No. 08-205

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

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

SUPPLEMENTAL BRIEF FOR THE APPELLEE

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, for the proper disposition of this case, the Court should overrule either or both *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell* v. *FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulation: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 08-205

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

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

SUPPLEMENTAL BRIEF FOR THE APPELLEE

The Federal Election Commission (FEC) respectfully submits this supplemental brief in response to this Court's order of June 29, 2009. For the reasons set forth below, this case is an unsuitable vehicle in which to re-examine either *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), or the relevant portion of *McConnell* v. *FEC*, 540 U.S. 93 (2003). If the Court reaches those questions, however, it should not overrule either decision. The decisions in *Austin* and *McConnell* were correct; a reversal of those decisions would likely invalidate federal legislation that has restricted corporate electioneering for over 60 years, as well as similar legislation enacted by many States; and basic principles of *stare decisis*, including most notably concern with reliance interests, demand adherence to precedent in this case.

A. This Case Is An Unsuitable Vehicle For Re-Examination Of *Austin* And *McConnell*

A decision overruling *Austin* and the relevant portion of *McConnell* would call into question the constitutionality of all federal and state regulation of all independent corporate electoral advocacy, including a federal law dating back to 1947 and the laws of dozens of States. Overruling *Austin* and *McConnell* would fundamentally alter the legal rules governing participation of corporations—including the Nation's largest for-profit corporations—in electoral campaigns, and would make vast sums of corporate money available for overt electioneering. At least three idiosyncratic features of this case make it a particularly unsuitable vehicle for considering a course of action that would have such far-reaching consequences.

1. Appellant is a nonprofit corporation whose stated purpose is expressly ideological: "to promote the social welfare through informing and educating the public on conservative ideas and positions on issues." J.A. 11a. In addition, appellant has represented to this Court that the funds used to finance *Hillary: The Movie* were raised "overwhelmingly" from individual donations. Appellant's Br. 29-34. For those reasons, appellant is, according to its own self-description, a distinctly atypical corporation.

These special features of appellant make it an inappropriate prism through which to view the world of corporate electioneering. A decision recognizing a constitutional right for large for-profit corporations to use their general treasuries, as opposed to segregated funds (*i.e.*, PACs), to advocate the election or defeat of candidates for public office would have potentially avulsive consequences. And because most such corporations engage in

businesses that are essentially unrelated to the dissemination of political ideas, restrictions on their electioneering intrude less significantly on their performance of core functions than is true of a nonprofit advocacy corporation like appellant. Even many nonprofit corporations, including the plaintiff in *Austin*, see 494 U.S. at 664, receive much more substantial funding from business corporations than appellant claims to receive (at least for the financing of *Hillary*). Any re-examination of the constitutional rules governing electoral advocacy by for-profit corporations, or by nonprofit corporations that are substantially financed by for-profit businesses, should occur in a case to which such a corporation is a party.[1]

2. The question the Court has set to the parties is not appropriately raised in this case. Early in this litigation, appellant asserted a facial challenge to BCRA

---

[1] This Court has held that certain small, ideologically-oriented corporations are constitutionally entitled to use their treasury funds for independent electoral advocacy if, *inter alia*, they have a policy against accepting contributions from business corporations or labor unions. See *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (*MCFL*); FEC Br. 3. Thus, corporations having the attributes that appellant says it possesses—*i.e.*, corporations that rely principally on individual donations but that nevertheless fail to qualify for the *MCFL* exception—are likely to be both rare and unrepresentative of the corporations that would be most substantially affected by a decision overruling *Austin* and *McConnell*. Some courts before *McConnell*, and one court afterward, have held that a corporation may claim the *MCFL* exemption even if it raises *de minimis* sums from corporate donations or business revenue. See, *e.g.*, *Colorado Right to Life Comm., Inc.* v. *Coffman*, 498 F.3d 1137, 1148-1151 (10th Cir. 2007); see also 63 Fed. Reg. 29,359-29,360 (1998) (discussing disagreement among lower courts). If appellant's overall operations are financed "overwhelmingly" by individual donations, as it asserts is true of the financing of *Hillary*, appellant would appear to be covered by these decisions.

Section 203, of the kind decided in *McConnell*. J.A. 23a-24a. Appellant subsequently announced, however, that it "inten[ded] to abandon th[at] count," 07-CV-2240 Docket entry No. 52, at 1-2 (D.D.C. May 16, 2008), and the parties stipulated to dismiss the facial challenge. See *id.* Nos. 53 (May 22, 2008), 54 (May 23, 2008). Appellant's jurisdictional statement did not urge that either *Austin* or *McConnell* should be overruled. See FEC Br. 33-34.

Appellant's merits briefs contained, in total, only two paragraphs and a footnote arguing that *Austin* should be overruled. See Appellant's Br. 30-31; Appellant's Reply Br. 16 n.7. Those briefs did not discuss considerations of *stare decisis*, and they did not urge the Court to overrule the relevant portion of *McConnell*. That is an even more "incomplete presentation" than the "afterthought" assault on another campaign-finance principle that this Court rejected three Terms ago. *Randall* v. *Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment); see FEC Br. 34-35. At oral argument, moreover, appellant effectively abandoned its challenge to *Austin* by (a) acknowledging that General Motors can constitutionally be banned from broadcasting express electoral advocacy and (b) expressly "accept[ing] the Court's decision in" *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), under which a corporation may use treasury funds for candidate-related broadcast advertising only when the advertising is not the functional equivalent of express electoral advocacy. Tr. of Oral Arg. 9, 55.

Rather than mounting any sustained challenge to *Austin* or the relevant portion of *McConnell*, appellant argued (1) that it received insubstantial funding from business corporations to produce *Hillary*, (2) that *Hil-*

lary is a feature-length film meant to be distributed through video-on-demand, and (3) that *Hillary* does not contain express advocacy or its functional equivalent. Appellant's own litigation choices make this case an unsuitable vehicle for reconsidering *Austin* and *McConnell*, particularly given the far-reaching consequences that overruling those decisions would entail. Cf., *e.g.*, *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996). When a plaintiff asserts only as-applied challenges to a statute, the usual course is to consider only those challenges. If one or more has merit, the Court should reverse the judgment on that ground. If, as here, those challenges lack merit or are procedurally barred, the proper disposition is to affirm—not to question the statute's facial constitutionality.

3. Appellant was a plaintiff in *McConnell*, joining with other parties to challenge BCRA's restrictions on the use of corporate treasury funds for electioneering communications. Br. for Appellants Paul *et al.* at 5, *McConnell*, *supra* (No. 02-1747). Appellant's brief cited *Austin* only in a single footnote, which did not urge that the decision be overruled. *Id.* at 26 n.9. Appellant's party status in *McConnell*, combined with its failure to urge the overruling of *Austin* during that massive litigation conducted to resolve facial constitutional challenges to BCRA, would render particularly inappropriate a decision by the Court to reverse either of those decisions in this litigation.

B. The Court's Decision In *Austin* Was Correct And Should Not Be Overruled

The Court in *Austin* held that corporations may constitutionally be prohibited from financing electoral advocacy with funds derived from business activities. That

holding was correct when issued and should not be overturned now. Use of corporate treasury funds for electoral advocacy is inherently likely to corrode the political system, both by actually corrupting public officeholders and by creating the appearance of corruption. Moreover, such use of corporate funds diverts shareholders' money to the support of candidates whom the shareholders may oppose.

Congress's interest in preventing these pernicious consequences is compelling, and Congress has chosen a valid means of achieving it—requiring a corporation to fund its electoral advocacy through the voluntary contributions of officers and shareholders who agree with its political statements. For the Court to overrule *Austin* now would open the political system, at every level of our representative democracy, to a form of corporate influence that federal law has proscribed since 1947. And it would do so in direct affront to Congress, which conducted years of factfinding and debate in reliance on *Austin*'s holding that corporations may constitutionally be required to finance electoral advocacy with funds donated specifically for political purposes.

1. The Court in* Austin *correctly held that business corporations may be barred from using treasury funds for electioneering, either directly or through conduits

The Court in *Austin* rested its decision on three basic propositions. *First*, electoral advocacy by for-profit corporations poses distinct risks, both to the public interest and to the corporation's shareholders, that are not implicated by individual electioneering. 494 U.S. at 658-660. *Second*, electoral advocacy by non-profit, nonstock corporations poses similar dangers if such corporations are allowed to serve as conduits for spending by

for-profit corporations. *Id.* at 664. *Third*, the option of engaging in electoral advocacy through a separate segregated fund is for most corporations a constitutionally sufficient alternative to the use of general treasury monies. *Id.* at 660-661. In endorsing those propositions, *Austin* is scarcely an outlier. Rather, those holdings are consistent with decades of federal legislation, as well as with this Court's case law both before and after *Austin* was decided.

a. i. Congress first recognized the special problem of corporate money in electoral politics more than a century ago, in 1907, when it banned corporate contributions to federal election campaigns. Congress similarly banned union contributions during World War II. In the wake of that ban, a dispute arose over whether the statutory term "contributions" encompassed independent expenditures. Extensive study of the efficacy of those prohibitions on corporations and unions led Congress to conclude that independent expenditures had frequently been used to evade the contribution bans. See *United States* v. *International Union UAW*, 352 U.S. 567, 579-584 (1957) (*UAW*).

Accordingly, in the Taft-Hartley Act, Congress 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; see *UAW*, 352 U.S. at 589 (prohibition applies to "the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party"); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-249 (1986) (*MCFL*) (construing the term "expenditure," in the context of regulating independent candidate-related communications, to require "express advocacy" of the candidate's election

or defeat). Congress has since re-enacted the expenditure prohibition, while expressly authorizing corporations and unions to establish and administer separate segregated funds for election-related spending. See *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 409-412 (1972) (discussing 1971 revision); 2 U.S.C. 441b. "This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (*NRWC*) (citation and internal quotation marks omitted).

ii. Corporate participation in candidate elections creates a substantial risk of corruption or the appearance thereof. Corporations can use electoral spending to curry favor with particular candidates and thus to acquire undue influence over the candidates' behavior once in office. See *Austin*, 494 U.S. at 678 (Stevens, J., concurring) (concluding, with respect to "corporate participation in candidate elections," that "the danger of either the fact, or the appearance, of *quid pro quo* relationships provides an adequate justification for state regulation of both expenditures and contributions"). The record in *McConnell*—which is by far the most extensive body of evidence ever compiled on these issues—indicated that, during the period leading up to BCRA's enactment, federal office-holders and candidates were aware of and felt indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 623-624 (D.D.C. 2003) (Kollar-Kotelly, J.); see also *id.* at 555-560 (discussing evidence).

The nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance of such corruption. Even minor modifications in complex legislation have great potential to benefit or burden particular companies, industries, or sectors. The economic stake of corporations in the nuances of such matters as industry-specific tax credits, subsidies, or tariffs generally dwarfs that of any set of individuals. And when those benefits can be obtained through a game of "pay to play," corporations are better suited than individuals to afford the ante. Corporate managers need not assemble a coalition of the like-minded; they can draw on the firm's entire capitalization without seeking the approval of shareholders. If only businesses can afford the investment necessary to pursue rents in this way, only businesses can reap the (even larger) reward. See, *e.g.*, *McConnell*, 251 F. Supp. 2d at 491, 511-512 (Kollar-Kotelly, J.). And the public perception that businesses reap such rewards from legislators whom they supported in campaigns creates an appearance of corruption that corrodes popular confidence in our democracy. *Id.* at 517.

Corporations, moreover, are artificial persons endowed by government with significant "special advantages" that no natural person possesses. *NRWC*, 459 U.S. at 207. Well before *Austin*, this Court recognized the need for "particularly careful regulation" to limit the effect of those corporate special advantages on the political process. *Id.* at 209-210; see *id.* at 207; *MCFL*, 479 U.S. at 256-257. Because corporations do not age, retire, or die, they can amass great wealth from their business activities even while changing owners, directors, and officers as needed. Corporations also benefit from lim-

ited liability; by permitting investors to contribute without taking responsibility for the corporations' actions, state law promotes corporations' accumulation of investment capital. See, *e.g.*, *Grojean* v. *Commissioner*, 248 F.3d 572, 575 (7th Cir. 2001) (Posner, J.). The government may take into account in its regulatory framework these state-created "advantages unique to the corporate form." *Austin*, 494 U.S. at 665.

A restriction on individuals' independent election-related spending, moreover, would intrude far more deeply on First Amendment values because it would prevent individuals from spending their own money to express their own electoral preferences. That is not the case with corporate spending, which does not reflect the personal views of the officers (who cannot appropriately spend corporate money for purposes of personal self-expression), the customers or shareholders (whose political preferences officers do not and generally cannot ascertain), or the corporation itself (which is an artificial entity that has no "beliefs" to express). Thus, while restrictions on the use of treasury funds for electioneering may prevent corporate officers from utilizing one effective means to further the corporations' economic interests, those restrictions do not hinder the expression of any natural person's ideas.[2]

[2] As Judge Kollar-Kotelly explained in her opinion in *McConnell*, corporations during the pre-BCRA period frequently financed advertisements that praised or criticized candidates based on issues unrelated to the mission of the financing corporation. 251 F. Supp. 2d at 613-614. A similar phenomenon has been observed in state judicial elections, where business and union advertising often focuses on candidates' records on crime rather than on issues of special concern to the corporate or union speaker. See, *e.g.*, Thomas R. Phillips, *The Merits of Merit Selection*, 32 Harv. J.L. & Pub. Pol'y 67, 81 & n.63 (2009); Dee J. Hall, *High Court Races as Barroom Brawls*, Wis. State J., Apr. 6, 2008,

iii. The Court did not decide in *Austin* or *McConnell* whether the compelling interest in preventing actual or apparent corruption provides a constitutionally sufficient justification for prohibiting the use of corporate treasury funds for independent electioneering. Nor did the Court's previous decisions resolve that question. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court struck down an independent-expenditure limit that applied to all persons, concluding that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. Whatever the accuracy of that assessment with respect to *individual* independent expenditures as of 1976, the record compiled in *McConnell* indicated that *corporate* spending on candidate-related speech, even if conducted independently of candidates, had come to be used as a means of currying favor with and attempting to influence federal office-holders. If for-profit corporations were permitted to use treasury funds to finance all forms of candidate-related expression—both everything permissible before BCRA *and* the express advocacy that has long been forbidden by 2 U.S.C. 441b—the risk of corruption and the appearance of corruption would only increase.

If the Court regards the fact or extent of that risk as uncertain, that doubt provides no ground for overruling *Austin*. Nor does the conclusion of the *Buckley* Court, offered 33 years ago without specific consideration of the distinct risks posed by *corporate* electioneering, pro-

---

at A1 (describing corporate-funded advertisement calling state judge "Loophole Louie"). That pattern of behavior reinforces the understanding that, for corporations and unions, electoral advocacy is a means to an end rather than an expression of political conviction.

vide a sound basis for discounting the import of the massive and much more recent *McConnell* record. Rather, if the Court concludes that the proper disposition of this case turns on the likelihood that unrestricted corporate electoral advocacy would lead to actual or apparent corruption, the Court should remand the case for evidentiary proceedings in the district court.

iv. Restrictions on the use of treasury funds for corporate or union electioneering also "protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208. Even before *Austin*, this Court had recognized the legitimacy of that interest. See *ibid.*; *MCFL*, 479 U.S. at 260. See generally Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871, 928-930 (2004) (explaining that support for the Taft-Hartley expenditure limitation was based in large part on the need to protect dissenting union members and shareholders). Persons who buy shares in for-profit corporations entrust money to the corporations' managers because of their business acumen, not their political ideology, and the purchase of corporate stock does not imply any intent to subsidize electoral advocacy.

If *Austin* were overruled, investors could not practicably divest from or avoid acquiring interests in corporations that engage in electioneering. Investors in mutual funds and beneficiaries of pension funds cannot easily monitor election-related expenditures by the various corporations in which the funds invest over time. And an individual's decision to eschew all mutual funds that might invest in a particular corporation's shares could

substantially limit his investment options. Even for the shrinking minority of investors who own shares directly, see Alicia D. Evans, *A Requiem for the Retail Investor?*, 95 Va. L. Rev. 1105, 1105 (2009) (noting that "retail investors own less than 30%" of the stock of U.S. corporations), keeping track of the corporation's electioneering may be difficult, see *Austin*, 494 U.S. at 674 n.5 (Brennan, J., concurring), and the capital-gains tax will often impose a financial disincentive to divestment.

This Court has approved protections against the use of investors' money without their consent to finance speech with which they disagree, as well as protections against the use of compulsory union dues for political purposes. *MCFL*, 479 U.S. at 260 (noting the Court's "acknowledg[ment of] the legitimacy of this concern" in both corporate and union contexts). Indeed, in the union context, the Court has recognized that the use of funds exacted from an individual for political or ideological messages with which that individual disagrees can itself be a First Amendment injury. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 235-236 (1977); cf. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 410-411 (2001). Although an investor in corporate stock has no similar constitutional *right* to insist that the funds he contributes not be used for electoral advocacy, Congress and state governments may appropriately act to protect shareholders' interests in avoiding unwanted subsidization of electioneering.

b. For the foregoing reasons, Congress and state legislatures may constitutionally prohibit for-profit corporations from using their general treasuries (as opposed to segregated funds, or PACs) for electoral advocacy. In order to prevent those corporations from accomplishing the same purpose indirectly, Congress and

the States may also forbid nonprofit corporations from engaging in electoral advocacy with funds received from for-profit corporations. See *Austin*, 494 U.S. at 664; *id.* at 673-674 (Brennan, J., concurring); *MCFL*, 479 U.S. at 262, 264.

In *MCFL*, the Court identified a limited class of corporations that are constitutionally exempt from Section 441b's prohibition on the use of corporate treasury funds for express advocacy because their political spending does not raise the dangers at which the prohibition is directed. 479 U.S. at 256-265. That exemption is available only to nonprofit corporations that, *inter alia*, decline to accept contributions from business corporations or labor unions. *Id.* at 264; see *McConnell*, 540 U.S. at 211; *Austin*, 494 U.S. at 664; note 1, *supra*. The Court in *MCFL* explained that this limitation on the scope of the exemption "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." 479 U.S. at 264.

To extend a constitutional exemption to *all* nonprofit corporations, including those (like the plaintiff in *Austin*, see 494 U.S. at 664) that accept substantial funding from business corporations, would provide a ready means for business corporations to circumvent the ban on their use of treasury funds for direct electoral advocacy. The record compiled in *McConnell* revealed that, even when business corporations could lawfully finance candidate-related advertisements (without express advocacy) in their own names, they often chose instead to do so "while hiding behind dubious and misleading names" and straw organizations. *McConnell*, 540 U.S. at 196-197 (quoting *McConnell*, 251 F. Supp. 2d at 237); cf. *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009) ("And For The Sake Of The Kids"). If this

Court were to hold that the challenged restrictions on corporate electioneering are constitutional as applied to for-profit corporations, but that nonprofit corporations are categorically exempt from those restrictions, the incentive to use nonprofits as conduits would be substantially increased.

c. "[U]nder BCRA," as under the pre-existing limits on corporate electoral advocacy imposed by 2 U.S.C. 441b, "corporations and unions may not use their general treasury funds" for electioneering, but they may "organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204; see *NRWC*, 459 U.S. at 201. Any shareholder or executive can voluntarily contribute to a corporation's PAC. BCRA Section 203, like Section 441b in its pre-BCRA form, thus restricts the manner in which funds for electioneering may be raised rather than the speech in which the corporation may engage. It is therefore "'simply wrong' to view" those provisions "as a 'complete ban' on expression rather than a regulation." *McConnell*, 540 U.S. at 204 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)).

The requirement that corporations and unions conduct their electioneering through PACs furthers the compelling government interests described above while allowing meaningful corporate and union participation in electoral campaigns. By ensuring that corporate electioneering is funded solely by willing donors, the PAC-financing requirement prevents corporations from acquiring undue electoral influence—with all its potential for actual or apparent corruption of office-holders—through the special state-created advantages of the corporate structure. The requirement also ensures that individuals may invest in shares of business corporations

without subsidizing electoral communications with which they disagree.

The PAC option has proved to be a workable and effective mechanism by which individuals (including individuals affiliated with corporations and unions) who wish to contribute to political activity can pool their resources for effective electoral advocacy. During the 2007-2008 election cycle, federal PACs raised $1.2 billion, of which $840 million was raised by corporations' and unions' separate segregated funds. See FEC, *Summary of PAC Activity* (Apr. 24, 2009) <http://www.fec.gov/press/press2009/20090415PAC/documents/4sumhistory2008_000.pdf>. And although the formation of a PAC does entail some administrative burden, appellant has already chosen to incur that burden: it has maintained a PAC for 15 years. J.A. 226a.

2. The decision in* Austin *ratified a longstanding principle of federal and state election law on which Congress has subsequently relied and that should not now be abandoned

a. As explained above (see p. 7, *supra*), Congress has prohibited corporate treasury contributions to federal candidates since 1907, and since 1947 it has barred the use of corporate treasury funds for independent expenditures in federal election campaigns. That longstanding congressional judgment, on a matter (the conduct of federal elections) as to which federal legislators have particular expertise, is entitled to this Court's respect. At the time *Austin* was decided, moreover, 20 States already barred electioneering expenditures by corporations. J.S. at 16 n.13, *Austin*, *supra* (No. 88-1569). Like 2 U.S.C. 441b, many of those state regimes (including the Michigan law at issue in *Austin*) forbade

the use of corporate treasury funds for electioneering but authorized corporations and unions to create and administer segregated funds to finance election-related spending. Because overruling *Austin* would negate a longstanding and central principle of federal and state campaign-finance law, concerns of *stare decisis* have especial force.

Precisely because federal restrictions on corporate electioneering have been in place for so long, the consequences of a decision recognizing a constitutional right for all corporations to use general treasury funds for electoral advocacy are difficult to predict. During the 2007-2008 election cycle, however, FEC-registered political parties spent $1.5 billion, and federal PACs spent $1.2 billion, while the *Fortune* 100 companies had combined revenues of $13.1 trillion and profits of $605 billion. If those 100 companies alone had devoted just one percent of their profits (or one-twentieth of one percent of their revenues) to electoral advocacy, such spending would have more than doubled the federally-reported disbursements of all American political parties and PACs combined. Cf. *Austin*, 494 U.S. at 659 (noting concern about "corporate domination of the political process"). That amount of corporate cash pouring into the political system, as earlier suggested, could dramatically increase the reality and appearance of *quid pro quo* corruption. Even the possibility of such a result counsels restraint in reversing prior decisions.

b. Particularly once *Austin* was decided, Congress and state legislatures were entitled to take as given that corporations could constitutionally be barred from using treasury funds for at least some forms of electoral advocacy. Based on that understanding, Congress devoted extraordinary time and energy to the consideration of

potential refinements to the federal campaign-finance regime. The bills that culminated in BCRA were debated for weeks and amended dozens of times during the seven years between initial introduction and BCRA's ultimate enactment. Those legislative debates reflected individual Members' understanding of, and careful attention to, this Court's decision in *Austin*. See, *e.g.*, 147 Cong. Rec. 4895 (2001) (statement of Sen. Snowe, cosponsor of Section 203); *id.* at 4899, 4905-4907 (views of legal scholars); *id.* at 5003 (statement of Sen. Feingold).[3]

Austin itself involved express electoral advocacy, see 494 U.S. at 714 (appendix to opinion of Kennedy, J., dissenting) ("Elect Richard Bandstra"), and the Court did not delineate precisely which corporate-funded communications can properly be treated as electioneering. But given this Court's decision in *Austin*, Congress was entitled to conclude that it had *some* authority to act in this area. Overruling *Austin* now would tell Congress, long after the fact, that its extraordinary effort to craft a constitutionally acceptable standard was a pointless endeavor.

c. Numerous provisions of BCRA, including its definition of "electioneering communication" and its ban on the use of corporate treasury funds for communications falling within that definition, were promptly challenged by a broad range of plaintiffs, including appellant. The parties compiled a voluminous record, and the proceedings in this Court included an extraordinary four-hour

---

[3] On the state level, use of corporate treasury funds for electioneering is currently prohibited by at least 22 States (and strictly limited by two more), including some that have adopted their statutes since *Austin* and in reliance on it. See, *e.g.*, *State* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 608-610 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000); Ariz. Rev. Stat. Ann. §§ 16-917(C), 16-919, 16-920 (2006).

oral argument. The plaintiffs who challenged Title II of BCRA, however, did not urge the overruling of *Austin*, and they did not dispute the government's general authority to prohibit the use of corporate treasury funds for express electoral advocacy. Rather, they contended that the challenged BCRA provisions unduly burdened corporate speech that mentions federal candidates but is *not* calculated to influence federal elections. See *McConnell*, 540 U.S. at 205-206. The *McConnell* plaintiffs' acceptance of *Austin* as controlling precedent, during the expedited proceeding authorized by Congress to facilitate prompt clarification of the rules that govern in this area, underscores the absence of any "special justification," *e.g.*, *IBM Corp.*, 517 U.S. at 856 (citation omitted), for overruling *Austin* now.

C. The Relevant Holdings Of *McConnell* Were Correct And Should Not Be Overruled

Over the many decades that Congress required corporations to fund express advocacy using voluntary PAC contributions, corporations increasingly came to use their treasuries to fund advertisements that omitted "magic words" of express advocacy but that functioned no differently. Voluminous evidence confirmed that the interests recognized in *Austin* extend to election-eve communications that are the functional equivalent of express advocacy. The facts have not changed, and there is no sound basis for rejecting the *McConnell* Court's determination that BCRA Section 203 is constitutional.

1. The Court in McConnell *correctly held that express advocacy and its functional equivalent may be treated alike, and that BCRA's definition of "electioneering communication" is not facially overbroad*

After extensive study and evidence-gathering over several sessions, Congress concluded that the existing restriction on corporation- and union-funded express advocacy had become ineffective. "Corporations and unions spent hundreds of millions of dollars" on advertising "specifically intended to affect election results." *McConnell*, 540 U.S. at 127. Those advertisements overtly attacked the character, qualifications, and fitness for office of federal candidates, but they were not subject to Section 441b under then-prevailing law because they did not include "magic words" of express advocacy. The record of the *McConnell* litigation amply bore out Congress's conclusions. See *id.* at 126, 193; *McConnell*, 251 F. Supp. 2d at 526-568 (Kollar-Kotelly, J.) (collecting advertisements); *id.* at 875-889 (Leon, J.) (same).

BCRA Section 203 was a targeted response. Consistent with the Court's recognition in *Austin* of the compelling governmental interests that justify barring corporations and unions from spending their general treasury funds on electioneering, Section 203 applied the same financing restriction to "electioneering communications," a term defined (and temporally limited) to capture advertisements that were electoral advocacy in substance if not in form. 2 U.S.C. 434(f)(3), 441b(b)(2). If corporations or unions wish to finance electioneering communications, they may do so through their separate segregated funds. 2 U.S.C. 441b(b)(2)(C).

As explained above, the plaintiffs in *McConnell* argued that BCRA's definition of "electioneering communi-

cation" encompasses an unduly broad range of speech that mentions federal candidates but is not intended to influence electoral outcomes. The Court rejected that facial challenge. Based on a voluminous record, the Court concluded that "the vast majority" of advertisements encompassed by the electioneering communication provision had no functional difference from advertisements regulated as express advocacy, and that the previously existing statutory dividing line had proved to be a "functionally meaningless" set of magic words. *McConnell*, 540 U.S. at 193, 206; see *id.* at 126-127, 131-132, 193-194, 206-207.

The relevant holdings in *McConnell* rest on two subsidiary conclusions. First, the Court held that the former "express advocacy" test was not constitutionally compelled, and that Congress could permissibly restrict the use of corporate treasury funds for communications that do not contain "magic words" but that are calculated to affect electoral outcomes. Second, the Court held that BCRA's definition of "electioneering communication" is a sufficiently accurate proxy for this kind of electoral intent to withstand a facial challenge. No sound basis exists for reversing either of those conclusions now. If, under *Austin*, corporations may constitutionally be forbidden from using treasury funds to finance advertisements that expressly urge the election or defeat of federal candidates, then they likewise have no constitutional right to use treasury funds for the "functional equivalent" of express advocacy. And appellant has offered no new empirical evidence casting doubt on the *McConnell* Court's conclusion that "the vast majority" of "electioneering communications," as defined by the statute, were indeed calculated to influence electoral outcomes.

2. No sound justification exists for overruling the relevant holdings in **McConnell**

Even if the relevant portion of *McConnell* were open to more substantial question, there are at least three reasons—in addition to the general importance of *stare decisis* and appellant's previous failure to urge overruling of that decision—for the Court to decline to overrule *McConnell* now.

a. This Court's intervening decision in *WRTL* has eliminated any significant risk that BCRA's restrictions on corporate financing of "electioneering communications" will be applied to speech that is not actually calculated to influence federal elections. In *WRTL*, the Court concluded that BCRA's PAC-financing requirement is constitutional as applied to particular communications if, but only if, a communication is the "functional equivalent" of express advocacy, 551 U.S. at 465 (opinion of Roberts, C.J.)—*i.e.*, if the communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.* at 470. Thus, if some number of "electioneering communications" are *not* the functional equivalent of express advocacy, the as-applied constitutional exemption recognized in *WRTL* (and subsequently codified by the FEC, see 11 C.F.R. 114.15) ensures that BCRA Section 203 does not apply to those communications.

b. The FEC has provided a simple mechanism for corporations and unions to claim that a particular electioneering communication is permissible under *WRTL*. See *FEC Form 9* (2007) <http://www.fec.gov/pdf/forms/fecfrm9.pdf>. In the short time between the FEC's implementation of *WRTL* and the 2008 election, corporations and unions reported spending *$108.5 million* on electioneering communications that fell within

the *WRTL* exemption. See FEC, *Electioneering Communication Summary* (visited July 23, 2009) <http://www.fec.gov/finance/disclosure/ECSummary.shtml>. That experience suggests that the standard articulated in *WRTL* has not chilled the use of corporate treasury funds for speech that falls within BCRA's definition of "electioneering communication" but is not the functional equivalent of express advocacy.

c. Congress anticipated that constitutional challenges to BCRA would be brought, and it established a mechanism for expedited review of such challenges, including a right of direct appeal to this Court. See BCRA § 403(a), 116 Stat. 113. In *McConnell*, the parties compiled a massive record, and the district court and this Court issued voluminous opinions resolving a variety of constitutional challenges to the statute. Congress's evident intent to provide prompt clarification of the rules that apply in the campaign-finance context, and the extraordinary resources devoted by the courts and the parties to the *McConnell* litigation, weigh heavily against overruling a significant aspect of that decision now.

CONCLUSION

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

Respectfully submitted.

ELENA KAGAN
Solicitor General

JULY 2009