

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITIZENS UNITED, :

4 Appellant :

5 v. : No. 08-205

6 FEDERAL ELECTION :

7 COMMISSION. :

8 - - - - - x

9 Washington, D.C.

10 Wednesday, September 9, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:05 a.m.

15 APPEARANCES:

16 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
17 the Appellant.

18 FLOYD ABRAMS, ESQ., New York, N.Y.; on behalf of Senator
19 Mitch McConnell, as amicus curiae, in support of the
20 Appellant.

21 GEN. ELENA KAGAN, ESQ., Solicitor General, Department of
22 Justice, Washington, D.C.; on behalf of the Appellee.

23 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf
24 Senators John McCain, et al., as amici curiae, in
25 support of Appellee.

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3	THEODORE B. OLSON, ESQ.
4	On behalf of the Appellant
5	FLOYD ABRAMS, ESQ.
6	On behalf of Senator Mitch McConnell, as
7	amicus curiae, in support of the Appellant
8	GEN. ELENA KAGAN, ESQ.
9	On behalf of the Appellee
10	SETH P. WAXMAN, ESQ.
11	On behalf of Senators John McCain, et al.,
12	as amici curiae, in support of the Appellee
13	REBUTTAL ARGUMENT OF
14	THEODORE B. OLSON, ESQ.
15	On behalf of the Appellant
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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear
reargument this morning in Case 08-205, Citizens United
v. The Federal Election Commission.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE APPELLANT

MR. OLSON: Mr. Chief Justice and may it
please the Court:

Robust debate about candidates for elective
office is the most fundamental value protected by the
First Amendment's guarantee of free speech. Yet that is
precisely the dialogue that the government has
prohibited if practiced by unions or corporations, any
union or any corporation.

The government claims it may do so based
upon the Austin decision that corporate speech is by its
nature corrosive and distorting because it might not
reflected actual public support for the views expressed
by the corporation. The government admits that that
radical concept of requiring public support for the
speech before you can speak would even authorize it to
criminalize books and signs.

This Court needs no reminding that the

1 government when it is acting to prohibit, particularly
2 when it is acting to criminalize, speech that is at the
3 very core of the First Amendment has a heavy burden to
4 prove that there is a compelling governmental interest
5 that -- that justifies that prohibition and that the
6 regulation adopted, in this case a criminal statute, is
7 the most narrowly tailored necessary to accomplish that
8 compelling governmental interest.

9 JUSTICE GINSBURG: Mr. Olson, are you taking
10 the position that there is no difference in the First
11 Amendment rights of an individual? A corporation, after
12 all, is not endowed by its creator with inalienable
13 rights. So is there any distinction that Congress could
14 draw between corporations and natural human beings for
15 purposes of campaign finance?

16 MR. OLSON: What the Court has said in the
17 First Amendment context, *New York Times v. Sullivan*,
18 *Rose Jean v. Associated Press*, and over and over again,
19 is that corporations are persons entitled to protection
20 under the First Amendment.

21 JUSTICE GINSBURG: Would that include --

22 MR. OLSON: Now, Justice --

23 JUSTICE GINSBURG: Would that include
24 today's mega-corporations, where many of the investors
25 may be foreign individuals or entities?

1 MR. OLSON: The Court in the past has made
2 no distinction based upon the nature of the entity that
3 might own a share of a corporation.

4 JUSTICE GINSBURG: Own many shares?

5 MR. OLSON: Pardon?

6 JUSTICE GINSBURG: Nowadays there are
7 foreign interests, even foreign governments, that own
8 not one share but a goodly number of shares.

9 MR. OLSON: I submit that the Court's
10 decisions in connection with the First Amendment and
11 corporations have in the past made no such distinction.
12 However --

13 JUSTICE GINSBURG: Could they in your view,
14 in the view that you are putting forth, that there is no
15 distinction between an individual and a corporation for
16 First Amendment purposes, then any mega-corporation,
17 even -- even if most of the investors are from abroad,
18 Congress could not limit their spending?

19 MR. OLSON: I'm not -- I'm not saying that,
20 Justice Ginsburg. I'm saying that the First Amendment
21 applies. Then the next step is to determine whether
22 Congress and the government has established a compelling
23 governmental interest and a narrowly tailored remedy to
24 that interest. If the Congress -- and there is no
25 record of that in this case of which I am aware.

1 Certainly the government has not advanced it in its
2 briefs: That there is some compelling governmental
3 interest because of foreign investment in corporations.

4 If there was, then the Court would look at,
5 determine how serious is that interest, how destructive
6 has it been to the process and whether the -- maybe the
7 limitation would have something to do with the ownership
8 of shares of a corporation or some --

9 JUSTICE SCALIA: Do you think Congress could
10 prevent foreign individuals from funding speech in
11 United States elections?

12 MR. OLSON: The -- the --

13 JUSTICE SCALIA: Private individuals,
14 foreigners who -- who want to --

15 MR. OLSON: That's, of course, a different
16 question. I haven't studied it, Justice Scalia.

17 JUSTICE SCALIA: Well, it's not different.
18 I asked it because I thought it was related to the
19 question you were answering.

20 MR. OLSON: The fundamental point here is --
21 and let me start with this, and I think we should -- we
22 should start with this, and the government hardly
23 mentions this.

24 JUSTICE STEVENS: Before you do, Mr. Olson
25 --

1 MR. OLSON: The language of the First
2 Amendment, "Congress shall make" --

3 JUSTICE STEVENS: Mr. Olson -- Mr. Olson,
4 would you answer Justice Ginsburg's question yes or no?
5 Can the -- leaving aside foreign investors, can the --
6 can -- does the First Amendment permit any distinction
7 between corporate speakers and individual speakers?

8 MR. OLSON: I am not -- I'm not aware of a
9 case that just --

10 JUSTICE STEVENS: I am not asking you that.
11 I meant in your view does it permit that distinction?

12 MR. OLSON: My view is based upon the
13 decisions of this Court and my view would be that unless
14 there is a compelling governmental interest and a
15 narrowly --

16 JUSTICE STEVENS: But if there is a
17 compelling government -- can there be any case in which
18 there is a different treatment of corporations and
19 individuals in your judgment?

20 MR. OLSON: I would not rule that out,
21 Justice Stevens. I mean, there may be. I can't imagine
22 all of the infinite varieties of potential problems that
23 might exist, but -- but we would eventually come back to
24 the narrow tailoring problem anyway.

25 What the government has done here is

1 prohibit speech. I don't know how many unions there are
2 in this country, but there are something like 6 million
3 corporations that filed tax returns in 2006.

4 JUSTICE ALITO: Well, Mr. Olson, do you
5 think that media corporations that are owned or
6 principally owned by foreign shareholders have less
7 First Amendment rights than other media corporations in
8 the United States?

9 MR. OLSON: I don't think so, Justice Alito,
10 and certainly there is no record to suggest that there
11 is any kind of problem based upon that. And I come back
12 to the language of the First Amendment: "Congress shall
13 make no law." Now, what this Court has repeatedly said
14 is that there may be laws inhibiting speech if there is
15 a compelling governmental interest and a narrowly
16 tailored remedy. But there is no justification for
17 this.

18 I was going to say that 97 percent of the 6
19 million corporations that filed tax returns in 2006 had
20 assets less than \$5 million -- assets, not net worth.
21 So we are talking about a prohibition that covers every
22 corporation in the United States, including nonprofit
23 corporations, limited liability corporations, Subchapter
24 S corporations and every union in the United States.

25 JUSTICE GINSBURG: But what are the -- you

1 have used the word "prohibition," Mr. Olson. One answer
2 to that is that no entity is being prohibited, that it
3 is a question of not whether corporations can contribute
4 but how. They can use PACs and that way we assure that
5 the people who contribute are really supportive of the
6 issue, of the candidate.

7 But so the -- the corporation can give, but
8 it has to use a PAC.

9 MR. OLSON: I respectfully disagree. The
10 corporation may not expend money. It might find people,
11 stockholders or officers, who wanted to contribute to a
12 separate fund, who could then speak. That in one -- to
13 use the words of one Justice, that is
14 ventriloquist-speak. I would say that it is more like
15 surrogate speech. If you can find some other people
16 that will say what you want to say and get them to
17 contribute money through a process that this just --

18 JUSTICE GINSBURG: Who is the "you"? I mean
19 do you -- you -- those are the directors, the CEO, not
20 the shareholders? We don't know what they think.

21 MR. OLSON: Well, this statute is not
22 limited to cases where the shareholders agree or don't
23 agree with what the corporation says. As the Court said
24 in the Bellotti case, the prohibition would exist
25 whether or not the shareholders agree. But let me go

1 back to your question.

2 JUSTICE SCALIA: It -- it covers totally --
3 totally owned corporations, too, doesn't it?

4 MR. OLSON: Yes.

5 JUSTICE SCALIA: I mean, if I owned all the
6 stock in a corporation, the corporation still can't --

7 MR. OLSON: Yes. And it includes membership
8 corporations such as Citizens United that --

9 JUSTICE BREYER: And the individual
10 contribution also covers people who would like to give
11 \$2500 instead of \$2400, which is the limit. And maybe
12 there are 100 million or 200 million people in the
13 United States who, if they gave 2500 rather than 2400,
14 nobody could say that that was really an effort to buy
15 the Senator or the Congressman. So is that
16 unconstitutional, too?

17 MR. OLSON: No -- well, what this Court has
18 said is that in connection with contribution limitations
19 there is a potential compelling governmental interest.

20 JUSTICE BREYER: Yes.

21 MR. OLSON: This is what Buckley says.

22 JUSTICE BREYER: Yes.

23 MR. OLSON: Then that -- in that -- but
24 expenditures, which is what we are talking about today,
25 do not concern the -- the question, the actual threat of

1 quid pro quo corruption or the appearance of quid pro
2 quo corruption. And you know, Justice Breyer, what the
3 Court said in that case is because it's not inhibiting
4 someone from actually speaking, it's -- it's giving
5 money to someone --

6 JUSTICE BREYER: So here the obvious
7 argument is: Look, they said the compelling interest is
8 that people think that representatives are being bought,
9 okay? That's to put it in a caricature, but you
10 understand what I'm driving at, okay? That's what they
11 said in Buckley v. Valeo. So Congress now says
12 precisely that interest leads us to want to limit the
13 expenditures that corporations can make on
14 electioneering communication in the last 30 days of a
15 primary, over-the-air television, but not on radio, not
16 on books, not on pamphlets, not on anything else. All
17 right?

18 So in what respect is there not conceptually
19 at least a compelling interest and narrow tailoring?

20 MR. OLSON: Well, in the first place, I
21 accept what the Court said in Buckley, that expenditures
22 do not raise that concern at all. Congress has not made
23 that finding. You are talking -- and you mentioned just
24 -- just a matter of radio and television, but in Buckley
25 v. Valeo the Court specifically said that that is the

1 most important means of communicating concerning
2 elections --

3 JUSTICE BREYER: It's important --

4 MR. OLSON: And the Court used the word
5 "indispensable." So what -- and -- and what the Court
6 said in Buckley v. Valeo is it compared a limitation on
7 expenditures, independent uncoordinated expenditures,
8 with the prohibition that the Court addressed when it
9 had a statute before it that said newspapers couldn't
10 endorse candidates on the day of election, and the
11 Torneo case, where it required a right of reply to be
12 given. And the Court said those restrictions, which
13 were unconstitutional, were considerably less, and that
14 the restriction in Buckley v. Valeo on expenditures --

15 JUSTICE KENNEDY: I -- I agree -- I agree
16 that Buckley made the distinction between contributions
17 and expenditures, and it seems to me that the
18 government's argument necessarily wants to water down
19 that distinction. But in response or just in
20 furtherance of Justice Breyer's point, you have two
21 cases, one in which an officeholder goes to a
22 corporation and says: Will you please give me money?
23 They say: We can't do that.

24 The other is in which a corporation takes
25 out an ad for the -- for the candidate, which relieves

1 that candidate of the responsibility of -- of
2 substantial television coverage. Isn't that about the
3 same?

4 MR. OLSON: Well, in the first place, if
5 there is any coordination --

6 JUSTICE KENNEDY: And I -- and I think
7 Buckley says no.

8 MR. OLSON: Buckley says --

9 JUSTICE KENNEDY: But, as a practical
10 matter, is that always true?

11 MR. OLSON: Well, it may not always be true.
12 In the infinite potential applications of something like
13 that, Justice Kennedy, anything might possibly be true.
14 And Justice Breyer said, well, what if Congress thought
15 or what if Congress thought the people might think that
16 that was kind of somehow suspect? That is not a basis
17 for prohibiting speech by a whole class of individual --

18 JUSTICE BREYER: Well, of course, it did --
19 was a basis for prohibiting speech by, in the sense of
20 giving contributions above \$2,400, by 300 million people
21 in the United States. But the point, which I think is
22 the one that Justice Kennedy was picking up, is are we
23 arguing here between you and my questions, is the
24 argument in this case about the existence of a
25 compelling interest? Because Congress seemed to think

1 that there was certainly that; it's this concern about
2 the perception that people are, say, buying candidates.

3 Are we arguing about narrow tailoring?
4 Congress thought it was narrow tailoring. Or are we
5 arguing about whether we should second-guess Congress on
6 whether there is enough of a compelling interest and the
7 tailoring is narrow enough?

8 MR. OLSON: You must always second-guess
9 Congress when the First Amendment is in play. And that
10 we are arguing -- we are not -- we are discussing --

11 JUSTICE BREYER: Yes.

12 MR. OLSON: -- both the compelling --

13 (Laughter.)

14 MR. OLSON: -- both the compelling
15 governmental interest and the narrow tailoring, and
16 what -- what -- there is not a sufficient record. The
17 reason -- the government has shifted position here. They
18 were, first of all, talking about the so-called
19 distortion rationale in Austin, the distortion rationale
20 which they seem to have abandoned in the -- in the
21 supplemental briefs filed in connection with this
22 argument, and they resorted to the corruption,
23 appearance of corruption. There isn't a sufficient
24 record of this. There isn't --

25 JUSTICE GINSBURG: But what about the

1 district court's finding? Wasn't there a finding before
2 the three-judge court that Federal officials know of and
3 feel indebted to corporations or unions who finance ads
4 urging their election or the defeat of their opponent?
5 There was a finding of fact to that effect, was there
6 not?

7 MR. OLSON: The find -- yes. I -- there is
8 something to that effect in the district court opinion,
9 but it doesn't cover all corporations. It didn't focus
10 in specifically on expenditures.

11 JUSTICE GINSBURG: So if -- so if they just
12 covered large corporations, so you take out the mom and
13 pop single shareholder --

14 MR. OLSON: Well, that is 97 percent of the
15 corporation.

16 JUSTICE GINSBURG: Not 97 percent of the
17 contributions. I mean, the contributions that count are
18 the ones from the corporations that can amass these huge
19 sums in their treasuries.

20 MR. OLSON: I think that goes back to
21 Justice Kennedy's question, and my response, which
22 distinguishes between contributions and expenditures.
23 The point that Justice Kennedy was making in his
24 question is that under -- under some circumstances an
25 expenditure might coincide or resonate with what the

1 candidate wishes to do, but the Court looked at that
2 very carefully in Buckley v. Valeo and said that might
3 not be the case. It might, in fact, be these
4 expenditures might be counterproductive when they are
5 independent, they are not coordinated with the
6 candidate, they are more directly expression by the
7 party spending the money, they are not like a
8 contribution, so they are more of an infringement on the
9 right to speak.

10 CHIEF JUSTICE ROBERTS: Counsel --

11 MR. OLSON: And they are less of a threat of
12 corruption because there is less -- there is no quid pro
13 quo there, and if there is it would be punishable as a
14 crime.

15 CHIEF JUSTICE ROBERTS: Counsel, in your
16 discussion of Austin, you rely on its inconsistency with
17 Bellotti. Bellotti, of course, involved a referendum
18 and Austin expenditures in an individual election. Why
19 isn't that a significant distinction?

20 MR. OLSON: Well, it is -- it is -- what the
21 Bellotti Court said is that we are not deciding that
22 question.

23 And -- and Austin did address, you are
24 correct, expenditures, but it based it on a rationale --

25 JUSTICE STEVENS: It more than said we are

1 not deciding. It said they are entirely different
2 situations. You read that long footnote which has been
3 cited six or eight times by our later cases.

4 MR. OLSON: Yes. And I also read the
5 footnote 14 in the Bellotti case that cited case after
6 case after case that said corporations had rights,
7 protected rights under the First Amendment. I am not
8 disagreeing with what you just said, Justice Stevens.
9 The Court said it was -- it was dicta, because the Court
10 did not deal with --

11 JUSTICE STEVENS: But it has been
12 repeated -- that footnote has been repeatedly cited in
13 subsequent cases, most of which were unanimous.

14 MR. OLSON: Well, because it was -- and I
15 agree the Bellotti Court was not discussing that. But
16 The Bellotti Court --

17 JUSTICE STEVENS: It did discuss it
18 precisely in that footnote and it said it's a different
19 case.

20 MR. OLSON: I understand and I don't
21 disagree with what you have just said, Justice Stevens.

22 JUSTICE SCALIA: It didn't say it would come
23 out differently. It just said, we're not deciding that
24 case, right?

25 MR. OLSON: That -- that is -- that's the

1 point I'm trying to make.

2 JUSTICE SCALIA: I don't mind citing that.
3 Bellotti didn't decide that.

4 MR. OLSON: What Bellotti also said is --
5 and I think this is also in many decisions of this Court
6 -- the inherent worth of speech in terms of its capacity
7 for informing the public does not depend upon the
8 identity of the source, whether corporation,
9 association, union, or individual.

10 CHIEF JUSTICE ROBERTS: Now that we've
11 cleared up that Bellotti didn't decide the question,
12 what is the distinction that -- why don't you think that
13 distinction makes sense? In other words, a corporate --
14 you don't have a potential for corruption if a
15 corporation is simply speaking on a referendum that may
16 directly affect its interest. If you are dealing with a
17 candidate, what the Court has said in the past is that
18 you do have that problem of corruption.

19 MR. OLSON: Well --

20 CHIEF JUSTICE ROBERTS: In other words, why
21 isn't that distinction a way to reconcile Bellotti and
22 Austin?

23 MR. OLSON: There is a distinction, but I
24 think the distinction goes back to, A, expenditures
25 versus contributions, number one; and then secondly, it

1 goes back to what this Court said in conjunction with
2 the impossibility of finding a distinction between issue
3 ads and candidate ads. The line dissolves on practical
4 application. The interest --

5 CHIEF JUSTICE ROBERTS: Where did we say
6 that?

7 MR. OLSON: You said that repeatedly,
8 including most recently in the Wisconsin Right to Life
9 case. And it first appeared in Buckley itself. The
10 distinction is very hard to draw between the interest
11 that the speaker is addressing and whether it's a
12 candidate or an issue, because issues are wrapped up in
13 candidates. The corporation interest and the interests
14 that its fiduciary officers are representing when it
15 speaks on behalf of the corporation --

16 JUSTICE STEVENS: I don't think you are
17 correct to say the Court said there was no distinction.
18 It said the distinction requires the use of magic words.
19 And that's what they said in Wisconsin Right to Life,
20 too. Both of them said there is a distinction.

21 MR. OLSON: Well, but the words --

22 JUSTICE STEVENS: It's difficult to draw in
23 some cases, but nobody said there is no distinction that
24 I am aware of.

25 MR. OLSON: Well, what the Court -- to

1 use -- to use the words of the Court, which occurred
2 repeatedly, is that the distinction dissolves
3 impractical application. That, Justice Stevens, I think
4 addresses the very commonsense point that when you are
5 addressing an issue, whether you are addressing a
6 referendum matter, whether it is a proposed legislation
7 or a candidate that is going to raise taxes on the
8 corporation, those distinctions dissolve. It's all
9 First Amendment freedom.

10 JUSTICE SCALIA: I -- I -- I thought that
11 Buckley had narrowed the statute precisely to magic
12 words and still found it unconstitutional as applied to
13 corporations that made independent expenditures.

14 MR. OLSON: Yes.

15 JUSTICE SCALIA: Isn't that what happened in
16 Buckley?

17 MR. OLSON: The \$1,000 limit in Buckley was,
18 first of all, limited to the magic words "candidacy
19 expression"; then secondly, the Court -- and the -- and
20 the words of the statute were "any person," which
21 included corporations found, the statute as narrowed
22 unconstitutional and said --

23 JUSTICE SCALIA: And some of the plaintiffs
24 were corporations.

25 MR. OLSON: Some of the plaintiffs were

1 corporations.

2 JUSTICE STEVENS: Yes, but that point wasn't
3 even discussed in the opinion, was it?

4 MR. OLSON: It was not discussed in the
5 opinion.

6 JUSTICE STEVENS: No.

7 MR. OLSON: But what was discussed in the
8 opinion was the breadth of the definition of "person,"
9 which did include corporation. Corporations were
10 parties in the case. And in that part of the Buckley
11 case, the Court repeatedly cites cases involving
12 corporations, including NAACP v. Alabama and New York
13 Times v. Sullivan, all cases involving corporations.

14 So while it wasn't specifically discussed,
15 it was a part of the decision of the Court that a \$1,000
16 limitation was worse, more restrictive than the -- than
17 the restriction of editorials appearing on election day
18 or requiring a newspaper to give a right of reply.

19 The Court in Buckley in fact says, this
20 is -- with respect to that expenditure limitation, the
21 words of the Court were this is the most drastic of the
22 limitations imposed by the Federal Election Campaign
23 Act. It goes to the core of First Amendment freedom.

24 JUSTICE BREYER: If that is so -- this is a
25 point that is concerning me. I don't know the answer

1 precisely. But suppose you are right. Suppose we
2 overrule these two cases. Would that leave the country
3 in a situation where corporations and trade unions can
4 spend as much as they want in the last 30 days on
5 television ads, et cetera, of this kind, but political
6 parties couldn't, because political parties can only
7 spend hard money on this kind of expenditure? And
8 therefore, the group that is charged with the
9 responsibility of building a platform that will appeal
10 to a majority of Americans is limited, but the groups
11 that have particular interests, like corporations or
12 trade unions, can spend as much as they want?

13 Am I right about the consequence? If I am
14 right, what do we do about it?

15 MR. OLSON: I think you are wrong about the
16 consequence. There are 27 States that have no
17 limitations on either contributions or expenditures and
18 that -- the Earth is not --

19 JUSTICE BREYER: No, I'm not -- I'm not -- I
20 am saying am I right in thinking that if you win, the
21 political party can't spend this money, it's limited to
22 hard money contributions, but corporations and trade
23 unions can spend unlimited funds?

24 MR. OLSON: Well, if -- if the Court decides
25 in favor of the arguments that we are making here, I

1 think what you are suggesting is that because there are
2 other limitations that someone has not challenged in
3 this case, that that would be somehow unfair and
4 unbalanced.

5 JUSTICE BREYER: No, I'm not suggesting
6 that. I am suggesting we will make a hash of this
7 statute, and if we are going to make a hash of this
8 statute, what do we do about it? And that's why I want
9 you to take a position on another important part of that
10 statute, and that is the part that says political
11 parties themselves cannot make these expenditures that
12 we are talking about except out of hard money.

13 MR. OLSON: What -- I want to address that
14 in this way, and I said when we were here before the
15 most fundamental right that we can exercise in a
16 democracy under the First Amendment is dialogue and
17 communication about political candidates. We have
18 wrapped up that freedom, smothered that freedom, with
19 the most complicated set of regulations and bureaucratic
20 controls. Last year the Federal Election Commission
21 that was supposed to be able to give advisory opinions
22 didn't even have a quorum for 6 months of the year 2008
23 when people would have needed some help from the Federal
24 Election Commission.

25 What I am saying, in answer to your

1 question, Justice Breyer, there are, I suspect, all
2 kinds of problems with Federal election laws where they
3 apply to parties and where they apply to what candidates
4 might do and so forth; but that has never been a
5 justification. We will uphold a prohibition on all
6 kinds of people speaking because if we allowed them to
7 speak someone else might complain that they don't get to
8 speak as much as they would like.

9 JUSTICE KENNEDY: Well, with reference to
10 any incongruities that might flow from our adopting your
11 position, are you aware of any case in this Court which
12 says that we must refrain from addressing an
13 unconstitutional aspect of the statute because the
14 statute is flawed in some other respects as well?

15 MR. OLSON: No, I'm not, and that's -- I
16 think that was what I was attempting to say in response
17 to what Justice Breyer was asking me.

18 JUSTICE SOTOMAYOR: Mr. Olson, are you
19 giving up on your earlier arguments that there are ways
20 to avoid the constitutional question to resolve this
21 case? I know that we asked for further briefing on this
22 particular issue of overturning two of our Court's
23 precedents. But are you giving up on your earlier
24 arguments that there are statutory interpretations that
25 would avoid the constitutional question?

1 MR. OLSON: No, Justice Sotomayor. What --
2 what -- there are all kinds of lines that the Court
3 could draw which would provide a victory to my client.
4 There are so many reasons why the Federal Government did
5 not have the right to criminalize this 90-minute
6 documentary that had to do with elections, but what the
7 Court addressed specifically in the Washington Right to
8 Life case is that the lines if they are to be drawn must
9 not be lines that are ambiguous, that invite litigation,
10 that hold the threat of prosecution over an individual;
11 and in practical application that is what the --

12 JUSTICE SOTOMAYOR: Mr. Olson, my difficulty
13 is that you make very impassioned arguments about why
14 this is a bad system that the courts have developed in
15 its jurisprudence, but we don't have any record
16 developed below. You make a lot of arguments about how
17 far and the nature of corporations, single corporations,
18 single stockholder corporations, et cetera. But there
19 is no record that I am reviewing that actually goes into
20 the very question that you're arguing exists, which is a
21 patchwork of regulatory and jurisprudential guidelines
22 that are so unclear.

23 MR. OLSON: I would like to answer that.
24 There are several answers to it and I would like to
25 reserve the balance of my time for rebuttal. It is the

1 government has the burden to prove the record that
2 justifies telling someone that wants to make a 90-minute
3 documentary about a candidate for president that they
4 will go to jail if they broadcast it. The government
5 has the obligation and the government had a long
6 legislative record and plenty of opportunity to produce
7 that record and it's their obligation to do so.

8 JUSTICE STEVENS: Mr. Olson --

9 JUSTICE SOTOMAYOR: But the facial
10 challenge --

11 JUSTICE STEVENS: -- may I ask one question
12 you can answer on rebuttal? No one has commented on the
13 National Rifle Association's amicus brief. None of the
14 -- none of the litigants have. That's in response to
15 Justice Sotomayor's thought that there are narrow ways
16 of resolving the problem before us. On rebuttal, will
17 you tell us what your view on their solution to this
18 problem is?

19 MR. OLSON: I will, Justice Stevens.

20 CHIEF JUSTICE ROBERTS: Why don't you tell
21 us now. We will give you time for rebuttal.

22 (Laughter.)

23 JUSTICE SCALIA: Don't keep us in suspense.

24 (Laughter.)

25 MR. OLSON: Every line, including the lines

1 that would be drawn in several of the amicus briefs, and
2 they are not the same, could put the entity who wishes
3 to speak before you again a year from now. Because the
4 movie might be shorter, it might be video on demand, it
5 might be a broadcast, it might have a different tone
6 with respect to a candidate. Every one of those lines
7 puts the speaker at peril that he will go to jail or be
8 prosecuted or there will be litigation, all of which
9 chills speech and inhibits individual --

10 JUSTICE STEVENS: No, but to answer my
11 question, the line suggested by the NRA is the line
12 identified by Congress in the Snowe-Jeffords amendment
13 dealing with individual financing of speech which would
14 separate all of these problems. What is your comment on
15 that possible solution to the problem?

16 MR. OLSON: I would like to take advantage
17 of Justice Stevens' offer and respond to that during the
18 rebuttal, Mr. Chief Justice.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.
21 Olson.

22 Mr. Abrams.

23 ORAL ARGUMENT OF FLOYD ABRAMS
24 ON BEHALF OF SENATOR MITCH McCONNELL,
25 AS AMICUS CURIAE,

1 IN SUPPORT OF THE APPELLANT

2 MR. ABRAMS: Mr. Chief Justice, and may it
3 please the Court:

4 The first case cited to you by Mr. Olson
5 happened to be New York Times v. Sullivan, and I would
6 like to begin by urging two propositions on you from
7 that case.

8 In that case the Court was confronted with a
9 situation where the Times made three arguments to the
10 Court. They said -- for us to win, they said, you
11 either have to revise, basically federalize, libel law
12 to a considerable degree, which they did; or, they said,
13 we only sold 390 copies in Alabama, so you could rule in
14 our favor by saying there was no jurisdiction; or, they
15 said, we didn't even mention Sheriff Sullivan's name, so
16 you could rule in our favor on the ground that they
17 haven't proved a libel case.

18 The Court did the first. It did the first,
19 which is the broader rather than the narrowest way to
20 address the question, and I suspect they did it -- don't
21 know, but I suspect they did it -- because they had come
22 to the conclusion that the degree of First Amendment
23 danger by the sort of lawsuits which were occurring in
24 Alabama and elsewhere was something that had to be faced
25 up to by the Court now, or --

1 JUSTICE GINSBURG: Mr. Abrams, Times v.
2 Sullivan was not -- did not involve overruling
3 precedents of this Court that had been followed by this
4 Court and others. So, I think the situation is quite
5 different.

6 MR. ABRAMS: That's true, Your Honor. It
7 did involve overruling 150 years of American
8 jurisprudence. I mean, there was no law at that point
9 that said that actual malice --

10 JUSTICE GINSBURG: There was no -- there was
11 no decision of this Court, I mean --

12 MR. ABRAMS: That's true, Your Honor.

13 JUSTICE GINSBURG: We do tend to adhere to
14 our precedents --

15 MR. ABRAMS: Yes.

16 JUSTICE GINSBURG: -- especially a case like
17 Austin which was repeating the business about amassing
18 large funds in corporate treasuries. It was not a new
19 idea in Austin, and it was repeated after -- after
20 Austin. But there was -- so Times v. Sullivan I think
21 is quite distinct.

22 The question that was posed here is, is it a
23 proper way to resolve this case, to overrule one
24 precedent in full and another in part?

25 MR. ABRAMS: And what I'm urging on you,

1 Your Honor, is that by a parity of reasoning, although
2 not precisely the same situation, that there are cases
3 in which there is a -- an ongoing threat to freedom of
4 expression which may lead -- if you were to agree to
5 that, which may lead the Court to say, rather than
6 taking a narrower route to the same result, that it is
7 worth our moving away in this case from looking for the
8 narrowest way out, and determining it now, rather than
9 the next as-applied challenge.

10 JUSTICE SCALIA: There are -- there are two
11 separate questions that -- that have been raised in
12 opposition to your position. One is -- one is that we
13 should not resolve a broad constitutional issue where
14 there are narrower grounds, and that's the question you
15 are responding to.

16 An entirely separate question is the issue
17 of stare decisis, and you acknowledge that stare decisis
18 was not involved in *New York Times v. Sullivan*, but the
19 first question obviously was.

20 MR. ABRAMS: And stare decisis of course is
21 a question much -- much briefed by the parties, and it
22 is one which involves of course a consideration not only
23 of the merits of the decision, but certain other
24 factors, the length of time the decision has been in
25 effect and the like. The time in this case for the

1 McConnell case, of course, is only 6 years. The time
2 for the Austin case is 19 years, which is less than one
3 ruling of this Court's just last term.

4 JUSTICE GINSBURG: But what the Court said
5 in Austin it also said in the NRWC case, which was I
6 think 8 years before Austin. So Austin was not a new
7 invention.

8 MR. ABRAMS: Well, Austin was the first time
9 that corporate speech was barred -- corporate
10 independent expenditures were barred by a ruling of this
11 Court. That had not happened prior to Austin, and the
12 Solicitor General's brief acknowledges that. Now --

13 JUSTICE GINSBURG: But there have been
14 limits on corporate spending in aid of a political
15 campaign since the turn of the 20th century.

16 MR. ABRAMS: There had been limits on
17 corporate contributions since the turn of the century.
18 Corporate independent expenditures came much later and I
19 think that is something that I think is worth --

20 JUSTICE STEVENS: Much later than 1947.

21 MR. ABRAMS: Yes, Your Honor. In 1947,
22 President Truman vetoed that bill, saying that it was a
23 dangerous intrusion into free speech. That has always
24 been an area of enormous controversy, not just in the
25 public sphere but in the judicial sphere. The early

1 cases about Taft-Hartley were ones in which what the
2 Court did was to basically say in one case after another
3 that the statute did not govern the particular facts of
4 the case so as to avoid --

5 JUSTICE STEVENS: But those were union
6 cases, weren't they, rather than corporate cases?

7 MR. ABRAMS: Yes, they were three union
8 cases. And the case after that essentially was Buckley.
9 And Buckley held unconstitutional the limits posed there
10 to independent expenditures. All I'm saying is that
11 this is not a situation as if we have an unbroken amount
12 of years throughout American history in which it has
13 been accepted that independent expenditures could be
14 barred. It has always been a matter of high level of
15 controversy, with courts at first and understandably
16 shying away from facing up to the issue directly and
17 then the first ruling on point.

18 JUSTICE STEVENS: But have you read Justice
19 Rehnquist's dissent in the Bellotti case?

20 MR. ABRAMS: I'm sorry, Your Honor.

21 JUSTICE STEVENS: Have you read Justice
22 Rehnquist's dissent in the Bellotti case?

23 MR. ABRAMS: Yes, I have.

24 JUSTICE STEVENS: Which is somewhat
25 inconsistent with what you said.

1 MR. ABRAMS: Yes, it is.

2 CHIEF JUSTICE ROBERTS: And also
3 inconsistent with his later view, correct?

4 MR. ABRAMS: Yes.
5 Yes, Justice?

6 JUSTICE SOTOMAYOR: Going back to the
7 question of stare decisis, the one thing that is very
8 interesting about this area of law for the last
9 100 years is the active involvement of both State and
10 Federal legislatures in trying to find that balance
11 between the interest of protecting in their views how
12 the electoral process should proceed and the interests
13 of the First Amendment.

14 And so my question to you is, once we say
15 they can't, except on the basis of a compelling
16 government interest narrowly tailored, are we cutting
17 off or would we be cutting off that future democratic
18 process? Because what you are suggesting is that the
19 courts who created corporations as persons, gave birth
20 to corporations as persons, and there could be an
21 argument made that that was the Court's error to start
22 with, not Austin or McConnell, but the fact that the
23 Court imbued a creature of State law with human
24 characteristics.

25 But we can go back to the very basics that

1 way, but wouldn't we be doing some more harm than good
2 by a broad ruling in a case that doesn't involve more
3 business corporations and actually doesn't even involve
4 the traditional nonprofit organization? It involves an
5 advocacy corporation that has a very particular
6 interest.

7 MR. ABRAMS: Your Honor, I don't think you'd
8 be doing more harm than good in vindicating the First
9 Amendment rights here, which transcend that of Citizens
10 United.

11 I think that, reading my friend's brief here
12 on the right, they come -- some of them at least come
13 pretty close to saying that there must be a way for
14 Citizens United to win this case other than a broad way.
15 In my view the principles at stake here are the same.
16 Citizens United happens to be sort of the paradigmatic
17 example of the sort of group speaking no less about who
18 to vote for or not who to vote for or what to think
19 about a potential ongoing candidate for President of the
20 United States. But in lots of other situations day by
21 day there is a blotch to public discourse caused as a
22 result of this Congressional legislation.

23 And so we think it is not a matter of
24 cutting off what legislatures can do. They can still
25 pass legislation doing all sorts of things. They can do

1 public funding. They can do many other things that
2 don't violate the First Amendment. If we are right in
3 saying that independent expenditures, that category of
4 money leading to speech that we are talking about today,
5 if we are right that that is the sort of speech which is
6 at the core of the First Amendment, then you would be
7 doing only good, only good, by ruling that way today
8 across the board.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Abrams.

12 General Kagan.

13 ORAL ARGUMENT OF ELENA KAGAN

14 ON BEHALF OF THE APPELLEE

15 GENERAL KAGAN: Mr. Chief Justice and may it
16 please the Court:

17 I have three very quick points to make about the
18 government position. The first is that this issue has a
19 long history. For over 100 years Congress has made a
20 judgment that corporations must be subject to special
21 rules when they participate in elections and this Court
22 has never questioned that judgment.

23 Number two --

24 JUSTICE SCALIA: Wait, wait, wait, wait. We
25 never questioned it, but we never approved it, either.

1 And we gave some really weird interpretations to the
2 Taft-Hartley Act in order to avoid confronting the
3 question.

4 GENERAL KAGAN: I will repeat what I said,
5 Justice Scalia: For 100 years this Court, faced with
6 many opportunities to do so, left standing the
7 legislation that is at issue in this case -- first the
8 contribution limits, then the expenditure limits that
9 came in by way of Taft-Hartley -- and then of course in
10 Austin specifically approved those limits.

11 JUSTICE SCALIA: I don't understand what you
12 are saying. I mean, we are not a self -- self-starting
13 institution here. We only disapprove of something when
14 somebody asks us to. And if there was no occasion for
15 us to approve or disapprove, it proves nothing whatever
16 that we didn't disapprove it.

17 GENERAL KAGAN: Well, you are not a
18 self-starting institution. But many litigants brought
19 many cases to you in 1907 and onwards and in each case
20 this Court turns down, declined the opportunity, to
21 invalidate or otherwise interfere with this legislation.

22 JUSTICE KENNEDY: But that judgment was
23 validated by Buckley's contribution-expenditure line.
24 And you're correct if you look at contributions, but
25 this is an expenditure case. And I think that it

1 doesn't clarify the situation to say that for
2 100 years -- to suggest that for 100 years we would have
3 allowed expenditure limitations, which in order to work
4 at all have to have a speaker-based distinction,
5 exemption from media, content-based distinction,
6 time-based distinction. We've never allowed that.

7 GENERAL KAGAN: Well, I think
8 Justice Stevens was right in saying that the expenditure
9 limits that are in play in this case came into effect in
10 1947, so it has been 60 years rather than 100 years.
11 But in fact, even before that the contribution limits
12 were thought to include independent expenditures, and as
13 soon as Congress saw independent expenditures going on
14 Congress closed what it perceived to be illegal. So in
15 fact for 100 years corporations have made neither
16 contributions nor expenditures, save for a brief period
17 of time in the middle 1940's, which Congress very
18 swiftly reacted to by passing the Taft-Hartley Act.

19 Now, the reason that Congress has enacted
20 these special rules -- and this is the second point that
21 I wanted to make --

22 JUSTICE STEVENS: Before you go to your
23 second point, may I ask you to clarify one part of the
24 first, namely, your answer to the question I proposed to
25 Mr. Olson, namely, why isn't the Snowe-Jeffords

1 Amendment, which was picked on by Congress itself, an --
2 and which is argued by the NRA, an appropriate answer to
3 this case?

4 GENERAL KAGAN: That was my third point,
5 Justice Stevens.

6 JUSTICE STEVENS: Oh, I'm sorry.

7 (Laughter.)

8 GENERAL KAGAN: So we will just skip over
9 the second.

10 My third point is that this is an anomalous
11 case in part because this is an atypical plaintiff. And
12 the reason this is an atypical plaintiff is because this
13 plaintiff is an ideological nonprofit and --

14 CHIEF JUSTICE ROBERTS: So you are giving up
15 -- you are giving up the distinction from MCFL that you
16 defended in your opening brief? There you said this
17 doesn't qualify as a different kind of corporation
18 because it takes corporate funds, and now you are
19 changing that position?

20 GENERAL KAGAN: No, I --I don't think we are
21 changing it. MCFL is the law, and the FEA -- FEC has
22 always tried to implement MCFL faithfully. And that's
23 what the FEC has tried to do. But if you --

24 CHIEF JUSTICE ROBERTS: So I guess -- do you
25 think MCFL applies in this case even though the

1 corporation takes corporate funds from for-profit
2 corporations?

3 GENERAL KAGAN: I don't think MCFL as
4 written applies in this case, but I think that the Court
5 could, as lower courts have done, adjust MCFL
6 potentially to make it apply in this case, although I
7 think that would require a remand. What lower courts
8 have done -- MCFL was set up, it was written in a very
9 strict kind of way so that the organization had to have
10 a policy of accepting no corporate funds whatsoever.

11 Some of the lower courts, including the D.C.
12 Circuit, which, of course, sees a lot of these cases,
13 have suggested that MCFL is too strict, that it doesn't
14 --

15 CHIEF JUSTICE ROBERTS: Do you -- do you
16 think it's too strict?

17 GENERAL KAGAN: I -- I -- the FEC has no
18 objection to MCFL being adjusted in order to -- to give
19 it some flexibility. What the --

20 CHIEF JUSTICE ROBERTS: So you want to give
21 up this case, change your position, and basically say
22 you lose solely because of the questioning that we have
23 directed on reargument?

24 GENERAL KAGAN: Solely because? I am sorry?

25 CHIEF JUSTICE ROBERTS: Because of the

1 question we have posed on reargument.

2 GENERAL KAGAN: No, I don't think that that
3 is fair. We think -- we continue to think that the --
4 the judgment below should be affirmed. If you are
5 asking me, Mr. Chief Justice, as to whether the
6 government has a preference as to the way in which it
7 loses, if it has to lose, the answer is yes.

8 CHIEF JUSTICE ROBERTS: What case of ours --
9 what case of ours suggests that there is a hierarchy of
10 bases on which we should rule against a party when both
11 of them involve constitutional questions? Extending --
12 modifying MCFL would be, I assume, by virtue of the
13 First Amendment. Overruling Austin would be by virtue
14 of the First Amendment. So what case says we should
15 prefer one as opposed to the other?

16 GENERAL KAGAN: I think the question really
17 is the Court's standard practice of deciding as-applied
18 challenges before facial challenges. And this case
19 certainly raises a number of tricky as-applied
20 questions. One is the question of how the -- the
21 statute applies to nonprofit organizations such as this
22 one. Another is a question of how it applies to VOD
23 transmissions. Yet another is the question of how it
24 applies to a 90-minute infomercial as opposed to smaller
25 advertisements.

1 JUSTICE KENNEDY: But if you -- if you
2 insist on the as-applied challenge, isn't that
3 inconsistent with the whole line of cases that began in
4 Thornhill v. Alabama and Coates v. Cincinnati? What
5 about the Thornhill doctrine? It is not cited in the
6 briefs, but that doctrine is that even a litigant
7 without standing to object to a particular form of
8 conduct can raise that if the statute covers it in order
9 that the statute does not have an ongoing chill against
10 speech. And there is no place where an ongoing chill is
11 more dangerous than in the elections context.

12 GENERAL KAGAN: Well, I think even --

13 JUSTICE KENNEDY: So you are asking us to
14 have an ongoing chill where we have as-applied
15 challenges which are based on, as I indicated before,
16 speaker, content, time, and this is the kind of chilling
17 effect that the Thornhill doctrine stands directly
18 against.

19 GENERAL KAGAN: You know, I think even in
20 the First Amendment context, Justice Kennedy, the Court
21 will not strike down a statute on its face unless it
22 finds very substantial overbreadth, many applications of
23 the statute that are unconstitutional, as opposed to
24 just a few or just some. What I am suggesting here is
25 that the Court was right in McConnell and then confirmed

1 in WRTL to find that BCRA, which is of course the only
2 statute directly involved in this case, did not have
3 that substantial overdraft.

4 JUSTICE KENNEDY: Let me ask you this.
5 Suppose that we were to rule that nonprofit corporations
6 could not be covered by the statute. Would that --
7 would the statute then have substantial overbreadth?

8 GENERAL KAGAN: Well, I would urge you not
9 to do that in that kind of sweeping way, because the
10 reason for the nonprofit corporations being covered is
11 to make sure that the nonprofit corporations don't
12 function as conduits for the for-profit corporations.

13 JUSTICE KENNEDY: But suppose we were to say
14 that. Would the statute then not be substantially
15 overbroad?

16 GENERAL KAGAN: Well, I don't think that the
17 statute is substantially overbroad right now. So if you
18 took out certain applications, I can't think --

19 JUSTICE KENNEDY: But I am asking you to
20 assume that we draw the nonprofit/profit distinction.
21 Then the statute, it seems to me, clearly has to fall
22 because, number one, we couldn't sever it based on the
23 language.

24 GENERAL KAGAN: I see what you are saying.
25 Well, you could do a couple of things. You could do

1 what Justice Stevens suggested. Justice Stevens
2 suggested -- I suggested to Chief Justice Roberts --

3 JUSTICE STEVENS: I don't think you -- I
4 don't think you really caught what I suggested because
5 you treated it as an enlargement of the MCFL example.

6 GENERAL KAGAN: I was going to go back.

7 JUSTICE STEVENS: But that is not what the
8 National Rifle Association argues or what Snowe-Jeffords
9 covers. It covers ads that are financed exclusively by
10 individuals even though they are sponsored by a
11 corporation.

12 GENERAL KAGAN: Yes, that's exactly right.
13 What you are suggesting, Justice Stevens, is essentially
14 stripping the Wellstone amendment from the --

15 JUSTICE STEVENS: Correct and treating the
16 Snowe-Jeffords amendment as being the correct test. And
17 nobody has explained why that wouldn't be a proper
18 solution, not nearly as drastic as -- as being argued
19 here.

20 GENERAL KAGAN: Yes, and there are some, you
21 know -- there are -- there are some reasons that that
22 might -- that might be appropriate. The Wellstone
23 amendment was a funny kind of thing. It was passed very
24 narrowly, but beyond that it was passed with a -- a
25 really substantial support of many people who voted

1 against the legislation in the end, presumably as a
2 poison pill.

3 JUSTICE BREYER: Well, if we -- if we go --
4 if we go that route, what we are doing is creating an
5 accounting industry, aren't we? Corporations give huge
6 amounts of money to the C-4 organization, and then
7 somebody, perhaps the FEC, has to decide whether in fact
8 that is a way of subverting the prohibition against the
9 direct payment for the communication, right? Okay, so
10 Congress said, we don't want that. Congress said,
11 that's going to be a nightmare, and we decide Wellstone,
12 for whatever reasons.

13 Now don't we have to focus on whether
14 Congress can say that or whether it can't?

15 JUSTICE STEVENS: But --

16 JUSTICE BREYER: And I don't know why it
17 cannot say it.

18 JUSTICE STEVENS: Congress also said if you
19 strike down the Wellstone amendment, we want the Snowe-
20 Jeffords amendment.

21 JUSTICE BREYER: That's true.

22 JUSTICE STEVENS: And why shouldn't we
23 follow that direction?

24 GENERAL KAGAN: If you strike down the
25 Wellstone amendment, what is left is the Snowe-Jeffords

1 amendment --

2 JUSTICE STEVENS: Right.

3 GENERAL KAGAN: -- which allows nonprofit
4 organizations of the kind here to fund these ads out of
5 separate bank accounts, not PACs just separate bank
6 accounts --

7 JUSTICE STEVENS: Correct.

8 GENERAL KAGAN: -- which include only
9 individual expenditures.

10 JUSTICE STEVENS: Then why is that not the
11 -- the wisest narrow solution of the problem before us?

12 GENERAL KAGAN: Well, it is -- it is
13 certainly a narrower and I think better solution than a
14 facial invalidation of the whole statute.

15 CHIEF JUSTICE ROBERTS: Counsel, what do you
16 -- what do you understand to be the compelling interest
17 that the Court articulated in Austin?

18 GENERAL KAGAN: I think that what the Court
19 articulated in Austin -- and, of course, in the
20 government briefs we have suggested that Austin did not
21 articulate what we believe to be the strongest
22 compelling interest, which is the anticorruption
23 interest. But what the Court articulated in Austin was
24 essentially a concern about corporations using the
25 corporate form to appropriate other people's money for

1 expressive purposes.

2 CHIEF JUSTICE ROBERTS: Right. So but you
3 -- you have more or less -- "abandoned" is too strong a
4 word, but as you say you have relied on a different
5 interest, the quid pro quo corruption. And you -- you
6 articulate on page 11 of your brief -- you recognize
7 that this Court has not accepted that interest as a
8 compelling interest.

9 So isn't it the case that as you view Austin
10 it is kind of up for play in the sense that you would
11 ground it on an interest that the Court has never
12 recognized?

13 GENERAL KAGAN: Well, a couple of points.
14 The first thing is, as you say, we have not abandoned
15 Austin. We have simply said that in addition --

16 CHIEF JUSTICE ROBERTS: Where --

17 GENERAL KAGAN: -- to other people's money
18 interest that --

19 CHIEF JUSTICE ROBERTS: Where in your --
20 where in your supplemental briefing do you say that this
21 aggregation of wealth interest supports Austin?

22 GENERAL KAGAN: I would not really call it
23 an aggregation of wealth interest. I would say that
24 it's -- it's a concern about corporate use of other
25 people's money to --

1 CHIEF JUSTICE ROBERTS: Putting it outside,
2 putting the quid pro quo interest aside, where in your
3 supplemental briefing do you support the interest that
4 was articulated by the Court in Austin?

5 GENERAL KAGAN: Where we talk about
6 shareholder protection and where we talk about the
7 distortion of the electoral process that occurs when
8 corporations use their shareholders' money who may or
9 may not agree --

10 CHIEF JUSTICE ROBERTS: I understand that to
11 be a different interest. That is the shareholder
12 protection interest as opposed to the fact that
13 corporations have such wealth and they -- they distort
14 the marketplace.

15 GENERAL KAGAN: Well, I -- I think that they
16 are connected because both come --

17 CHIEF JUSTICE ROBERTS: So -- so am I right
18 then in saying that in the supplemental briefing you do
19 not rely at all on the market distortion rationale on
20 which Austin relied; not the shareholder rationale, not
21 the quid pro quo rationale, the market distortion issue.
22 These corporations have a lot of money.

23 GENERAL KAGAN: We do not rely at all on
24 Austin to the extent that anybody takes Austin to be
25 suggesting anything about the equalization of a speech

1 market. So I know that that's the way that many people
2 understand the distortion rationale of Austin, and if
3 that's the way the Court understands it, we do not rely
4 at all on that.

5 JUSTICE GINSBURG: So --

6 CHIEF JUSTICE ROBERTS: So if we have to
7 preserve -- if we are going to preserve Austin we have
8 to accept your invitation that the quid pro quo interest
9 supports the holding there or the shareholder protection
10 interest.

11 GENERAL KAGAN: I would say either the quid
12 pro quo interest, the corruption interest or the
13 shareholder interest, or what I would say is a -- is
14 something related to the shareholder interest that is in
15 truth my view of Austin, which is a view that when
16 corporations use other people's money to electioneer,
17 that is a harm not just to the shareholders themselves
18 but a sort of a broader harm to the public that comes
19 from distortion of the electioneering that is done by
20 corporations.

21 JUSTICE SCALIA: Let's -- let's talk about
22 overbreadth. You've -- let's assume that that is a
23 valid interest. What percentage of the total number of
24 corporations in the country are not single shareholder
25 corporations? The local hairdresser, the local auto

1 repair shop, the local new car dealer -- I don't know
2 any small business in this country that isn't
3 incorporated, and the vast majority of them are
4 sole-shareholder-owned.

5 Now this statute makes it unlawful for all
6 of them to do the things that you are worried about, you
7 know, distorting other -- the interests of other
8 shareholders. That is vast overbreadth.

9 GENERAL KAGAN: You know, I think that the
10 single shareholders can present these corruption
11 problems. Many, many closed corporations, single
12 shareholder corporations --

13 JUSTICE SCALIA: I'm not talking about the
14 corruption interest. You -- you have your quid pro quo
15 argument, that's another one. We get to that when we
16 get there. But as far as the interest you are now
17 addressing, which is those shareholders who don't agree
18 with this political position are being somehow cheated,
19 that doesn't apply probably to the vast majority of
20 corporations in this country.

21 GENERAL KAGAN: You are quite right,
22 Justice Scalia, when -- we say when it comes to single
23 shareholders, the kind of "other people's money"
24 interests, the shareholder protection interests do not
25 apply. There --

1 JUSTICE SCALIA: So that can't be the
2 justification --

3 GENERAL KAGAN: There --

4 JUSTICE SCALIA: -- because if it were, the
5 statute would be vastly overbroad.

6 GENERAL KAGAN: There the strongest
7 justification is the anticorruption interest.

8 JUSTICE ALITO: Well, with respect to that
9 what is your answer to the argument that more than half
10 the States, including California and Oregon, Virginia,
11 Washington State, Delaware, Maryland, a great many
12 others, permit independent corporate expenditures for
13 just these purposes? Now have they all been overwhelmed
14 by corruption? A lot of money is spent on elections in
15 California; has -- is there a record that the
16 corporations have corrupted the political process there?

17 GENERAL KAGAN: I think the experience of
18 some half the States cannot be more important than the
19 100-year old judgment of Congress that these
20 expenditures would corrupt the Federal system, and I
21 think that --

22 JUSTICE SCALIA: Congress has a
23 self-interest. I mean, we -- we are suspicious of
24 congressional action in the First Amendment area
25 precisely because we -- at least I am -- I doubt that

1 one can expect a body of incumbents to draw election
2 restrictions that do not favor incumbents. Now is that
3 excessively cynical of me? I don't think so.

4 GENERAL KAGAN: I think, Justice Scalia,
5 it's wrong. In fact, corporate and union money go
6 overwhelmingly to incumbents. This may be the single
7 most self-denying thing that Congress has ever done. If
8 you look -- if you look at the last election cycle and
9 look at corporate PAC money and ask where it goes, it
10 goes ten times more to incumbents than to challengers,
11 and in the prior election cycle even more than that.

12 And for an obvious reason, because when
13 corporations play in the political process, they want
14 winners, they want people who will produce outcomes for
15 them, and they know that the way to get those outcomes,
16 the way to get those winners is to invest in incumbents,
17 and so that's what they do. As I said, in double digits
18 times more than they invest in challengers. So I think
19 that that -- that that rationale, which is undoubtedly
20 true in many contexts, simply is not the case with
21 respect to this case.

22 JUSTICE KENNEDY: But under your position,
23 if corporations A, B, and C, are called to Washington
24 every Monday morning by a high-ranking administrative
25 official or a high-ranking member of the Congress with a

1 committee chairmanship and told to tow the line and to
2 tell their directors and shareholders what the policy
3 ought to be, some other corporation can't object to that
4 during the election cycle. The government silences a
5 corporate objector, and those corporations may have the
6 most knowledge of this on the subject.

7 Corporations have lots of knowledge about
8 environment, transportation issues, and you are
9 silencing them during the election.

10 GENERAL KAGAN: Well --

11 JUSTICE KENNEDY: When other corporations,
12 via -- because of the very fact you just point out, have
13 already been used and are being used by the government
14 to express its views; and you say another corporation
15 can't object to that.

16 GENERAL KAGAN: Well, to the extent,
17 Justice Kennedy, that you are talking about what goes on
18 in the halls of Congress, of course corporations can
19 lobby members of Congress in the same way that they
20 could before this legislation. What this legislation is
21 designed to do, because of its anticorruption interest,
22 is to make sure that that lobbying is just persuasion
23 and it's not coercion. But in addition to that, of
24 course corporations have many opportunities to speak
25 outside the halls of Congress.

1 JUSTICE STEVENS: One of the amicus briefs
2 objects to -- responds to Justice Kennedy's problem by
3 saying that the problem is we have got to contribute to
4 both parties, and a lot of them do, don't they?

5 GENERAL KAGAN: A lot of them do, which is a
6 suggestion about how corporations engage the political
7 process and how corporations are different from
8 individuals in this respect. You know, an individual
9 can be the wealthiest person in the world but few of
10 us -- maybe some -- but few of us are only our economic
11 interests. We have beliefs, we have convictions; we
12 have likes and dislikes. Corporations engage the
13 political process in an entirely different way and this
14 is what makes them so much more damaging.

15 CHIEF JUSTICE ROBERTS: Well, that's not --
16 I'm sorry, but that seems rather odd. A large
17 corporation just like an individual has many diverse
18 interests. A corporation may want to support a
19 particular candidate, but they may be concerned just as
20 you say about what their shareholders are going to think
21 about that. They may be concerned that the shareholders
22 would rather they spend their money doing something
23 else. The idea that corporations are different than
24 individuals in that respect, I just don't think holds
25 up.

1 GENERAL KAGAN: Well, all I was suggesting,
2 Mr. Chief Justice, is that corporations have actually a
3 fiduciary obligation to their shareholders to increase
4 value. That's their single purpose, their goal.

5 CHIEF JUSTICE ROBERTS: So if a candidate --
6 take a tobacco company, and a candidate is running on
7 the platform that they ought to make tobacco illegal,
8 presumably that company would maximize its shareholders'
9 interests by opposing the election of that individual.

10 GENERAL KAGAN: But everything is geared
11 through the corporation's self-interest in order to
12 maximize profits, in order to maximize revenue, in order
13 to maximize value. Individuals are more complicated
14 than that. So that when corporations engage the
15 political process, they do it with that set of you know,
16 blinders -- I don't mean it to be pejorative, because
17 that's what we want corporations to do, is to --

18 CHIEF JUSTICE ROBERTS: Well, I suppose some
19 do, but let's say if you have ten individuals and they
20 each contribute \$1,000 to a corporation, and they say,
21 "we want this corporation to convey a particular
22 message," why can't they do that, when if they did that
23 as partnership, it would be all right?

24 GENERAL KAGAN: Well, it sounds to me as
25 though the corporation that you were describing is a

1 corporation of the kind we have in this case, where one
2 can assume that the members all sign on to the
3 corporation's ideological mission, where the corporation
4 in fact has an ideological mission.

5 JUSTICE SCALIA: General Kagan, most -- most
6 corporations are indistinguishable from the individual
7 who owns them, the local hairdresser, the new auto
8 dealer -- dealer who has just lost his dealership and --
9 and who wants to oppose whatever Congressman he thinks
10 was responsible for this happening or whatever
11 Congressman won't try to patch it up by -- by getting
12 the auto company to undo it. There is no distinction
13 between the individual interest and the corporate
14 interest. And that is true for the vast majority of
15 corporations.

16 GENERAL KAGAN: Well --

17 JUSTICE SCALIA: Yet this law freezes all of
18 them out.

19 GENERAL KAGAN: To the extent that we are
20 only talking about single shareholder corporations, I
21 guess I would ask why it's any burden on that single
22 shareholder to make the expenditures to participate in
23 the political person in the way that person wants to
24 outside the corporate forum? So single shareholders
25 aren't suffering any burden here; they can do everything

1 that they could within the corporate form, outside the
2 corporate form. They probably don't get the tax breaks
3 that they would get inside the corporate form, but I'm
4 not sure anything else is very different.

5 JUSTICE SCALIA: Oh, he wants to put up a
6 sign --

7 JUSTICE STEVENS: Ultra Vires would take
8 care of about 90 percent of the small corporations that
9 Justice Scalia is talking about. They can't just --
10 they can't even give money to charities sometimes
11 because of Ultra Vires. Giving political contributions
12 is not typical for corporate activity.

13 JUSTICE BREYER: Is -- I -- I remember
14 spending quite a few days one summer reading through
15 1,000 pages of opinion in the D.C. Circuit. And I came
16 away with the distinct impression that Congress has
17 built an enormous record of support for this bill in the
18 evidence.

19 And my recollection is, but it is now a
20 couple of years old, that there was a lot of information
21 in that which suggested that many millions of voters
22 think, at the least, that large corporate and union
23 expenditures or contributions in favor of a candidate
24 lead the benefited political figure to decide quite
25 specifically in favor of the -- of the contributing or

1 expending organization, the corporation or the union.

2 GENERAL KAGAN: Yes, that's --

3 JUSTICE BREYER: Now, it was on the basis of
4 that, I think, that this Court upheld the law in BCRA.
5 But we have heard from the other side there isn't much
6 of a record on this.

7 So, if you could save me some time here,
8 perhaps you could point me, if I am right, to those
9 thousand pages of opinion and tens of thousands of
10 underlying bits of evidence where there might be support
11 for that proposition?

12 GENERAL KAGAN: Yes, that's exactly right,
13 Justice Breyer, that in addition to the 100-year old
14 judgment that Congress believes this is necessary, that
15 very recently members of Congress and others created a
16 gigantic record showing that there was corruption and
17 that there was the appearance of corruption.

18 And in that record, many times senators,
19 former senators talk about the way in which fundraising
20 is at the front of their mind in everything that they do
21 the way in which they grant access, the way in which
22 they grant influence, and the way in which outcomes
23 likely change as a result of that fundraising.

24 JUSTICE BREYER: BCRA has changed all that.

25 CHIEF JUSTICE ROBERTS: Counsel, could I

1 ask, it seems -- to your shareholder protection
2 rationale, isn't it extraordinarily paternalistic for
3 the government to take the position that shareholders
4 are too stupid to keep track of what their corporations
5 are doing and can't sell their shares or object in the
6 corporate context if they don't like it?

7 GENERAL KAGAN: I don't think so, Mr. Chief
8 Justice. I mean, I, for one, can't keep track of what
9 my -- where I hold --

10 CHIEF JUSTICE ROBERTS: You have a busy job.
11 You can't expect everybody to do that.

12 (Laughter.)

13 GENERAL KAGAN: It's not that -- it's not
14 that I have a busy job.

15 CHIEF JUSTICE ROBERTS: But it is
16 extraordinary -- I mean, the -- the idea and as I
17 understand the rationale, we -- we the government, big
18 brother, has to protect shareholders from themselves.
19 They might give money, they might buy shares in a
20 corporation and they don't know that the corporation is
21 taking out radio ads. The government has to keep an eye
22 on their interests.

23 GENERAL KAGAN: I appreciate that. It's not
24 that I have a busy job, it's that I, like most
25 Americans, own shares through mutual funds. If you

1 don't know where your mutual funds are investing, so you
2 don't know where you are --

3 CHIEF JUSTICE ROBERTS: So it is -- I mean,
4 I understand. So it is a paternalistic interest, we the
5 government have to protect you naive shareholders.

6 GENERAL KAGAN: In a world in which most
7 people own stock through mutual funds, in a world where
8 people own stock through retirement plans in which they
9 have to invest, they have no choice, I think it's very
10 difficult for individual shareholders to be able to
11 monitor what each company they own assets in is doing or
12 even to know the extent of the --

13 JUSTICE GINSBURG: In that respect, it's
14 unlike the union, because the -- the worker who does not
15 want to affiliate with a union cannot have funds from
16 his own pocket devoted to political causes. But there
17 is no comparable check for corporations.

18 GENERAL KAGAN: That's exactly right,
19 Justice Ginsburg. In the union context, of course, it's
20 a constitutional right that the unions give back
21 essentially the funds that any union member or employee
22 in the workplace does not want used for electoral
23 purposes.

24 JUSTICE GINSBURG: Does that mean that
25 unions should be taken out, because there isn't the

1 same -- the shareholder protection interest doesn't --
2 there is no parallel for the union?

3 GENERAL KAGAN: You are right about that.
4 But I -- the government believes that with respect to
5 unions, the anticorruption interest is as strong, and
6 that unions should be kept in.

7 I think what your point suggests, that
8 the -- that the union member point suggests why Congress
9 might have thought that there was a compelling interest
10 to protect corporate shareholders in the same way that,
11 let's say, dissenting union members are protected by the
12 Constitution. There is no State action, of course, so
13 there is no constitutional right in the corporate
14 context.

15 But Congress made a judgment that it was an
16 important value that shareholders have this choice, have
17 the ability both to invest in our country's assets and
18 also to be able to choose our country's leaders.

19 CHIEF JUSTICE ROBERTS: It's not investing
20 in our country's --

21 JUSTICE KENNEDY: In the course of this
22 argument, have you covered point two?

23 (Laughter.)

24 GENERAL KAGAN: I very much appreciate --

25 JUSTICE KENNEDY: And I would like to know

1 what it is, so that I -- my notes are complete.

2 GENERAL KAGAN: I very appreciate that,
3 Justice Kennedy. I think I did cover point two, which
4 was an explanation of some of the questions that the
5 Chief Justice asked me about what interests the
6 government was suggesting motivated these laws and are
7 compelling enough such that this Court certainly should
8 not invalidate these laws.

9 CHIEF JUSTICE ROBERTS: I take it we have
10 never accepted your shareholder protection interest.
11 This is a new argument.

12 GENERAL KAGAN: I think that that's fair.
13 Certainly Bellotti does not accept it. I would think --
14 you know, National Right to Work is an interesting
15 opinion, because National Right to Work accepts for a
16 unanimous court both the shareholder protection argument
17 and the anticorruption argument with respect to the
18 section 441b in particular.

19 Now, in later cases the Court has suggested
20 that National Right to Work was only focused on
21 contributions. If you read National Right to Work, that
22 distinction really does not -- it's not evident on the
23 face of the opinion, and I think Chief Justice Rehnquist
24 at later -- in a later dissent suggested that he had
25 never understood it that way.

1 But -- so National Right to Work is a
2 confusion on this point. It --

3 CHIEF JUSTICE ROBERTS: Well, I guess other
4 than that, and I think there may be some ambiguity
5 there, but I wouldn't say NRWC is a holding on
6 shareholder protection. So to the extent that you
7 abandoned the original rationale in Austin, and
8 articulated different rationales, you have two, the quid
9 pro quo corruption interest and the shareholder
10 protection interest --

11 GENERAL KAGAN: Which we think is not in
12 Austin.

13 CHIEF JUSTICE ROBERTS: Austin, I thought,
14 was based on the aggregation of immense wealth by
15 corporations.

16 GENERAL KAGAN: Again, Austin is not the
17 most lucid opinion. But the way we understand Austin,
18 what Austin was suggesting was that the corporate form
19 gave corporations significant assets, other people's
20 money that when the corporations spent those assets --

21 CHIEF JUSTICE ROBERTS: Can you -- can you
22 give me the citation to the page in Austin where we
23 accepted the shareholder protection rationale?

24 GENERAL KAGAN: I think it comes when the --
25 when the Court is distinguishing MCFL. And the message

1 of that distinction of MCFL is the shareholder
2 protection interest? But --

3 CHIEF JUSTICE ROBERTS: Do the words
4 "shareholder" -- I don't know, do the words "shareholder
5 protection" appear in the Austin opinion?

6 GENERAL KAGAN: I honestly don't know,
7 Mr. Chief Justice. And -- and I don't want to --

8 CHIEF JUSTICE ROBERTS: If they don't --
9 let's assume they don't, then I get back to my question,
10 which is, you are asking us to defend the Austin or
11 support or continue the Austin opinion on the basis of
12 two rationales that we have never accepted, shareholder
13 protection and quid pro quo corruption?

14 GENERAL KAGAN: I would say on the quid pro
15 quo corruption, of course you have accepted that
16 rationale --

17 CHIEF JUSTICE ROBERTS: In the context of
18 contributions, not expenditures.

19 GENERAL KAGAN: That's correct. And I think
20 what has changed since -- since that time is the BCRA
21 record that Justice Breyer suggested, which was very
22 strong on the notion that there was no difference when
23 it came to corporate contributions and expenditures,
24 that there actually was no difference between the two.
25 That they --

1 CHIEF JUSTICE ROBERTS: Is that a yes? Is
2 that a yes? In other words, you are asking us to uphold
3 Austin on the basis of two arguments, two principles,
4 two compelling interests we have never accepted, in
5 expenditure context.

6 GENERAL KAGAN: In this -- in this
7 particular context, fair enough. But, you know, I
8 think --

9 JUSTICE KENNEDY: And to undercut Buckley in
10 so doing?

11 GENERAL KAGAN: Well, I don't think so,
12 because I do think Buckley was about individuals rather
13 than corporations, and Buckley was in 1976, not in 2009,
14 after the very extensive record that was created in
15 BCRA.

16 I see my time is up. I don't --

17 JUSTICE GINSBURG: May I ask you one
18 question that was highlighted in the prior argument, and
19 that was if Congress could say no TV and radio ads,
20 could it also say no newspaper ads, no campaign
21 biographies? Last time the answer was, yes, Congress
22 could, but it didn't. Is that -- is that still the
23 government's answer?

24 GENERAL KAGAN: The government's answer has
25 changed, Justice Ginsburg.

1 (Laughter.)

2 GENERAL KAGAN: It is still true that BCRA
3 203, which is the only statute involved in this case,
4 does not apply to books or anything other than
5 broadcast; 441b does, on its face, apply to other media.
6 And we took what the Court -- what the Court's -- the
7 Court's own reaction to some of those other
8 hypotheticals very seriously. We went back, we
9 considered the matter carefully, and the government's
10 view is that although 441b does cover full-length books,
11 that there would be quite good as-applied challenge to
12 any attempt to apply 441b in that context.

13 And I should say that the FEC has never
14 applied 441b in that context. So for 60 years a book
15 has never been at issue.

16 JUSTICE SCALIA: What happened to the
17 overbreadth doctrine? I mean, I thought our doctrine in
18 the Fourth Amendment is if you write it too broadly, we
19 are not going to pare it back to the point where it's
20 constitutional. If it's overbroad, it's invalid. What
21 has happened to that.

22 GENERAL KAGAN: I don't think that it would
23 be substantially overbroad, Justice Scalia, if I tell
24 you that the FEC has never applied this statute to a
25 book. To say that it doesn't apply to books is to take

1 off, you know, essentially nothing.

2 CHIEF JUSTICE ROBERTS: But we don't put our
3 -- we don't put our First Amendment rights in the hands
4 of FEC bureaucrats; and if you say that you are not
5 going to apply it to a book, what about a pamphlet?

6 GENERAL KAGAN: I think a -- a pamphlet
7 would be different. A pamphlet is pretty classic
8 electioneering, so there is no attempt to say that 441 b
9 only applies to video and not to print. It does --

10 JUSTICE ALITO: Well, what if the
11 particular -- what if the particular movie involved here
12 had not been distributed by Video on Demand? Suppose
13 that people could view it for free on Netflix over the
14 internet? Suppose that free DVDs were passed out.
15 Suppose people could attend the movie for free in a
16 movie theater; suppose the exact text of this was
17 distributed in a printed form. In light of your
18 retraction, I have no idea where the government would
19 draw the line with respect to the medium that could be
20 prohibited.

21 GENERAL KAGAN: Well, none of those things,
22 again, are covered.

23 JUSTICE ALITO: No, but could they? Which
24 of them could and which could not? I understand you to
25 say books could not.

1 GENERAL KAGAN: Yes, I think what you --
2 what we're saying is that there has never been an
3 enforcement action for books. Nobody has ever
4 suggested -- nobody in Congress, nobody in the
5 administrative apparatus has ever suggested that books
6 pose any kind of corruption problem, so I think that
7 there would be a good as-applied challenge with respect
8 to that.

9 JUSTICE SCALIA: So you're -- you are a
10 lawyer advising somebody who is about to come out with a
11 book and you say don't worry, the FEC has never tried to
12 send somebody to prison for this. This statute covers
13 it, but don't worry, the FEC has never done it. Is that
14 going to comfort your client? I don't think so.

15 JUSTICE GINSBURG: But this -- this statute
16 doesn't cover. It doesn't cover books.

17 GENERAL KAGAN: No, no, that's exactly
18 right. The only statute that is involved in this case
19 does not cover books. So 441b which --

20 CHIEF JUSTICE ROBERTS: Does cover books.

21 GENERAL KAGAN: -- which does cover books,
22 except that I have just said that there would be a good
23 as-applied challenge and that there has been no
24 administrative practice of ever applying it to the
25 books. And also only applies to express advocacy,

1 right? 203 has -- is -- is -- has a broader category of
2 the functional equivalent of express advocacy, but 441b
3 is only express advocacy, which is a part of the reason
4 why it has never applied to a book. One cannot imagine
5 very many books that would meet the definition of
6 express advocacy as this Court has expressed that.

7 CHIEF JUSTICE ROBERTS: Oh, I'm sorry, we
8 suggested some in the last argument. You have a history
9 of union organizing and union involvement in politics,
10 and the last sentence says in light of all this, vote
11 for Jones.

12 GENERAL KAGAN: I think that that wouldn't
13 be covered, Mr. Chief Justice. The FEC is very careful
14 and says this in all its regulations to view matters as
15 a whole. And as a whole that book would not count as
16 express advocacy.

17 CHIEF JUSTICE ROBERTS: Thank you, General.
18 Mr. Waxman.

19 ORAL ARGUMENT OF SETH WAXMAN
20 ON BEHALF OF SENATORS JOHN McCAIN, ET AL.,
21 AS AMICI CURIAE,
22 IN SUPPORT OF THE APPELLEE

23 MR. WAXMAN: Mr. Chief Justice, and may it
24 please the Court:

25 The requirement that corporations fund

1 electoral advocacy the same way individuals do, that is
2 with money voluntarily committed by people associated
3 with the corporation, is grounded in interests that are
4 so compelling that 52 years ago, before Buckley was
5 decided, before FECA was enacted, before Buckley-style
6 quid pro quo corruption was ever addressed, this Court
7 explained that, quote: "What is involved here is the
8 integrity of our electoral process and not less the
9 responsibility of the individual citizen for the
10 successful functioning of that process."

11 If the Court now wishes to reconsider the
12 existence and extent of the interests that underlie that
13 sentiment expressed for the Court by Justice Frankfurter
14 in the context of a prosecution of union officials for
15 running television ads supporting political candidates,
16 it should do so in a case in which those interests are
17 forthrightly challenged with a proper and full record
18 below.

19 CHIEF JUSTICE ROBERTS: One of the amicus
20 briefs, I'm not -- maybe it's professor Hayward, if I am
21 getting that right -- suggested the history of this 1947
22 provision was such that it really wasn't enforced
23 because people were concerned about the First Amendment
24 interests and that the courts to the extent cases were
25 brought did everything they could to avoid enforcing the

1 limitations.

2 MR. WAXMAN: Well, I don't recall who the
3 professor was either, Mr. Chief Justice, but I do recall
4 pretty well the history that was recounted -- I would
5 say the history that was recounted by this Court in the
6 Auto Workers case, in CIO, in the Pipefitters case,
7 which is quite inconsistent with that. We've never had
8 this case -- until this Court's supplemental order, we
9 never had a case that challenged directly, quote,
10 "Austin" and Austin-style corruption, which is a term I
11 think that is quite misleading.

12 When the sober-minded Elihu Root was moved
13 to stand up in 1894 and urged the people of the United
14 States, and urged the Congress of the United States, to
15 enact legislation that would address, quote, "a
16 constantly growing evil which has done more to shake the
17 confidence of plain people of small means of this
18 country in our political institutions than any practice
19 which has ever obtained since the founding of our
20 government," he was not engaging in a high level
21 discussion about political philosophy.

22 JUSTICE KENNEDY: But he was talking about
23 contributions in that context. That's quite clear.

24 MR. WAXMAN: He -- with all due respect,
25 Justice Kennedy, I don't think that there was any

1 distinction whatsoever in that time between the
2 distinction that this Court came to understand as a
3 result of FECA, and its adjudication of FECA and that --
4 really the prehistory of Taft-Hartley, between
5 contributions expenditures.

6 For this reason, Justice Kennedy, was that
7 what Root said was the idea -- and I am quoting now from
8 his speech which is also partly reprinted in this
9 Court's opinion in McConnell -- the idea is to prevent
10 the great companies, the great aggregations of wealth
11 from using corporate funds directly or indirectly to
12 send members of the legislature to these halls in order
13 to vote for their protection and the advancement of
14 their interests as against those of the public.

15 JUSTICE SCALIA: Great aggregations of
16 wealth. The brief by the Chamber of Commerce, the
17 amicus brief by the Chamber of Commerce points out that
18 96 percent of its members employ less than 100 people.
19 These are not aggregations of great wealth. You are not
20 talking about the railroad barons and the rapacious
21 trusts of the Elihu Root era; you are talking mainly
22 about small business corporations.

23 MR. WAXMAN: Justice Scalia, I take your
24 point and I think you have made this point forceful lily
25 many times before. A unanimous court in National Right

1 to Work Committee concluded that Congress was entitled
2 to make the judgment that it would treat in order to
3 address this root evil, a problem of such concern that
4 it goes to the very foundation of the democratic
5 republican exercise, that is, the notion of integrity in
6 representative government.

7 Now this -- this case, of course, is not a
8 case --

9 JUSTICE SCALIA: I don't understand that
10 answer. I mean, if that's what you were concerned
11 about, what Elihu Root was concerned about, you could
12 have said all corporations that have a net worth of more
13 than, you know, so much or whatever. That is not what
14 Congress did. It said all corporations.

15 MR. WAXMAN: Right. And Justice Scalia, if
16 a small corporation or even any corporation of any sort
17 wants to bring an as-applied challenge to 441b or a
18 State law analogue and say, you know, I am not the
19 problem that Theodore Roosevelt and Elihu Root was
20 addressed at; there isn't a compelling interest because
21 I only have three employees and \$8,000 in my bank
22 account, that's fine. But what is extraordinary, truly
23 extraordinary, given the sentiments that underlay the
24 Tillman Act and the Taft-Hartley Act is that we would be
25 having a discussion today about the constitutionality of

1 a law that has been on the books forever when no party,
2 no corporation, has ever raised the challenge. I well
3 recall --

4 JUSTICE KENNEDY: You say it's been on --
5 it's been on the books forever. But, No. 1, the
6 phenomenon of -- of television ads where we get
7 information about scientific discovery and -- and
8 environment and transportation issues from corporations
9 who after all have patents because they know something,
10 that -- that is different. And the -- the history you
11 applied apply to contributions, not to those kinds of
12 expenditures.

13 MR. WAXMAN: Justice Kennedy, first of all,
14 I -- I think it is actually true that patents are owned
15 by individuals and not corporations. But be that as it
16 may, there is no doubt -- I am not here saying that this
17 Court should reconsider Bellotti on first principles any
18 more than I am saying that it shouldn't consider Austin
19 on first principles. Corporations can and do speak
20 about a wide range of public policy issues, and since
21 the controlling opinion was issued in Wisconsin Right to
22 Life, the -- the kind of campaign-related speech that
23 corporations can't engage in, in the pre-election period
24 is limited to the functional equivalent of expressed
25 advocacy and nothing else.

1 JUSTICE ALITO: Mr. Waxman, all of this talk
2 about 100 years and 50 years is perplexing. It sounds
3 like the sort of sound bites that you hear on TV. The
4 -- the fact of the matter is that the only cases that
5 are being -- that may possibly be reconsidered are
6 McConnell and Austin. And they don't go back 50 years,
7 and they don't go back 100 years.

8 MR. WAXMAN: My point here is, Justice Alito
9 -- and I don't mean to be -- to be demeaning this Court
10 with sound bites. The point is that what -- Austin was,
11 to be sure, the very first case in which this Court had
12 to decide -- actually had to decide whether or not the
13 prohibition on corporate treasury funded campaign speech
14 could properly be limited and was supporting by a
15 compelling interest. All I am suggesting -- and I hope
16 that if you take nothing else from my advocacy today it
17 will be this -- is that we have here a case in which the
18 Court has asked a question that essentially goes to the
19 bona fides, that is, the factual predicates of the
20 interests that have been viewed as compelling in Austin,
21 in MCFL, in McConnell itself, whether you call it the
22 corrosive effect of corporate wealth, whether you call
23 it, quote, "shareholder protection" --

24 JUSTICE ALITO: And my point is that there
25 is nothing unusual whatsoever about a case in which a

1 party before the Court says, my constitutional rights
2 were violated, and there is no prior decision of this
3 Court holding that what was done is constitutional. And
4 in that situation is it an answer to that argument that
5 this has never been challenged before? The Court has
6 never held that it was unconstitutional? It has been
7 accepted up until this point by the general public that
8 this is -- that this is constitutional? No, that is not
9 regarded as an answer to that question.

10 MR. WAXMAN: Mr. Olson is -- was quite
11 right -- either Mr. Olson or Mr. Abrams, I find it so
12 difficult to tell the two apart. One of them was
13 saying, well, it's, you know -- yes, I think in response
14 to Justice Sotomayor's question, you know, about there
15 is no factual record here. There is absolutely nothing
16 in this case.

17 And the response was, well, it's the
18 government's burden. The government has to prove that
19 any restriction that it imposes passes strict scrutiny.

20 Fair enough, but the question has to be
21 raised. The issue has to be raised. If the -- if
22 Austin, Justice Alito, or the compelling interests that
23 Austin and McConnell relied on were forthrightly
24 challenged in a case, the government would have the
25 option --

1 CHIEF JUSTICE ROBERTS: Well, Mr. Waxman,
2 the government did have that opportunity, and the
3 government compiled a record. And when the Citizens
4 United abandoned that position -- you are quite right,
5 they changed their course -- the government and the
6 district court complained that it had to go to all this
7 work to develop this record, and yet we hear nothing
8 about what the record showed.

9 MR. WAXMAN: Well, that's because the
10 ultimate -- I assume I have your permission to answer.

11 CHIEF JUSTICE ROBERTS: Go ahead.

12 MR. WAXMAN: The -- the only challenges that
13 were litigated in the district court -- and they largely
14 were related to disclosure -- were very direct
15 as-applied challenges that had -- that did nothing
16 whatsoever to implicate the foundation of McConnell or
17 Austin. And all I'm saying is, if you want to re-
18 examine the predicates, the existence and magnitude of
19 interests that Congress has, going back a -- whether
20 it's 60 years or 100 years, and courts, whether it has
21 been the actual rationale of the decision or a predicate
22 of the rationale of the decision, you ought to do it in
23 a case where the -- where the issue is squarely
24 presented so that the government can do what it did in
25 McConnell and in another context in Michigan v. Grutter

1 when it suggested that Aderand had undermined this
2 Court's controlling opinion in Bakke. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Waxman. Mr. Olson five minutes.

5 REBUTTAL ARGUMENT OF THEODORE B. OLSON
6 ON BEHALF OF THE APPELLANT

7 MR. OLSON: Thank you, Mr. Chief Justice.
8 The words that I would leave with this Court are the
9 Solicitor General's. The government's position has
10 changed. The government's position has changed as to
11 what media might be covered by congressional power to
12 censor and -- and ban speech by corporations. Now we
13 learn, contrary to what we heard in March, that books
14 couldn't be prohibited but pamphlets could be
15 prohibited. We also learn --

16 JUSTICE GINSBURG: But that's not -- the --
17 the statute that we are involved in, in this case does
18 not cover those.

19 MR. OLSON: Unless they are engaged in,
20 quote, "expressed advocacy." And the other way in which
21 the government has changed its position, if I listened
22 carefully, is what type of corporation might be covered.
23 The government now says that it wouldn't -- the -- the
24 FEC is now willing to recede from its regulations which
25 explicitly covered this corporation, and I don't know as

1 I stand here today what kind of corporations the
2 government would choose to prosecute.

3 Remember, the Federal Election Commission,
4 which didn't even have a quorum and couldn't function at
5 all for six months during the important election year of
6 2008 --

7 JUSTICE STEVENS: If the FEC chooses to
8 prosecute only those who do not -- who do not rely
9 exclusively on individual contributions.

10 MR. OLSON: Well, that's your question from
11 before.

12 JUSTICE STEVENS: Yes. I want to see he
13 gets it.

14 MR. OLSON: And that -- (a), it wouldn't --
15 this corporation accepted a small amount, \$2,000 out of
16 -- out of the funding of this, so that wouldn't solve
17 the problem for my corporation, my client's corporation.

18 JUSTICE STEVENS: But it would solve it for
19 the advertising, and there are two things. There is the
20 long Hillary document and the advertisements. It would
21 cover those.

22 MR. OLSON: If -- but the --

23 JUSTICE STEVENS: And they are the only --
24 only ones that clearly violate the statute.

25 MR. OLSON: My point is that the overbreadth

1 in this statute -- that solves the problem by saying
2 that corporations still can't speak, and if you don't
3 have anything to do with them, you -- you -- they wear a
4 scarlet letter that says "C." If you accept one dollar
5 of funding, then you had better make darn sure that when
6 a check comes in for \$100 from the XYZ hardware store in
7 the neighborhood, that it wasn't a corporation that you
8 used to -- to make a documentary about a candidate.

9 The other way in which the government's
10 position has changed is we do not know --

11 JUSTICE STEVENS: Does that mean you
12 disagree with the NRA's submission?

13 MR. OLSON: I -- I submit that it does not
14 solve the problem. It would lead exactly --

15 JUSTICE STEVENS: If it solved the problem
16 as it would for the advertising, would it be an
17 appropriate solution?

18 MR. OLSON: It -- I can't say that it -- if
19 it solved the problem, because it doesn't solve the
20 problem of prohibiting all corporate speech. And I
21 think -- and I am submitting, Justice Stevens, that that
22 is unconstitutional. I think what you are suggesting is
23 that some limitation that -- what -- what you were
24 suggesting is not a whole lot different than PAC. It
25 would lead, I think Justice Breyer was saying, to an

1 accounting nightmare. It would be --

2 JUSTICE STEVENS: But it is a nightmare that
3 Congress endorsed in the Snowe-Jeffords Amendment.

4 MR. OLSON: Well, but the -- but the
5 Wellstone Amendment sort of in a sense repealed it.

6 JUSTICE STEVENS: We have held the Wellstone
7 Amendment literally cannot be applied.

8 MR. OLSON: Well --

9 JUSTICE STEVENS: We unanimously held that.

10 MR. OLSON: I think what -- what the -- my
11 response is that that does not solve the problem of
12 inhibiting --

13 JUSTICE STEVENS: You do not endorse the
14 NRA's position?

15 MR. OLSON: No, we don't Justice Stevens,
16 and -- and, as I said, it would not exempt my clients.
17 The other -- the third way in which the government has
18 changed its position is its rationale for this
19 prohibition in the first place. Is it corruption? Is
20 it shareholder protection? Is it equalization?

21 There was some dispute. I heard the
22 Solicitor General say that the equalization rationale
23 was something the government disavowed. It wasn't what
24 Austin said, the government -- the government said. And
25 I --

1 JUSTICE GINSBURG: Justice Marshall said
2 that he was not trying to equalize all voices in the
3 political process. He has a sentence that says, well,
4 that's not what the rationale of this case is.

5 MR. OLSON: I don't -- I don't -- with all
6 due respect Justice Ginsburg, the words that jump out at
7 me are the words from page 665 that say the desire to
8 counterbalance those advantages unique to the corporate
9 forum is the state's compelling interest in this case.
10 That sounds to me like -- like equalization.

11 I don't know. I am -- I am representing an
12 individual who wants to speak about something that's the
13 most important thing that goes on in our democracy. I'm
14 told it's a felony. I am not -- and I -- I don't know
15 what the rational basis is. It's overbroad. Now I hear
16 about this shareholder -- protecting shareholders.
17 There is not a word in the congressional record with
18 respect to the -- which was before the Court in the
19 McConnell case about protecting shareholders. As the
20 Bellotti case pointed out, that would be overbroad
21 anyway because this statute applies to every --

22 JUSTICE BREYER: Actually I read that
23 sentence that you just read as meaning the corporation
24 is an artificial person in respect to which the State
25 creates many abilities and capacities, and the State is

1 free also to create some disabilities and capacities.
2 Not a statement about balancing rich and poor.

3 MR. OLSON: Well, it -- it -- it strikes me
4 that it is, because it follows the words that say
5 corporations are given unique advantages to aggregate
6 wealth and that we must take away that advantage by
7 equalizing the process. I think that's the plain
8 meaning but my point I guess is -- if I may finish this
9 sentence.

10 CHIEF JUSTICE ROBERTS: Briefly.

11 MR. OLSON: My point is that the government
12 here has an overbroad statute that covers every
13 corporation irrespective of what its stockholders think,
14 irrespective of whether it's big, and whether it's
15 general -- a big railroad baron or anything like that,
16 and it doesn't know, as it stands here today two years
17 after this movie was offered for -- to the public for
18 its view, what media might be covered, what type of
19 corporation might be covered and what compelling
20 justification or narrow standard would be applied to
21 this form of speech.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

24 (Whereupon, at 11:34 a.m., the case in the
25 above-entitled matter was submitted.)

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