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 AMICI CURIAE SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, FORMER REPRESENTATIVE CHRISTOPHER SHAYS, AND FORMER REPRESENTATIVE MARTIN MEEHAN IN SUPPORT OF APPELLEE


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## INTEREST OF AMICI CURIAE[1]

The interest of the amici curiae, BCRA's principal sponsors, is stated in their previous brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

If judicial modesty is a virtue, then "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). By that standard, this Court's order that the parties brief and argue whether *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell* v. *FEC*, 540 U.S. 93 (2003), should be overruled is a modest proposal only in the Swiftian sense.

The Court's directive dramatically changes the issue in this case. No longer is it only whether BCRA and its implementing regulations can apply to on-demand satellite transmission of a movie by a nonprofit corporation that accepts some funding from business corporations, and whether that movie is the functional equivalent of express advocacy. The Court now asks whether *all* restrictions on use of treasury funds of *for-profit* corporations (and unions) for express advocacy should be held facially unconstitutional.

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[1] Letters consenting to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici or their counsel made a monetary contribution to its preparation or submission.

Overruling *Austin* or *McConnell* in this case would be unwarranted and unseemly. *Stare decisis* requires respect for precedents absent a special justification for overruling them. No such justification exists. *Austin* and *McConnell* (and their antecedents) are vital cornerstones of modern campaign finance regulation and have engendered much reliance. Overruling them would severely jolt our political system by suddenly overturning not only federal statutes that have stood for decades, but also laws of many States. The foundations of *Austin* and *McConnell* have not been undermined by precedential development, and their holdings have not proved unworkable. Nor does the Court have new information that undermines their factual basis; there is *no* factual record in this case that even bears on, let alone undermines, the justifications for the longstanding restrictions on the use of corporate treasury funds for express candidate advocacy.

More fundamentally, *Austin* and *McConnell* were correctly decided. Unlimited expenditures supporting or opposing candidates may create at least the appearance of corruption, as *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), illustrates. The tremendous resources business corporations and unions can bring to bear on elections, and the greater magnitude of the resulting apparent corruption, amply justify treating corporate and union expenditures differently from those by individuals and ideological nonprofit groups. So, too, does the countervailing free-speech interest of the many shareholders who may not wish to support corporate electioneering but have no effective means of controlling what corporations do with what is ultimately the shareholders' money. *Austin* was rightly concerned with the corruption of the system that will result if campaign discourse becomes dominated not by

individual citizens—whose right it is to select their political representatives—but by corporate and union war-chests amassed as a result of the special benefits the government confers on these artificial "persons." That concern remains a compelling justification for restrictions on using corporate treasury funds for electoral advocacy—constraints that ban no speech but only require that it be funded by individuals who have chosen to do so.

## ARGUMENT

### I. OVERRULING *AUSTIN* OR *MCCONNELL* WOULD DISREGARD PRINCIPLES OF *STARE DECISIS* AND PROCEDURAL REGULARITY

#### A. There Is No Special Justification For Overruling *Austin* Or *McConnell*

*Stare decisis* is "of fundamental importance to the rule of law." *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). This Court has often emphasized that overruling one of its precedents is an extraordinary action requiring "special justification." *See Dickerson* v. *United States*, 530 U.S. 428, 443 (2000).

The controlling opinion in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* identified several "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law." 505 U.S. 833, 854 (1992). These include whether the decision has engendered "reliance that would lend a special hardship to the consequences of overruling," whether the rule established by a decision "def[ies] practical workability," whether recent decisions have "left the old rule no more than a remnant of abandoned doctrine," and whether "facts

have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 854-855. None of these considerations supports overruling precedent here.

1. Overruling *Austin* and *McConnell* would deeply disturb settled expectations regarding the role of corporations in the electoral process. It would overturn not only BCRA's restriction on use of corporate and union treasury funds for electioneering communications, but also the provision originating in the Taft-Hartley Act of 1947 that requires corporations and unions to use segregated funds (PACs) for expenditures in connection with federal elections. 2 U.S.C. § 441b. It would also—at a stroke—invalidate laws of twenty-two States that prohibit corporations from using treasury funds for campaign advocacy and jeopardize statutes in two others that strictly limit corporate expenditures.[2]

That alone is a powerful reason for adhering to precedent. "*Stare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995). Just as "*Buckley* has promoted considerable reliance" because "Congress and state legislatures have used *Buckley* when drafting campaign finance laws," *Randall* v. *Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.), so, too, have legislatures relied extensively on the longstanding principle that use of corporate treasury funds for express advocacy may be limited. The requirement that

[2] These laws are compiled in the Appendix to this brief.

business corporations and unions use segregated funds for candidate advocacy has become "embedded," *Dickerson*, 530 U.S. at 443, in our national political culture in the generations since the Taft-Hartley Act and is "part of the basic framework," *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317 (1992), of how corporations and unions conduct their political activities.

2. The constitutional principle that a corporation can be restricted from using treasury funds for express advocacy has not proved unworkable. Although regulating only express advocacy proved *insufficient* to prevent potentially corrupting corporate expenditures, *see McConnell*, 540 U.S. at 126-127, identifying express advocacy was not itself unworkable. Nor did *McConnell*'s application of the principle to the "functional equivalent of express advocacy," *id.* at 206, as refined in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), render the rule unworkable. Indeed, the controlling opinion in *WRTL* devised its test principally for "clarity," *id.* at 474 n.7, and there is no reason to think it is less clear today than two years ago. That Citizens United contests application of the *WRTL* standard hardly demonstrates that it is "unworkable."

3. Nor has "evolution of legal principle … implicitly or explicitly left [*Austin* or *McConnell*] behind as a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857. The federal prohibition on use of corporate and union treasury funds for express advocacy has existed since 1947, and this Court's decisions have not indicated any infirmity in it. As *McConnell* pointed out in upholding the constitutionality of regulating the functional equivalent of express advocacy, that result rested not only on *Austin*, but on the Court's campaign finance jurisprudence from

*Buckley* v. *Valeo*, 424 U.S. 1 (1976), onward, with special emphasis on *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*), and *FEC* v. *Beaumont*, 539 U.S. 146 (2003). *See McConnell*, 540 U.S. at 203-206. The constitutionality of regulating express advocacy by business corporations also provided the analytical starting point for *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which recognized a special exception for ideological nonprofit organizations that accept no funding from for-profit corporations.

That some Justices have vehemently disagreed with *Austin* and *McConnell* does not make them doctrinal relics. *Cf. Casey*, 505 U.S. at 860 (noting that *Roe* v. *Wade* "engendered disapproval" from the outset). If anything, it demonstrates that the arguments advanced against *Austin* do not rest on new doctrinal developments, but are the same ones already *twice* deemed unpersuasive by the Court.

*WRTL* further demonstrates that *Austin* and *McConnell* have not been left behind by doctrinal development. *WRTL*'s controlling opinion disclaimed overruling *McConnell* and drew a constitutional line that was based on *McConnell*'s principles but designed to avoid overbreadth. By "reduc[ing] the impact" of *McConnell* "while reaffirming the decision's core ruling," *Dickerson*, 530 U.S. at 443-444, *WRTL* strengthened *McConnell*'s *stare decisis* effect, just as subsequent decisions limiting but reaffirming *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were held in *Dickerson* to enhance *Miranda*'s precedential stature.

4. There is no basis for concluding that the factual premises of *Austin* and *McConnell* have changed or proven unfounded. In contrast to *Austin* (where there

was an evidentiary record on corporate and PAC campaign spending in Michigan and the adequacy of PACs as mechanisms for channeling corporate speech) and *McConnell* (which involved a massive evidentiary record detailing the impact of large-scale corporate and union expenditures that were the functional equivalent of express advocacy), in this case there is no factual record that has any bearing on the justifications for restricting the use of corporate treasury funds for candidate advocacy. There is, therefore, no possible basis for concluding that "'facts newly ascertained,'" *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986), necessitate overruling *Austin* or *McConnell*.

### B. Overruling *Austin* Or *McConnell* Would Be Procedurally Inappropriate

1. Sound judicial process counsels against reaching out to decide this case on the broadest possible basis. Until now, Citizens United itself never asked this Court to overrule *McConnell* and made only a perfunctory argument for overruling *Austin*. That argument was not raised in the district court or the jurisdictional statement, and even when Citizens United did raise it in two paragraphs of its merits brief, it addressed none of the criteria this Court has used to identify a special justification for overruling a decision. *See* Appellant Br. 30-31. Ordinarily, this Court would not consider an argument that it should overrule a precedent that was raised "[o]nly as a backup argument, an afterthought almost," and was marked by a complete "fail[ure] to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall*, 548 U.S. at 263 (Alito, J., concurring).

Citizens United has advocated a number of much narrower grounds for deciding the case in its favor, some of which do not require constitutional adjudication at all. *See Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 400-401 (1972). Its arguments question whether its film contains the functional equivalent of express advocacy under the *WRTL* standard, whether that standard can constitutionally be applied to "on-demand" television programming, and whether the FEC's regulations even reach on-demand programming.

Citizens United has also argued that the criteria set forth in *MCFL* should be expanded to cover nonprofit corporations that have received some contributions from business corporations. Under such an approach, nonprofit corporations whose receipts from business corporations are so modest that they plainly are not being used as conduits would not need to establish and maintain a PAC to fund express advocacy or its functional equivalent.[3]

We continue to believe that the judgment below should be affirmed; but if this Court concludes otherwise, a decision on any one of those narrower bases, as opposed to a wholesale overruling of *Austin* and *McConnell*, would be more consistent with the "venerable principle," *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 525 (1989) (O'Connor, J., concurring), that the Court will not "'formulate a rule of constitutional law broader than is required by the precise facts to

[3] *Cf. FEC* v. *NRA*, 254 F.3d 173 (D.C. Cir. 2001) (*MCFL* applies to organizations accepting *de minimis* contributions from business corporations).

which it is to be applied.'" *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

2. Moreover, because Citizens United framed this case below as a narrow, as-applied challenge involving application of the *WRTL* test to Citizens United's movie, there is *no* evidentiary record bearing on whether requiring business corporations to use segregated funds for candidate advocacy is facially constitutional. Because of the way Citizens United structured its case, the FEC had no occasion to develop a record with respect to the broader issue, and it appropriately carried its burden just by showing that the film satisfied the *WRTL* standard. As the controlling opinion in *WRTL* explained (551 U.S. at 465):

> This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. *McConnell*, [540 U.S.] at 206. So to the extent the ads in these cases fit this description, the FEC's burden is not onerous; all it need do is point to *McConnell* and explain why it applies here.

As a result, there is no record evidence that sheds any light on many factual questions that might bear on the broad issues of whether restrictions on the way business corporations fund express advocacy serve a compelling interest and whether requiring them to use segregated funds unacceptably burdens their speech. Such questions might include:

- The magnitude of candidate advocacy that would result if business corporations and unions were free to use treasury funds;

- The effect of such expenditures on political campaigns, candidates, and officeholders, and on public perceptions of corruption;

- Whether corporate shareholders are able to monitor and control corporate political spending or alter investments based on their views regarding such spending;

- Whether legislation comporting with *Austin*, *McConnell*, and *WRTL* has had a chilling effect on speech other than traditional campaign advertising;

- Whether segregated-fund requirements significantly burden for-profit corporations and unions;

- Whether, as Citizens United contends, wealthy individuals have as much ability to engage in massive election spending as business corporations and unions;

- Whether corporate political expenditures discourage citizen participation in the process of selecting representatives for public office.

As the Court recognized in *WRTL*, "*McConnell*'s analysis was grounded in the evidentiary record before the Court." 551 U.S. at 466. And even the *McConnell* record reflected the fact that BCRA's challengers in that case did "not contest that the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office." 540 U.S. at 205. Thus, although the record in *McConnell* contained considerable evidence bearing on the corrupting effect of such corporate ex-

press advocacy, it did not have reason to address the justifications for *Austin*.[4]

Here, by contrast, there is no record at all against which to assess the justifications for *Austin* and *McConnell*. For the Court to overrule either decision in the absence of a record—or a fair opportunity to develop one—would be manifestly improper. And because the absence of a record is attributable to the way Citizens United framed its challenge, the Court should rule on that as-applied challenge and leave the development of the necessary record for a case in which the broader issue truly requires decision.

3. These procedural concerns are heightened because the significant expansion of the potential impact of this Court's ruling—to encompass not only BCRA, but also the expenditure provision of 2 U.S.C. § 441b, and the laws of many States—greatly increases the number of affected parties who had no reason to participate earlier. In particular, the States have not heretofore been heard in this case—because the narrow arguments Citizens United raised did not significantly affect their interests—and now have only a limited opportunity to defend their laws.

Given the unusual circumstances here, overruling precedents may well suggest that the outcome rested on "a ground no firmer than a change in [the Court's] membership," which would "invite[] the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court

[4] And because Congress relied on *Austin* in enacting BCRA, it had no need to create a full legislative record justifying *Austin*.

and to the system of law which it is our abiding mission to serve." *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting). Such a decision could threaten the Court's legitimacy in the eyes of the Nation and undermine the respect this Court's precedents should command.

## II. *McConnell* And *Austin* Were Correctly Decided

The holdings of *Austin* and *McConnell*—that it is constitutional to require business corporations to use segregated funds contributed by shareholders, officers and employees for express candidate advocacy or its functional equivalent—remain sound today. The interests in preventing actual or apparent corruption of the electoral process and protecting shareholders provide compelling justification for such requirements, which neither unduly burden nor overbroadly inhibit protected speech.

1. This Court's decision in *Caperton* dramatically illustrates the appearance of corruption that can result from unrestrained independent electoral expenditures on behalf of corporate interests. In *Caperton*, the Court concluded that substantial independent expenditures advocating the election of a judicial candidate and the defeat of his opponent "had a significant and disproportionate influence on the electoral outcome" and created a "risk of actual bias" so "substantial" that due process required the successful candidate to recuse himself from a case involving the corporation whose executive engineered the expenditures. 129 S. Ct. at 2264-2265.

Surely, preventing such apparent bias is a compelling interest, but if *Austin* and *McConnell* were over-

ruled, state laws aimed at preventing corporate expenditures in connection with judicial elections would fall with them. *Cf. Republican Party of Minn.* v. *White*, 536 U.S. 765 (2002) (First Amendment applies fully to judicial elections). Moreover, there is no reason to believe that the types of expenditures that create an appearance of bias in a judge are less likely to create such an appearance with respect to legislative or executive officials. Indeed, if anything, the public would be less inclined to attribute corruption to judges than to other elected officials. *See id.* at 796 (Kennedy, J., concurring). And the due-process recusal remedy, though itself problematic in some respects, *see Caperton*, 129 S. Ct. at 2269-2272 (Roberts, C.J., dissenting), is not even available for legislators, who, by stepping aside, would leave constituents unrepresented. Therefore, preventing the appearance of corruption by forestalling potentially corrupting expenditures is the only practical remedy for such officials (and is also the simplest solution for judicial elections).

Not surprisingly, the *McConnell* record provided strong corroboration that corporate and union expenditures on ads that were the functional equivalent of express advocacy created the appearance of corruption. Based on that record, Judge Kollar-Kotelly found that such expenditures "permit corporations and labor unions to inject immense aggregations of wealth into the process" and "radically distort[] the electoral landscape." 251 F. Supp. 2d 176, 555 (D.D.C. 2003). She further found that candidates are "acutely aware of" and "appreciate" such expenditures, *id.*, and "feel indebted to those who spend money to help get them elected," *id.* at 556 (citing declaration of former Sen. Bumpers). She concluded that "the record demonstrates that candidates and parties appreciate and en-

courage corporations and labor unions to deploy their large aggregations of wealth into the political process," and that "the record presents an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups." *Id.* at 560.

2. It remains true, as it was when *Austin* was decided, that distinguishing corporate and union expenditures from those of individuals is justified by the much greater magnitude of the resources that business corporations and unions can bring to bear on elections: Using state-conferred legal advantages and privileges, these entities can accumulate "political 'war chests,'" *NRWC*, 459 U.S. at 207, so that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257; *see also FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985). The vast sums at corporations' disposal create a much more formidable risk of corruption than those generally available to individuals.

Business corporations, moreover, necessarily deploy wealth in the electoral process to serve relatively narrow economic interests. To be sure, individuals' participation in electoral politics may also be driven by particular interests. But a citizen's involvement in our system of representative democracy also reflects a broad range of considerations reflecting each citizen's status as a sovereign member of a republic, engaged in a process of selecting representatives entrusted to act on her behalf across the full range of public issues—a process in which artificial persons, unlike individuals, have no direct role. This important distinction is surely an appropriate consideration for a democratic society arranging its electoral politics.

*First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), is not at all to the contrary. *McConnell* and *Austin* extensively discussed and rejected *Bellotti*'s application outside of ballot measures, and *MCFL* also recognized that requiring corporations to use PACs for candidate advocacy was "of course distinguishable" from the law in *Bellotti*. 479 U.S. at 259 n.12. *WRTL* also emphasized the distinction between candidate advocacy and the issue advocacy in *Bellotti*. 551 U.S. at 480. *Bellotti* itself said it "implie[d] no comparable right" to make expenditures in "the quite different context of participation in a political campaign for election to public office." 435 U.S. at 788 n.26. It is one thing for a corporation to spend treasury funds on a measure that will have the same effect as a law passed by a legislature that it may freely lobby, and quite another for it to unleash its wealth on elections in which sovereign citizens determine who will exercise their proxies on the full breadth of public issues. Moreover, there is no "risk of corruption … in a popular vote on a public issue." *Id.* at 790. In contrast, as *Bellotti* recognized, § 441b was enacted to combat "the problem of corruption of elected representatives through the creation of political debts." *Id.* at 788 n.26.

3. In addition, *Austin*'s point that distinguishing corporate and individual spending vindicates an important interest in protecting shareholders not only remains valid today, but is, if anything, even more compelling. Since *Austin*, the trend toward wider stock ownership has accelerated, fueled by explosive growth in mutual funds and changes in the funding of retirement plans that require most workers to rely on their own investments to provide for their old age. Thus, whereas less than twenty-five years ago only about one

in five American households held stocks, today about half do.[5]

Owners of corporate stocks thus reflect the diverse political views of the American public at large. And because of the dispersion of ownership through mutual funds, individual investors have little or no ability even to monitor political spending by the corporations they own, let alone control or influence it. Neither, however, do they have the realistic option of *not* investing their retirement funds, or of ensuring that they invest only in companies whose political activities they endorse.

Allowing unrestrained political spending by corporations would empower corporate managers, authorized by state laws to control assets whose ownership resides elsewhere, to use other people's money to advance their own political agendas. Just as union members have a strong First Amendment interest in not being legally compelled to support political activities, *see Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), so corporate shareholders have a free-speech interest in not having what is ultimately their money spent to elect candidates they do not support. And just as there is no right to receive government assistance to collect funds for political purposes, *see Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093 (2009), so, too, corporate managers have no First Amendment right to use government-endowed authority over property ultimately belonging to others to divert money to electoral politics.

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[5] *See* U.S. Congress Joint Economic Committee, *The Roots of Broadened Stock Ownership* 1 (2000), www.house.gov/jec/tax/stock/stock.pdf; Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, at 2 (2005), http://www.ici.org/pdf/fm-v14n5.pdf.

The corporate PAC option, moreover, is ideally suited to balancing the First Amendment interests of corporate entities and their shareholders. It allows the corporation to direct political spending only to the extent shareholders have personally decided to contribute for that specific purpose. It thus ensures that the corporation may have a voice, but one that is not subsidized unwillingly by those who may disagree with its electoral message. And there is no basis in the record for concluding that PACs are inadequate or unduly burdensome for *business* corporations, whatever may be true of certain ideological nonprofit corporations. Indeed, PAC requirements pale in comparison with the detailed recordkeeping and accounting otherwise required of corporations and unions.

4. Finally, there is no reason to conclude that restrictions on corporate political expenditures chill legitimate, non-electoral corporate expression. At oral argument, members of the Court expressed concern over the possibility that limits on corporate express advocacy might lead to banning of books that incidentally express views on electoral outcomes. Such concerns cannot justify the drastic step of overruling *Austin* or *McConnell*.

The statute at issue—BCRA § 203—does not apply to books or to any mode of expression other than television and radio broadcasts. It would be unprecedented to strike down a law on its face because of concerns that some *other* statute, such as 2 U.S.C. § 441b, might be applied overbroadly.[6]

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[6] Neither party has argued that § 441b barred Citizens United from producing its film or showing it in non-broadcast settings, which Citizens United did without any enforcement threat.

Even were § 441b at issue, there would be no basis for overruling *Austin*'s holding that restrictions on corporate expenditures are facially constitutional. As far as we are aware, § 441b has *never* been applied to a book. The bare possibility that the statute might be applied to expression that was incidentally campaign-related or that, taken as a whole, was not reasonably understood as being "in connection with" an election (as § 441b requires) does not establish that the statute is overbroad, because such isolated, hypothetical impermissible applications are not "substantial … 'relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 120 (2003)). Should § 441b or a similar state statute be applied outside the realm of true electioneering activity, an as-applied challenge would remain available, as *WRTL* demonstrates.

## CONCLUSION

The Court should not overrule *Austin* or *McConnell*.

Respectfully submitted.

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JULY 2009

# APPENDIX

## STATE STATUTES PROHIBITING INDEPENDENT EXPENDITURES FROM GENERAL TREASURY

| | |
|---|---|
| Alaska | Alaska Stat. § 15.13.400(8), (13) ("group" excludes corporations unless their "principal purpose" is to influence elections; "nongroup entity" excludes entities that "participate in business activities") |
| | Alaska Stat. § 15.13.065(a) (permitting contributions to groups only by other groups, nongroup entities, and individuals) |
| | Alaska Stat. § 15.13.067 (permitting expenditures only by groups, nongroup entities, individuals, and candidates) |
| Arizona | Ariz. Const. art. 14, § 18 ("It shall be unlawful for any corporation, organized or doing business in this State, to make any contribution of money or anything of value for the purpose of influencing any election or official action.") |
| | Ariz. Rev. Stat. Ann. § 16-919(A) (prohibiting corporations from making "any contribution of money or anything of value for the purpose of influencing an election") |
| | Ariz. Rev. Stat. Ann. § 16-920(A)(4) (permitting corporations to make expenditures only to establish, administer, and solicit voluntary contributions for a separate segregated fund) |

| | |
|---|---|
| Colorado | Colo. Const. art. 28, § 3, cl. 4 (prohibiting corporations from making expenditures "expressly advocating the election or defeat of a candidate"; permitting corporations to establish committees to accept contributions from employees, officeholders, shareholders, or members; corporations that are "formed for the purpose of promoting political ideas and cannot engage in business activities" are excepted from these restrictions) |
| Connecticut | Conn. Gen. Stat. § 9-613(a), (b) (prohibiting corporate expenditures "for the benefit of" any candidate or "to promote the success or defeat of any political party" except to administer and solicit contributions for a political committee established by the corporation) |
| Iowa | Iowa Code § 68A.503(1) (prohibiting corporations from making contributions to a committee or candidate or to expressly advocate for the election or defeat of a candidate) |
| | Iowa Code § 68A.503(3) (permitting corporations to establish political committees, but permitting use of corporate funds only for the administration of the committee) |
| Kentucky | Ky. Rev. Stat. Ann. § 121.035(2) ("No officer, agent, attorney, or employee of any corporation … shall disburse, distribute, pay out, or in any way |

handle any money, funds, or other thing of value that belongs to or has been or is being furnished by any such corporation … to be used or employed in any way for the purpose of aiding, assisting, or advancing any candidate for public office in this state in any way whatever.")

Massachusetts — Mass. Gen. Laws ch. 55, § 8 (prohibiting corporations from making contributions or expenditures "for the purpose of aiding, promoting or preventing the nomination or election of any person to public office" and prohibiting any political committee from accepting contributions or donations from any corporation)

Michigan — Mich. Comp. Laws § 169.254 (prohibiting corporations and labor organizations from making contributions or expenditures)

Minnesota — Minn. Stat. § 211B.15, subdiv. 2 (prohibiting corporations from making contributions or expenditures "to promote or defeat the candidacy of an individual")

| | |
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| Montana | Mont. Code Ann. § 13-35-227(1), (3) (prohibiting corporations from making contributions or expenditures "in connection with a candidate or political committee that supports or opposes a candidate or a political party"; corporations may establish a segregated fund consisting of contributions from affiliated individuals) |
| North Carolina | N.C. Gen. Stat. § 163-278.19(a)(1), (f)(1) (prohibiting corporations and labor unions from making "any contribution" to candidate or political committee or from making "any expenditure to support or oppose the nomination or election of a clearly identified candidate"; non-business entities with the "express purpose" of "promoting social, educational, or political ideas" are excepted) |
| North Dakota | N.D. Cent. Code § 16.1-08.1-03.3(1)(d), (e) (prohibiting corporations from making contributions to any candidate, political party or committee, or for any "political purpose," or "[f]or the influencing of any measure before the legislative assembly") |
| Ohio | Ohio Rev. Code Ann. § 3599.03(A)(1) (prohibiting corporations from making contributions or expenditures to aid the election of any candidate or to contribute to any political action committee) |

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| | Ohio Rev. Code Ann. § 3517.082(A) (authorizing corporations to use corporate funds only to create and administer political action committees or segregated funds) |
| Oklahoma | Okla. Const. art. 9, § 40 (prohibiting corporations from "influenc[ing] elections or official duty by contributions of money or anything of value") |
| | Okla. Stat. Ann. tit. 74, ch. 62, App. § 257:10-1-2(d) (prohibiting corporate contributions or expenditures for benefit of candidate or committee in connection with election; allows solicitation of funds to separate committee for political purposes) |
| Pennsylvania | 25 Pa. Stat. Ann. § 3253 (prohibiting corporations from making any "contribution or expenditure in connection with the election of any candidate or for any political purpose whatever," unless corporation is formed primarily for political purpose or as political committee) |
| Rhode Island | R.I. Gen. Laws § 17-25-10.1(h)(1) (prohibiting "any corporation, whether profit or non-profit, domestic corporation or foreign corporation … or other business entity" from making "any campaign contribution or expenditure … to or for any candidate, political action committee, or political party committee") |

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| South Dakota | S.D. Codified Laws § 12-27-18 (prohibiting "organization[s]" from making "a contribution to a candidate committee, political action committee, or political party or mak[ing] an independent expenditure expressly advocating the election or defeat of a candidate"; excepting "independent expenditures expressly advocating the election or defeat of a candidate by a qualified nonprofit corporation from its treasury funds"; providing that "[a]n organization may create a political action committee") |
| | S.D. Codified Laws § 12-27-1(16) (defining "[o]rganization" to include "any business corporation," "nonprofit corporation," or "labor union") |
| Tennessee | Tenn. Code Ann. § 2-19-132(a) (making it unlawful for executive or representative of corporation to use corporate money "for the purpose of aiding" a candidate for office or for "in any way contributing to the campaign fund of any political party, for any purpose whatever") |
| Texas | Tex. Elec. Code Ann. § 253.094(a) (generally prohibiting a corporation or labor organization from making "political contribution[s]" and "political expenditure[s]") |
| | Tex. Elec. Code Ann. § 251.001(7), (10) (defining "[p]olitical expenditure[s]" to include "campaign expenditure[s]", |

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| | i.e., "expenditure[s] made by any person in connection with a campaign for an elective office or on a measure") |
| | Tex. Elec. Code Ann. § 253.100(a) (excepting from general prohibition corporate political expenditures made for "the establishment or administration of a general-purpose committee" or the "maintenance and operation" of such a committee) |
| | Tex. Elec. Code Ann. § 253.098(a) (excepting from general prohibition "campaign expenditures" made by corporations "from [their] own property for the purpose of communicating directly with [their] stockholders … or with the families of [their] stockholders") |
| West Virginia | W. Va. Code § 3-8-8(a), (b)(1)(C) (forbidding corporate contributions "for the purpose of expressly advocating the election or defeat of a clearly identified candidate"; a corporation may solicit contributions to a separate segregated fund to be used for political purposes) |
| Wisconsin | Wis. Stat. Ann. § 11.38(1)(a) (forbidding corporate contributions and expenditures; allowing a corporation to solicit contributions to a "separate segregated fund"; corporation may not spend more than $500 annually for purpose of soliciting contributions to such a fund) |

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| Wyoming | Wyo. Stat. Ann. § 22-25-102(a) (prohibiting corporations from contributing funds "or election assistance to aid, promote or prevent the nomination or election of any candidate or group of candidates or to aid or promote the interests, success or defeat of any political party") |

**STATE STATUTES LIMITING INDEPENDENT EXPENDITURES FROM GENERAL TREASURY**

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| Alabama | Ala. Code § 10-2A-70 (generally prohibiting corporations from making expenditures "for the purpose of aiding any political party or any candidate for any public office") |
| | Ala. Code § 10-2A-70.1(a) (permitting corporate expenditures not exceeding $500 in "any one election in order to aid, promote or prevent the nomination or election of any person") |
| | Ala. Code § 10-2A-70.2 (permitting a corporation to contribute no more than $500 to a committee) |
| New York | N.Y. Elec. Law § 14-116 (prohibiting contributions or expenditures by corporations in excess of $5,000; corporations organized "for political purposes only" are excepted) |