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 APPELLANT

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QUESTION PRESENTED

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

RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Appellant remains accurate.

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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*.

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." *See* Tr. 27. The communication's format, medium, and audience have "no constitutional significance." *Id.* at 41.

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. And if 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 ex-

press 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 authored to accompany *Hillary*. David N. Bossie, *Hillary: The Politics of Personal Destruction* (2008); *see also* J.A. 13a. 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. Tr. 29, 33. This much, the government contends, is "absolutely clear under *Austin*, under *McConnell*." *Id.* at 33.

"Enough is enough." *FEC v. Wisc. Right to Life, Inc.* ("*WRTL II*"), 127 S. Ct. 2652, 2672 (2007) (opinion of Roberts, C.J.). 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.

The First Amendment provides "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. Because Section 203 of BCRA abridges speech based on its content, each of its applications is subject to strict scrutiny. *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.). While the Court has long recognized the "compelling government interest[ ]" in "preventing corruption or the appearance of corruption" (*FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 496-97 (1985)), the government pointedly has not

even attempted to justify its prohibition of the Video On Demand distribution of *Hillary* as necessary to prevent "actual or apparent *quid pro quo* arrangements." *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.). Nor could it.

The government instead seeks to justify its suppression of Citizens United's political speech as necessary to stamp out a "different type of corruption" identified for the first time in *Austin*: "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." 494 U.S. at 660. Citizens United's film must be suppressed, the government urges, so its "huge corporate treasur[y]" does not "influence unfairly the outcome of elections." *Id.* at 669.

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. *See Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978). *Austin* was wrong when it was decided, and this Court's subsequent decisions have further undermined its First Amendment analysis. It should be overruled.

And it 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. 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.

I. *AUSTIN* WAS WRONGLY DECIDED AND ITS SPEECH-SUPPRESSING ANTI-DISTORTION RATIONALE SHOULD BE ABANDONED.

"[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).

"[T]he 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." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). Each of these factors weighs strongly in favor of overruling *Austin*.

A. *Austin* Was A Poorly Reasoned Departure From *Buckley* And Other First Amendment Precedent.

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.

1. In *Austin*, the Court upheld a Michigan campaign finance statute that prohibited corporations—including nonprofits, such as the Michigan State Chamber of Commerce—from using their general treasury funds "for independent expenditures in support of, or in opposition to, any candidate in elections for state office." 494 U.S. at 654. The Court reasoned that Michigan had a compelling interest in prohibiting corporate independent expenditures in order to minimize "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.* at 660. According to the Court, "corporations . . . enjoy legal advantages enhancing their ability to accumulate wealth," and "[t]he desire to counterbalance those

advantages unique to the corporate form is the State's compelling interest." *Id.* at 665 (internal quotation marks omitted). And even though the Chamber's members could withhold their membership fees in response to political activities with which they disagreed, the Court equated the Chamber's members with the "shareholders of a business corporation" and held that the prohibition on independent expenditures was appropriate to protect members who may have an "'economic disincentive'" to withdraw from the organization. *Id.* at 663.

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. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court held that "independent expenditure ceiling[s] . . . fail[ ] to serve *any* substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," while "heavily burden[ing] core First Amendment expression." *Id.* at 47-48. The Court therefore struck down Section 608(e)(1) of the Federal Election Campaign Act ("FECA"), which prohibited any "person"—including a *corporation*—from spending more than $1,000 per year on "expenditure[s] . . . relative to a clearly identified candidate" for federal office. 18 U.S.C. § 608(e)(1) (1975); *see also* 2 U.S.C. § 431(h) (1975).

In concluding that Section 608(e)(1) did not serve any "substantial"—let alone, compelling—governmental interest, the Court rejected the government's reliance on its interest in preventing *quid pro quo* corruption. The Court explained that the "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only

undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47; *see also NCPAC*, 470 U.S. at 496-97 (there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign").

The Court also dismissed out of hand the government's asserted interest "in equalizing the relative ability of individuals *and groups* to influence the outcome of elections." *Buckley*, 424 U.S. at 48 (emphasis added). 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." *Id.* 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.

2. *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.

The Court has repeatedly reaffirmed—both before and after *Austin* was decided—that the protections afforded by the First Amendment do not diminish as a speaker's "financial ability to engage in pub-

lic discussion" increases. *See*, *e.g.*, *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."). Indeed, just last Term, the Court reiterated *Buckley*'s holding that "the interest in equalizing the relative ability of individuals and groups to influence the outcome of elections cannot support a cap on expenditures for express advocacy of the election or defeat of candidates." *Davis*, 128 S. Ct. at 2771 (internal quotation marks omitted). For the same reasons that Congress cannot use expenditure limits to "equaliz[e]" "relative ability . . . to influence" elections, it cannot use differential contribution limits to "level electoral opportunities for candidates of different personal wealth." *Id.* at 2773 (internal quotation marks omitted). The Court therefore invalidated the so-called Millionaire's Amendment of BCRA, 2 U.S.C. § 441a-1, which sought to counteract the "immense aggregations of wealth" at the disposal of self-funded candidates by increasing the limits on contributions to their opponents' campaigns. *See Davis*, 128 S. Ct. at 2774.

And, in *Bellotti*, the Court struck down a Massachusetts statute that severely restricted the right of corporations to make independent expenditures for the purpose of influencing a referendum vote. 435 U.S. at 795. The Court explained that this "type of speech [is] indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777. In unequivocal language, the Court concluded that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its sources, whether corporation, association, union, or individual." *Id.*

In addition to reaffirming the absence of a compelling governmental interest in regulating corporate independent expenditures, the Court in *Bellotti* also concluded that the Massachusetts statute was overbroad in relation to the Commonwealth's asserted interest in protecting shareholders from funding political speech with which they disagreed. 435 U.S. at 794. The Court observed that the statute would prohibit corporate speech even where the shareholders had unanimously approved the speech and where the government's purported shareholder-protection rationale was therefore manifestly inapposite. *Id.* The better approach, the Court concluded, was for the "shareholders" to "decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues." *Id.*

Thus, every element of *Austin*'s reasoning is hopelessly at odds with well-settled tenets of this Court's First Amendment jurisprudence. *Austin* concluded that the "State ha[d] articulated a sufficiently compelling rationale to support its restriction on independent expenditures" because "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures." 494 U.S. at 660. But, at the time *Austin* was decided, this Court had already held that speech equalization is *not* a compelling governmental interest (*Buckley*, 424 U.S. at 48-49)—a conclusion that was reaffirmed last Term (*Davis*, 128 S. Ct. at 2771)—and that "the inherent worth of . . . speech" does not depend on whether it is funded by an individual, corporation, or other person. *Bellotti*, 435 U.S. at 777. And to support its novel distinction between the First Amendment rights of individuals and corporations, *Austin* relied on the purported need to protect shareholders from funding speech with which they disagree. 494

U.S. at 663. *Bellotti*, however, had explicitly rejected that shareholder-protection rationale in favor of shareholders' reliance on "the procedures of corporate democracy" to control a corporation's political activities. 435 U.S. at 794.

Austin is simply a jurisprudential outlier.

3. 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.

As an initial matter, there is simply no evidence that corporate and union independent expenditures have a "corrosive and distorting effect[ ]" on the election process. In fact, many States place no limits at all on the right of corporations and unions to make independent expenditures in elections for state offices. *See*, *e.g.*, Mo. Rev. Stat. § 130.029. The government—which bears the burden of defending the constitutionality of restrictions on political speech (*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.))—has never demonstrated that the election process in these States functions less efficiently, effectively, or fairly than the election process in States that prohibit independent expenditures by corporations and unions.

In any event, a blanket prohibition on broad categories of corporate independent expenditures—such as that imposed by the Michigan law in *Austin* or by BCRA § 203—is an immensely overbroad means of combating the allegedly deleterious effects of corporate wealth on the election process. Indeed, it 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 "im-

mense 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.

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. *Buckley*, however, leaves no doubt that such a prohibition on individuals' independent expenditures would be unconstitutional. 424 U.S. at 46.

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. 2 U.S.C. § 434(f)(3)(B). Indeed, BCRA § 203 and similar prohibitions on corporate political speech "concentrate more political power in the hands of the country's wealthiest individuals"—as well as in the hands of those for-profit corporations that control media outlets—who have come to dominate political discourse as a result of the restrictions on the political activity of nonprofit ideological corporations. *WRTL II*, 127 S. Ct. at 2686 (opinion of Scalia, J.); *see also id.* ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to 527s"). Thus, while multimillionaires 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."

No less flawed is *Austin*'s contention that state law grants corporations "special advantages" that allegedly facilitate the accumulation of wealth and that distinguish corporations from individuals and other noncorporate persons. Whatever "special advantages" state law may afford a corporation, it is well settled that the "inherent worth" of speech is not diminished by "its source[ ], whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. Moreover, *Austin* overlooks the fact that state

and federal law grants "special advantages" to many persons—including individuals—that assist in the accumulation of wealth. For example, the federal government offers several tax-advantaged retirement savings plans and government-guaranteed loans for education, and many States additionally subsidize tuition at public universities. These benefits undoubtedly assist those individuals who receive them in amassing wealth that may be spent on independent expenditures that "distort[ ]" the political dialogue in favor of wealthier, college-educated individuals at the expense of less wealthy individuals without a college education. Yet, it surely would be unconstitutional for the government to prohibit retirees and college graduates from speaking based on their receipt of these "benefits." *Austin* nevertheless rests on the premise that corporations that benefit from "special advantages" forfeit their fundamental First Amendment right to participate in the political process.

As a final basis for upholding Michigan's campaign finance law, *Austin* concluded that the prohibition on corporate independent expenditures was necessary to protect shareholders from providing compulsory support for ideological messages with which they disagree. 494 U.S. at 663. But shareholder protection is *not* a compelling state interest, and thus cannot justify restrictions on core political speech. *NCPAC*, 470 U.S. at 497. In any event, *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. Moreover, the shareholder-protection rationale fails even when applied to for-profit corporations because,

as the Court recognized in *Bellotti*, shareholders have at their disposal the "procedures of corporate democracy" to decide whether their corporations should engage in political activity at all and whether the corporation should continue to disseminate a political message with which they disagree. 435 U.S. at 795. Imposing restrictions on corporations' First Amendment rights is thus manifestly unnecessary to protect the interests of a corporation's shareholders or members.

B. There Are No Reliance Interests Or Other Prudential Considerations That Militate Against Overruling *Austin*.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828. No such interests—or other prudential considerations—weigh against overruling *Austin*.

BCRA § 203 has been subject to repeated constitutional challenges since its enactment in 2002. *See McConnell*, 540 U.S. 93; *Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); *WRTL II*, 127 S. Ct. 2652. This constant stream of litigation has provided ample notice both to regulators and to the regulated community that the constitutionality of BCRA § 203 is open to substantial doubt. Indeed, the possibility that this Court would eventually reject *Austin*'s anti-distortion rationale as applied to some or all corporations—and thereby invalidate BCRA § 203 in some or all of its applications—was foreshadowed by the vigorous dissents in *Austin* itself and by the persistent criticism that the decision has received from Members of this Court in later cases, including repeated, explicit exhortations that the decision be

overruled. *See McConnell*, 540 U.S. at 257 (opinion of Scalia J.); *id.* at 274 (opinion of Thomas, J.); *id.* at 323 (opinion of Kennedy, J., joined by Rehnquist, C.J.); *WRTL II*, 127 S. Ct. at 2674 (opinion of Scalia, J., joined by Kennedy and Thomas, JJ.).

Nor are there any other prudential reasons for declining to overrule *Austin*. For example, there are no considerations of "antiquity" that weigh in favor of retaining *Austin*'s flawed anti-distortion rationale. The decision is less than twenty years old, and has been on the books four years *less* than *Michigan v. Jackson*, 475 U.S. 625 (1986), which the Court overruled this Term. *See Montejo*, 129 S. Ct. at 2091; *see also United States v. Salvucci*, 448 U.S. 83, 95 (1980) (overruling *Jones v. United States*, 362 U.S. 257 (1960)); *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (per curiam) (overruling *Morey v. Doud*, 354 U.S. 457 (1957)). Moreover, the question whether to overrule *Austin* has been extensively briefed and argued in this case, which squarely presents the Court with the opportunity to rectify *Austin*'s aberrational departure from established First Amendment principles.

II. A REEXAMINATION OF *AUSTIN*'S ANTI-DISTORTION RATIONALE IS ESSENTIAL TO THE PROPER DISPOSITION OF THIS CASE.

A "proper disposition" of a case is one that grants to the prevailing party all the relief to which it is entitled under the law. To grant Citizens United meaningful and effective relief from the government's efforts to suppress its political speech, the Court should reexamine and reject *Austin*'s anti-distortion rationale.

A. Although the FEC no longer seeks to restrict the distribution of *Hillary*—the litigation delay was

sufficient to suppress the film for the entire duration of Senator Clinton's candidacy—Citizens United's as-applied challenge is not moot because "there exists a reasonable expectation that the same controversy involving the same party will recur." *WRTL II*, 127 S. Ct. at 2663; *see also* FEC Br. 14 n.9 (conceding case is not moot). And, in fact, while the litigation over *Hillary* was pending, Citizens United produced and released a film about then-Senator Obama, and averred that it wished "to broadcast the Obama documentary on television." J.A. 214a. This litigation outlived Senator Obama's candidacy as well, but Citizens United will, if permitted, engage in similar acts of political speech in the future. *Id.*

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.

To accomplish this objective, the lines separating protected political speech from criminal conduct must be clear and must leave ample "breathing space" between the two zones. The "imperative for clarity" (*WRTL II*, 127 S. Ct. at 2669 n.7 (opinion of Roberts, C.J.)) is amplified by the fact that Congress has chosen to punish transgressions with substantial fines and up to five years' imprisonment. 2 U.S.C. § 437g(d). Indeed, even BCRA's sponsors acknowledged the need for a "certain and sure" set of campaign finance regulations (148 Cong. Rec. S2142 (2002) (statement of Sen. Feingold)), and accordingly provided for expedited judicial review of any consti-

tutional challenge to BCRA's provisions, including mandatory appellate jurisdiction in this Court. 2 U.S.C. § 437h note.

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" (*WRTL II*, 127 S. Ct. at 2669 (opinion of Roberts, C.J.)), 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." 11 C.F.R. § 114.15(b)(2). Whether a discussion of a "candidate's or officeholder's character, qualifications, or fitness for office"—core political speech, if the term means anything at all—is a felony thus now turns on whether the FEC views the speaker as "tak[ing] a position" on the topic in a manner that the FEC would characterize as an "appeal to vote." *Id.*

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. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002) ("a scheme conditioning expression on a licensing body's prior approval of content presents peculiar dangers to constitutionally protected speech") (internal quotation marks omitted). But even those would-be speakers that seek pre-

clearance 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. *See* App. to Wyoming Liberty Group Merits *Amicus* Br. 11 (transcript of FEC hearing); *see also* FEC Advisory Op. 2008-15 (Nov. 24, 2008).

That leaves the courts as a would-be speaker's only option. But as this Court observed in *Virginia v. Hicks*, 539 U.S. 113 (2003), "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech." *Id.* at 119. And this case demonstrates that, even when a speaker is willing to undertake that "considerable burden," litigation often enough will fail to provide timely relief.

A decision that leaves the FEC in the role of licensing Citizens United's political speech will not afford Citizens United meaningful relief. Such a decision would leave Citizens United in substantially the same position as it is today—litigating against the FEC for the right to distribute its movies. If BCRA § 203 is unconstitutional as applied to *Hillary*, Citizens United is entitled to a ruling that ensures that it will be able to engage through its movies in uninhibited debate about candidates for office—including their character, qualifications, and fitness for office—without again seeking the permission of the FEC or the courts. 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.

B. The government argues that Citizens United's attack on "the continuing vitality of *Austin*" "is not properly before the Court." FEC Br. 33-34. Having invoked *Austin*'s anti-distortion rationale as its *only* justification for suppressing Citizens United's speech, and having argued that the sweeping breadth of that rationale—encompassing virtually any corporate speech in any format or medium—defeated *all* of Citizens United's efforts to distinguish *Austin* and *McConnell*, the government now demands that the legal sufficiency of that rationale be insulated from judicial review. Nothing in this Court's precedent or the procedural history of this case requires that untoward result. Although the plaintiffs in *McConnell* "d[id] not contest" (540 U.S. at 205) *Austin*'s anti-distortion rationale, Citizens United now has challenged it as applied to its movie, and this Court can and should address it.

As an initial matter, this case comes to the Court under its mandatory appellate jurisdiction, and, accordingly, the Court is "required to deal with its merits." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). And, as this case arises from the district court's grant of summary judgment to the FEC (J.A. 261a), "deal[ing] with its merits" means reversing the district court if its First Amendment analysis is premised on an error of law.

Any objection to a reexamination of *Austin*'s anti-distortion rationale based upon the questions presented in Citizens United's jurisdictional statement

would be equally misguided. Citizens United presented the question, *inter alia*, whether its movie is "subject to regulation as an electioneering communication." J.S. i. Because this is a First Amendment case, fundamental to the question whether Citizens United's political speech is "subject to regulation" is the validity and sufficiency of the government's sole justification for "regulati[ng]" that speech—*Austin*'s anti-distortion rationale. Particularly when a question is "submerged in [the lower court's] analysis" of another question, this Court has treated it as fairly encompassed within a question presented in a jurisdictional statement when it "is an essential, or at least an advisable, predicate to an intelligent resolution" of the question presented. *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see also United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) (addressing constitutionality of anticipatory warrants before considering the requirements for such a warrant); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 378 n.1 (1970) (petitioner's "challenge to *The Tungus* is properly before us on certiorari, and, of course, it subsumes the question of the continuing validity of *The Harrisburg*, upon which *The Tungus* rests").

In any event, "consideration of issues not present in the jurisdictional statement . . . and not presented [below] is not beyond [this Court's] power." *Vance*, 444 U.S. at 258 n.5. This Court has found it appropriate to reach such questions when "what transpired at oral argument" led the Court to inquire whether one of its precedents warranted a "modification" (*Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971)), or, more generally, when the issue is "important" and "the parties have briefed it" (*Vance*, 444 U.S. at 258 n.5), or when, as is undoubtedly true here, "resolution of

those questions is necessary for the proper disposition of the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981).

III. BCRA § 203 IS UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED.

If this Court overrules *Austin*, then BCRA § 203 would be unconstitutional as applied to Citizens United's Video On Demand distribution of *Hillary*. And it would undermine, perhaps fatally, this Court's holding in *McConnell* that BCRA § 203 is constitutional on its face because that facial analysis was premised exclusively on *Austin*'s reasoning. 540 U.S. at 205. Without *Austin*, BCRA § 203 and *McConnell*'s facial analysis of that provision would be the proverbial house above a vacant lot—supported by nothing. Whether *McConnell* collapses would depend on whether this Court continues to adhere to the view, stated in *Buckley*, that the "absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47; *see also NCPAC*, 470 U.S. at 497.[1]

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[1] Restrictions on corporate independent expenditures cannot be defended on the ground that they are necessary to prevent circumvention of limits on corporate contributions. This Court has already held that, in light of the provisions of federal election law that treat coordinated expenditures as contributions, a prohibition on independent expenditures does not further the government's interest in preventing the circumvention of contribution limits. *See Buckley*, 424 U.S. at 47 (FECA's "contribution ceilings rather than [its] independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures").

But even if, "in some circumstances," large independent expenditures could "pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions" (*WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.) (internal quotation marks omitted)), it would be the *government's* burden in each and every case in which it sought to apply BCRA § 203 to establish that the electioneering communication at issue created this *quid pro quo* danger. *Id.* at 2664. The government has demonstrably failed to meet that burden in this case because it is inconceivable that, had Citizens United not been chilled by BCRA § 203 from distributing *Hillary* through Video On Demand during the Democratic primary season, President Obama would have viewed an overtly conservative documentary about Senator Clinton's political background as the equivalent of a campaign contribution that demanded repayment in the form of political favors for Citizens United. And any conceivable appearance of corruption is dispelled by the fact that Citizens United's expenditures on the movie would have been treated as prohibited contributions had it coordinated the production of *Hillary* with one of Senator Clinton's Democratic primary opponents. 2 U.S.C. § 441a(a)(7)(B)(i)-(ii). The public can therefore rest assured that *Hillary* represents nothing more than one conservative ideological group's independently expressed views on Senator Clinton's political background and policy positions.[2]

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[2] Moreover, if the Court did conclude that *Hillary* created the possibility of *quid pro quo* corruption, then the Court would open the door to the regulation not only of *corporations'* independent expenditures but also *individuals'* independent expenditures because there is nothing inherent in the nature of cor-

* * *

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.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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porate-funded expenditures that creates a greater risk of *quid pro quo* corruption than individually funded expenditures.