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KEY EXCERPTS FROM CITIZENS UNITED BRIEF:
Citizens United v. Federal Election Commission

> ***"'Enough is enough.'… When the government of the United States of America claims the authority to ban books because of their political speech, something has gone terribly wrong and it is as sure a sign as any that a return to first principles is in order." (p. 2)***

Please visit www.CUvFEC.com to view the brief, along with other documents pertaining to this case, in full.

The Government Seeks Too Much Power To Ban Political Speech:

- "To answer Citizens United's argument that Section 203 of BCRA could not be constitutionally applied to a feature-length documentary film distributed through Video On Demand, the government has uncloaked an arresting conception of its own power to suppress the political speech of corporations and labor unions: The government contends that, once a communication's content has been determined by the FEC to constitute the functional equivalent of express advocacy, the First Amendment permits the government to ban any corporation or union from engaging in that speech—unless the government has qualified the organization as an 'MCFL' or a member of the 'institutional media.'" (p. 1)

- "Thus, the government reasons, the First Amendment permits Congress to criminalize not just Citizens United's proposed Video On Demand distribution of *Hillary*, but also 'putting [the movie] on its Web site or putting it on YouTube,' or even 'providing DVDs . . . in a public library.' Tr. 27, 39." (p. 1)

- "[I]f Congress wishes to enlarge its superintendence of printed political speech, there would be no First Amendment impediment to making it a felony for a corporation or union to self-publish 'a campaign biography that was the functional equivalent of express advocacy' or otherwise participate in 'the overall enterprise of writing then publishing the book' (id. at 27, 37)—such as the compendium book that Citizens United released to accompany *Hillary*." (pp. 1-2)

- "Indeed, it would be anomalous, according to the government, if it did *not* have the power to prohibit *all* corporate and union communications that constitute the functional equivalent of express advocacy because the government already makes it a felony for corporations and unions to make *any* communication that includes express advocacy—even 'a newsletter,' 'a sign held up in Lafayette Park,' or a '500-page book' that includes "vote for X" as its last three words." (p. 2)

The *Austin* Case Is Antithetical to the First Amendment and Incompatible with Court Precedent, and the Court Should Reject Its Rationale to Suppress Corporate Political Speech:

- "*Austin* was wrong when it was decided, and this Court's subsequent decisions have further undermined its First Amendment analysis. It should be overruled." (p. 3)

- "[E]very element of *Austin's* reasoning is hopelessly at odds with well-settled tenets of this Court's First Amendment jurisprudence.... *Austin* is simply a jurisprudential outlier." (pp. 9-10)

- "*Austin's* anti-distortion rationale is antithetical to the First Amendment and incompatible with this Court's precedents. The government does not have any legitimate interest—much less a compelling one—in policing the marketplace of ideas for signs of 'distortion,' equalizing the relative voice of participants in political discourse, or preventing corporations from influencing the outcome of elections." (p. 3)

- "[*Austin*] should be overruled now, even if this Court concludes (as we have urged) that *Hillary* is *not* the functional equivalent of express advocacy. 'First Amendment freedoms need breathing space to survive' (*NAACP v. Button*, 371 U.S. 415, 433 (1963)), and Citizens United's experience amply demonstrates that whatever 'breathing space' the 'functional equivalent of express advocacy' framework provides is inadequate." (pp. 3-4)

- "Although, in *WRTL II*, the Court sought to provide a test that 'allow[s] parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation' (127 S. Ct. at 2666 (opinion of Roberts, C.J.)), by the time this Court renders its decision, the

moment for Citizens United's political message—January 2008—will have long since passed. The FEC's stubborn refusal to 'give the benefit of any doubt to protecting rather than stifling speech' (id. at 2667) has rendered the existing framework unworkable and requires the Court to examine the antecedent question whether the government's underlying rationale for suppressing Citizens United's documentary film—a rationale that is rooted only in this Court's decision in *Austin*—is sustainable. And, without *Austin*, the government's attempt to suppress Citizens United's political speech collapses." (p. 4)

- "'[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.' *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (internal quotation marks omitted). 'This is particularly true in constitutional cases.' Id. at 828; see also id. at 828 n.1 (listing 33 constitutional decisions overruled between 1971 and 1991)." (p. 4)

- *"Austin* effected a dramatic break with this Court's earlier First Amendment jurisprudence. *Austin* was the *first* case—and, until *McConnell*, the only case—to hold that the government has a compelling anti-corruption interest in prohibiting corporations and unions from making independent expenditures to fund candidate-related speech. *Austin's* holding was a poorly reasoned and jurisprudentially insupportable departure from *Buckley* and this Court's other campaign finance precedent." (p. 5)

- *"Austin's* anti-distortion rationale—suppressing the speech of some speakers to diminish their impact on the marketplace of ideas—is fundamentally inconsistent with this Court's earlier campaign finance jurisprudence." (p. 6)

    - "The 'concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others,' the Court explained, 'is wholly foreign to the First Amendment.' *Buckley*, 424 U.S. at 48-49. 'The First Amendment's protection against government abridgment of free expression,' the Court continued, 'cannot properly be made to depend on a person's financial ability to engage in public discussion.' Id. at 49." (p. 7)

- *"Austin's* three fundamental premises—that (1) the government has a compelling interest in equalizing the relative voices of participants in political discourse, that (2) the First Amendment affords fewer rights to corporations than to individuals, and that (3) prohibitions on corporate expenditures are necessary to protect shareholders—are also impossible to reconcile with a number of post-*Buckley* precedents." (p. 7)

- "Even setting aside *Austin's* precipitous break with prior precedent and its unmistakable tension with later decisions, its anti-distortion rationale is flawed on its own terms." (p. 10)

- *Austin*'s anti-distortion rationale—and its fundamental premise that to protect the marketplace of ideas the government must suppress political speech—is antithetical to the First Amendment. It has created an unworkable campaign finance framework that chills fundamental First Amendment freedoms, punishes core political speech with felony prosecution, and continues to generate lengthy, piecemeal litigation. It must fall. And unless the government can locate some heretofore-unidentified justification for suppressing political speech, *McConnell*'s validation of BCRA's restrictions on "electioneering communications" also must fall." (p. 23)

Most Non-Profit Corporations Lack the Immense Wealth that Triggered *Austin's* Flawed Reasoning:

- "[I]t certainly is not the case that most for-profit corporations—let alone, most nonprofit corporations, such as the Michigan State Chamber of Commerce and Citizens United—possess treasuries laden with 'immense aggregations of wealth.' While a small number of for-profit corporations achieve great financial success, an undifferentiated prohibition on all corporate independent expenditures that ascribes the same financial power to mega-corporations such as ExxonMobil, mom-and-pop grocery stores, and ideologically oriented nonprofits prohibits vast swaths of corporate speech that are not conceivably funded by the immense corporate warchests that animated *Austin's* reasoning." (pp. 10-11)

***Austin* Failed To Recognize that Individuals of Modest Means Should Have an Ability To Pool Their Resources To Engage in Political Speech:**

- *"Austin* suggested that it is nevertheless appropriate to prohibit independent expenditures by nonprofit corporations that accept donations from for-profit corporations because, in the absence of such a prohibition, nonprofits could serve as a 'conduit' for the political expenditures of for-profit corporations. 494 U.S. at 664. This 'conduit' argument fails because *Austin's* anti-distortion rationale is flawed as to both for-profit and nonprofit corporations. But even if that were not the case, the First Amendment simply does not permit the government to suppress a person's speech as a prophylaxis against the possibility that the speaker might utter another person's assertedly harmful ideas. If that were the case, the government would be authorized to prohibit the independent expenditures of *individuals* because an individual could theoretically be used as an intermediary to funnel corporate money into the political process." (p. 11)

- *"Austin* also failed to recognize that prohibitions on corporate independent expenditures are a dramatically underinclusive means of removing 'immense aggregations of wealth' from the political process because such prohibitions do not apply to wealthy *individuals* or the 'institutional media,' which encompasses some of the largest and most financially successful corporations in the United States, including General Electric, Microsoft, and TimeWarner."

(pp. 11-12)

- "Thus, while multi-millionaires and media corporations are free to exercise their First Amendment right to devote unlimited funds to independent expenditures, individuals of modest means are barred by state and federal prohibitions on corporate independent expenditures from pooling their resources to fund the political speech of ideologically oriented nonprofit corporations, and are thus denied their most effective tool for challenging the political primacy of the super-rich and the 'institutional media.'" (p. 12)

- "*Austin's* shareholder-protection rationale is categorically inapplicable to ideologically oriented nonprofit corporations whose supporters may freely resign their membership or withhold donations if the corporations engage in political activity with which they disagree." (p. 13)

The Court Should Reject *Austin* Rather than Tinkering with the "Express Advocacy" Definition, Because Otherwise Everyone Needs To Pre-Clear Their Political Speech with the FEC To Avoid Jail:

- "Further tinkering with the definition of 'functional equivalent of express advocacy' will offer neither the clarity nor the breathing space that the First Amendment requires. The FEC has demonstrated that. Even after this Court warned that '[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor,' the FEC took the *WRTL II* lead opinion's 'susceptible of no interpretation other than as an appeal to vote' standard, and enacted a multi-factored test that excludes from its safe harbor any speech that 'take[s] a position on any candidate's or officeholder's character, qualifications, or fitness for office.'" (p. 17)

- "Facing the prospect of felony prosecution and imprisonment for its officers, no corporation or labor union would dare opine on a candidate's qualifications without checking with the FEC first. This burden on political speech, effectively placing the FEC in the role of licensor, in and of itself violates the First Amendment." (p. 17)

- "But even those would-be speakers that seek preclearance from the FEC can scarcely hope to obtain the needed advice before the moment for the political speech has passed. It took the FEC more than two months, three draft opinions, and a series of unsuccessful votes to issue its only advisory opinion on the application of the appeal-to-vote test." (pp. 17-18)

- "Unless the FEC is now willing to admit that the political speech of nonprofit ideological corporations like Citizens United poses no greater threat of corruption than that of MCFL entities or media conglomerates—something the FEC has thus far been unwilling to do—

the Court must test the strength of the government's assertion, rooted only in *Austin*, that suppression of Citizens United's movies is necessary to prevent actual or apparent corruption of officeholders." (pp. 18-19)

Citizens United Has a Constitutionally Protected Right to Political Speech and Deserves Relief:

- "To grant Citizens United effective relief—which is to say, relief that would enable Citizens United to disseminate its constitutionally protected political speech in the future without first checking with FEC minders or otherwise risking imprisonment—the Court should decide the case in a way that safeguards from FEC suppression not just *Hillary*, but also any similar documentary film that Citizens United might wish to distribute in the future." (p. 16)

- "For the proper disposition of this case, the Court should reject the anti-distortion rationale for suppressing corporate political speech formulated in *Austin* and relied upon in *McConnell*—which is the only justification the government has advanced for prohibiting Video On Demand distribution of *Hillary*." (p. 1)

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