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* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether, for the proper disposition of this case, the Court should overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), that addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b.

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INTEREST OF *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a 501(c)(3) not-for-profit corporation that seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. Since its establishment in 1994, Judicial Watch has investigated and monitored the activity of government officials and politicians and reported its findings to the public through radio, television, and print media and via the Internet. Due to the nature of its mission, Judicial Watch regularly discusses elected officials and candidates for public office via a multitude of media, and these discussions may happen to occur 30 to 60 days before elections. Judicial Watch assiduously avoids any type of electioneering or other advocacy for or against the election of any particular candidate for federal office. Nonetheless, Judicial Watch is concerned that, if the ruling under review is allowed to stand, its watchdog activities and public education efforts might be misconstrued as trying to influence and/or having the effect of influencing federal elections. Because such a result could substantially and adversely impact how Judicial Watch carries out its public interest mission, it

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[1] Pursuant to Rule 37.3(a), letters of consent have been submitted to the Clerk. All parties consent to the filing of this brief. No counsel for a party authored 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 *Amicus Curiae* , its members, or its counsel made a monetary contribution to its preparation or submission.

has an obvious interest in this matter and therefore respectfully submits this *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

The Court's solicitude for free speech has led it to fashion the fundamental principle that government may curtail speech *only to the degree necessary* to meet a particular, compelling interest and *must avoid infringing on speech that does not pose the danger that has prompted regulation*.

Until *Austin,* preventing corruption and the appearance of corruption were the only legitimate interests identified for restricting campaign finances. This Court had held that independent expenditures, which are not coordinated with a candidate or campaign, do not pose a danger of corruption or its appearance, and, as a result, cannot be limited or restricted, even when made by a corporation. The Court had consistently invalidated legislative attempts at limiting or restricting corporate expenditures as violating the First Amendment.

The *Austin* Court deviated from this precedent, holding that independent expenditures made by corporations, even when not coordinated with a candidate or campaign, pose a danger of corruption or its appearance. Likewise deviating from precedent, it sanctioned the interest of equalizing the relative ability of individuals and groups to influence the outcome of elections. The *McConnell* Court compounded the error

made in *Austin* by expanding the scope of suppressed speech to include any reference to a candidate that might influence an election. Because this expansion is in direct conflict with long-established precedent, *Austin* and *McConnell* should be overruled.

ARGUMENT

I. Political Speech Is at the Heart of the First Amendment and Is Entitled to the Broadest Protection.

In *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), this Court declared that political speech is at the heart of the First Amendment and is entitled to "the broadest protection." In reviewing certain provisions of the Federal Election Campaign Act of 1971 ("FECA or Act"), 86 Stat. 3, as amended 1974, 88 Stat. 1263, the *Buckley* Court stated:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

424 U.S. at 14 (*quoting Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

The rationale underlying this broad protection has two major aspects. First, the Framers of the First Amendment specifically intended to protect political speech: "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Id.* (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The second aspect is related to the first: the Framers intended to protect political speech because they understood that it was "integral to the operation of the system of government established by our Constitution." *Id.* That is, representative government depends for its very existence on "uninhibited, wide-open, and robust" debate on public issues. *Id.* (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). As the Court explained,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Id. at 14-15. Or, as the Court stated elsewhere in the opinion, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Id.* at 49 n.55.

The *Buckley* Court thus was solicitous to protect political speech not only as a matter of individual liberty, and not only because it was the intention of the Framers, but because political speech is crucial to the survival of our representative government and its system of ordered liberty. This principle, in turn, presupposes that First Amendment protection of political speech is the precondition of all other freedoms protected by the Constitution. *See FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 264 (1986) ("MCFL") ("Freedom of speech plays a fundamental role in a democracy . . . [It] 'is the matrix, the indispensable condition of nearly every other form of freedom.'") (*quoting Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

The First Amendment protects speech not only because it fosters free government, but because it fosters the development of the individual by protecting freedom of thought and conscience. Quoting Justice Brandeis, this Court has stated:

> Those who won our independence believed that *the final end of the State was to make men free to develop their faculties*; and that in its government the deliberative forces should prevail over the arbitrary. *They valued liberty both as an end and as a means*.

MCFL, 479 U.S. at 258 n.10 (*quoting Whitney v. California*, 274 U.S. 357, 375 (1927)) (emphasis added). Thus, free speech not only plays a vital role in protecting

democracy itself, but it allows people to develop their faculties to the fullest extent possible.

Considering these fundamental truths, it is no wonder that the *Buckley* Court was so avid of protecting political speech against infringement by the FECA.

II. Unlike Contributions to Candidates, Independent Expenditures, Which Are Not Coordinated with a Candidate or Campaign, Do Not Pose a Danger of Corruption or its Appearance.

The Court's solicitude for free speech caused it to fashion the fundamental principle that "[w]here at all possible, government must curtail speech *only to the degree necessary* to meet the particular problem at hand, and *must avoid infringing on speech that does not pose the danger that has prompted regulation*." *MCFL*, 479 U.S. at 265 (emphasis added). This principle is a reformulation of the "strict scrutiny" test the Court applies in all cases where a regulation is challenged as a content-based restriction on speech. *Id.* at 251, 252; *see also Buckley*, 424 U.S. at 24, 25; *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978). In essence, because as a nation we value free speech so highly, our government is permitted to regulate it *only* where the government's interest is *compelling* and *only* to the extent *absolutely necessary* to achieve that interest.

Until *Austin*, "preventing corruption or the appearance of corruption" were the only "legitimate and compelling interests" identified for restricting campaign

finances. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496 (1985) (" *NCPAC*"). In *NCPAC*, the Court explained what it meant by corruption:

> Corruption is the subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors.

Id. at 497.

With this in mind, the Court in *Buckley* addressed the contribution and expenditure limits imposed by the FECA. Although the Court found that the FECA's contribution and expenditure limits implicate fundamental First Amendment interests, *Buckley*, 424 U.S. at 14, it enunciated a constitutional distinction between "contributions" and "independent expenditures." The Court found that contribution limits did not place significant burdens on protected speech and associational freedoms. The Court reasoned that

> a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction on the contributor's ability to engage in free communication.

Id. at 21, 22. This conclusion follows from the fundamental differences between independent expenditures and contributions. Whereas independent expenditures entail expressive and articulate communications to the public, a contribution to a candidate merely "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. Contributions thus are not "political speech" in the same sense as independent expenditures because their communicative effect provides only a "rough index of the contributor's support for the candidate." *Id.*

Moreover, contributions differ from independent expenditures in that a limit on contributions does not result in diminishing the quantity of political speech. This principle is related to the idea that contributions do not constitute political speech in the same sense as independent expenditures. As the Court explained,

> [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Id. at 21. The Court's reasoning in this regard was essentially that, whereas increasing the amount of an independent expenditure will result in more political speech by the person or group making the expenditure, increasing the size of a contribution (which by definition is made directly to the candidate or campaign) will not

increase the amount of political speech by the person or group making the contribution. This follows from the fact that, while contributions may allow a candidate to increase the amount that he spends on political speech, they do not constitute "articulate" or "expressive" political speech by the contributor as such. As the Court explained:

> While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. The Court concluded,

> [a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id.

The Court also found that contributions could be limited because they posed the danger of *quid pro quo* corruption (and the appearance thereof) to the political system. Independent expenditures by contrast, which are not coordinated with a candidate or campaign, do not

pose a danger of corruption or its appearance. This is because a candidate does not necessarily benefit from (and may well even be harmed by) an expenditure that is made independently of his campaign. As the Court recognized,

> [u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. 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.

Id. at 47. Thus, because as a practical matter the candidate may well not benefit from an independent expenditure made without coordination, the danger of a *quid pro quo* is obviated. This not only alleviates the danger of corruption, but the appearance of corruption as well.

III. This Court Has Consistently Invalidated Legislative Attempts at Limiting or Restricting Corporate Expenditures as Violative of First Amendment Free Speech.

In light of these principles, the *Buckley* Court addressed the constitutionality of a FECA provision that prohibited any "person" from making independent

expenditures above $1,000. The Act defined "person" broadly to include corporations. 424 U.S. at 23, 39 n.45 (*citing* 18 U.S.C. § 591(g)). The Court found that the government's interest in preventing corruption and the appearance thereof was not applicable to independent expenditures because there was no threat of a political *quid pro quo* with this type of core independent political expression. *Id.* at 45-48. In other words, a candidate could not be corrupted by expenditures of which he had no knowledge, let alone any control. The Court held that the limit on independent expenditures, including those made by corporations, violated the First Amendment because there was no compelling interest to justify the burdens such restrictions imposed upon the exercise of free speech and association. *Id.* at 39-51.

In *Bellotti*, the Court again addressed a restriction on corporate expenditures. The challenged statute prohibited expenditures by corporations for the purpose of influencing the vote on referendum proposals. The Court framed the question presented as "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." *Belotti*, 435 U.S. at 778. In this regard, it noted,

> [i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The

> inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id. at 777 (footnotes omitted). The Court concluded that the corporate speech at issue was deserving of First Amendment protection as there was no support in the First or Fourteenth Amendment, or precedent, "for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . ." *Id.* at 784.

The Court recognized that any such attempt by a legislature to regulate who can speak is fraught with peril to First Amendment freedom of speech:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. If a legislature may direct business corporations to "stick to business," it also may limit other corporations – religious, charitable, or civic – to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

Id. at 784-85 (citation and footnotes omitted).

As a result, the statute could stand only if the state could demonstrate a "subordinating interest which is compelling," and it used "closely drawn" means to further that interest. *Id.* at 786. The state argued that it had an "interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." *Id.* at 787. According to the state, "corporations are wealthy and powerful and their views may drown out other points of view." *Id.* at 789. The Court rejected this interest, as no evidence existed in the record or legislative history that corporate speech "threatened imminently to undermine democratic processes." *Id.*

The state also argued it had an interest "in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation." *Id.* at 787. The Court again rejected the state's argument because assuming, *arguendo*, that protection of shareholders is a "compelling" interest, it could find "no substantially relevant correlation between the governmental interest asserted and the State's effort" to prohibit corporations from speaking. *Id.* at 795 (citation omitted). Because the state could not demonstrate that the statute advanced any compelling interest or that it was closely drawn to advance any alleged interest, the statute was declared unconstitutional.

In *NCPAC*, 470 U.S. 480, the Court reviewed a FECA provision that prohibited certain groups from making independent expenditures above $1,000. The Court

rejected the state's argument that the speech rights of these groups were not entitled to full First Amendment protection (*i.e.*, that they could be treated differently) simply because they were political action committees ("PACs"). *Id.* at 494. It then recognized that PACs are not corrupting simply because they are *groups of individuals*; in other words, the structure of PACs does not, *ipso facto*, make them corrupting. *Id.* at 497. The Court held that the fact that PACs might be able to make *greater* independent expenditures due to the collective efforts of their members did not alter the calculus: because independent expenditures were made without the knowledge of candidates, there was no danger of a *quid pro quo* between a PAC and an (unknowing) candidate, regardless of the amount of the expenditure. *Id.* at 497, 498. Because there was no danger of corruption, the statute did not advance any compelling interest; as a result, it was unconstitutional.

Clearly, this Court has consistently held that independent expenditures are protected speech which require the broadest protection by the First Amendment. This Court has also consistently invalidated legislative attempts at limiting or restricting corporate expenditures as violative of First Amendment free speech because the government's interest in preventing corruption and the appearance thereof is inapplicable to independent expenditures, as there is no threat of a political *quid pro quo* with this type of core independent political expression.

But then came *Austin* and *McConnell . . .*

IV. *Austin* and *McConnell* Deviated from Established Precedent, And, as a Result, Should Be Overruled by this Court.

In *Austin*, the Court addressed a state statute that prohibited corporations from using "corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office." 494 U.S. at 654. The Court first determined that the statute burdened expressive activity. *Id.* at 658. The Court rightly recognized that the mere fact that an entity "is a corporation does not remove its speech from the ambit of the First Amendment." *Id.* at 657. As a result, the statute could not stand unless the state could demonstrate a compelling interest for its existence. *Id.* at 658.

The state argued that the statute was necessary to stem corruption or the appearance of corruption caused by the unique legal and economic characteristics of corporations that, in the Court's words, permits them "to use resources amassed in the economic marketplace to obtain an unfair political advantage in the political marketplace." *Id.* at 659. The Court did not find that the state had proven the existence of *quid pro quo* corruption or its appearance, "the only legitimate and compelling government interes[t] thus far identified for restricting campaign finances," *NCPAC*, 470 U.S. at 496, 497, but invented a new species of corruption: "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 654. The Court stated 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.* at 660. "Ay, there's the rub." William Shakespeare, *Hamlet*, act 3, sc. 1.

Not only did the *Austin* Court deviate from *Buckley's* clear pronouncement that corporate independent expenditures, which are not coordinated with a candidate or campaign, do not pose a danger of corruption or its appearance, *Buckley*, 424 U.S. at 45-48, it embarked upon a path refuted by *Buckley*. Specifically, in *Buckley*, the government claimed its independent expenditure limit served its alleged interest of "equalizing the relative ability of individuals and groups to influence the outcome of elections . . . ." *Id.* at 48. The Court, in no uncertain terms, rejected this interest as incompatible with First Amendment free speech:

> 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

> government abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Id. at 48-49 (citations and internal quotation marks omitted).

In *Bellotti*, the Court again rejected such an argument, especially in light of the complete lack of evidence that corporate wealth threatens to imminently "undermine democratic processes." 435 U.S. at 785, 786, 789. And to be sure, it is the suppressor of speech's burden to prove the actual existence of the alleged harm:

> When the government defends a regulation on speech . . . it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way.

U.S. v. National Treasury Employees Union, 513 U.S. 454, 475 (1995) (citation and internal quotation marks omitted); *see also Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (Striking down a regulation of independent party expenditures because the government failed to "point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"); and *NCPAC*, 470 U.S. at 490 (Recognizing there must be real substance to the fear of corruption; mere suspicion, *i.e.*, "a tendency to

demonstrate distrust . . . is not sufficient," no matter how widely the suspicion is shared.). In *Austin*, the state utterly failed to make this showing.

The underinclusiveness of the statute only confirms the statute exists to quiet the voices of certain segments of society. While the statute suppresses the voices of corporations whose wealth allegedly "can unfairly influence elections," *Austin*, 494 U.S. at 660, it leaves uninhibited, *inter alia*, wealthy individuals, many of whom gained their wealth through the corporate form, and mega media corporations (some of which are owned by for-profit non-media corporations), who undoubtedly "pose a much more realistic threat to valid interests than do . . . similar entities not regularly concerned with shaping popular opinion on public issues." *Bellotti*, 435 U.S. at 796, 797 (Burger, C. J., concurring); *see also id.* at 797 ("In *Tornillo* [418 U.S. 241, 250 (1974)], for example, we noted the serious contentions advanced that a result of the growth of modern media empires 'has been to place in a few hands the power to inform the American people and shape public opinion.'").[2]

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[2] The so-called "institutional press" is not deserving of special protection as the First Amendment applies equally to all persons. *Bellotti*, 435 U.S. at 782 ("the press does not have a monopoly on either the First Amendment or the ability to enlighten"); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.") (citations omitted).

In *McConnell*, the Court upheld against a First Amendment challenge Congress' amendment of the FECA provision prohibiting corporate independent expenditures, 2 U.S.C. § 441(b), which, until *McConnell*, were defined as expenditures that in "explicit" words or "express terms advocate the election or defeat of a clearly identified candidate," *i.e.*, express advocacy. *Buckley*, 424 U.S. at 43, 44. The Court upheld Congress' amended provision that not only prohibits corporate express advocacy, but any corporate "electioneering communication," which it defines broadly as *any* "broadcast, cable, or satellite communication" that:

> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within--
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i). The Court reasoned that the "justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *McConnell*, 540 U.S. at 206. Herein lies the error.

Buckley clearly stated that issue advocacy, which unquestionably cannot be restricted in any way consonant with the First Amendment, may include discussion of candidates, including discussion that incidentally advocates a candidate's success or defeat:

> Public discussion of public issues which also are campaign issues *readily and often unavoidably* draws in candidates and their positions, their voting records and other official conduct. Discussion of those issues, as well as more positive efforts to influence public opinion on them, tend *naturally and inexorably* to exert some influence on voting at elections.
>
> * * *
>
> So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to *promote the candidate* and his views.

Buckley, 424 U.S. at 43 n.50 and 45 (emphasis added).

In short, *McConnell* suppresses speech that this Court has unambiguously held cannot be suppressed. It "compounds the error made in *Austin* [], and silences political speech central to the civic discourse that sustains and informs our democratic processes." *McConnell*, 540 U.S. at 323 (Kennedy, J., Rehnquist, C.J., and Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully submits that the Court should overrule *Austin* and *McConnell*.

Respectfully submitted,

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