No. 08-205

In the
Supreme Court of the United States

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

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

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST

The Democratic National Committee (DNC)[1] is the organization which, by virtue of the bylaws of the Democratic Party of the United States, is responsible for the day-to-day operation of that party at the national level, within the meaning of § 301(14) of the Federal Election Campaign Act. 2 U.S.C. § 431(14). The DNC plans the Party's quadrennial presidential nominating convention; promotes the election of Party candidates with both technical and financial support; and works with national, state, and local party organizations, elected officials, candidates, and constituencies to respond to the needs and views of the Democratic electorate and the nation.

The DNC, the candidates that it supports, and its contributors must all comply with campaign finance laws. The DNC's pursuit of its mission is heavily influenced, if not decisively shaped, by the long- and short-term structure and implementation of those laws. Accordingly, the DNC is, by necessity, deeply conversant with the laws and constitutional principles that the Court has requested parties and amici to address.

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[1] The DNC submits this brief pursuant to the written consent of the parties. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than the DNC has made a financial contribution to its preparation or submission.

The Court has asked whether it need revisit a cornerstone of campaign finance regulation—the prohibition on corporate spending for express advocacy in federal elections. From its perspective as a major party organization, and drawing on decades of experience with an evolving regulatory scheme, the DNC will offer the Court its views on the consequences of sudden upheaval in the constitutional foundation of regulation.

SUMMARY OF ARGUMENT

This case is far from the right occasion for a convulsive change in campaign finance doctrine affecting corporations. The question posed by the Court—the scope of the corporate right to intervene directly in the political process—is one laden with consequence, particularly at this time. The relationship of corporation to government, and of profit motive to public responsibility, is an all-consuming topic in American politics and government, more so than at any time since the Great Depression. A decision now to sweep away long-standing corporate spending limitations would alter, much to the favor of one class of participants, the very terms on which this great national debate is being conducted.

As the Court has observed, the campaign finance laws have developed over time, by a process of incremental adjustment and with careful attention to differences among types of organizations and political actors. A decision to abruptly recast the foundation of the laws, by

reversing the corporate spending restrictions, would reverberate throughout the campaign finance system, materially and profoundly affecting the position of other speakers, including political parties such as the DNC and individual donors. In considering so momentous a step, the Court does not have at its disposal anything approaching the necessary extensive evidentiary inquiry—for which an expedited briefing schedule is no substitute. The parties and *amici* cannot manufacture this record now, and two months' time is not enough. Also lacking on this schedule is the opportunity for the Court to fully consider complex doctrinal issues it has never before addressed.

Any such radical adjustment to the intricate structure of the law also threatens to arrest a trend in progress toward the empowerment of the individual "small donor" who contributes to candidates and to parties such as the DNC. The campaign laws protect the political participation of individuals, as volunteers and otherwise, in the political process. They also provide numerous outlets for corporate, including for-profit, political expression. But only now, through the interaction of the law and new technologies, have small individual givers grown in importance, closer than ever before to matching the aggregate, but modestly constrained, giving power and associated influence of corporations and other institutional actors.

A rough balance in the operation of the law, just recently established, would not survive the sudden revision of the rules to the great and instant advantage of the for-profit corporate community. The predictable outcome would be a heightened risk of corruption—both corruption in fact and corruption in appearance.

ARGUMENT

Reconsidering *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell* v. *FEC*, 540 U.S. 93 (2003), is unnecessary in this case. The issues presented by the type of nonprofits and activity before the Court are quite separate from the large questions posed for reargument. Not even the Appellant, in the first round of briefing before the Court, suggested that the relief it seeks turns on confronting those questions.

Just last Term the Court held: "[T]he importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, No. 08–322, at 2 (June 22, 2009).

That is the rule followed in the case of open constitutional issues. It applies even more compellingly to settled ones, where the established law has been applied to a number of different statutory iterations over many years, and where the federal and state legislatures have been part of,

and have relied on, a larger dialogue with the Court that has influenced the course of constitutional interpretation. *Cf. Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-56 (1992).

Campaign finance regulation, as this Court has noted, has proceeded incrementally, and the Court has reviewed the constitutional issues as necessarily—and only as necessarily—presented. *See FEC* v. *Mass. Citizens for Life, Inc.,* 479 U.S. 238, 258, n.11 (1986). As evident from *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (per curiam), to the present day, the Court has been mindful of the pressures on the Congress to fashion regulation sensitive to the complexity of the political process and to constitutional constraints. The law as it stands today, and in its fundamental parts, represents a laboriously wrought balance, a historic component of which is control on corporate political spending.

I. Striking Down the Long-Standing Corporate Spending Restrictions Would Undermine the Very Architecture of Campaign Finance Law and Is Not Necessary to Protect Corporate Political Expression

Especially where the law has evolved in this way, institutional modesty, as well as fairness to the other branches, counsels great hesitation when considering an abrupt reversal in the law's

direction without thorough consideration of the consequences.

A. The Federal Campaign Finance Laws Have Developed Through a History of Close Attention to the Differences Among Types of Spenders

As Justice Rehnquist wrote for a unanimous Court, "the differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process." *FEC* v. *Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (internal quotation marks and citation omitted). In regulating campaign finance within the limits established by the Court, Congress has paid proper heed to the differences among spenders and the interrelationship of rules established for each. Regulation in this field is not a "one size fits all" proposition, nor is the rule established for one type of organization, in conducting any particular activity, without consequences for the rules established for other types of organizations and their operations.

The statutory prohibition implicated in this case is a fitting example, for Congress, having imposed source restrictions on corporations, concluded that it should extend them to labor organizations as well. *See* Hatch Act, 18 U.S.C. § 610; War Labor Disputes Act of 1943, ch. 144, § 9, 57 Stat. 167; Taft-Hartley Act, 61 Stat. 136 (1947). In the Bipartisan Campaign Reform Act of 2002

(BCRA), Pub. L. No. 107-155, 116 Stat. 81, §§ 202, 214 (codified at 2 U.S.C. § 441a), Congress distinguished even among types of political party committees, setting out different financing rules for national parties, on the one hand, and state parties, on the other. *Compare* 2 U.S.C. § 441i(a) *with id.* § 441i(b).

These and other distinctions are grounded in the concern to prevent corruption or its appearance. *See First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 787 n.26 (1978) (opinion of Powell, J.) ("The importance of the governmental interest in preventing [the problem of corruption of elected representatives through the creation of political debts] has never been doubted."). But such distinctions also serve the requirement that restrictions must be closely tailored to the constitutional source of government authority. *Buckley*, 424 U.S. at 25. The result is a scheme of varied limits, built around different organizational characteristics and sources of funding.

Spenders adjust to and function under rules that, if radically altered, have immediate and far-reaching effects on political competition. The full impact over time of a tectonic shift in the constitutional balance is unknowable. That there will be an impact is certain, and the consequences—for the rights and relative influence of spenders within the political system—are sure to be profound. There can be no question that revisiting the core constitutional law governing

corporate spending, and particularly *Austin*, would be just such a radical step of vast consequence.

A major political party such as the DNC, closely regulated in its activities, does not function in isolation from the spending of other political actors. Whether as allies or adversaries, other organizations raise and spend money within the same political process to influence the same elections. Should the corporate sector as a whole be freed to make use of its large aggregations of wealth to influence voter choice, the very terms on which political parties compete to be heard will undergo dramatic, wholesale revision.

Some aspects of what this would mean are foreseeable. For-profit, statutorily-created corporations could devote unlimited sums, generated through business activity, to express advocacy. Parties could respond, where response is required, only with funds raised contributor by contributor, within meaningful limits, including restrictions on the universe of lawful contributors. Parties are indeed limited in their fundraising reach by the power of their political appeal. Unlike corporations, their donors must choose to give, as contributors; parties are not free to set up ancillary lines of business and generate funds by establishing a "customer" base from which funds, gathered in commercial exchange, may be tapped for political purposes.

Of course, not all corporations are alike, as the Court has affirmed. *See Mass. Citizens for Life*,

479 U.S. at 259. Since l907, the corporate sector has become more differentiated, and nonprofit corporations have proliferated. The Court has distinguished for-profit corporations, with wealth accrued without regard to levels of political support, from nonprofit corporations established for ideological purposes and independent of commercial firms. The case before the Court falls into this latter category. Resolution of this case does not compel the Court to revisit, much less overturn, its decisions validating Congressional controls on for-profit corporate spending on elections.

Distinctions of this kind have supplied the analytic tools for the Court's (and the Congress's) labors in this field. Disposing of the Appellant's claim does not require disregarding such distinctions. And to disregard them would lead the Court to demolish virtually overnight one of the foundations of federal and many state campaign finance laws.

B. Corporations Have Ample and Effective Means of Political Participation, and Abrupt Revisiting of Established Restrictions on Their Spending Is Not Warranted

In no event need the Court be concerned that, absent radical surgery on the campaign finance laws, corporations will be shut out of the political process by a misguided application of notions of "equality." The statute analyzed in

Austin and BCRA § 203 as analyzed in *McConnell* represent "marginal restriction[s]." *Buckley*, 424 U.S. at 20. Indeed, one can hardly say that the development of the campaign finance laws since *Austin* has rendered corporations voiceless or without the means of participating in the federal elections process. Nothing before the Court—either argued directly or intimated—would suggest that for-profit corporations, though restricted by law, have been silenced by it, suffering injury disproportionate to the rationale for regulation.

Corporations may finance political action committees (PACs) and may devote considerable resources to these vehicles for expressing their preferences among electoral choices. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5. PAC funds are supplied by executives and shareholders, yet they are a corporate enterprise through which the monies on hand are controlled by corporate managers, in the corporate interest. 11 C.F.R. § 114.5(d).

Corporations are similarly able to fund unlimited communications on political topics with their executives and shareholders. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.3(a)(1). They may fund additional PAC activity through trade associations of which they are members, 2 U.S.C. § 441b(b)(4)(D); 11 C.F.R. § 114.8; they may distribute voting guides and voting records, 11 C.F.R. § 114.4(c)(4)-(5); and they may underwrite both partisan and nonpartisan voter registration

and turn-out activity, *id.* §§ 114.3(c)(4), 114.4(c)(2). They may host fundraising events for candidates, fully associating themselves with specific partisan causes. *Id.* §§ 113.4(c), 114.2(f)(2). They may even publicly endorse candidates. *Id.* § 114.4(c)(6).

No one has suggested to the Court that for the last 102 years, following passage of the Tillman Act, American corporations have been absent from the political process, somehow rendered mute. However, as state-created mechanisms for artificially large aggregations of wealth, they have been subject to limits on the use of that wealth to prevent them from dominating and corrupting the political process. *Austin*, 494 U.S. at 658.

The Court poses its question directly about *Austin*, but the law constraining corporate general treasury express advocacy was settled well before *Austin*. The Court has long defended Congress's efforts to protect the electoral process "from what it deemed to be the corroding effect of money employed in elections by aggregated power." *United States* v. *Int'l Union United Auto Workers*, 352 U.S. 567, 582 (1957). For decades, "the [i]mportance of the governmental interest in preventing this occurrence has never been doubted." *Bellotti*, 435 U.S. at 787 n.26.

II. The Moment Is Wrong for the Court to Radically Reverse Established Law

A. The Moment Is Wrong for the Court to Open the Channels for Unlimited Corporate Spending

The Court's decisions are not rendered in a vacuum. It would be strange indeed if historic limits on the political use of artificially aggregated wealth were summarily swept away at a time of heightened national concern about corporate social and political accountability.

In this regard, the current environment is much like that of a century ago, when the same concerns first resulted in limitations on the use of corporate wealth in campaigns. As trusts and corporate wealth grew, so did corporate contributions, beginning in earnest in the 1896 presidential election. *See* Matthew Josephson, *The Politicos, 1865-1896* at 699 (1938). Responding to public outrage, President Theodore Roosevelt repeatedly urged Congress to forbid all corporate campaign contributions. In his 1905 State of the Union address, he stated,

> The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign—that is, to the Government, which represents the people as a

> whole—some effective power of supervision over their corporate use.

Theodore Roosevelt, State of the Union Message, December 5, 1905, *available at* http://www.theodore-roosevelt.com/sotu5.html. Two years later, Congress passed the first statute of the type at issue here.

These issues are just as salient, under changed conditions, in this era. Huge aggregations of wealth, facilitated by state-created mechanisms and other forms of public support, are front and center in the national policy dialogue of the day. The notion of "firms too big to fail" figures prominently in this debate. So, too, does a range of other statutory enactments, regulatory initiatives and new proposals that underscore the complex, politically sensitive relationship of the private and public sectors, of public interest and private profit. *See* Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* 208-09, 242-43 (2009).[2]

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[2] In his analysis of contemporary policy challenges, Judge Posner urges close attention to corporate interaction with the political process. Judge Posner considers how "a profound failure of the market was abetted by government inaction. That inaction was the result in part of political pressures (to keep interest rates down . . . and to conciliate powerful political interests that are—not incidentally—large contributors to political campaigns)." Posner, *supra*, at 242-43; *see also* Simon Johnson, *The Quiet Coup*, The Atlantic, May 2009 (alleging the connection of campaign finance,

These circumstances, echoing as they do the nation's experience at the outset of the last century, do not favor a sudden and major shift in political spending power to the benefit of the for-profit corporate sector. A public already troubled by the great pending questions of corporate influence and responsibility would be still more troubled. The balance holding under the current regulatory scheme would, if so violently disturbed, give way to deep anxieties about potential, perceived, and actual corruption.

B. The Moment Is Wrong for the Court to Upset a Regulatory and Constitutional Balance Now Featuring Unprecedented Participation by Small Donors

Also at risk in any radical revision of the campaign finance laws is the nascent—and so, still tenuous—power of small individual donors. Parties, political committees, and candidates, working within the structure of the campaign finance laws and with the aid of new technologies,

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among other factors, to failed government policy and oversight). The feared or actual deployment in the political process of massive corporate resources, calculated to induce government inaction or thwart regulatory controls, is what defines the corruption addressed by long-standing campaign finance limits. Reconsideration of these limits, in this case and its non-record, would be—to understate the point—poorly timed.

have mobilized small individual donors in unprecedented numbers.[3]

Those same donors are now enlisting to volunteer in their political causes, forming a new online corps of freshly empowered average citizens of varying party affiliations and political commitments. This is a new development, the further maturation of which is being awaited with keen anticipation. Quite apart from this new development's established success in bolstering public participation, it promises to increase long lagging public confidence in the political process.

The 2008 election in particular proved that the small donor increase was not an anomaly but rather was indicative of an emerging trend. Senator John McCain raised $35 million from about 827,000 small donors, while Senator Barack

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[3] The convergence of BCRA and the Internet in 2004 was a watershed moment for small donors. *See* Institute for Politics Democracy & the Internet & Campaign Finance Institute, *Small Donors and Online Giving: A Study of Donors to the 2004 Campaigns* (Mar. 2006), *available at* http://www.ipdi.org/UploadedFiles/Small%20Donors%20Report.pdf. Senator John Kerry raised 37 percent of his contributions from small donors—those contributing $200 or less—while President George W. Bush raised 31 percent from small donors. For perspective, during the 2000 election, Vice President Al Gore's small donor base was 20 percent of his total fundraising efforts, while then-Governor Bush's was 16 percent. *Id.* at 3-4. Overall, the total number of small donors tripled or quadrupled, from close to 625,000 in 2000 to perhaps 2.8 million in 2004. *Id.* at 5.

Obama raised $178 million from 3.7 million small donors. *See generally* Ctr. for the Study of Elections & Democracy, *The Change Election: Money, Mobilization, and Persuasion in the 2008 Federal Elections* 1-56 (David B. Magleby ed., 2009). The Presidential elections are leading indicators: the political parties and their candidates are building on this "small donor" participatory model throughout the country.

A sudden change in the law, to the advantage of corporate wealth amassed in commercial transactions, would cause a violent disruption in this process. An emerging balance, years in the making, would be undone. In the place of a sense of empowerment could be expected another spell of disillusionment. What will predictably follow is a widespread sense that the rules were changed, and corporate political power restored to commanding levels, just as the era of the small individual donor had begun.

III. The Court Lacks Any Record to Support the Sudden Review of Core Precedent on Corporate Spending, Nor Does It Have the Time on This Schedule to Address Complex Doctrinal Issues

If "[t]he quantum of empirical evidence needed . . . will vary up or down with the novelty and plausibility of the justification raised," *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000), then a very complete record should be demanded of any party asking to overturn established law built

on accepted public law facts. It is novel indeed for the Court to consider revisiting those factual understandings in a case in which there is no relevant record whatsoever. And the record suitable for a case involving nonprofit ideological corporations does not suffice to support the review of spending restrictions on for-profit corporations. Throughout the Court's jurisprudence, from *National Right to Work*, 459 U.S. 197, through *Massachusetts Citizens for Life*, 479 U.S. 238, and *Federal Election Commission* v. *Beaumont*, 539 U.S. 146 (2003), to *Federal Election Commission* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), the Court has expressly recognized the significance of the difference in type of corporation.

Compounding the problem of a missing record is the doctrinal challenge of adapting the contribution/expenditure distinction to the field of corporate political spending. *Buckley* laid down this distinction in cases where the spender was authorized to contribute directly, but was subject to contribution limits. This same corruption rationale was inadequate to sustain the same limits when the spending was truly "independent" of the candidate. In the case of corporations, barred from contributing directly, the question never before addressed is whether an entity prohibited from giving at all may claim the same right to escape all limits on a claim of "independence."

Is the right the same where the concern at the heart of the regulatory scheme is the source of

funds, not the amount that an otherwise lawful source may donate? The Court has never spoken to this issue;[4] it was not presented and briefed in this case to date; and reargument on this schedule affords minimal opportunity, without a record, to achieve the "comprehensive examination" that such an issue calls for. *Beaumont*, 539 U.S. at 164 (Kennedy, J., concurring).[5]

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[4] The Court has sanctioned express electoral advocacy by a special class of nonprofit corporations, *Mass. Citizens for Life*, 479 U.S. at 263-64, but only on the condition that these entities are not funded by prohibited sources, including business corporations. This unusual case does address the larger question of whether prohibited sources themselves, barred from direct giving, free themselves of all limits by asserting independence under the Buckley rationale. The significance of this question extends beyond this case. *See, e.g.*, 2 U.S.C. § 4411e(a)(1)(A), (C) (statutory ban on foreign national contributions *and* independent expenditures).

[5] The issue of bona fide independence is not a simple one, as the history of regulation on this point amply demonstrates. In 2002, Congress enacted a revision of the "coordination rules" designed to more clearly distinguish truly independent from coordinated spending. BCRA, 2 U.S.C. § 441a. Litigation ensued and has yet to conclude. *Shays* v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008). Corporate "independent spending," if sanctioned by a reversal of *Austin*, raises a host of other questions unique to the corporate sector. For example, may a corporation running a full lobbying operation in regular contact with Members successfully establish independence from those same Members when proposing to spend without limit on their campaigns? How the contribution/expenditure distinction is maintained for for-profit corporations within the framework of congressional

A nation's political integrity is "a value second to none in a free society." *Wis. Right to Life*, 127 S. Ct. at 2689 (Souter, J., dissenting). The Court should not consider a radical reversal of its precedents without a high level of confidence that such action would not damage the nation's political integrity, real and perceived. Such a risk should certainly not be courted without the support of a full record and the opportunity for a complete engagement with the difficult constitutional questions presented.

CONCLUSION

What the Court does on the merits of this or any case is not going to be affected by public opinion. But it is surely appropriate for the Court, in applying the jurisprudential principles behind constitutional avoidance and stare decisis, to consider whether the time, case, and process are right.

The DNC fears that few things could be worse, for the country and for the Court, than to make a hurried decision on the merits of an issue that the Court need not decide, using an expedited reargument process unfamiliar to the public. The Court should take all action to avoid the impression or conclusion that it is in an unusual rush to reconsider, abruptly, principles that were

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authority to guard against corruption or its appearance presents a novel question, and a complex one.

developed during a long and careful process and were reaffirmed just years ago.

A hasty rush to decide these particular questions would represent a sharp break from the constitutional decision-making discipline that the Court has avowed. Moreover, for the reasons stated, the time and case chosen for abandoning that discipline would be deeply inopportune.

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