No. 08-205

IN THE

Supreme Court of the United States

Citizens United, *Appellant,*

v.

Federal Election Commission, *Appellee.*

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANT CITIZENS UNITED

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and were timely notified.

particular ideology. That includes the right to Freedom of Speech under the First Amendment.

SUMMARY OF ARGUMENT

This case involves core political speech, which is at the heart of the First Amendment. The freedom to engage in such core political speech has been recognized since the Founding as a fundamental foundation of our democracy. It can be restricted only in the most extreme circumstances, where the restriction is narrowly tailored to serve a compelling state interest. Such extreme circumstances are not present in this case, and the free speech rights of appellant Citizens United have consequently been violated.

There is no corruption or appearance of corruption in the case of a non-profit corporation engaging only in independent expenditures. The facts of this case clearly show no *quid pro quo* or appearance of any such *quid pro quo.*

Moreover, Citizens United is a modest non-profit with no "immense aggregation of wealth." The entire corporate treasury of Citizen's United does come precisely from those who support the corporation's political ideas, because the corporation was formed precisely to advance a particular, stated, ideological viewpoint.

The First Amendment's free speech guarantee is focused on maximizing freedom of speech, not equalizing or balancing speech. Indeed, what has not been sufficiently recognized is that this case

involves simple speech, which the listener can accept or reject. If the speech persuades many listeners, then it was all the more important to protect. If the speech does not persuade many listeners, then it cannot be harmful.

Moreover, corporate interests are not monolithic in their views on politics and public policy. Their views are generally in competition with each other, and there are many corporate supporters of both political parties. Many corporate interests favor public policies that will give them competitive advantages over other corporate interests, which are then naturally opposed by those disfavored corporate interests.

This Court should protect the free speech rights of Citizens United with a broad ruling establishing that the government may not restrict the core political speech of non-profit corporations involving independent expenditures. It should expressly reserve the issue of protections for the core political speech of for-profit corporations based on independent expenditures for a case involving for-profit corporations.

This Court should overrule *Austin* as fundamentally inconsistent with the protections of the First Amendment for core political speech. The government may not restrict core political speech on an impossible mission of balancing all such speech in society. The Constitution's policy is far more realistically for all such speech to compete, with the public making the ultimate decision as to what is right, within constitutional limitations.

ARGUMENT

I. THIS CASE INVOLVES CORE POLITICAL SPEECH, ENTITLED TO THE HIGHEST POSSIBLE CONSTITUTIONAL PROTECTION.

This case involves a movie discussing the public record of Hillary Clinton, a top candidate for President of the United States at the time the movie was to be distributed. It is the cinematic equivalent of an opinion commentary in a newspaper or magazine, or a book presenting political opinions. *See Jenkins v. Georgia,* 418 U.S. 153 (1974); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853 (1982). As such, it involves core political speech at the very heart of the First Amendment.

The freedom to engage in such core political speech has been recognized since the Founding as a fundamental foundation of our democracy. The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *E.g., Buckley v. Valeo,* 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238 (1986)("*MCFL*"); *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995); *Boos v. Barry,* 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life,* 127 S. Ct. 2652 (2007); *FEC v. National Conservative Political Action*

Committee, 470 U.S. 480 (1985)("*NCPAC*"); W*illiams v. Rhodes,* 393 U.S. 23 (1968).

Yet, acting under the authority of the BCRA (The Bipartisan Campaign Reform Act of 2002), the Appellee Federal Election Commission effectively banned the movie for the entire 2008 election season. This amounts to a gross violation of the fundamental political free speech rights of Appellant Citizens United, which must be corrected so that Citizens United will be free to distribute future movies reflecting the political views and opinions of its members.

The First Amendment states, "Congress shall make no law...abridging the freedom of speech...." The well-established precedents of this Court allow regulation of protected speech only when the restrictions are narrowly tailored to serve a compelling state interest. *E.g., Buckley; MCFL; NCPAC; Bellotti; Wisconsin Right to Life.*

But there is no compelling state interest that would justify the severe restriction on the political free speech of Appellant Citizens United in this case. The restriction on free speech is also not narrowly tailored, but that is a secondary consideration when there is no compelling state interest to justify the restriction in the first place.

II. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY THE RESTRICTION ON CORE POLITICAL SPEECH IN THIS CASE.

As this Court said in *NCPAC,* "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-497. But there is no such corruption or the appearance of corruption in this case.

Citizens United is a modest non-profit corporation whose expenditures in producing and promoting the movie were all completely independent of any campaign. Such independent expenditures do not involve any "actual or apparent *quid pro quo* arrangements." *Wisconsin Right to Life,* 127 S. Ct. at 2672 (opinion of Roberts, C.J.).

As this Court said in *Buckley,* the

> "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."

424 U.S. at 47. The Court also recognized in *NCPAC* that there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." 470 U.S. at 496-497.

Kennedy adds in dissent in *Austin,*

> "Our cases acknowledge the danger that corruption poses for the electoral process, but

> draw a line in permissible regulation between payments to candidates ('contributions') and payments or expenditures to express one's views ('independent expenditures')."

494 U.S. at 702. Kennedy also stated,

> In *NCPAC*...[w]e distinguished between the campaign contributions at issue in *FEC v, National Right to Work Committee, supra,* and independent expenditures, by noting that while 'the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funded through the corporate form' with regard to candidate campaign contributions, a similar finding could not be supported for independent expenditures. *NCPAC, supra, at 500-501."*

494 U.S. at 705.

Similarly, Scalia stated in dissent in *Austin,*

> "Independent advocacy, moreover, unlike contributions, 'may well provide little assistance to the candidate's campaign and indeed may prove counterproductive,' thus reducing the danger that it will be exchanged 'as a *quid pro quo* for improper commitments from the candidate.'"

494 U.S. at 683-684 (quoting *Buckley* 424 U.S. at 47). That is why, as Scalia also said in *Austin,* this Court held in *Buckley* "that independent expenditures to express the political views of individuals and

associations do not raise a sufficient threat of corruption to justify prohibition." 494 U.S. at 682.

The facts of this case clearly show no *quid pro quo* or appearance of any such *quid pro quo.* If the FEC had not prevented Citizens United from distributing and broadcasting the movie about Hillary Clinton during the Democratic party primaries last year, it is inconceivable that President Obama would now feel in any way obligated to repay the ideologically conservative Citizens United with policy accommodations to those conservative views or other political favors.

The majority in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) saw a compelling state interest justifying restrictions on political speech to counter,

> "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. But Citizens United is a modest non-profit with no such "immense aggregation of wealth." Moreover, the entire corporate treasury of Citizen's United does come precisely from those who support the corporation's political ideas, because the corporation was formed precisely to advance a particular, stated, ideological viewpoint. The independent expenditures here, therefore, are the same as the independent expenditures in *NCPAC,*

which this Court held could not be banned under the First Amendment.

Consequently, while we do not agree that the state interest advanced in *Austin* can justify restricting political speech, that interest in any event is not present in this case. As Scalia said in dissent in *Austin*,

> "If narrow tailoring means anything, surely it must mean that action taken to counter the effect of amassed 'war chests' must be targeted, if possible, at amassed 'war chests.' And surely such targeting is possible...."

494 U.S. at 688.

For these reasons, there is no compelling state interest to justify the restriction on core political speech in this case.

III. *AUSTIN* SHOULD BE OVERRULED BECAUSE IT IS NOT CONSISTENT WITH THE FIRST AMENDMENT'S PROTECTIONS FOR CORE POLITICAL SPEECH.

Austin involved a Michigan campaign finance statute prohibiting corporations from using their general corporate treasury funds for contributions or independent expenditures in support of, or in opposition to, any candidate in state elections. The Michigan Chamber of Commerce, a non-profit corporation, wanted to pay for a newspaper ad supporting a candidate for the Michigan House of

Representatives in a June, 1985 special election. Since violation of the state campaign finance statute was punishable as a felony, the Michigan Chamber sued for injunctive relief against enforcement of the statute, on the grounds that it unconstitutionally violated the free speech guarantee of the First Amendment.

The *Austin* majority found a compelling state interest to restrict core political speech based on "a different type of corruption in the political arena." 494 U.S. at 660. That was, again, "the corrosive and distorting effects of immense aggregations of wealth," that are both "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." Id.

This concern that the resources of some may enable them to engage in too much speech, which is somehow unfair to others, is inconsistent with the whole notion of the First Amendment's free speech guarantee. That guarantee is focused on maximizing freedom of speech, not equalizing or balancing speech. The Court recognized this point in *Buckley*, in expressly rejecting the argument later embraced by the *Austin* majority, saying,

> "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the *First Amendment*, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered

> interchange of ideas for the bringing about of political and social changes desired by the people.' The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."

424 U.S. at 48-49 (citations omitted). This Court reiterated this same principle just last term in *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008), holding that "the interest in equalizing the relative ability of individuals and groups to influence the outcome of elections cannot support a cap on expenditures for express advocacy of the election or defeat of candidates."

Kennedy added in dissent in *Austin*, "The regulatory mechanism adopted by the Michigan statute is aimed at reducing the quantity of political speech, a rationale endorsed by today's majority. The First Amendment rests on quite the opposite theory." 494 U.S. at 704. Kennedy also stated,

> "The suggestion that the government has an interest in shaping the political debate by insulating the electorate from too much exposure to certain views is incompatible with the First Amendment. '[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.' Id., at 791."

494 U.S. at 706 (Quoting *Bellotti*).

Similarly, Scalia stated in dissent in *Austin* regarding the compelling interest argument of the majority,

> "This is not an argument that our democratic traditions allow – neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be 'unduly' extensive (because they are rich) or 'unduly' persuasive (because they are movie stars) or 'unduly respected' (because they are clergymen). The premise of our system is that there is no such thing as too much speech – that the people are not foolish but intelligent, and will separate the wheat from the chaff."

494 U.S. at 695.

Indeed, if this concern of the *Austin* majority is a valid basis for restricting core political speech, then as Scalia asks in dissent in *Austin,* "Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with 'actual public support' for his positions?" 494 U.S. at 685. As Scalia adds, the state interest in balancing speech advanced by the *Austin* majority cannot be "sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates." 494 U.S. at 680.

The most fundamental error of the *Austin* majority is that what is involved here is just speech, which can be accepted or rejected by the listener, and

doesn't force anyone to do anything. If it is accepted by a majority of listeners, then the speech is highly desirable from a social perspective, and if it is rejected by a majority, then there is no harm. As this Court said in *Belloti*, "[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it." 435 U.S. at 790. Scalia added in dissent in *Austin*,

> "The advocacy of such entities that have 'amassed great wealth' will be effective only to the extent that it brings to the people's attention *ideas* which – despite the invariably self-interested and probably uncongenial source – strike them as true."

494 U.S. at 684.

Another fundamental error of *Austin* is that the political and policy views of corporate interests are not monolithic. Indeed, a sophisticated economic understanding recognizes that corporate interests are always jockeying for competitive advantage over one another by law, known as "economic rents." Much if not most corporate advocacy is aimed at achieving such artificial advantages through law and politics, rather than advancing a general "corporate interest." The failure to recognize this reflects an unsophisticated, "neo-Marxist" mindset assuming that corporate interests will always be advancing a mythical "class interest," rather than what they see as their narrow individual corporate interests.

These two reasons, and the focus of the First Amendment on maximizing rather than equalizing

speech, are why the fact that corporations accumulate their wealth in part with government help is irrelevant to whether there is a compelling government interest justifying restrictions on core political speech. However corporations may accumulate their wealth, what is involved is still just speech that listeners may accept or reject, espousing competing rather than monolithic political interests, and the policy of the First Amendment is to protect the freedom to engage in such speech to the maximum extent possible, not hopelessly try to balance such speech through restrictions on freedom of speech.

That is why, as Scalia says in answer to the legal advantages granted to corporations,

> "[S]o are other associations and private individuals given all sorts of special advantages that the state need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiting of *First Amendment* rights."

494 U.S. at 680.

These points are reflected in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). In that case, this Court protected the free speech rights of corporate noncommercial broadcasting stations that received federal funds to operate, in striking down a Congressional ban on editorializing by those stations. Advocates of the ban tried to justify it

based on the federal assistance, but this Court rejected that justification.

The policy of the First Amendment protecting freedom of speech rather than balancing of speech is based in part on the judgment that the government cannot be trusted to balance speech without favoritism among political viewpoints. Scalia again explained this in his dissent in *Austin*, saying,

> "[G]overnmental abridgement of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars). The premise of our *Bill of Rights*, however, is that there are some things – even some seemingly desirable things – that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature...was trying to give unincorporated unions...political advantage over major employers. Or perhaps...it knows that with evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment...was to assume the worst, and to rule the regulation of political speech 'for fairness sake' simply out of bounds."

494 U.S. at 692-693.

Scalia concludes on this point,

> "Despite all the talk of 'corruption and the appearance of corruption' – evils that are not significantly implicated and that can be avoided in many other ways – it is entirely obvious that the object of the law we have approved today is not to prevent wrongdoing but to prevent speech."

494 U.S. at 694. Scalia adds,

> "The Michigan law appears to be designed...neither to protect shareholders, nor even (impermissibly) to 'balance' general political debate, but to protect political candidates."

494 U.S. at 686.

For all of these reasons, this Court should overrule *Austin* as fundamentally inconsistent with the protections of the First Amendment for core political speech. We respectfully submit that the Court should issue a broad ruling establishing the clear principle that the government may not restrict the core political speech of non-profit corporations involving independent expenditures. It should expressly reserve the issue of protections for the core political speech of for-profit corporations based on independent expenditures for a case involving for-profit corporations.

CONCLUSION

For all of the foregoing reasons, *Austin* should be overruled, and the judgment of the District Court below should be reversed.

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