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 *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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## INTEREST OF *AMICUS CURIAE*[1]

As detailed in its prior *amicus* brief, the National Rifle Association ("NRA") is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its nearly four million members are individual Americans bound by a common desire to preserve the Second Amendment right to keep and bear arms. The NRA funds its political speech almost exclusively with dues and contributions from individual members. The organization does not accept business corporations as members, and the contributions it receives from such corporations are negligible. *See* Br. of *Amicus Curiae* NRA in Support of Appellant ("NRA *Amicus* Br.") 1-2.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Government has had an epiphany in response to the Court's request for supplemental briefing: despite arguing to the contrary in case after case before this Court, the Government has now decided that nonprofit advocacy corporations whose "operations are financed 'overwhelmingly' by individual donations" – like Citizens United and the NRA – are, after all, "distinctly atypical" corporations when

[1] The parties have consented to the filing of this brief. This brief was not authored in whole or in part by any counsel for a party to this case. No person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

it comes to regulating their political speech. Supplemental Br. for the Appellee ("FEC Suppl. Br.") at 2-3 & n.1. One might have hoped that the Government would confess error and join Citizens United and its brethren in their struggle to recover their political voices, lost since passage of BCRA. But, no – that would mark a substantial inroad into Title II in favor of core political speech, and so the Government instead only pays lip service to speech by nonprofits for the sake of keeping them mute.

Thus, the Government seems to argue that Citizens United, as a nonprofit advocacy corporation, is "distinctly atypical" enough to make this case a bad vehicle for overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), but not enough to actually qualify it for (ever-illusory) First Amendment protection. The upshot, according to the Government, is that this Court should hold against Citizens United on the basis of *Austin* without finding occasion actually to analyze *Austin*. Such reasoning would seem risible were the continued specter of criminal prosecution not lurking behind it.

"Enough is enough." *FEC v. Wisconsin Right to Life, Inc. ("WRTL II")*, 127 S.Ct. 2652, 2672 (2007) (Roberts, C.J.). There is only one sure way finally to put an end to this and vindicate the First Amendment. It is to trace the Government's tangled line of argument back to its source. In the pages that follow, *Amicus* NRA respectfully explains why this Court should overrule *Austin* and *McConnell v. FEC*, 540 U.S. 93 (2003), at least to the extent they stand for

the arresting proposition that government may bar nonprofit advocacy corporations from using individual donations to fund political speech. Correspondingly, the Court should restore the provision of Title II (the Snowe-Jeffords provision) that expressly exempted 501(c)(4) corporations funded by individuals from Section 203's speech ban, by striking down the superseding provision (the Wellstone amendment) that placed 501(c)(4) corporations under the same cone of silence as for-profit business corporations. Alternatively, this Court should overrule *Austin* in whole and *McConnell* in part, holding that all corporations (for-profit and nonprofit alike) are no less entitled under the First Amendment than are other speakers to air their independent political speech to the public, including around election time.

## ARGUMENT

### I. The Government's Distinction of Nonprofit Advocacy Corporations Rings Hollow

In discounting the burdens of Title II (while simultaneously defending them as sacrosanct), the Government has always trumpeted the exception for certain nonprofits established in *FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 264 (1986). That exception has proved illusory in practice, particularly because the Government has been so begrudging in administering and so zealous in policing it. *See* NRA *Amicus* Br. 22-24. Indeed, the Government has gone to court repeatedly arguing

that corporations such as Citizens United and the NRA cannot claim the benefit of *MCFL*. *See FEC v. National Rifle Ass'n*, 254 F.3d 173, 190-91 (D.C. Cir. 2001); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995); 63 Fed. Reg. 29,359-29,360 (1998) (collecting decisions). Against this backdrop, footnote 1 of the Government's supplemental brief comes with poor grace. According to it, Citizens United "would appear to" come within certain lower-court decisions (ruling *against* the Government) construing the *MFCL* exception because Citizens United's "overall operations are financed 'overwhelmingly' by individual donations." FEC Suppl. Br. 3 n.1. In saying this, of course, the Government by no means acknowledges that "these decisions" are *correct*; to the contrary, it continues to maintain they are wrong. Nor does the Government agree that Citizens United *in fact* comes within them; it points only to an "appear[ance]" behind which the Government would surely poke over years of protracted litigation.

Indeed, the FEC's regulations implementing *MCFL* categorically deny the exemption if the corporation receives even a penny from business entities, as Citizens United and the NRA do. *MCFL*, 479 U.S. at 264 (corporation must have "policy not to accept contributions from" business corporations); 11 C.F.R. § 114.10(c) (corporation must "not directly or indirectly accept donations of anything of value from business corporations"); NRA *Amicus* Br. 4, 24-25. Even setting that aside, Citizens United and the NRA

would also be disqualified from the *MCFL* exception simply because they maintain programs and benefits extending beyond their political mission, strictly defined. *Id*. Thus, the Government's seeming concession marks nothing more than a last-minute maneuver by which to shield *Austin* from this Court's scrutiny, offering the false promise of extending *MCFL* to additional nonprofit corporations today only so that the Government may withhold that exception and restrict their speech (along with all other corporations' speech) tomorrow.

As the Government would now have it, "a nonprofit corporation whose stated purpose is expressly ideological" and whose electoral speech is funded "'overwhelmingly' from individual donations" is "a distinctly atypical corporation" because its general treasuries are not "unrelated to the dissemination of political ideas." FEC Suppl. Br. 2-3. Such solicitude by the Government for the special case of nonprofits is sure to have been lost on attentive readers of all of its prior submissions to this Court. In *those* filings, the Government uniformly maintained that – outside the preexisting regulatory strictures of *MCFL* – nonprofits were no different from all other corporations. *See* Br. for the Appellee 29-32; Br. for the FEC 75, 78, 113, *McConnell v. FEC*, No. 02-1674 (S.Ct. Aug. 2003). The Government did so, in fact, in direct opposition to arguments by the NRA and others that nonprofit advocacy corporations funded predominantly by individuals posed no meaningful risk of *Austin*-style distortion. NRA *Amicus* Br. 16; Br. for

Appellants the NRA, *et al.* 20-23, 28-33, *NRA v. FEC*, No. 02-1675 (S.Ct. July 8, 2003); *FEC v. Beaumont*, 539 U.S. 146, 159 (2003) ("advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve").

Lest there be any doubt, the Government *defended* a provision of Title II that *specifically targeted* nonprofit corporations such as Citizens United and the NRA for restriction, notwithstanding their funding from individual supporters. As the NRA explained in its prior *amicus* brief, Congress initially accounted for the distinctive status of corporations like Citizens United and the NRA. Specifically, Congress enacted the Snowe-Jeffords provision to exempt from BCRA § 203 independent expenditures by a nonprofit 501(c)(4) corporation, provided that "the communication is paid for exclusively by funds provided directly by individuals," 2 U.S.C. § 441b(c)(2); and, if the corporation receives funds from "business activities" or other corporations, provided that the funds used for the communication are kept in "a segregated account to which only individuals can contribute," § 441b(c)(3)(B).

But Congress then decided to cast a wider net. It later enacted the Wellstone amendment, § 441b(c)(6), which nullified Snowe-Jeffords, for fear that

"negative attack ads" from these nonprofits would continue to threaten incumbents.[2] The Wellstone amendment has stood out like an unconstitutional sore thumb ever since – it serves an illegitimate, content-based purpose and *Austin*'s anti-distortion aim could be achieved through the less-restrictive alternative of Snowe-Jeffords. *See* NRA *Amicus* Br. 5-6, 9-16; *McConnell*, 540 U.S. at 248-50, 260, 262-64 (Scalia, J., dissenting) (Section 203 "cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government.").

## II. The Court Should Overrule *Austin* and *McConnell* at Least as to Nonprofit Advocacy Corporations' Independent Expenditures Funded by Individuals

In *Austin*, the Court thought the restriction on independent corporate expenditures was necessary to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. In *McConnell*, the Court relied upon *Austin*'s anti-distortion rationale, without critical analysis, to

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[2] As an additional measure of protection, Congress further leveraged the "media-related advantages of incumbency" by exempting media corporations from BCRA § 203's restrictions. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

uphold BCRA § 203 on its face. 540 U.S. at 205. Far from preventing a nonprofit advocacy group's political voice from being unfairly *inflated* by funds derived from the economic marketplace, however, Section 203 has artificially *deflated* the strength of such a group's voice in the political marketplace vastly below its "contributors' support for the corporations' political views" and has, perversely, "concentrat[ed] more political power in the hands of the country's wealthiest individuals." *Austin*, 494 U.S. at 660-61; *WRTL II*, 127 S.Ct. at 2686-87 (Scalia, J., concurring); *see* NRA *Amicus* Br. 2-3, 11-16; *McConnell*, 540 U.S. at 255-58 (Scalia, J.).

The NRA respectfully reiterates that it and Citizens United, along with other nonprofit advocacy organizations funded by individuals, have always been constitutionally distinct from business corporations. Indeed, "associations" are essential for vigorous public debate in a democracy because they "circulate" "opinions or sentiments" to "the multitude" and possess a voice loud enough to be heard and thus to check governmental impingement upon rights. 2 Alexis de Tocqueville, DEMOCRACY IN AMERICA 109 (P. Bradley ed. 1948). If anything, therefore, speech by corporations – particularly nonprofit corporations funded by like-minded individuals of modest means – deserves a special place under the First Amendment. Consequently, independent expenditures by such groups should be categorically exempt from limitation.

There simply is no answer to this reality. The Government nonetheless purports to offer one, positing that it may limit independent expenditures by nonprofit advocacy corporations because the nonprofits might otherwise "serve as conduits for spending by for-profit corporations." FEC Suppl. Br. 6-7. Of course, Snowe-Jeffords solves that problem completely by limiting a nonprofit advocacy corporation's funding of electioneering communications to the amount of donations it receives *from individuals*. The prospect of nonprofit corporations becoming mere conduits for *Austin*-type distortion would thus be nil.

Certainly, fidelity to *Austin* by no means mandates the miserly delineation of a nonprofit exemption that the FEC has taken from *MCFL*. In *Austin*, the Court was concerned that there was "little or no correlation" between the corporation's wealth and its contributors' "support for the corporation's political ideas" because 75 percent of the corporate speaker's contributors were business corporations. 494 U.S. at 660. *Austin* did not address whether nonprofit advocacy corporations with a smaller positive percentage of for-profit contributors would be beyond the Government's reach. Clearly, however, if a nonprofit's political expenditure is funded solely by contributions from individuals who are "informed that their money may be used for [a particular electioneering] purpose," the funds provide not only a "rough barometer" but a near perfect correlation of the public's support for the corporation's political view. *MCFL*, 479 U.S. at 258, 261. Likewise, where

the funds come overwhelmingly from informed individuals, there is a strong "correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660.[3] Such is the case here, where less than one percent of the funds for *Hillary* came from for-profit corporations and Citizens United "is funded predominantly by donations from individuals who support [its] ideological message." Br. of Appellant at 5, 7; JA 244a, 251a-52a.[4]

In sum, an independent electoral expenditure like *Hillary* – paid for by a nonprofit corporation overwhelmingly with contributions from informed individual supporters – is categorically exempt from Section 203, because the expenditure "accurately reflects members' support for the organization's political views." *Austin*, 494 U.S. at 666. This Court should overrule both *Austin* and *McConnell* insofar as necessary to vindicate the ability of Citizens United,

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[3] The percentage of business contributions rather than the absolute amount is the appropriate measure of the correlation. *See* NRA *Amicus* Br. 24.

[4] Thus, it should not matter that Citizens United used a *de minimis* amount of business funds to finance *Hillary* or co-mingled its funds rather than strictly comply with Snowe-Jeffords, which was not the operative standard at the time. As long as a nonprofit corporation's contributions by informed individuals are equal to all or all but a *de minimis* amount of its independent electoral expenditures, there is no constitutionally significant risk of *Austin*-style distortion.

the NRA, and other nonprofit advocacy groups to use donations from like-minded individuals to fund electoral speech.

## III. The Court Should Overturn *Austin* in Whole and *McConnell* in Part

More generally, the Court would be amply justified in overturning *Austin* in whole and that portion of *McConnell* upholding Section 203 on its face. The doctrine of *stare decisis* does not stand in the way. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S.Ct. 2705, 2734 (2007) (Breyer, J., dissenting) ("Justice Scalia, writing [in *WRTL II*, 127 S.Ct. at 2685-86], well summarizes [the] law" of *stare decisis*). As Justice Scalia observed recently, "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment ... and to do so promptly where fundamental error was apparent." *WRTL II*, 127 S.Ct. at 2684-85. *Austin* and *McConnell* employed flawed reasoning to sanction an unworkable regime – one that shunts most corporate electoral speech into a world of post-litigation irrelevance and skews the political marketplace in favor of wealthy individuals and media conglomerates. The two decisions are recent aberrations in an otherwise robust First Amendment tradition of assiduously protecting political speech and leaving it to flow free. Groping for precedent, the Government notes that "since 1947 [Congress] has barred the use of corporate treasury funds for independent expenditures in federal election campaigns," FEC Suppl. Br. 7, 16, but the

Court "expressly declined to pronounce upon the constitutionality of such restrictions" until *Austin*. *WRTL II*, 127 S.Ct. at 2685-86 (Scalia, J.). And reversal of *Austin* and *McConnell* would not disrupt any contractual or property interests formed in reliance upon those decisions.

### A. The Government Has Abandoned *Austin*'s Anti-Distortion Rationale

The Government, in grasping for strands of doctrine and reasoning that might ground *Austin*'s holding, does not even mention the anti-distortion rationale that expressly undergirds it. This is not surprising, for that anti-distortion rationale has never found meaningful existence or explication outside *Austin* itself, apart from *McConnell*'s unexamined reliance thereon.

*Austin*'s anti-distortion rationale does not square with the Court's considered judgments in prior and subsequent cases. Just over a year ago, the Court stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Davis v. FEC*, 128 S.Ct. 2759, 2773 (2008). "The hallmark of corruption is the financial '*quid pro quo*': dollars for political favors." *FEC v. National Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 497 (1985). *Austin*-style distortion has no connection to actual or apparent corruption of public officials, as even *Austin* recognized.

494 U.S. at 659-60 (calling distortion "a different type of corruption" from "financial *quid pro quo*"). Indeed, the Government now appears to concede as much. FEC Suppl. Br. 11 ("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.").

Rather, "[t]he only effect ... that the 'immense aggregations' of wealth will have (in the context of independent expenditures) on an election is that they might be used to fund communications to convince voters to select certain candidates over others" – that is, "to convince voters of the correctness of their ideas." *McConnell*, 540 U.S. at 274 (Thomas, J., dissenting). Legislation that suppresses the ability to compete effectively in the marketplace of political ideas "is antithetical to everything for which the First Amendment stands." *Id*.; *id*. at 324 (Kennedy, J., dissenting). Moreover, such distortion is "*especially*" "unlikely [under Title II because] disclosure requirements *tell* the people where the speech is coming from." *Id*. at 258-59 (Scalia, J., dissenting).

Finally, if mitigating *Austin*-style distortion were a compelling governmental interest, Section 203 would be impermissibly underinclusive because expenditures by wealthy political activists are no less likely to distort than ones by corporations.

In sum, the Government is correct to abandon *Austin*'s anti-distortion rationale.[5] We respectfully urge this Court to follow suit.

### B. Gratitude for Political Support Does Not Equate to Corruption

With the anti-distortion rationale moribund, the Government scurries to justify Title II as the antidote for actual or apparent corruption. The Government posits that "federal office-holders and candidates [might be] aware of and [feel] indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents." FEC Suppl. Br. 8. This argument is as misplaced as it is familiar. The gratitude a candidate feels to his supporters "is not a *corruption* of the democratic political process; it *is* the democratic political process." *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J. dissenting). The fear that a candidate may feel grateful for political support – whether a vote, an endorsement, an independent issue ad, or an independent ad extolling the candidate's virtues or decrying the opponent's vices – is, in a real sense, a fear of democracy itself. Those who

[5] The Government's revisionist attempt to justify Title II as protection for corporate shareholders, FEC Br. at 12, which is generally flawed for reasons discussed below, specifically makes no sense as applied to nonprofit advocacy organizations such as Citizens United and the NRA, whose speech naturally attracts only those individuals who support it.

provide such support naturally expect that, if the campaign succeeds, the official will cast votes in a way that reflects the shared views that inspired the support in the first place.

This is a founding principle of our Republic. As Publius explained, not only is it "natural" that a candidate for office "should be willing to allow [his 'fellow-citizens'] their proper degree of influence upon his conduct," but also such "dependence on the people" is a central virtue of democracy, for it is "the primary control on the government." THE FEDERALIST No. 35, at 221 (Hamilton); *id*. No. 51, at 349 (Madison). Or, as Justice Kennedy more recently put it: "It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *McConnell*, 540 U.S. at 297; *see also id*. at 259 (Scalia, J.). "Evil corporate (and private affluent) influences are well enough checked (so long as adequate campaign-expenditure disclosure rules exist) by the politician's fear of being portrayed as 'in the pocket' of so-called moneyed interests." *Id*.

The Government tries to blur the line between ordinary political gratitude and *quid pro quo* transactions, but the Court has drawn the line straight, bright, and firm. In *Buckley v. Valeo*, the Court concluded that "independent expenditure ceiling[s] ... fail[ ] to serve *any* substantial governmental interest

in stemming the reality *or appearance* of corruption in the electoral process." 424 U.S. 1, 47-48 (1976) (emphases added); *see also, e.g., FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001). Citing Judge Kollar-Kotelly's opinion from the three-judge district court in *McConnell*, the Government here asserts that the "record in *McConnell* ... indicated that ... federal office-holders ... felt indebted to corporations ... that financed [favorable] electioneering advertisements." FEC Suppl. Br. 8. Tellingly, no other judge on the *McConnell* panel joined Judge Kollar-Kotelly's skimpy collection of evidence and no Justice later ratified it. More importantly, as Judge Kollar-Kotelly admitted, "the record [did] not have any direct examples of votes being exchanged for" independent electioneering communications, in marked contrast to the robust evidentiary record supporting Title I. *Compare McConnell v. FEC*, 251 F.Supp.2d 176, 555-60, 623-24 (D.D.C. 2003) (Kollar-Kotelly, J.), *with McConnell*, 540 U.S. at 129-30, 143-52, 155-56. Today, "[n]o one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures." *WRTL II*, 127 S.Ct. at 2678 n.4 (Scalia, J.).

Moreover, the gratitude "rationale has no limiting principle," and would leave independent political expenditures of every stripe exposed to regulatory suppression. *McConnell*, 540 U.S. at 329 (Kennedy, J.). Under the Government's theory, "Congress would have the authority to outlaw even

pure issue ads," independent expenditures by individuals, and independent expenditures by PACs "because they, too, could endear their sponsors to candidates who adopt the favored positions." *Id*. But the Court has rightly rejected each of those restrictions. *See WRTL II*, 127 S.Ct. at 2672; *Buckley*, 424 U.S. at 51; *NCPAC*, 470 U.S. at 498; *McConnell*, 540 U.S. at 275 n.8 (Thomas, J.).[6] In short, the Government's false equation of gratitude to corruption rings no truer now than it did before.

### C. No Other Rationale Justifies BCRA § 203

None of the Government's other asserted rationales for limiting independent expenditures by corporations should carry the day.

First, *Austin*'s anti-distortion theory ultimately seems to reflect a desire to "level the playing field" between wealthy and non-wealthy political speakers. That is most certainly not a legitimate government

[6] According to the Government, "[t]he nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance" thereof. FEC Suppl. Br. 9. There is no reason to suppose, however, that wealthy, powerful, or influential individuals cannot provide assistance comparable to that of business corporations when it comes to helping candidates win office. And there certainly is no reason to suppose that "corporate political activity" by a *PAC*, which all agree cannot be stifled, does not pose precisely the same risk of corruption or the appearance thereof.

objective. *Davis*, 128 S.Ct. at 2773-74; *MCFL*, 479 U.S. at 257; *Buckley*, 424 U.S. at 48-49; *WRTL II*, 127 S.Ct. at 2677 (Scalia, J.).

Second, *Austin* and the Government evince a distrust of corporate speech and participation in the political process. *See* FEC Suppl. Br. 9-10. But the Court has repeatedly recognized that express advocacy is "at the heart of the First Amendment's protection" and is "indispensable to decisionmaking in a democracy"; this is "no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978); *Buckley*, 424 U.S. at 45, 50, 187 (striking down restriction on independent expenditures by "persons," which included "corporation[s]"); *see also WRTL II*, 127 S.Ct. at 2677-78 (Scalia, J.). Indeed, in *Bellotti* the Court squarely rejected the idea that corporate participation "would exert an undue influence on the outcome of a referendum vote" by "drown[ing] out other points of view" and "destroy[ing] the confidence of the people in the democratic process." 435 U.S. at 789.

Third, *Austin* expressed concern, which the Government echoes, for shareholders, whose "purchase of [for-profit] corporate stock does not imply any intent to subsidize electoral advocacy." FEC Suppl. Br. 12-13; *Austin*, 494 U.S. at 663. But shareholders necessarily delegate some authority to the corporation to act in a way that maximizes the shareholders' return. Presumably, if a business corporation engages in political speech, it does so to

serve its business interests and thus benefit its shareholders. If shareholders nonetheless disagree with the way in which the corporation exercises its authority, they are protected by the "procedures of corporate democracy," as well as the "free[dom] to withdraw [the] investment at any time and for any reason." *Bellotti*, 435 U.S. at 794-95 & n.34; *see McConnell*, 540 U.S. at 324-25 (Kennedy, J.); *id*. at 275 (Thomas, J.). Likewise, a contribution to a non-profit advocacy corporation, such as Citizens United or the NRA, "necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor," and a member "dissatisfied with how funds are used can simply stop contributing." *MCFL*, 479 U.S. at 261. Of course, "contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *NCPAC*, 470 U.S. at 494-95.

Finally, when enacting BCRA § 203, Congress fretted "that there is too much money spent on elections." *McConnell*, 540 U.S. at 261 (Scalia, J.). But Congress was not concerned that this money was being spent running disciplined ads supporting

re-election of incumbents. Rather, as explained above, Congress enacted Title II for the utterly impermissible purpose of suppressing speech that threatened incumbents – that is, Congress itself. *Id*. at 261-64. Nonprofits were a particular target but not the only one; Title II "prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort." *Id.* at 248-50; *see* NRA *Amicus* Br. 9-10.

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Section 203 is, therefore, invalid in its origins, design and operation. And it is due to be struck down along with the anomalous and misconceived precedents that paved its way.

## CONCLUSION

For the reasons stated here, in the NRA's prior *amicus* brief, and in Citizens United's briefs, the judgment of the district court should be reversed, and Title II's prohibition on corporate funding of electioneering communications either should be held categorically unconstitutional as applied to nonprofit corporations that fund their electioneering communication with contributions from individuals informed of the corporation's political purpose, or else should be held unconstitutional on its face.

Respectfully submitted,

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