No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

SUPPLEMENTAL BRIEF FOR AMICUS CURIAE CATO INSTITUTE IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for political speech and activity, which lies at the very heart of the First Amendment.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

Under the common law and this Court's jurisprudence, *stare decisis* does not require preserving either *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), or the part of *McConnell* upholding the facial validity of Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"). Both are incorrect statements of the law as expounded in *Buckley v. Valeo*, 424 U.S. 1 (1976), are of relatively recent constitutional vintage, and have produced an arbitrary, irrational, and increasingly unworkable campaign finance system; no reliance interests weigh against overruling either decision.

ARGUMENT

I. *STARE DECISIS* MEANS FOLLOWING THE LAW, NOT MECHANICALLY PRESERVING EVERY PRECEDENT OR PERPETUATING ERRONEOUS DECISIONS.

Stare decisis, an important policy in this Court's jurisprudence with deep roots in the common law, "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). A core principle underlying *stare decisis* is that courts do not make the law, but rather declare what the law is. *See, e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will tomorrow be.") (Scalia, J., concurring in the judgment); 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 51 (London, E. & R. Brooke 1797) (1642) ("it is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."); *cf. Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Consequently, "precedents are not sacrosanct." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989). *See also Payne*, 501 U.S. at 828 ("*Stare decisis* is not an inexorable command; rather, it is a principle

of policy and not a mechanical formula of adherence to the latest decision.") (citation and quotation marks omitted). This case, and the particular issues on which the Court ordered reargument, implicate the proper application of *stare decisis* when confronting fundamentally erroneous precedents that, in making new law, departed from the immutable core of the First Amendment.

A. *Stare decisis* under the common law.

Stare decisis reflects the common law's declaratory view of precedents, which are not law themselves, but rather evidence of the law. *See, e.g.*, MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1820) ("the Decisions of Courts of Justice . . . do not make a Law . . . yet they have a great Weight and Authority in Expounding, Publishing, and Declaring what the Law of this Kingdom is."). Indeed, the word "jurisdiction" itself "is composed of JUS and DICTIO, *juris dictio* or a speaking and pronouncing of the law." THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

As William Blackstone explained, *stare decisis* does not require courts to extend or preserve a prior decision that misstated or misapplied the law:

> [A judge is] not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to

> the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm as has been erroneously determined.

1 COMMENTARIES 69-70 (Univ. of Chicago Press 1979) (1765). Blackstone concluded "that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." *Id.* at 71. In the same vein:

> I wish not to be understood to press too strongly the doctrine of *stare decisis* . . . . It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law . . . .

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 477 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989)

(12th ed. 1873). Kent continued that precedent is worthy of adherence "unless it can be shown that the law was misunderstood or misapplied in that particular case." *Id.* at 475.

Stare decisis also derives from practical considerations of doctrinal stability; in Blackstone's words, "to keep the scale of justice even and steady." 1 COMMENTARIES 69. *Stare decisis* deference is appropriate in many cases because "[i]t is by the notoriety and stability of such rules that professional men can give safe advice . . . and people in general can venture with confidence to buy and trust, and to deal with one another." 1 KENT, COMMENTARIES 476. From its origins, therefore, *stare decisis* sought to balance reliance interests in doctrinal stability with the countervailing interest in clarification when in an earlier case "the judge may *mistake* the law." 1 BLACKSTONE, COMMENTARIES 71.

B. The policy of *stare decisis* is at its nadir in this case.

This Court recognizes the importance of having settled rules of law. *See Agostini v. Felton*, 521 U.S. 203, 235 (1997). But following the common law approach to *stare decisis* as a prudential policy rooted in the declaratory view of precedent, its underlying interests are not equally compelling for all areas of law. *See Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Patterson*, 491 U.S. at 172-73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in

the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Indeed, this "policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 521 U.S. at 235. "Overruling a constitutional case decided just a few years earlier is far from unprecedented." *WRTL II*, 127 S. Ct. at 2685 (Scalia, J., concurring in part and concurring in the judgment) (citing cases).

For example, earlier this Term the Court overturned *Michigan v. Jackson*, 475 U.S. 625 (1986), rather than adopt "an unworkable standard" or force lower courts to make "arbitrary and anomalous distinctions." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2083 (2009). The Court explained, "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Id.* at 2088 (quoting *Payne*, 501 U.S. at 827). "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 2088-89.

This case—like *Buckley*, *Austin* and *McConnell*—turns on issues of constitutional interpretation under the Free Speech Clause of the First Amendment, not on statutory construction or on property or contract rights. "This Court has not hesitated to overrule decisions offensive to the First Amendment (a 'fixed star in our constitutional constellation,' if there is one) – and to do so promptly where fundamental error was

apparent." *WRTL II*, 127 S. Ct. at 2685 (Scalia, J., concurring in part and concurring in the judgment) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Thus, the policy of *stare decisis* is at its nadir here.

II. OVERTURNING *AUSTIN* AND *MCCONNELL* IS CONSISTENT WITH *STARE DECISIS*.

A. *Austin* and *McConnell* were wrongly decided and unfaithful to the First Amendment principles correctly stated in *Buckley*.

Because *stare decisis* does not require preserving or extending precedents that misstate the law, it does not shield either *Austin* or *McConnell* from being reexamined and overturned. Those decisions were fundamentally erroneous and untrue to the core principles of the First Amendment.

1. *Austin* wrongly deviated from *Buckley* by embracing the goal of equalizing the relative volume of political speakers and by permitting censorship of an entity or individual's speech based on the government's perception of public support for the ideas expressed. *Buckley* held government may not decide political speakers' relative worth or proper position in the marketplace of ideas. "[E]qualizing the relative ability of individuals and groups to influence the outcome of elections" is not a cognizable governmental interest justifying restriction of independent political speech because

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Buckley, 424 U.S. at 48-49 (internal quotation omitted). Thus Congress may not "prescribe how much political speech is too much," using means-based censorship in a misguided effort to ensure "the 'fairness' of political debate." *Austin*, 494 U.S. at 680, 695 (Scalia, J., dissenting). In *Bellotti*, the Court re-emphasized the importance of this principle, cautioning that "the people in our democracy" are entrusted with the responsibility of judging and evaluating "the relative merits of conflicting arguments"—the obvious corollary being that the government must not usurp the people's prerogative. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 (1978). *See also Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . . That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.").

But in *Austin* the Court deviated from *Buckley* by upholding Michigan's ban on corporate independent expenditures to "ensure[] that expenditures reflect actual public support for the political ideas espoused by corporations." 494 U.S. at 660. To reach this paternalistic result, the Court manufactured a new form of "corruption" to which the Michigan statute purportedly was tailored: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* Though the concern plainly was one of perceived unfairness, *Austin* creatively deemed it a form of "corruption" because the Court already had held "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985). But the corruption interest previously recognized was limited to "financial *quid pro quo*: dollars for political favors" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *Id.* at 497.

While claiming it was "a different type of corruption," the *Austin* Court more accurately described its newly minted compelling governmental interest as "eliminat[ing] the *distortion* caused by corporate spending." 494 U.S. at 660 (emphasis added). "Distortion," however, is not equivalent to corruption or even to its appearance, and is simply another way of saying corporations were speaking too

much relative to others. In fact, the Court exposed its true "equalizing" rationale when it conceded "[t]he desire to *counterbalance* those advantages unique to the corporate form is the State's compelling interest in this case." *Id.* at 665 (emphasis added). In sanctioning rationing of political speech as a compelling governmental interest, the Court permitted Michigan to suppress corporate speech in order to enhance other voices the Court viewed as more worthwhile. This was a fundamental error, perhaps chiefly because governmental actors are notoriously untrustworthy judges of the merit, or desired quantity, of potential critics, a fact amply demonstrated by the infamous Sedition Act of 1798, 5 Cong. Ch. 74, 1 Stat. 596 (expired 1801). *See also Austin*, 494 U.S. at 680 (Scalia, J., dissenting) (stating that the majority opinion is "incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate").

Demonstrating that *Austin* misinterpreted the law, the Court reinforced *Buckley* last Term in *Davis v. FEC*, holding that "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election, [but] [t]he Constitution . . . confers upon voters, not Congress, the power to choose [its] Members[.]" 128 S. Ct. at 2774. The Court rejected the notion that the government has a legitimate interest in organizing the marketplace of ideas—not to ensure each speaker is heard, and certainly not (as Michigan's attorney proposed during the *Austin* oral argument) to prevent "the people . . .

[from getting] talked at too much." 1989 U.S. Trans. LEXIS 109, *13 (Oct. 31, 1989). *Davis*'s holding implicitly confirmed that *Austin* is inconsistent with the First Amendment and with *Buckley*.

2. *Austin* silently departed from *Buckley*, not just by inventing a form of "corruption" at odds with *Buckley*, but by ignoring the actual holding: *Buckley* overturned as unconstitutional a limitation on "persons," defined to include corporations, making independent expenditures. 424 U.S. at 23; *see also Austin*, 494 U.S. at 682-83 (Scalia, J., dissenting) ("Section 608(e)(1) of [FECA], which we found unconstitutional in *Buckley* . . . limited to $1,000 (a *lesser* restriction than the absolute prohibition at issue here) such expenditures not merely by 'individuals,' but by 'persons,' specifically defined to include corporations.") (citations omitted). Consequently, *Austin* does not deserve to be extended or preserved because it contradicted the actual holding of *Buckley*.

3. Section 203 and *Austin* rest upon the false premise that banning corporate independent expenditures can actually counter an appearance of corruption. While proponents of campaign finance regulation relentlessly cite this rationale, recent research proves the link between campaign finance regulation and improved governmental reputation is tenuous at best. *See, e.g.*, David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L. J. 23, 24 (2006); David M. Primo, *Public Opinion and Campaign Finance: Reformers vs. Reality*, 7 INDEP. REV. 207 (2002). Primo and Milyo, for example, conducted an

unprecedented study of state-level campaign finance laws and searched for a statistically significant connection between such laws and voters' faith in the political process. They concluded that judges and legislators "have long assumed that campaign finance reforms can and do influence public perceptions about the workings of democracy. . . . [but] our findings are in stark contrast to what has been accepted as the common sense and self-evident connection between campaign reform and the perceived integrity of the American democratic process." 5 ELECTION L. J. at 24.

According to their detailed and specific research—as opposed to *McConnell* and *Austin*'s vague generalities—the effect of campaign finance laws is "sometimes perverse, rarely positive, and never more than modest. Given the importance placed on public opinion for the development of campaign finance law, it is remarkable that we have found so little evidence that citizens are influenced by the campaign finance laws of their state." *Id.* Not only was the *Austin* Court's cited governmental interest a transparent rephrasing of the "equalizing" interest rejected in *Buckley*, but these studies suggest that interest is not even served by restricting corporations' independent political speech.

Beyond the lack of a causal relationship between campaign finance regulation and improved government reputation generally, proponents of Section 203 and defenders of *Austin* have never proven that such an "appearance of corruption" even exists. The *McConnell* Intervenor-Defendants argued in their brief that "the testimony of the true experts"—i.e., themselves—revealed "their constituents had become

as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." 2003 WL 21999280, *16 (Aug. 5, 2003) (internal citations omitted). Not only does this fail to address *Austin* "corruption"—expenditures uncorrelated to public support for the ideas expressed—but also, as the quotation itself might suggest, the *McConnell* record is devoid of any real examples of an "appearance of corruption" problem that was not directly traceable to the opinions, op-eds, or studies of the law's proponents themselves. Accordingly, the *McConnell* opinion does not provide any concrete examples of apparent corruption.

In this light, the true aim of "campaign finance reform" comes into focus; as Justice Scalia noted dissenting in *McConnell*, it is readily apparent in that "the most passionate floor statements during the debates on this legislation pertained to so-called attack ads, which the Constitution surely protects. . . . There is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation." 540 U.S. at 297. Or, as two well-known practitioners put it, "[t]he claim that Title II was aimed at curbing actual or apparent corruption is nothing more than a post hoc justification, mouthed by government lawyers seeking to recast the provision into a form more pleasing to the Court's campaign finance jurisprudence." Charles Cooper & Derek L. Shaffer, *What Congress 'Shall Make' The Court Will Take: How McConnell v. FEC Betrays the First Amendment in Upholding Incumbency Protection Under the Banner of 'Campaign Finance Reform'*, 3 ELECTION L. J. 223, 224 (2004). "The true *telos* of Title

II was openly proclaimed from its inception by the Members of Congress who sponsored and supported it." *Id.* To wit:

> Senator Cantwell: "[Section 203] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves."
>
> Senator McCain: "[Negative attack ads] simply drive up an individual candidate's negative polling numbers and increase public cynicism for public service in general."
>
> Senator Wellstone: "I think these issue advocacy ads are a nightmare. I think all of us should hate them. . . . We could get some of this poison politics off television."
>
> Senator Jeffords: "[Issue ads] are obviously pointed at positions that are taken by you saying how horrible they are . . . . The opposition comes forth with this barrage [of ads] and you are totally helpless."
>
> Senator Boxer: "We have an opportunity . . . to stop [negative ads] and basically say, if you want to talk about an issue, that is fine, but you can't mention a candidate . . . ."

Id. (citing additional statements).

This candid fear of dissent or criticism—an "interest" clearly not recognized by this Court at any point in its history—is the true animating force behind Section 203. And it is indisputable that bald incumbent protection is antithetical to the true "corruption and appearance of corruption" rationale articulated in *Buckley*, or, for that matter, even to the dubious "corruption by amassment of wealth" rationale contrived in *Austin*.

Because they are unfaithful to the core protections of the First Amendment, as correctly articulated in *Buckley*, neither *Austin* nor *McConnell* are correct statements of law. Following the policy of *stare decisis*, the Court should "declare[], not that [either decision] was *bad law*, but that it was *not law*." 1 BLACKSTONE, COMMENTARIES 70.

B. Other *stare decisis* factors—reliance, antiquity, and workability—support overruling *Austin* and *McConnell*.

1. *Austin* and *McConnell* have not engendered the kind of reliance interests that *stare decisis* contemplates protecting. The reliance interests at stake in "cases involving property and contract rights" understandably weigh in favor of adhering to precedent. *Payne*, 501 U.S. at 828; *see also* 1 KENT, COMMENTARIES 443 (*stare decisis* helps ensure "people in general can venture with confidence to buy and trust, and to deal with one another."). But such concerns are irrelevant here. Certainly no one has "ordered their thinking and living" in reliance on the continued viability of either *Austin* or *McConnell*. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833,

856 (1992). On the contrary, both decisions have had a chilling effect on the exercise of the constitutional right to freedom of speech. In other words, no one is relying on having less freedom of speech, *see Lawrence v. Texas*, 539 U.S. 558, 577 (2003), so no reliance interests weigh in favor of extending or preserving either case.

2. Another "relevant factor" under *stare decisis* is "the antiquity of the precedent." *Montejo*, 129 S. Ct. at 2088-89. *See also WRTL II*, 127 S. Ct. at 2685 ("Overruling a constitutional case decided just a few years earlier is far from unprecedented."). But both *Austin* and *McConnell* are of relatively recent constitutional vintage, such that *stare decisis* does not mandate extending either erroneous decision. In fact, *Austin* "is so unancient that [three] of the current Members of this Court [were] sitting" when it was decided. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 106 (Scalia, J., concurring; joined by Kennedy, J.) (one justice sitting for precedent). *Six* members of this Court were sitting for *McConnell*. Accordingly, *stare decisis* does not counsel that this Court follow either decision.

3. By deviating from the First Amendment principles clearly stated in *Buckley*, *Austin* and *McConnell* bred an unworkable regulatory regime riddled with increasingly arbitrary exemptions, which are irreconcilable with the "corruption-as-distortion" interest conceived in *Austin*. The validity of the "corrosive and distorting effects of immense aggregations of [corporate] wealth" rationale for banning corporate speech in *Austin* and *McConnell*,

respectively, was belied *ab initio* by the media exemption. Since then, the media exemption has been exposed as fallacious by more recent exemptions for incorporated Internet entities and LLCs. These exemptions, by which entities enjoying the same state-conferred benefits and wealth aggregation are permitted to speak without the restrictions imposed on corporations generally, demonstrate the fallacy of that purported governmental interest. All American corporations should be permitted to engage unfettered in constitutionally protected political speech.

Without any attempted distinction from the general corrupting influence of corporate spending articulated in *Austin*, certain corporations are permitted to make expenditures on the Internet, even expenditures coordinated with a candidate or committee. *See* 11 C.F.R. § 100.155; VoterVoter.com, Op. FEC 2008-10 (Oct. 24, 2008). Surely the "distortion" threat that concerned the *Austin* Court is equally implicated by corporate Internet communication, as no forum is more egalitarian, easier to access, and inexpensive to use than the Internet. Some 74% of Internet users, representing 55% of the entire adult population, went online in 2008 to get involved in the political process or to get news and information about the election.[2] Yet, though possessing all of the characteristics used to justify regulation in *Austin*, these Internet corporations are

[2] *See* Pew Internet & American Life Project, *The Internet's Role in Campaign 2008* (Apr. 2009), *available at* http://www.pewinternet.org/~/media//Files/Reports/2009/The_Internets_Role_in_Campaign_2008.pdf (last accessed July 30, 2009).

permitted to spend corporate dollars freely on unrestricted political speech, exposing *Austin* as based on a results-driven fabrication rather than a truly compelling governmental interest.

Similarly, an LLC not treated as a corporation by the IRS is permitted to make contributions and independent expenditures. *See* 11 C.F.R. § 110.1(g). Although *Austin* justified restricting corporations' political speech because of "the special benefits conferred by the corporate structure," 494 U.S. at 661, the benefits conferred by state law upon those LLCs equal and even exceed corporations' benefits. *See* Nicholas G. Karembelas, *The Revised Uniform Limited Liability Act*, WASH. LAWYER, Feb. 2008, at 34. Additionally, because single-member LLCs can make unlimited independent expenditures, The True Patriot Network, LLC, Op. FEC 2009-02 (Apr. 17, 2009), an individual (whose wealth undoubtedly originated in a corporation) can expend unlimited funds to influence a federal election—though he enjoys identical state-conferred benefits and his speech has "little or no correlation to the public's support for [his] political ideas." *Austin*, 494 U.S. at 660. The increasing prevalence of LLCs and single-member LLCs, without a concomitant devastating "distortion" of the political process, further exposes the fallacy of *Austin*-style "corruption."

The media exemption, codified since FECA's inception and specifically approved in *Austin* and *McConnell*, is the ultimate inconsistency showing the *Austin* corruption interest was arbitrary and unworkable from the start. Under this exemption,

corporations "in the regular business of imparting news to the public," like Fox News or the New York Times, may "routinely endorse candidates," despite sharing all of the wealth-amassing characteristics that justified banning corporate speech in *Austin*. *Internet Communications*, 71 Fed. Reg. 18589, 18609-10 (Apr. 12, 2006) (quoting *McConnell*, 540 U.S. at 208) (codified at 11 C.F.R. §§ 100.73 & .132). Incorporated bloggers now fall within the media exemption and may even make expenditures coordinated with candidates and committees, *id.*, thus the emergence of the new media is further eroding any meaningful distinction between those corporations the government deems worthy of speaking and those it chooses to silence under the guise of "distortion."

CONCLUSION

For the foregoing reasons, the Court should overturn both *Austin* and the part of *McConnell* upholding the facial validity of Section 203.

Respectfully submitted,

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July 31, 2009