence of the anti-distortion rationale, and affirm now that all independent political speakers deserve constitutional protection.

tity of the speaker. *Pacific Gas & Elec. Co. v. Public Util. Comm'n. of Cal.*, 475 U.S. 1, 8 (1986) ("identity of speaker . . . not decisive in determining whether speech is protected"). Focusing on independence would remedy, by removing, the unnerving proposition that Congress may exempt media corporations from otherwise applicable expenditure bans despite the Equal Protection Clauses, *see Austin*, 494 U.S at 666-68, and replace it with a much wiser, more workable standard, this time on First Amendment grounds: government cannot prohibit media corporations (or any other corporation) from engaging in independent political speech, period.

VI. SECTIONS 201 AND 311 OF BCRA ARE UNCONSTITUTIONAL AS-APPLIED TO ISSUE ADVOCACY, BUT SHOULD BE FACIALLY INVALIDATED WITH THE REPEAL OF *AUSTIN*, AS CORPORATE EXPRESS ADVOCACY CAN BE DISCLOSED UNDER FECA

Prior to this Court's opinion in *WRTL II*, *supra*, there was no need for corporations to disclose disbursements for "electioneering communications" because such disbursements could never be made: BCRA § 203 banned corporate disbursements for such communications entirely. Of course, corporate express advocacy was likewise banned. 2 U.S.C. §441b; *Austin*, 494 U.S. at 661. After *WRTL II* exempted certain corporate communications from the funding prohibitions of § 203, 551 U.S. 449 (2007), the FEC required those corporate issue-advocacy communications that fell within the electioneering-communication definition to be disclosed under BCRA §§ 201 and 311. *See Electioneering Communications*,

72 Fed. Reg. 72,899, 72901 (Dec. 26, 2007) (codified at 11 C.F.R. pt. 104, 114.[5]

If this Court repeals *Austin*, and invalidates § 203 as unconstitutional, it should make equally clear that non-express advocacy communications are not subject to reporting under §§ 201 and 311, and, indeed, should strike those sections entirely. In *Buckley*, this Court recognized the burden that compelled disclosure places on issue advocacy, *see Buckley*, 424 U.S. at 64 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)), and held that disclosure could apply only to express advocacy and disbursements by "political committees." 424 U.S. at 78-79.

If *Austin* is repealed, corporations and unions making independent expenditures (as opposed to issue ads) would be subject to the disclosure requirements of 2 U.S.C. §§ 434(c) and 441d(a). The FEC already has proven that a workable method exists for corporations to disclose and disclaim these communications.[6]

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[5] The FEC required disclosure of issue-advocacy communications carved from the source prohibition by *WRTL II* largely because plaintiff Wisconsin Right to Life did not challenge BCRA §§ 201 and 311.

[6] *See* Electioneering Communications 72 Fed. Reg. at 72911.

CONCLUSION

For the foregoing reasons, the Court should overrule *Austin v. Michigan Chamber of Commerce*, overrule the relevant portion of *McConnell v. FEC* supporting BCRA § 203, and reverse the United States District Court for the District of Columbia.

Respectfully submitted,

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