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 *AMICI CURIAE* HACHETTE BOOK GROUP, INC. AND HARPERCOLLINS PUBLISHERS L.L.C. IN SUPPORT OF NEITHER PARTY ON SUPPLEMENTAL QUESTIONS

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INTEREST OF AMICI CURIAE[1]

Amici curiae, Hachette Book Group, Inc. (Hachette Book Group) and HarperCollins Publishers L.L.C. (HarperCollins), are publishing companies that publish books on a wide range of subjects, including books about electoral campaigns and candidates for elected office, and books written by political figures. Hachette Book Group is a leading trade publisher based in New York and a division of Hachette Livre, the second largest book publisher in the world. Hachette Book Group publishes about 600 books per year. HarperCollins Publishers L.L.C. (HarperCollins) is one of the world's leading publishers. HarperCollins is based in New York and is a subsidiary of News Corporation. The company publishes under the divisions of HarperCollins General Books Group–U.S., HarperCollins Children's Books Group–U.S., HarperCollins U.K., HarperCollins Canada, HarperCollins Australia, HarperCollins India, HarperCollins New Zealand, and Zondervan.

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[1] The parties have consented to the filing of this brief. No counsel for a party prepared this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

HarperCollins' revenues exceed $1 billion each year.

This case is about a film, not a book. However, the issue of the government's power to regulate the publication of books referring to candidates for federal office, or containing "express advocacy" or the "functional equivalent of express advocacy," was raised at Oral Argument before the Court. Specifically, the Deputy Solicitor General responded to hypothetical inquiries from the Court by contending that: (1) books downloaded for reading onto an Amazon Kindle electronic reader device are subject to Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b (2005), Tr. 28:21-29:18; (2) books that include express advocacy or its functional equivalent could be subject to pre-existing provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 et seq. (2005), such that "a corporation could be barred from using its general treasury funds to publish the book," Tr. 29:10-14; see also Tr. 31:14-32:7; and (3) more generally, that the interest in preventing corruption of the electoral process permits Congress to require corporations, which publish books that include either express advocacy or its functional equivalent, to fund those books through segregated funds or a political action committee (PAC). Tr. 27:15-31:1.

Any regulation of books directly implicates and affects amici's rights and interests. Amici are

key players in the marketplace of ideas who publish books about electoral campaigns and candidates in the ordinary course of their business, in which they do not serve as conduits for the type of campaign-related spending that may create a threat to the political marketplace. If the Deputy Solicitor General's responses to the Court's hypothetical questions were correct, book publishers would need to make significant changes to their business models and practices, for example, to establish special segregated funds for the writing, advertisement, publication and distribution of any book that included electoral speech. They are not correct. The Deputy Solicitor General's responses depart from statutory and constitutional law, as well as regulatory practice to date.

In its supplemental briefing, the government appears to soften its positions. Amici note, however, that the government's supplemental briefing does not explicitly revise the statements made during Oral Argument in connection with books. Consequently, amici consider it important to articulate for the Court why those statements are inconsistent with the relevant statutory language and implementing regulations, and are not supported by Austin v. Michigan Chamber of Commerce, 494 U.S. 653 (1990), or McConnell v. FEC, 540 U.S. 93 (2003).

SUMMARY OF THE ARGUMENT

The question now before the Court is whether the Court should overrule either Austin or the part of McConnell that addresses the facial validity of BCRA Section 203. Amici respectfully submit that it is not necessary for the Court to overrule either Austin or the relevant part of McConnell in order to guarantee the constitutional protection of electoral speech in books, whether in printed form or downloaded onto an Amazon Kindle or similar device. Specifically, amici submit that: (1) books are plainly exempted from BCRA Section 203, such that there is no reason for the Court to consider Austin or McConnell in connection with this issue; and (2) even if the Court were to visit the broader constitutional inquiry about the government's authority to regulate books containing electoral speech, neither Austin nor McConnell entails or permits the potential imposition of restrictions on books.

As an initial matter, as the Deputy Solicitor General conceded, Section 203 of BCRA on its face does not apply to paper-printed books. Tr. 35:24-36:5. Section 203 is also inapplicable to books distributed via an electronic reader device, such as an Amazon Kindle, because such books are not "broadcast, cable, or satellite communication[s]." 2 U.S.C. § 434(f)(3)(A)(i) (2005).

Further, nothing in either Austin or McConnell supports the extension to books of the government's authority to regulate electioneering communications. Books present none of the features associated with the media that McConnell addresses. Unlike other forms of media deemed to present the greatest risk of corruption, books require a willing reader who "opts in" to seeking, acquiring and reading the book. Accordingly, neither Austin nor McConnell supports the claim that Congress may constitutionally regulate books.

ARGUMENT

I. BCRA SECTION 203 DOES NOT APPLY TO BOOKS EVEN IF DISTRIBUTED VIA ELECTRONIC READER DEVICES SUCH AS AN AMAZON KINDLE

A. BCRA Section 203 Does Not Apply to Books

Section 203 of BCRA prohibits corporations from using their general corporate treasury funds to finance "electioneering communications," 2 U.S.C. § 441b(b)(2), which are defined as "any broadcast, cable, or satellite communication" that meets certain criteria. Id. § 434(f)(3)(A)(i). Where "the statutory text is plain and unambiguous," the statute must be applied "according to its terms." Carcieri v. Salazar, 129 S.Ct. 1058, 1063-64 (2009). By its plain, unambiguous language, BCRA Section 203 does not apply to paper-printed books. The

BCRA's implementing regulations further confirm that BCRA Section 203 does not apply to paper-printed books. See 11 C.F.R. § 100.29(c)(1) (2009) ("[E]lectioneering communication does not include communications appearing in print media . . . .").[2]

A book distributed to an electronic reader device, such as an Amazon Kindle, is equally excluded from the scope of BCRA Section 203. Such a book is, quite simply put, a book; it consists of a large number of successive words rendered on a flat surface. Books downloaded onto electronic reader devices are not fundamentally different from paper-printed books; indeed, many such devices

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[2] "Electioneering communications" has also been defined by at least 13 states to include some forms of non-broadcast communications, including billboards, pamphlets, paid print advertising, where such communications are targeted at an election, appear close in time to that election, clearly identify a candidate, and incur cost over a specified threshold. None of these expanded state definitions includes books. Alaska Stat. § 15.13.400 (2009); Cal. Elec. Code § 304 (West 2009); Conn. Gen. Stat. Ann. § 9-601b (West 2009); Fla. Stat. Ann. § 106.011(13) (West 2009); Haw. Rev. Stat. § 11-207.6(c) (2009); Idaho Code Ann. § 67-6602(f) (2009); 10 Ill. Comp. Stat. Ann. 5/9-1.14 (West 2009); Me. Rev. Stat. Ann. tit. 21-A, § 1014(2-A) (2009); Okla. Stat. tit. 74, § 257:1-1-2 (2009); S.C. Code Ann. § 8-13-1300(31) (2008); Vt. Stat. Ann. tit. 17, § 2891 (2008); Wash. Rev. Code Ann. § 42.17.020 (West 2009); W. Va. Code Ann. § 3-8-1a(12)(A) (West 2009).

have been designed to look and feel as much like paper-printed books as possible. See, e.g., Kindle – Features – Enhanced Reading™, http://www.amazon.com/Kindle-Amazons-Wireless-Reading-Generation/dp/B00154JDAI (last visited July 30, 2009) ("Utilizing the latest in electronic-ink display technology, Kindle provides a crisp black-and-white 6" screen with the same appearance and readability of printed paper."). Much like a paper-printed book, the reader must flip each page of the book on an Amazon Kindle, in this case by punching an electronic button. Most importantly, the reader must choose to read the book in question and take an affirmative action—purchasing and downloading the book—in order to read it. The content of a book cannot be pushed onto an unwilling reader in the manner in which, for example, a television or radio advertisement might. The process of acquiring a book on an Amazon Kindle is similar to acquiring a physical book; the consumer—much like going to a bookstore or visiting Amazon.com on the Internet—must go to the "store" on the wireless reader device and decide which book to buy and read.

B. A Book Distributed to an Electronic Book Reader Device such as an Amazon Kindle Is Not a "Broadcast, Cable, or Satellite Communication" Subject to BCRA Section 203

In any event, a book distributed to an electronic reader device is not a "broadcast, cable, or satellite communication." 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(a), (b)(1). Books are not "publicly distributed by a television station, radio station, cable television system, or satellite system," 11 C.F.R. § 100.29(b)(1), to electronic book reader devices. Rather, a book is downloaded onto an electronic reader device, either wirelessly (through high-speed wireless data networks such as those provided by Sprint and AT&T) or through computers, via the Internet. *See* Product Description – Introducing Kindle™, http://www.amazon.com/Kindle-Amazons-Original-Wireless-generation/dp/B000FI73MA (last visited July 30, 2009) ("Using the same 3G network as advanced cell phones, [Amazon] deliver[s] your content using our own wireless delivery system . . . ."); Kindle Features – Wireless Access with Whispernet, http://www.amazon.com/Kindle-Amazons-Wireless-Reading-Generation/dp/B00154JDAI (last visited July 30, 2009) (explaining that "books . . . are delivered [to the Kindle] via Whispernet," which "utilizes Amazon's optimized technology plus Sprint's

national high-speed (3G) data network to enable you to wirelessly . . . download content"); Priya Ganapati, Plastic Logic E-Book Reader to Use AT&T Wireless, Wired, Jul. 22, 2009, http://www.wired.com/gadgetlab/2009/07/plasticlogic-att/ ("Electronic books reader manufacturer Plastic Logic announced . . . that it will offer wireless access in its upcoming devices through AT&T's 3G network . . . ."); Priya Ganapati, E-Book Reader Roundup: Samsung's Papyrus Joins the Crowd, Wired, Mar. 25, 2009, http://wired.com/gadgetlab/2009/03/samsungs-new-e (noting which electronic book reader devices allow for wireless downloads of books, and which such devices must be connected to Internet-enabled computers to allow such downloads).

Pursuant to the express terms of the BCRA implementing regulations, Section 203 does not cover communications that are "publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station." 11 C.F.R. § 100.29(c)(1). Thus, books downloaded onto an electronic reader device are exempt from Section 203. The implementing regulations exempt, even more explicitly, "communications over the Internet . . . or telephone communications," 11 C.F.R. § 100.29(c)(1)[3]—

[3] The government recognizes, as it must, that "the restrictions imposed by BCRA Section 203 . . . are limited to broadcast media and do not apply to . . . the Internet." (Appellee Br. at 25-26.)

categories that broadly include the transmission of books to electronic reader devices (via wireless networks or computers connected to the Internet), described above. In short, under the plain language of the statute and its implementing regulations, books—whether in paper or electronic form—are not subject to BCRA Section 203.

II. NEITHER AUSTIN NOR MCCONNELL SUPPORTS THE AUTHORITY OF THE GOVERNMENT UNDER THE CONSTITUTION TO REGULATE BOOKS CONTAINING ELECTORAL ADVOCACY

A. The Only Compelling Interest that May Justify Restricting Electoral Advocacy Is Preventing Corruption or the Appearance of Corruption in the Electoral Process

The Court has long recognized that political speech, including independent expenditures in connection with elections, is "at the core of our electoral process and of the First Amendment freedoms." Buckley v. Valeo, 424 U.S. 1, 39 (1976); see also FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985) (independent expenditures "produce speech at the core of the First Amendment"). Any restriction on political speech, including electoral advocacy, is therefore

subject to strict scrutiny; such speech may be burdened only if the government proves that the burden is justified by a compelling interest and is narrowly tailored to achieve that interest. *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 252 (1986) ("We must therefore determine whether the prohibition of § 441b burdens political speech, and, if so, whether such a burden is justified by a compelling state interest."); id. at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.").

The Court has found only one compelling government interest capable of justifying a restriction on campaign-related speech, namely, the interest in combating corruption or the appearance of corruption. *See* Nat'l Conservative Political Action Comm., 470 U.S. at 496-97 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."); accord Austin, 494 U.S. at 658. The Court has noted that "[c]orruption is a subversion of the political process." Nat'l Conservative Political Action Comm., 470 U.S. at 497.

In one formulation, the Court articulated the anti-corruption interest as preventing the "danger of 'financial quid pro quo' corruption." Austin, 494 U.S. at 659 (quoting Nat'l Conservative Political

Action Comm., 470 U.S. at 497); see also Nat'l Conservative Political Action Comm., 470 U.S. at 497 ("The hallmark of corruption is the financial quid pro quo: dollars for political favors."). In Austin, the Court found that the anti-corruption interest also includes curbing 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." Austin, 494 U.S. at 660. In formulating this type of "corruption in the political arena," id., the Court made clear that its concern was that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." Id. Thus, in Austin, the Court's recognition of a compelling government interest, which validates restrictions on corporations' speech in connection with elections, continued to focus on the danger that such speech might unduly affect the electoral process.

Although the Court in Austin identified the single interest deemed to be sufficiently compelling to justify restrictions on express advocacy, as the government implicitly recognizes here, the Court did not identify which forms and media of electoral advocacy invoke that interest. (See Appellee Suppl. Br. at 18 (noting that "the Court did not delineate precisely which corporate-funded communications

can properly be treated as electioneering").) As discussed below, at no time has a link between books and corruption of the electoral process been asserted, much less established.

B. The Holding in McConnell Is Predicated on the Finding that a Certain Form of Communication—Broadcast Advertisements—Poses a Real Risk of Corruption

McConnell's holding—that certain forms of corporate communications constituting the functional equivalent of express advocacy cannot be financed via general treasury funds—rests entirely on the corrosive effect of the specific forms of communications at issue in that case. In upholding BCRA Section 203 against a facial challenge in McConnell, the Court held that a compelling anti-corruption interest justified the regulation of certain broadcast, cable and satellite communications that constitute express advocacy or its functional equivalent. McConnell, 540 U.S. at 205-07. The Court found that "[t]he records developed in this litigation and by the Senate Committee adequately explain the reasons for th[e] legislative choice" of regulating these forms of communication and not others, insofar as "Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial

legislation was needed to stanch that flow of money." Id. at 207.[4]

Indeed, the district court, having examined the "elephantine" record, McConnell v. FEC, 251 F. Supp. 2d 176, 209 n. 40 (D.D.C. 2003), found that corporate-funded broadcast, cable and satellite communications are "the most potent form of advertising," id. at 645, in part because "advertisements on television and radio are aired throughout programming without any viewer choice," id. at 571. Contrasting broadcast advertising with other forms of media (including newspapers, the Internet, and direct mail), the district court concluded that those other media are not as effective as broadcast advertising in communicating an electioneering message to a mass audience, and, consequently, are not as problematic. Id. at 569-73.[5]

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[4] Cf. McConnell, 540 U.S., at 185 (in upholding another FECA provision, finding that "[t]he proliferation of sham issue ads has driven the soft-money explosion," and that "[t]he argument . . . that soft-money contributions to state and local candidates for 'public communications' do not corrupt or appear to corrupt federal candidates ignores . . . the record in this litigation").

[5] Specifically, the district court: (i) did "not find that the Internet is now, or was, a comparable medium to television and radio broadcast advertising," McConnell, 251 F. Supp. 2d at 572; (ii) found that "there is no evidence in the record that [direct mail] is

C. Because Books Do Not Have a Distorting Effect on the Electoral Process, Neither Austin nor McConnell Permits Imposing Restrictions on Books Containing Electoral Advocacy

The compelling interest in preventing the "virtual torrent of televised election-related ads during the periods immediately preceding federal elections," used to bombard unwilling recipients repeatedly with an electoral message, is simply not present with regard to books—no matter how they are purchased. A book requires its reader to "opt in" at two separate levels. First, the reader must affirmatively choose to acquire the book, whether through purchasing it in hard copy or as an electronic download to be read on a computer screen or an electronic reader device. Second, the reader must be motivated to read the book, and to absorb its message. Thus, a book is a form of communication that requires a significant element of "audience choice" in order for the message

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nearly as effective as broadcast advertising" and that, consequently, direct mail is not "as problematic as broadcast candidate-centered issue advertising," id. at 572; and (iii) did "not find newspaper advertising to be as effective as candidate-centered issue advertisements broadcast on radio and television," id. at 572, and accordingly did "not find that newspaper advertising poses a comparable problem to that of broadcast advertisements," id. at 573.

embedded in the communication to be transmitted. There are no unwilling recipients of a book's message; if a reader does not like it, she simply shuts the cover.[6] In addition, the significant investment of time required for the creation, production and distribution of books renders them an inherently less immediate and potent medium for the communication of electoral advocacy shortly before an election.[7]

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[6] Books typically are not distributed in free-of-charge mass-mailings sent to members of the public, by contrast with the newsletter at issue in FEC v. Mass. Citizens for Life, Inc. In that case, the Court held that a corporation's newsletter—which was "mailed free of charge and without request" to tens of thousands of individuals "regarded as sympathetic to the organization's purposes"—would be subject to 2 U.S.C. § 441b, but that Section 441b was unconstitutional as applied to appellee. 479 U.S. 238, 241, 244 (1986). That case does not stand for the broad proposition that Section 441b may constitutionally be applied to books published by publishers like amici.

[7] In considering whether certain governmental restrictions on speech (in contexts other than electoral advocacy) were constitutionally permissible, the Court has previously recognized that "'[e]ach medium of expression . . . may present its own problems.'" Reno v. ACLU, 521 U.S. 844, 868 (1997) (quoting Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)) (alterations in original). In particular, the Court has noted that "the broadcast media have established a uniquely pervasive presence in the lives of all

In short, the government has never demonstrated, or attempted to demonstrate, that books corrode or subvert the electoral process. Thus, neither Austin nor McConnell supports, or even suggests, that Congress may impose

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Americans," and that, "[b]ecause the broadcast audience is constantly tuning in and out," that audience may be subject to "unexpected program content." FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). By contrast, a medium—such as a "dial-it" telephone message service allowing users to call in and listen to prerecorded messages—that "requires the listener to take affirmative steps to receive the communication" does not present this "'captive audience' problem." Sable Comm'n of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989) (distinguishing Pacifica—noting that it relied, in part, on "the 'unique' attributes of broadcasting"—and holding that a statute imposing a blanket ban on obscene and indecent interstate commercial telephone message was unconstitutional as applied to indecent messages); see also Reno v. ACLU, 521 U.S. at 869 (distinguishing Pacifica, in considering a restriction on Internet communications, because, in part, "the Internet is not as 'invasive' as radio or television"). Just as "callers [of dial-it services] will generally not be unwilling listeners," Sable, 492 U.S. at 128, individuals who choose to acquire and read a particular book will not be "unwilling" recipients of that book's message. Because the medium of books does not present a "captive audience" problem, it does not create the danger that the electoral process will be subverted by the torrential, repeated, unwelcome bombardment of readers with electoral advocacy messages.

prohibitions and regulations on books that include electoral advocacy. The government's statement, at Oral Argument, that Congress may constitutionally regulate all such books is unsupported, because such broad regulation would not be justified by a compelling government interest and nothing in Austin or McConnell requires that untoward result.

CONCLUSION

For the foregoing reasons, amici respectfully submit that BCRA Section 203 does not extend to books downloaded via an electronic reader device, and urge the Court to reject any interpretation of Austin that would permit the regulation of books. Amici further submit that it is not necessary for the Court to overrule either Austin or McConnell in order to guarantee the constitutional protection of electoral speech in books, because neither decision permits Congress to impose prohibitions and regulations on books that include electoral advocacy.

Respectfully submitted,

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