No. 08-205

In The

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

WILLIAM H. MELLOR
STEVEN M. SIMPSON*
ROBERT W. GALL
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
**Counsel of Record*
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit public-interest legal center dedicated to defending the essential foundations of a free society, including the right of all to speak out on elections and other matters of public import. Campaign-finance laws that burden speech threaten this right. For this reason, the Institute both litigates First Amendment cases that challenge campaign-finance regulations and files *amicus curiae* briefs in important cases, including *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); and *McConnell v. FEC*, 540 U.S. 93 (2003). It is through these efforts that the Institute hopes to persuade this Court and others of the need to return to first principles in the realm of freedom of speech.

SUMMARY OF ARGUMENT

1. A mere three decades after this Court held in *Buckley v. Valeo* that political speech enjoys the fullest protections of the First Amendment, the Court is now addressing whether the government may ban films and even books that identify a candidate before

[1] No party counsel authored any of this brief, and no party, party counsel, or person other than *Amicus* or its counsel paid for brief preparation and submission. The parties consented to the filing of this brief.

an election. That this is an open question suggests something has gone terribly awry with this Court's First Amendment jurisprudence. The problem lies in allowing the logic of campaign-finance laws to trump the First Amendment. Each new campaign-finance restriction has increased the value of the available alternatives for speech and political participation, resulting in efforts to close down those alternatives with additional restrictions. In upholding many of these restrictions, this Court's jurisprudence has unfortunately exhibited far more concern for the circumvention of campaign-finance laws than for the circumvention of the First Amendment. The solution is to return to first principles. Overturning *Austin v. Michigan Chamber of Commerce* and the portion of *McConnell v. FEC* upholding BCRA Section 203 is a necessary first step.

2. *Austin* effectively overruled *Buckley* by obliterating the distinction between contributions and independent expenditures and by restoring the "fairness" rationale that *Buckley* had rejected. *McConnell* continued that radical expansion of the law, resulting in a rule that allows government to suppress the most effective political speech and to discriminate against speech based on its content and the identity of the speaker. Indeed, under *Austin* and *McConnell*, there is no principled bar to extending regulation to books, the Internet, other forms of communication, groups beyond corporations, or to ballot-issue elections.

3. It is time for the First Amendment to become more than an afterthought in this Court's "campaign-finance" jurisprudence; only then will Americans have true protection from politicians' endless quest to circumvent the right to free speech. *Austin* and *McConnell* have badly damaged the First Amendment, but this Court has the chance to repair that damage.

ARGUMENT

I. This Court's Decisions Have Allowed Campaign-Finance Law to Circumvent the First Amendment's Protection of Political Speech.

In *Buckley v. Valeo*, this Court stated that campaign speech enjoys the full protections of the First Amendment. "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. 1, 48 (1976). Indeed, according to this Court, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id*. at 15. The Court has repeated this sentiment many times in the intervening years, but unfortunately its holdings have not always lived up to this ideal. The history of campaign-finance law marks the steady erosion of First Amendment rights.

This case presents the question of whether the government may prohibit a corporation from spending its own money to distribute a film that criticizes a candidate in the months preceding an election. At oral argument, the government frankly admitted that the same precedents that allow this restriction of corporate speech would also logically apply to the publication and distribution of books. In previous cases, members of this Court have pointed out that the freedom of the press is in peril as well. *See McConnell v. FEC*, 540 U.S. 93, 283-86 (2003) (Thomas, J., dissenting); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 690-92 (1990) (Scalia, J., dissenting). Although Congress has exempted certain media from the reach of the campaign-finance laws, this Court has never held that those exemptions are constitutionally required; indeed, it has implied repeatedly that they are not. *See McConnell*, 540 U.S. at 207-08 (referring to exemption for print and Internet communications as a "legislative choice"); *id*. at 208 (relying on *Austin* for distinction between media corporations and other corporations).

In sum, merely three decades after this Court assured us in *Buckley* that the First Amendment's protections could accommodate regulations designed to prevent the alleged evils associated with campaign financing, this Court is now addressing whether the government may ban films and books, with freedom of the press more a matter of legislative grace than of right. The rhetoric of *Buckley* has simply not kept pace with the reality of campaign-finance law.

The government and its supporting *amici* argue that BCRA Section 203 does not directly ban speech, and only requires corporations to finance that speech through separate segregated accounts. They will no doubt point out that individuals may still make unlimited independent expenditures, and that individuals can contribute to political committees and candidates. They will claim that concerns about book banning and media censorship are remote, that political debate remains robust, that free speech is safe. But these arguments should give no comfort to those concerned about the direction in which campaign-finance law is headed. Indeed, they represent the very mechanism by which the First Amendment has been eroded.

With every incremental advance in campaign-finance law, we have been assured that adequate alternative channels of communication and political participation remained. And yet, as the available alternatives were shut down one by one, and those who wished to speak and participate flocked to the remaining channels, the cries of campaign-finance "reformers" became louder and louder, and the list of alleged evils they sought to prevent became longer and longer.

Thus, *Buckley* upheld contribution limits because they allegedly helped eliminate *quid pro quo* corruption and its appearance. Before long, corruption became "improper influence" and the "distorting

effects" of large aggregations of wealth,[2] and still later any perceived "circumvention" of the regulatory scheme itself.[3] Protections for issue advocacy led to claims that it was a "sham" effort to influence elections, and the ban on corporate express advocacy was expanded to include merely identifying a candidate near an election.[4] Several states have extended the regulation of this speech to include print and Internet communications, to groups beyond corporations, and even to those who speak out in ballot-initiative elections. *See infra* pp. 10-11. The growth of individual independent expenditures has resulted in calls to regulate them as well,[5] to the extent that the FEC now takes the position that independent expenditures are "indirect contributions" to candidates that cause corruption. *See infra* pp. 11-12.

In short, every incremental advance in campaign-finance laws has laid the foundation for the next advance, with the result that today's "alternative

---

[2] *See*, *e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000); *Austin*, 494 U.S. at 659-60.

[3] *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001).

[4] *See McConnell*, 540 U.S. at 185, 206.

[5] *See, e.g.,* H.R. 158, 111th Cong. § 301 (2009) (proposing ban on independent expenditures); FairElections Oregon, *Campaign Finance Reform: Why We Need It and How To Do It*, http://fairelections.net/fe5.htm (last visited July 27, 2009) (calling for enactment of a ballot measure to limit individual independent expenditures to $10,000).

avenue of communication" inevitably becomes tomorrow's loophole.

Indeed, virtually every principle that formed *Buckley*'s foundation now stands on shaky ground. *Buckley* relied on *Mills v. Alabama*, 384 U.S. 214 (1966), in which this Court struck down a law banning express advocacy on election day. *See Buckley*, 424 U.S. at 14. Yet, today, state and federal law prevents many groups from so much as identifying a candidate a month before the election. *Buckley* relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for the principle that the First Amendment ensures that public debates will remain "uninhibited, robust, and wide-open." *See Buckley*, 424 U.S. at 14. Yet, today, governments may bar corporations from urging citizens to vote for or against candidates out of concerns that corporate speech has a "corrosive and distorting effect" on the debate. *Austin*, 494 U.S. at 660. *Buckley* held that government may not limit speech in order to equalize the relative ability of speakers to influence elections. 424 U.S. at 48-49. Yet the restrictions on corporate speech today rest on the notion that corporations allegedly have an "unfair advantage in the political marketplace." *Austin*, 494 U.S. at 659. *Buckley* above all emphasized the importance of speech about candidates and campaigns. Yet political speech today is subjected to some of the most burdensome regulations imposed on any speech.

The notion that we have reached an end point—that, having banned corporate-funded advertisements

and now films that identify a candidate at the wrong time, the government will not turn next to books, websites, magazines, and newspapers that do the same thing or more—is not merely naïve: it flies in the face of the last three decades of campaign-finance law. Indeed, the supporters of BCRA referred to it as merely "a modest step" that "does not even begin to address . . . the fundamental problems that exist with the hard money aspect of the system." 148 Cong. Rec. S2101 (Mar. 20, 2002) (statement of Sen. Feingold). Consistent with this attitude, the majority of this Court in *McConnell* referred to the exemption for print and Internet communications from the electioneering-communications ban as a "legislative choice" and stated that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207-08.

This Court now asks whether it should overturn *Austin* and that portion of *McConnell* that upheld BCRA Section 203. In answering these questions, the Institute for Justice urges this Court to approach the First Amendment as the starting point of its analysis, not as an afterthought. The history of campaign-finance law shows that the words of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press"—have too often been ignored. The question this Court now faces is whether to continue the steady march toward more regulation and less speech or to reaffirm the First Amendment principles on which *Buckley*

relied. *Austin* and *McConnell* went far beyond those principles. Both cases should be overturned.

II. *Austin* Upheld the Direct Regulation of Core Political Speech.

Austin held that corporate independent expenditures may be restricted because corporations enjoy state-created "advantages" that allow them to accumulate large amounts of wealth. This wealth is allegedly not commensurate with popular support for a corporation's ideas, thus giving corporations an "unfair" advantage in political debates. 494 U.S. at 659-60. This holding effectively overruled *Buckley* on two key points. First, it obliterated the distinction between direct contributions to candidates and expenditures by candidates and others. Second, *Austin* reintroduced "fairness" as a rationale for limiting speech. *Id.* at 679 (Scalia, J., dissenting). *Austin*'s holding was ostensibly limited to the corporate context, but the overarching principle that emerged from the case is clear: Anyone who can be said to have an "unfair" advantage in affecting political outcomes may have all of their expenditures for political speech, and thus their speech itself, limited.

The most obvious example of this principle in action is BCRA's ban on electioneering communications, which this Court upheld in *McConnell*. After all, if Congress may ban corporate express advocacy because of corporations' "unfair advantage" in affecting election outcomes, there is no doctrinal

reason that Congress may not ban a portion of corporations' non-express advocacy as well. That is precisely what Section 203 does—it prevents corporations from merely mentioning a candidate in the weeks leading up to an election, whether they engage in express advocacy or not.

But the logical extension of *Austin*'s rationale has not been limited to federal restrictions on corporations' independent electoral advocacy. In the wake of *McConnell*, ten states passed restrictions on "electioneering communications"—bringing the total number of such state laws to fifteen. Michael C. Munger, *Locking Up Political Speech* 5-8 (2009), http://www.ij.org/locking_up_political_speech.pdf. These laws far surpass even BCRA's restrictions. The majority of state laws apply to a larger range of media, including print media or the Internet.[6] Several states regulate electioneering communications over a longer period of time before an election,[7] and some even regulate

[6] Alaska Stat. § 15.13.400(3), (5); Cal. Gov't Code § 85310; Colo. Const. art. XXVIII, § 2(7)(a); Conn. Gen. Stat. § 9-601b(a)(2); Fla. Stat. § 106.011(13), (18)(a); Haw. Rev. Stat. § 11-207.6(c); Idaho Code § 67-6602(f); 10 Ill. Comp. Stat. 5/9-1.14; Okla. Stat. tit. 74, App., 257:1-1-2; Vt. Stat. Ann. tit. 17, § 2891; Wash. Rev. Code § 42.17.020(20); W. Va. Code § 3-8-1a(12)(A). Florida's law was recently struck down as unconstitutional. *Broward Coal. of Condos. v. Browning*, No. 08-445, 2009 U.S. Dist. LEXIS 43925 (N.D.Fla. May 22, 2009).

[7] Cal. Gov't Code § 85310; Conn. Gen. Stat. § 9-601b(a)(2); La. Rev. Stat. § 18:1463(C)(5); Ohio Rev. Code Ann. § 3517.1011(A)(7)(a); Wash. Rev. Code § 42.17.020(20).

speech about ballot issues.[8] Six states ban corporate electioneering communications entirely and, of these, two even ban speech by non-corporate groups like partnerships and trade associations.[9] When the fifteen states' laws do not ban electioneering communications outright, they indirectly ban many civic groups' speech by imposing on them onerous regulations with which they lack the resources to comply. *See* Munger, *supra*, at 2.

Austin's rationale has even been used to attack protections for independent expenditures as such. The FEC has taken the position in a case currently pending in the U.S. District Court for the District of Columbia that independent expenditures amount to "indirect contributions" to candidates and can cause corruption. The case, *SpeechNow.org v. FEC*, No. 1:08-cv-00248 (D.D.C. filed Feb. 14, 2008), involves a challenge to contribution limits that apply to a group of individuals that wish to pool their money and purchase advertisements that call for the election or

---

[8] Florida's, Illinois's, and Oklahoma's electioneering-communications regulations extend to speech about ballot issues. *See* Fla. Stat. § 106.011(18)(a); 10 Ill. Comp. Stat 5/9-1.14; Okla. Stat. tit. 74, App. 257:1-1-2.

[9] Corporate electioneering communications are banned in Alaska (Alaska Stat. 15.13.067; 15.13.400(6), (13)-(14)); Colorado (Colo. Const. art. XXVIII, § 6(2)); Connecticut (Conn. Gen. Stat. 9-613, -614); North Carolina (N.C. Gen. Stat § 163.278.82(a)); Ohio (Ohio Rev. Code Ann. § 3517.1011); and Oklahoma (Okla. Stat. tit. 74, App., 257:10-1-2(d)(2)). Connecticut's and North Carolina's bans extend to non-corporate groups.

defeat of candidates. The group is an unincorporated association that will make only independent expenditures. It will be financed only by individual contributions—meaning that it will accept no corporate or union funds—and it will not make contributions to candidates nor will it coordinate its communications with them. Plaintiffs' Proposed Findings of Fact for Certification under 2 U.S.C. § 437h at 3-4, *SpeechNow.org v. FEC*, No. 1:08-cv-00248 (D.D.C. Oct. 28, 2008).

The FEC has taken the position that independent expenditures made even by *non-corporate* groups amount to "indirect contributions" to candidates that cause corruption. FEC's Proposed Findings of Fact at 39-47, *SpeechNow.org v. FEC*, No. 1:08-cv-00248 (D.D.C. Oct. 28, 2008). Although the FEC has used this argument to justify limits on contributions to the group, the implication is that all independent expenditures, by every kind of speaker, may be limited. Indeed, the FEC argues in this case that corporate independent expenditures are corrupting, and therefore may be limited, because candidates may feel gratitude towards the speaker. *See* Supplemental Brief for the Appellee at 8-9. But that same rationale can be extended to any expenditure or action that can be said to result in a candidate's gratitude.

These developments should not be surprising. The states and the FEC have applied not only the rationale of *Austin* and *McConnell*, but this Court's express statement in *McConnell* that the particular restrictions at issue in that case were mere

"legislative choice[s]" and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." 540 U.S. at 207-08. Indeed, as Justice Scalia noted in his dissent in *Austin*, the majority's rationale logically extends to everyone who receives special advantages under federal or state tax laws, including individuals and non-corporate groups, such as LLCs. *See* 494 U.S. at 679.

The notion that everyone's political speech about elections can be regulated is a radical one, but as radical as it is, it follows logically from *Austin* and *McConnell*. So long as they remain the law of the land, there is no principled basis for this Court to turn back political censorship, including banning books.

III. *Austin* and *McConnell* Allow the Suppression of the Most Effective Speech.

This Court has made clear that the purpose of electoral advocacy is to affect the outcome of elections. "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . ." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). Yet, under *Austin* and *McConnell*, some of the most effective speakers and the most effective speech are limited or barred from the debate entirely.

This Court has repeatedly stated that, in today's world, it takes money to speak effectively. *See*, *e.g.*, *Buckley*, 424 U.S. at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."). Corporations generally have more money than individuals, so they can reach a larger audience. For Tax Year 2006, more than 5.8 million for-profit corporations filed tax returns with the IRS. Internal Revenue Service, *Statistics of Income: 2006, Corporation Income Tax Returns* 2 (2009). Also, incorporation is the most common organizational method for the 1.4 million nonprofit groups in America. Amy Blackwood et al., Urban Institute, *The Nonprofit Sector in Brief—Facts and Figures from the Nonprofit Almanac 2008: Public Charities, Giving, and Volunteering* 1 (2008), *available at* http://nccsdataweb.urban.org/kbfiles/797/Almanac2008publicCharities.pdf (last visited July 27, 2009); *see also* Mark Warda, *How To Form A Non-profit Corporation* 14 (3d ed. 2004). These numbers illustrate both the ease with which corporations are formed and that corporations provide numerous opportunities for Americans to associate with others who share common goals, views, or interests. Moreover, they illustrate the wide variety of voices Congress and state legislatures have been allowed to silence during election season. Indeed, for many Americans, the only way their voices will be heard is if they can speak through corporations of which they are either members, supporters, shareholders, or customers. Thus, the ironic result of *Austin*'s fairness rationale is that it ultimately shuts thousands of

Americans out of meaningful participation in the political process.

It is no answer to say that people can speak through means other than corporations that may be less effective. "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Nor does it matter that corporations are free to speak about candidates during other times of the year. Obviously, the ability to speak effectively about an election includes being able to speak when people are paying the most attention. In its zeal to strip this ability from corporations, Congress mutes their speech for long periods of time. For example, during a presidential-election race, Section 203 bans at least 120 days of speech about the candidates in every jurisdiction. Bradley A. Smith & Jason Robert Owen, *Boundary Based Media Restrictions in Boundless Broadcast Media Markets:* McConnell v. FEC*'s Underinclusive Overbreadth Analysis*, 18 Stan. L. & Pol'y Rev. 240, 261 (2007). In multi-state media markets, the ban can cover as many as 217 days. *Id.* at 257, 261.

By allowing the government to censor speech because of its effectiveness, *Austin* and *McConnell* assume that Americans need to be protected from it. Before *Austin*, this patronizing assumption was regularly rejected by this Court. *See*, *e.g.*, *Bellotti*, 435 U.S. at 791 ("[T]he people in our democracy are

entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."). It is time to reject it again, once and for all.

IV. *Austin* and *McConnell* Allow Discrimination Against Speech Based on Its Content and the Identity of the Speaker.

It is fundamental that the government cannot regulate speech based on either its content or the identity of the speaker. *See Bellotti*, 435 U.S. at 777. But *Austin* and *McConnell* allow regulation of corporate speech on both grounds. A corporate speaker can use its treasury funds to communicate about everything except candidates for office, their positions on the issues, and whether or not they deserve election or defeat. And discrimination against corporations is allowed by virtue of the fact they are corporations.

The government and self-styled "reformers" warn that ending discrimination against corporate speech will result in a "flood" of money into political campaigns. This argument, like *Austin* itself, wrongly conflates contributions with independent expenditures. And it is based on the notion that there is a monolithic corporate viewpoint that, left unchecked, will promote policy outcomes many will find disagreeable. Of course, even if all corporations spoke with one voice, and those who disagreed with their ideas could never succeed in accomplishing their policy goals, that would be no reason to censor

corporate speech. "The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. State Highway Employees*, 441 U.S. 463, 464-65 (1979) (internal citations omitted).

But there obviously is no such thing as a monolithic corporate viewpoint. True, if *Austin* and the portion of *McConnell* upholding BCRA Section 203 are overturned, corporations such as AIG, GM, and Chrysler may spend large sums of money to elect candidates who have benefitted them. But other voices, both corporate and non-corporate, will almost certainly spend money for the opposite purpose. Thus, for example, while AIG may run advertisements supporting candidates who opposed attempts to regulate it, other financial-services corporations that did not receive favorable treatment and nonprofit watchdog groups will be able to run ads opposing those candidates. Likewise, while Chrysler will be able to spend freely on ads supporting candidates who worked to give it favorable treatment in bankruptcy court, the institutional investors who owned Chrysler bonds will be able run ads opposing those candidates. And if Chrysler and GM run ads supporting candidates who helped bail them out, then other corporations, such as Ford, or advocacy groups that promote fiscal conservatism can run ads opposing those candidates. And, lest it be forgotten, unions, to whom Section 203 also applies, will also be able to speak out on these issues and others.

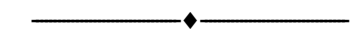
With the demise of *Austin* and *McConnell*'s upholding of Section 203, all corporations will have the same opportunity that media corporations now enjoy to endorse and talk about candidates during election season. But if those precedents remain in place, then censorship of even media corporations—which "flood" the public arena with money in the form of endorsements and coverage of candidates—will inevitably occur in the name of preventing circumvention of Section 203. As this Court noted in *Austin*, the media's exemption from restrictions on corporate speech is discretionary, not mandatory. 494 U.S. at 668. *McConnell* noted the same in regard to Section 203 and even hinted that Congress could, in the future, legitimately curb media companies' speech as part of the next "phase" of "stanch[ing] [the] flow" of corporate speech. 540 U.S. at 207-08.

This future could be sooner than we think. At least one corporation, the NRA, has established a media company to avoid Section 203's ban. John Eggerton, *Kerry Takes Aim at 'NRA-TV'*, Broadcasting & Cable, Dec. 15, 2003. Nothing prevents Congress from responding to similar efforts by narrowing the media exemption to include only "mainstream" or "established" companies.

But even these are shifting categories that provide little protection for the media. Recently, D.C. was abuzz over the Washington Post's now-cancelled plan to host a salon at the home of the Post's publisher. For $25,000, lobbyists and corporate executives would be granted exclusive access to

administration officials, members of Congress, and Post journalists. Mike Allen & Michael Calderone, *Washington Post Cancels Lobbyist Event Amid Uproar*, Politico.com, July 2, 2009, http://www.politico.com/news/stories/0709/24441.html (last visited July 27, 2009). This "scandal" brought to light that other news publications regularly host such events. Michael Calderone & Andy Barr, *Access Scandal Echoes Beyond the Washington Post*, Politico.com, July 4, 2009, http://www.politico.com/news/stories/0709/24496.html (last visited July 27, 2009). If Congress decides that media corporations are too politically involved, have a "corrosive and distorting effect" on public debate, or can garner too much "gratitude" from candidates, then *Austin* and *McConnell* would allow Congress to censor them. The same is true should Congress determine that media corporations have an "unfair" advantage as a result of the state-created benefits it is now considering giving to them to help them stay afloat. *See* Susan Milligan, *Senators Consider Options for Ailing Newspapers*, Boston Globe, May 7, 2009, at 14.

"Enough is enough." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007). To restore free speech on all topics and by all speakers as a right rather than a privilege, this Court should overturn *Austin* and the portion of *McConnell* upholding BCRA Section 203.



CONCLUSION

For too long, the First Amendment has been an afterthought in campaign-finance cases, as the government and often this Court have placed concern for circumventing campaign-finance laws above the concern that those laws were circumventing the First Amendment. The result has been an inexorable erosion of free speech to the extent that, today, we are seriously discussing whether government may prevent the distribution of films and even books, and the laws that have led to this discussion are treated as mere starting points in what will promise to be an endless effort to rid politics of any taint of "corruption."

To reverse this trend, this Court should return to first principles and overturn *Austin* and the portion of *McConnell* upholding BCRA Section 203. To leave unrepaired any longer the damage these cases have inflicted means continued erosion of the freedom of speech and, ultimately, the demise of the First Amendment.

Respectfully Submitted,

WILLIAM H. MELLOR
STEVEN M. SIMPSON*
ROBERT W. GALL
INSTITUTE FOR JUSTICE
901 North Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320

**Counsel of Record*
Counsel for Amicus Curiae