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 SENATOR MITCH MCCONNELL IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

Senator Mitch McConnell is the Senior Senator from the Commonwealth of Kentucky and the Senate Republican Leader in the 111th Congress. Senator McConnell was the lead plaintiff in *McConnell* v. *FEC*, 540 U.S. 93 (2003), litigation challenging, *inter alia*, the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). For many years, Senator McConnell has been a leader in the United States Senate in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform.

Senator McConnell submits this brief, *amicus curiae*, because of his belief that speech about candidates for federal office cannot be constrained by the Congress consistent with the First Amendment.

SUMMARY OF ARGUMENT

Few would dispute that *Hillary*: *The Movie* offers a critical, caustic, and often harsh view of then Senator and presidential candidate Hillary Clinton. But whatever one thinks of the film, from whichever side of the aisle, it is simply inconceivable that in a country founded on a profound commitment to freedom of speech, its dissemination may be punishable as a

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

crime. Lamentably, that is where Congress and this Court's decisions in *McConnell* and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), have brought us.

Senator McConnell does not offer a view in this brief as to whether, as a matter of law, *Hillary*: *The Movie* contains "express advocacy" as that term was defined by the Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which would make criminal its dissemination at any time in any forum. Nor does he opine as to whether the movie is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), which would make criminal its dissemination by broadcast television, cable or satellite during BCRA's extensive blackout periods. He does venture a guess that most citizens, unburdened with knowledge of the fine distinctions of current federal campaign finance law, would likely believe it was both. His conclusion is that if the screening of this movie can lead to the imposition of criminal sanctions on either — or any — theory, there is something seriously wrong, and constitutionally intolerable, not with the movie, but with the state of the law.

ARGUMENT

INTRODUCTION: THE ROAD TO CENSORSHIP

In this case, the federal government asserts the authority to criminalize a motion picture critical of a candidate for the presidency of the nation because it was paid for in part with corporate funds and shown too close to the election. It should really not be neces-

sary to cite a case for the proposition that Americans may not be fined or jailed for such speech. If it were, the unanimous ruling of this court in *Mills* v. *Alabama*, 384 U.S. 214 (1966), should suffice. There, an Alabama statute drafted to "protect" the public from the impact of last-minute campaign charges was applied to bar the publication on election day of an editorial urging adoption of a particular form of city government. Unsurprisingly, the statute was held unconstitutional on the ground that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of government affairs." *Id*. at 218. *"[O]f course*," this Court concluded, that includes "discussions of candidates [and] structures and forms of government." *Id*. (emphasis added).

What was self-evident in 1966 is no longer so today. Recent campaign finance legislation and litigation spawned by that legislation have too often turned First Amendment principles inside out.

Not until its ruling in *Buckley* was the constitutionality of limitations on independent expenditures addressed by this Court.[2] In *Buckley*, the Court

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[2] Prior to *Buckley*, the Court and various of its members had repeatedly voiced serious doubts about the constitutionality of sweeping limitations on independent expenditures by corporations and unions. In *United States* v. *CIO*, 335 U.S. 106 (1948), the Court narrowly construed the Taft-Hartley Act to avoid potential First Amendment concerns. 335 U.S. at 121 (Court has "gravest doubt . . . as to . . . constitutionality" of broader reading) (Reed, J.); *id*. at 155 (Rutledge, J., Black, J., Douglas, J., Murphy, J. concurring) ("A statute which, in the claimed interest of

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struck down the limits on independent expenditures set forth in the Federal Election Campaign Act ("FECA"). As originally enacted, FECA restricted expenditures by any person "relative to a clearly identified candidate" to $1,000. *See* FECA § 608(e)(1). Stressing the sanctity of the "[d]iscussion of public issues and debate on the qualifications of candidates," *Buckley*, 424 U.S. at 14, the Court emphasized that the First Amendment affords such speech the "broadest protection" from government regulation, because it is "at the core of our electoral process and [our] First Amendment freedoms." *Id.* at 39 (citation and internal quotation marks omitted).

Based on these principles, *Buckley* held that section 608(e)(1) could not withstand First Amendment scrutiny. Seeking to construe the provision in a manner that could save it from unconstitutional vagueness, the Court first narrowed the provision to "communications that in express terms advocate the election or defeat of a clearly identified candidate for fed-

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free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election . . . cannot be squared with the First Amendment."); *United States* v. *Automobile Workers*, 352 U.S. 567, 597 (1957) ("Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group — labor or corporate.") (Douglas, J., Warren, C.J., Black, J., dissenting.)

eral office," *id.* at 44, which it further clarified to mean "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

Even under its narrowing construction, the Court ultimately struck down section 608(e)(1), holding that the provision could not survive strict scrutiny. *See id.* at 44. Rejecting the lower court's conclusion that restrictions on expenditures were necessary to prevent circumvention of restrictions on contributions, *see id.*, the Court explained that the governmental interest in preventing corruption and the appearance of corruption was not implicated by independent expenditures and that, even if it were, the limitation on independent expenditures was necessarily underinclusive, *see id.* at 45-46. "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder [by running ads that do not 'in express terms advocate the election or defeat of a clearly identified candidate']." *Id.* at 45.

In the aftermath of *Buckley*, Congress amended FECA and the provision prohibiting contributions or expenditures by corporations and unions in connection with any federal election. *See* 2 U.S.C. § 441b(a). In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*"), the Court drew from *Buckley*'s narrowing construction of section 608(e)(1) the need to limit section 441b(a) expenditures to "express advocacy," *see MCFL*, 479 U.S. at 248-49. Nonethe-

less, the Court ruled that section 441b(a) could not constitutionally be applied to MCFL, a non-profit corporation with a policy of declining corporate contributions.

Four years later, the Court held, for the first time, that independent corporate expenditures could be restricted in the service of a goal other than the prevention of *quid pro quo* corruption. In *Austin*, the Court considered a Michigan law prohibiting corporations from using treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office. Implicitly recognizing that such restrictions did not advance the government's interest in preventing corruption or the appearance of corruption as *Buckley* had found, *Austin* identified a new governmental interest in the course of upholding Michigan's ban: "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." *Austin*, 494 U.S. at 660. Notwithstanding the Court's prior determinations that the alternative of establishing separate segregated funds or PACs imposed too great a burden on the right to engage in core political speech, *MCFL*, 479 U.S. at 253-255; *id.* at 266 (O'Connor, J., concurring), the Court embraced the PAC alternative in *Austin*, paving the way for BCRA.

In 2002, Congress passed BCRA. Signed into law by President Bush notwithstanding his publicly expressed doubts about its constitutionality, the statute bans all corporations and unions, or entities using funds donated by corporations or unions, from using treasury funds to make disbursements for "election-

eering communications." An electioneering communication is defined as "any broadcast, cable, or satellite communication" disseminated within 30 days of a primary or 60 days of a general election which "refers to a clearly identified candidate for Federal office." Anticipating that this definition might be held unconstitutional, Congress included a "fallback" definition which defines an electioneering communication as any broadcast, cable or satellite communication carried *at any time* which "promotes," "supports," attacks" or "opposes" a federal candidate and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201(a) (adding new FECA § 304(f)).

BCRA's ban on electioneering communications was sustained in *McConnell* without resort to the fallback definition. Although the Court concluded that appellants' challenge to the statute failed "to the extent that the issue ads . . . are the functional equivalent of express advocacy," it offered no narrowing construction and simply affirmed (in the single paragraph that the Court devoted to the merits of the challenge to BCRA's § 203) that "the vast majority of ads clearly had [an electioneering] purpose." *McConnell*, 540 U.S. at 206.

It did not take long after the Court's decision in *McConnell* for BCRA to lead to a significant diminution of speech:

> To comply with the new law in the months before the 2004 election, the Chamber of Commerce of the United States . . . had to abandon its plans to broadcast advertisements supporting class action reform legislation which

> mentioned the names of senators and congressmen whose votes the Chamber coveted. At the same time, and for the same reason, the AFL-CIO was forced to forego its efforts to broadcast advertisements criticizing federal overtime regulations issued by the Department of Labor in which the union wished to identify names of members of Congress that it sought to pressure to vote their way. . . [T]he ACLU. . .ultimately broadcast advertisements denouncing the Patriot Act but refrained, as McCain-Feingold required, from criticizing (or even mentioning) President Bush as it did so.

Floyd Abrams, *Speaking Freely: Trials of the First Amendment*, 274-75 (2005).

Significant, if partial, relief from the draconian impact of BCRA's ban on electioneering communications ultimately came with this Court's decision in *WRTL II*. However one characterizes that ruling, there can be no doubt that "electioneering communications" were, in effect, redefined. Under *WRTL II*, a communication in the targeted media at the targeted times is prohibited only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S.Ct. at 2655.

Corporations and unions now find themselves in the following position. As a result of FECA's ban on independent expenditures, no corporation or union may spend its treasury funds on any communication which contains express advocacy as defined in *Buck-*

ley.[3] This prohibition applies to any and all media whether it be a road sign, a placard, a newsletter, an internet posting, a movie, a television, cable or satellite offering or, indeed, a book. It applies 24 hours a day, seven days a week, 365 days a year. There are few exceptions, the most notable being for not-for-profit corporations that meet the criteria of this Court's decision in *MCFL*, media entities (as defined in FECA) and entities engaging in purely commercial transactions (*see* FEC Advisory Op. 1994-30 (Oct. 28, 1994)). In addition, as a result of BCRA's ban on electioneering communications, no corporation or union may spend its treasury funds on any communication which is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S.Ct. at 2667. This prohibition applies to any communication transmitted by broadcast television, cable or satellite during the "black out periods" defined in BCRA. Thus, if *Hillary*: *The Movie* contains "express advocacy" it is doomed wherever and however displayed. If it passes the express advocacy test of *Buckley* but fails the test of *WRTL II*, it subjects Citizens United to severe criminal penalties if distributed by broadcast television,

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[3] The emphasis in *McConnell* on corporate PACs serving as a sufficient substitute for a corporation's use of treasury funds is inconsistent with the Court's recognition in both *MCFL*, *see* p. 5, *supra*, and *WRTL II* of the "well-documented and onerous burdens" the use of PACs entails. *WRTL II*, 127 S. Ct. at 2671 n.9 (Roberts, C.J.). *See McConnell*, 540 U.S. at 330-333 (Kennedy, J., dissenting). *See generally* Brief of *Amicus Curiae* National Rifle Association at 18-22.

cable or satellite during any of BCRA's blackout periods.

I. *McCONNELL* SHOULD BE OVERRRULED AND BCRA'S BAN ON ELECTIONEERING COMMUNICATIONS HELD UNCONSTITUTIONAL

The Court's ruling in *WRTL II* makes it unnecessary to review in detail the constitutionally impermissible overbreadth of the primary definition set forth in BCRA. In addition to the analysis in that case by the Chief Justice and the concurring opinion of Justice Scalia, we note only that the consideration of BCRA's ban on electioneering communications in *McConnell* was driven by flawed factual and legal premises. Section 203 does not simply prohibit communications with "an electioneering purpose" or which are the "functional equivalent of express advocacy." On its face BCRA prohibits corporations and unions from using treasury funds to air *any* communication that even "refers" to a federal candidate during BCRA's blackout periods. In doing so, BCRA's goal of banning supposedly "bad" speech — *i.e.* speech with an "electoral purpose" — swept within it significant amounts of speech that had no such purpose. But this Court had previously made plain that the notion "that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 255 (2002); *accord WRTL II*, 127 S. Ct. at 2670 (Roberts, C.J.).

BCRA's fallback definition — banning any communication that "promotes," "supports," attacks" or "opposes" a federal candidate and "is suggestive of no

plausible meaning other than an exhortation to vote for or against a specific candidate" — cannot salvage the statute. As the record in the *McConnell* case vividly revealed, the definition is unconstitutionally vague.

A statute is unconstitutionally vague if people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *accord Reno* v. *ACLU*, 521 U.S. 844, 871-72 (1997). An "even greater degree of specificity is required" in the First Amendment context. *Buckley*, 424 U.S. at 77 (citation and internal quotation marks omitted). As the Court explained in *Buckley*:

> In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> *Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.*

Id. at 43 (emphasis added; citation and internal quotation marks omitted).

Discovery in *McConnell* confirmed that reasonable and intelligent people often disagree about whether particular political ads meet the criteria of the fallback definition. When shown particular ads during

their depositions in *McConnell*, the authors of the much disputed studies submitted to Congress and the Court, defendants' experts, and BCRA's sponsors routinely disagreed *with each other* as to whether a given ad was intended to promote, support, attack, or oppose a specific candidate or was "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." A criminal law that gives so little guidance as to its meaning cannot be sustained.

By way of example, an ad that ran within 60 days of the 1998 general election stated in part: "Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough." The ad then asked viewers to "[c]all Harry Reid and John Ensign" and urge them to cut taxes. "Otherwise," the ad concluded, "there will be nothing left but the crumbs." McConnell Br. App. 4a.[4] One author of the pro-BCRA studies opined that this ad was a "genuine" issue ad and not a candidate ad because its "focus is on taxes." J.A. 959. Senator McCain, in contrast, testified that the ad "attacks" both candidates. *Id.* at 937. And Congressman Shays, another legislative sponsor, offered a third view, testifying that the ad supported "one per-

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[4] References to "McConnell Br. App." are to the Appendix to the "Brief for Appellants/Cross-Appellees Senator Mitch McConnell, et al." in No. 02-1674. References to "J.A." are to the Joint Appendix in that case.

son's position, but not the other" and that it was therefore "designed to influence the election." *Id*. at 994.

Another ad, sponsored by the Alliance for Quality Nursing Home Care broadcast within 60 days of the 2000 general election, referred to then-presidential candidate Al Gore. *See* McConnell Br. App. 5a. In his deposition, Senator Feingold was unsure whether the ad was pro-Gore or anti-Gore. *See* J.A. 852. On the other hand, Senator McCain testified that the ad "implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment." *Id*. at 941. But Representative Meehan concluded that the ad "probably" was intended to promote Gore's candidacy, *see id*. at 973, and Representative Shays agreed, *see id*. at 994.

A third example was this ad, aired with 60 days of the 2000 general election:

> GRADUATE: Dear high tech company, I'd like to send you my resume.
>
> ANNOUNCER: Dear Graduate, sorry, Congress is going to give your job to a foreign worker.
>
> GRADUATE: But I've just finished four hard years of technical studies.
>
> ANNOUNCER 1: Sorry, besides foreign workers will work for a lot less.
>
> ANNOUNCER 2: Is this any way to treat American workers? But based on her record, Congresswoman Northup is likely to vote in favor of the Foreign Worker Bill. Call Congresswoman Northup and

> tell her to save our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill. This message paid for by the Coalition for the Future American Worker.

McConnell Br. App. 6a. Though the ad was treated by supporters of BCRA in a study much cited by members of Congress, as a "genuine" issue ad (that is, one that does not "generate support or opposition for a particular candidate"), *see* J.A. 895-98, Senator McCain called the ad "exactly what I have in mind as a sham issue ad," *id.* at 942.

With disagreement of such magnitude, it is plain that the fallback definition would inevitably lead speakers to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (citation and internal quotation marks omitted). Senator McCain said it best when he rose on the Senate floor to oppose the inclusion of materially identical statutory language:

> Boy, we better get out the dictionary because there is a great deal of ambiguity of words . . . It says in the amendment: . . . [ads] can have no reasonable meaning other than to advocate the defeat of one or more clearly identified candidates. Who decides that? . . . Now you are asking a judge to look at every commercial, or you are asking the broadcast station to look at every commercial[,] and make some decision as to whether it is an attack ad or not. . . I am not a lawyer, but I

> have been involved so long and so engaged in these issues that words do have meaning, and this amendment is very vague.

147 Cong. Rec. S3116 (daily. ed. Mar. 29, 2001). The fallback definition in section 201 is, as Senator McCain counseled, unacceptably and unconstitutionally vague.

The test adopted in *WRTL II*, which looks to whether a communication is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" is similar to BCRA's fallback definition and suffers from the same difficulties.[5] BCRA's sponsors and its expert defenders are no doubt reasonable people. If they cannot agree on whether an ad is "an exhortation to vote for or against a specific candidate," there is no reason to conclude that juries or judges would be any more able to agree on whether it is "an appeal to vote for or against a particular candidate."

McConnell should be overruled.

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[5] It is dissimilar in one significant way. BCRA's "fallback definition" has no temporal limitation. The test adopted by the Court in *WRTL II* is apparently limited to BCRA's blackout periods.

II. *AUSTIN* SHOULD BE OVERRULED TO ENSURE THAT CORPORATIONS AND UNIONS MAY ENGAGE IN CORE POLITICAL SPEECH ABOUT CANDIDATES

As a consequence of FECA's ban on independent expenditures, given force by this Court's decision in *Austin*, corporations and unions are currently subjected to criminal penalties for using their treasury funds to engage in "express advocacy" but are free to engage in "issue advocacy," subject, of course, to the limitations of BCRA's ban on electioneering communications. The criticism in some quarters of the Solicitor General's Office for forthrightly acknowledging in oral argument that the government's position would permit criminal punishments to be inflicted for the publication of books or the screening of movies funded by corporations or unions is thus entirely misplaced. Congress has already invoked that power in FECA if the work contains "express advocacy" and the FEC already enforces it. As a result, other movies have not escaped the FEC's scrutiny, in ways that cannot be reconciled with the First Amendment.

In the 2004 election cycle, Michael Moore's *Fahrenheit 9/11*, a documentary that criticized President Bush to the point of ridicule, came under the scrutiny of the FEC. The claim was that the movie, funded as it was by a corporation, was illegal express advocacy and that to show it at all would violate FECA. The movie barely escaped a finding of liability. The Commission ruled that because the film was a commercial venture, *i.e.*, because its producers charged viewers to see it, it fell within the Commission's exemption for "bona fide commercial activity," an exemption unavailable to Citizens United in the context of this

case. *Dog Eat Dog Films*, MURs 5474 and 5539, First General Counsel's Report at 8 (May 25, 2005). The second reason *Fahrenheit 9/11* wiggled away from the FEC's reach was the Commission's finding, after dissecting each minute of the entire film, that it did not quite contain any of the language specified in *Buckley*. *Id*. at 17-18.

Another film produced during the 2004 election cycle, also produced by Citizens United, met with similar FEC scrutiny. This film focused on the lives and careers of presidential candidate John Kerry and vice-presidential candidate John Edwards. Citizens United's plan was to make the film available to the public through movie theaters, DVD and videocassette sales and by purchasing air time to broadcast the film in certain television markets. It sought an advisory opinion from the FEC to ensure it would not be subjecting itself to potential criminal liability for doing so. The theater showings and DVD and videocassette sales passed muster with the FEC because Citizens United represented that the film "would not contain express advocacy." The television effort was doomed however because the film was to have aired during a BCRA blackout period. FEC Advisory Opinion 2004-30 (Sept. 10, 2004).

The world reflected in these opinions is one of government censors parsing through the content of core political speech in an effort to determine whether it may be published or whether the speaker would be guilty of a crime. And the case on which all this governmental authority rests is *Austin*.

At its core, *Austin* stands for the unsound proposition that the government has an interest in regulating speech by corporations simply because they are corpo-

rations. This is flatly contrary to this Court's prior ruling in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). *See McConnell*, 540 U.S. at 326 (Kennedy, J., dissenting). There is no valid justification for subjecting non-commercial speech by corporations to more stringent regulation, especially speech that is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill* v. *Alabama*, 310 U.S. 88, 103 (1940).

The Supplemental Brief for Appellant addresses in considerable detail why *Austin* was not analytically sound when issued and has not stood the test of time. So as not to burden the Court with duplicative argument, we join in those arguments and Appellant's request that *Austin* be overruled.

CONCLUSION

Sometimes a case helps us see just how far off constitutional course Congress and prior rulings of this Court have taken the nation. This is one of those cases. That the dissemination of *Hillary: The Movie* may be prohibited by BCRA (under the authority of *McConnell*) or prohibited by FECA (under the authority of *Austin*) is reason enough to overrule those decisions.

Respectfully submitted,

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