No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

vs.

FEDERAL ELECTION COMMISSION,

Appellee.

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

BRIEF OF THE STATES OF MONTANA, ARIZONA, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, VERMONT, WEST VIRGINIA, AS *AMICI CURIAE* ADDRESSING JUNE 29, 2009 ORDER FOR SUPPLEMENTAL BRIEFING AND SUPPORTING NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

Amici States have a fundamental interest in ensuring their authority to police the powers and duties of corporations and to oversee and conduct state elections. For more than a century, states have regulated corporate campaign electioneering, encouraging corporations' employees and shareholders to participate in election campaigns through segregated funds that protect the integrity of the political process by providing a well-established means of accountable corporate campaign speech. Today, twenty-four states limit or prohibit corporate electioneering paid with general treasury funds. Although not all *Amici* States regulate corporate spending on candidate elections, they all recognize the importance of preserving the discretion of state policy-makers to enact campaign finance regulations that may include regulation of corporate electioneering. *Amici* States, therefore, ask this Court to resolve this case without overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

SUMMARY OF ARGUMENT

I. This case does not concern the traditional regulation of corporate campaign spending by state laws. Instead, it presents the application of a recent federal statute to a novel form of political campaigning through the medium of video-on-demand and the message of a ninety-minute film. These and

other political campaign innovations present an occasion to draw on state law experiments—not end them. The Court cannot reach the validity of these laws under *Austin* without departing from its conventional approach to constitutional avoidance and as-applied review of campaign finance statutes, and ignoring its cautions against facial challenges in election law generally.

II. *Austin* follows a century of campaign finance law at the state and federal level honed by six decades of this Court's holdings. Those decisions, and the state and federal laws that gave rise to and rely on them, delineate a workable segregated-fund requirement for corporate electioneering that is embedded in campaign laws and practice at the federal and state level. While imposing minimal burdens on corporations, the segregated fund protects the integrity of the political process from the corrupting influence of corporate executives funding political campaigns that have no proven support from the shareholders or customers whose money pays for the advocacy. The flourishing of corporate speech through PACs, and continued harms of direct corporate electioneering, has vindicated rather than undermined *Austin*'s approval of segregated funds.

ARGUMENT

I. THE COURT NEED NOT ADDRESS *AUSTIN*.

1. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (quoting *Escambia County, Fla. v. McMillan,* 466 U.S. 48, 51 (1984)). As both Citizens United and the BCRA sponsors suggest, this case presents at least one such ground in the construction of the statutory term "electioneering communication." *See* Appellant's Br. at 26 n. 2; Br. of *Amici Curiae* Sen. McCain *et al.* at 18-19 (same). Both the thin record in this case and Citizens United's abandonment of its facial constitutional challenge below further counsel avoidance. This Court refrains "from avoidable constitutional pronouncements" unless "absolutely necessary to a decision." *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 590-91 (1957) ("UAW") (internal quotation marks omitted).

2. If it is necessary to reach a constitutional decision, the factual record does not provide a basis for reevaluating *Austin.* Once Citizens United abandoned its facial challenge on summary judgment, there was no reason for the parties to present or the lower court to consider "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *UAW*, 352 U.S. at 591.

a. This case does not address the medium or message of mainstream campaign materials that are the central subject of *Austin* and state- and federal-corporate-electioneering laws. In *Austin*, "[a]lthough the Chamber had established and funded a separate political fund, it sought to use its general treasury funds to place in a local newspaper an advertisement supporting a specific candidate." 494 U.S. at 656. In contrast, Citizens United raises novel issues concerning the application of BCRA to a ninety-minute movie distributed to people who chose to view it through a video-on-demand subscription service on cable. The record below does not evince any burdens or benefits of requiring the use of segregated funds to pay for the corporate express advocacy at issue in *Austin*. Such evidence would be critical to an assessment of whether, as Citizens United alleged, § 203 "has not proven workable in application." (J.A. 24a.) "Such an incomplete presentation is reason enough to refuse [Appellants'] invitation to reexamine" *Austin*. *Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring).

b. The sparse record below is particularly ill-suited to a facial challenge that would call into question the century of state and federal laws and decisions that led to *Austin*. Overruling *Austin* in this case necessarily would "rest on speculation" as to the broader benefits and burdens of corporate-electioneering laws, ask for "a rule of constitutional law broader than is required by the precise facts" of Citizens United's anomalous communication, and

"prevent[ ] laws embodying the will of the people from being implemented in a manner consistent with the Constitution" at the state and federal level. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008). Even as to advocacy groups funded by corporate donations, the lack of detail about Citizens United's funding makes it impossible "to quantify either the magnitude of the burden on this narrow class of [corporations] or the portion of the burden imposed on them that is fully justified." *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008).

Thus, this Court should not transform this case from an as-applied challenge concerning the regulation of a single video-on-demand campaign movie to a facial challenge that would affect the variety of long-standing state campaign finance regulations throughout the country regardless of their particular purposes and effects. *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw. U.L. Rev. 335, 383 (2000) ("Each state has its own political traditions, structures, and exigencies, and these differences can have profound effects on campaign finance concerns.").

II. *AUSTIN* CORRECTLY SETTLED THE BOUNDS OF STATE CORPORATE ELECTIONEERING LAWS.

The rule of *Austin* reflects over a century of law and practice dating to states' first efforts at campaign

finance reform, and remains vital to the campaign laws of nearly half of the states and the federal government. This case presents no "special justification" to depart from the principles of stare decisis. *Randall v. Sorrell*, 548 U.S. at 243-44 (plurality opinion). To the contrary, *Austin* is part of a decades-long line of state and federal cases developing the segregated-fund requirement "through iteration and reiteration," thus "avoid[ing] the instability and unfairness that accompany disruption of settled legal expectations" in Congress and the state legislatures that have relied on these cases. *Randall*, 548 U.S. at 244. And that line continues unbroken: cases since *Austin* have reinforced rather than undermined *Austin's* basic legal principles. *See* Part II.A, below. Moreover, there has been no demonstration that political campaigns have changed so radically as to undermine *Austin*'s critical factual assumptions. *See* Parts II.B & II.C, below. If the Court overrules *Austin*, "[n]ot just one case, but a half-century of election law would be tossed aside in favor of a new regime of corporate and union political participation of uncertain shape and effect." Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the Segregated Funds Cases*, 3 Election L.J. 361, 368 (2004).

A. *Austin* Confirmed the Settled Expectations of Governments, Corporations, and Campaigns.

1. The states were the first to react to the surge of corporate money into political campaigns in the late Nineteenth Century. In Montana "[p]olitical commentators reserved the phrase, 'the company,' for the special economic and political synergy of the Anaconda Company and the Montana Power Company, and to 'the company' they ascribed astounding political control." James J. Lopach, *Montana's Role in the Free Speech vs. Equal Speech Debate*, 60 Mont. L. Rev. 475, 485-86 (1999) (footnotes omitted). In 1898 mining company shareholders brought a derivative suit alleging misappropriation of corporate funds for political expenditures to promote "the silver cause" and lobby for the formation of a new county. *McConnell v. Combination Mining & Milling*, 76 P. 194, 198 (Mont. 1904), *modified on other grounds,* 79 P. 248 (Mont. 1905). The Montana Supreme Court held that the expenditures, made "for strictly political purposes," were *ultra vires*, noting that "[t]he stockholders of the company . . . were not unanimous in their political beliefs." *Id.* at 199.

In 1904, a New York state legislative committee found that insurance company campaign contributions were "wholly unjustifiable" uses of the policyholders' funds. *UAW*, 352 U.S. at 573. If the contributions were "made for the purpose of supporting political views," then "executive officers have sought to impose their political views upon a

constituency of divergent convictions." *Id*. If they were made "with the desire to obtain protection for the corporation" from policyholders in the legislature, the officers "have been guilty of a serious offense against public morals." *Id.* The New York state courts echoed these concerns in a resulting prosecution of an insurance executive for grand larceny, but ultimately held that the contributions, although *ultra vires*, were not crimes. *People ex rel. Perkins v. Moss*, 187 N.Y. 410 (1907).

Piecemeal derivative actions were a crude tool to protect the integrity of campaigns and corporate treasuries, however, given the costs of derivative actions and the decline of *ultra-vires* liability as courts deferred to management under the business judgment rule. *See, e.g., Marsili v. Pacific Gas & Elec. Co.*, 124 Cal. Rptr. 313, 323 (App. Ct. 1975). Moreover, one state's corporate law cannot take into account the effects of corporate electioneering that arise in the other jurisdictions where a corporation operates.

So states imposed statutory limits on corporate electioneering. As early as 1891, Kentucky prohibited corporate campaign spending in its Constitution. *See* Ky. Const. § 150 (1891). By 1897, Florida, Missouri, Nebraska, and Tennessee had enacted similar statutes. *See* Robert E. Mutch, *Before and After* Bellotti: *The Corporate Political Contribution Cases*, 5 Election L.J. 293, n.1 (2006) (citing Laws of Florida, ch. 4538 (June 2, 1897); Missouri Laws, p. 108 (March 20, 1897); General Laws of Nebraska, ch. 19 (April 3,

1897); Acts of Tennessee, ch. 18 (April 29, 1897)). The federal government followed the states' lead with the Tillman Act of 1907. Tillman Act, ch. 420, 34 Stat. 864-65 (1907). By the early 1930s, thirty-four states had enacted "corrupt practices laws" that prohibited direct corporate campaign spending. *See* Louise Overacker, *Money in Elections, Politics and People: The Ordeal of Self-Government in America,* 294-95 (1932).

2. Courts have repeatedly upheld these state and federal corporate-electioneering restrictions from their inception. *See* Mutch, 5 Election L.J. at 296-98. For example, the Michigan Supreme Court held that a corporation's charter did not allow it to "us[e] its funds for the purpose of influencing public sentiment in connection with any election" in violation of a state corrupt practices act, but if "the stockholders . . . desired, as individuals, to contribute to the campaign fund, it was their privilege so to do." *People v. Gansley*, 158 N.W. 195, 201 (Mich. 1916). State courts also narrowed corrupt practices acts to focus on "money from corporate treasuries," exempting non-profit voluntary associations long before *MCFL*. *State v. Joe Must Go Club of Wisconsin Inc.*, 70 N.W.2d 681, 682 (Wisc. 1955).

Later, this Court conformed the Tillman Act to constitutional bounds in the *Segregated Fund Cases*. First, it held that the Act did not cover political advocacy to members and stockholders within an organization concerning its interests. *United States v. Congress of Indus. Orgs.,* 335 U.S. 106, 120-22 (1948).

Second, it rejected constitutional challenges to the Act where the record did not answer whether a union's broadcast was paid with mandatory dues, reached the general public, or constituted "active electioneering," *UAW,* 32 U.S. at 592. Third, it recognized the segregated fund by holding that the Act allowed campaign contributions paid out of a voluntary political fund instead of union dues and assessments. *Pipefitters Local Union No. 562 v. United States,* 407 U.S. 385 (1971). The Federal Election Campaign Act codified the segregated-fund requirement. 2 U.S.C. § 441b ("FECA"). The requirement was not questioned in *Buckley v. Valeo*, 424 U.S. 1 (1976), where the Court observed that segregated funds "do not foreclose the making of substantial contributions to candidates by some major special-interest groups" including corporations and labor unions. *Id.* at 29 n.31.

State corporate campaign law came before the Court in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), which harmonized a state restriction with the free-speech principles recognized in the *Segregated Fund Cases*. Massachusetts had enacted "a complete prohibition of corporate expenditures" without a segregated-fund option. *Id.* at 775. Although the Court struck down the categorical ban as "an impermissible legislative prohibition of speech," *id.* at 784, it remained open to recognizing "the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Id.* at 787

n.26. Soon after, recognizing the "dangers . . . to the electoral process" posed by "the particular legal and economic attributes of corporations and labor organizations," the Court unanimously endorsed the segregated fund in upholding the FECA limitation of corporate PAC solicitations to members and shareholders. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-10 (1982); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) (noting "the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office").

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the Court firmly rooted corporate-electioneering laws in "the conviction that it is important to protect the integrity of the marketplace of political ideas." *Id.* at 257; *see also id.* at 266 (Rehnquist, C.J., dissenting) (careful regulation of corporate campaign spending "is constitutionally sound and entitled to substantial deference"). Reinforcing four decades of segregated-fund cases, the Court in *MCFL* held that corporate-electioneering regulation could extend only as far as the logic of the segregated-fund principle itself. *Id.* at 263. A nonprofit ideological corporation like *MCFL*, supported solely by individual contributions from donors sympathetic with its political ideas, more closely resembled the segregated fund solution than the corporate-electioneering problem. *Id.* at 259. Because MCFL refused corporate contributions, it and similar organizations could not "serve[ ] as conduits" for

direct campaign spending by corporations that posed the threats addressed by segregated funds. *Id.* at 264.

3. *Austin* is more an application of these cases than a culmination of them. The segregated fund for corporate electioneering is "a narrowly tailored solution" to the problem of a "significant possibility that corporate political expenditures will undermine the integrity of the political process." *Austin,* 494 U.S. at 668.

The line drawn by state legislatures and Congress, clarified in cases from *UAW* to *MCFL*, and confirmed in *Austin*, has proven workable for the vast majority of corporations over more than a century. Since *Austin*, this Court has maintained the steady course set by decades of precedent, noting that this "historical prologue would discourage any broadside attack on corporate campaign finance regulation." *FEC v. Beaumont*, 539 U.S. 146, 156 (2003). Thus, in upholding the federal-corporate-electioneering law as applied to a nonprofit advocacy corporation partly funded by business contributions, the Court repeated its endorsement of the segregated fund as "allow[ing] corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Id.* at 163 (citations omitted).

In the most recent step of the Court's as-applied approach to corporate electioneering, it held that the interest "justifying regulation of corporate campaign

speech" has no application to issue advocacy. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL*") (plurality opinion). This fits squarely within the framework articulated in *MCFL*'s holding "that an expenditure must constitute 'express advocacy'" to be subject to a segregated fund requirement. *MCLF*, 479 U.S. at 249. It therefore remains true that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell v. FEC*, 540 U.S. 93, 203 (2003).

States and campaigns have long relied on the constitutionality of corporate-campaign-finance regulation confirmed in *Austin*, as demonstrated by nearly half the states' adoption of corporate-electioneering restrictions, and the widespread emergence of corporate PACs. *See* Appendix hereto; Part II.C, below. Since *Austin*, states have relied on it and other "substantial evidence" confirming *Austin*'s corruption concerns to revise and review state corporate-electioneering laws within the segregated-fund framework. *See, e.g.*, *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 609 (Alaska 1999). The Court should not unsettle the foundations of a century of state laws.

B. Regulation of Corporate Electioneering Remains a Compelling State Interest.

1. "[N]ot only has the original ban on direct corporate contributions endured, but so have the original rationales for the law." *Beaumont*, 539 U.S. at 154. It "has never been doubted" that the people through their legislatures may prevent "the problem of corruption of elected representatives through the creation of political debts." *Bellotti*, 435 U.S. at 788 n.26. As this Court has understood, corruption occurs "not only as *quid pro quo* agreements, but also as undue influence on an officerholder's judgment, and the appearance of such influence." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (the corruption concern "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors").

More than individuals' campaign spending, corporations' spending disproportionately favors incumbent officeholders, who unlike challengers can easily return the favor, or simply entrench the status quo. *See* Val Burris, *The Two Faces of Capitalism: Corporations and Individual Capitalists as Political Actors*, 66 Am. Soc. Rev. 361 (2001). Thus, the Court has "repeatedly sustained legislation aimed at '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.'" *McConnell*, 540 U.S. at

205 (quoting *Austin*, 494 U.S. at 660); *see also MCFL*, 479 U.S. at 257-59 (explaining "concern over the corrosive influence of concentrated corporate wealth").

a. The corruption threat posed by corporate electioneering does not arise from any partisan viewpoint, or inequality of wealth or economic scale alone. Nor is it new. Indeed, the Framers aptly described the paramount threat of corruption not as theft or bribery, but as "the use of government power and assets to benefit localities or other special interests ('factions')." Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 Kan. L. Rev. 1, 48 (2003). Corporate electioneering corrupts the relationship between public officials and the public interest by encouraging political dependence on narrowly concentrated private interests embodied in the corporate form, backed only by "the economically motivated decisions of investors and customers," *MCFL*, 479 U.S. at 258, at the expense of the broader and more dispersed interests represented by the people themselves. *See generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 393 n.245, 406 (2009). Corporate-electioneering laws therefore aim "not merely to prevent the subversion of the integrity of the electoral process," but "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *UAW*, 352 U.S. at 575.

In *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), this Court reiterated the potential threat

of "significant and disproportionate influence" posed by campaign spending. *Id.* at 2264-65. In such instances, it is not enough to rely on a public servant's good faith to not be corrupted by $1000 in campaign contributions, $2.5 million in spending for a political organization supporting the candidate, and $500,000 in independent expenditures. *Id.* at 2257. In the majority of states with judicial elections at some level, corporate-electioneering laws help ensure that such situations remain "extraordinary" acts of a single individual, *see id.* at 2265, rather than business as usual. Beyond judicial campaigns, most state campaigns are waged with thousands rather than millions of dollars, and could be easily overwhelmed, as they were a century ago, by national corporations' campaign spending. *See id.* at 2264; *see also Montana Right to Life v. Eddleman*, 343 F.3d 1085, 1089 (9th Cir. 2003) (a state legislative campaign in Montana costs between $3,000 and $9,000).

b. Recent scholarship also has recognized corruption in the other direction, in the form of "systemic shakedowns of corporations" by "politician-maximizers" exercising increased regulatory powers. Robert Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1127 (2002). This kind of corruption, demonstrated by today's "pay-to-play" scandals, had its roots in the migration of political fundraising from pre-civil-service kickbacks from public employees based on salary (called assessments) to pre-Tillman-Act shakedowns of major

corporations based on capitalization (also called assessments). *See* Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 Albany Gov't L. Rev. 1, 8-12 (2008); Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L. J. 871, 84 (2004). Thus, corporate-electioneering laws may help "protect society from the purchase of special-interest regulation by corporations and their shareholders." Sitkoff, 69 U. Chi. L. Rev. at 1118; *see also id.* at 1152-53 (noting corporations' support of new spending bans).

2. Second, the Court has unanimously held that "individuals who have paid money into a corporation or union for purposes other than the support of candidates" should not have "that money used to support political candidates to whom they may be opposed." *Nat'l Right to Work Comm.*, 459 U.S. at 208. Beyond coercion, the original corrupt practices acts recognized that "[p]olitical spending was different from other types of corporate spending because the former could be used to disempower the owners of [an] enterprise relative to management," itself a kind of corruption of corporate governance. Winkler, 92 Geo. L. J. at 896.

Efforts short of a segregated-fund requirement have proven ineffective. Before the Tillman Act and similar state laws, "publicity laws" intended to unveil corporate campaign spending "either became dead letters or were found to be futile." *UAW*, 352 U.S. at 571. Derivative actions premised on *ultra-vires* liability failed due to their cost and jurisdictional

limitations. *See* Part II.A.1, above. Both attempts foundered on the ease with which corporations can conceal campaign spending through accounting and other means, and the difficulty shareholders face in policing it. *See* Winkler, 92 Geo. L. J. at 884-85; *cf. Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 730 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing *en banc*), *cert. granted*, 129 S. Ct. 1579 ("Competition in product and capital markets can't be counted on to solve the problem [of protecting mutual fund shareholders]"). Without the segregated fund, political-dissident shareholders, members, and employees could lose retirement savings, member benefits, or a job, simply to enjoy the same protection of their speech rights enjoyed by employees in a collective bargaining unit with respect to a union's political activities. *See Austin*, 494 U.S. at 665-66; *MCFL*, 479 U.S. at 260-61.

3. Finally, "certain restrictions on corporate electoral involvement permissibly hedge against" circumvention of other valid campaign spending regulations. *McConnell,* 540 U.S. at 205. Corporate officers "diverting money" for campaign expenditures through the corporate treasury could transform the corporation itself into an informal PAC while avoiding PAC regulations. *Beaumont*, 539 U.S. at 155 (citation and quotation marks omitted). Complex corporate structures would either enable evasion of disclosure requirements, coordinated expenditure restrictions, and other unchallenged campaign laws, or demand an added level of regulatory complexity to rival

securities and corporate tax law. The regulation of non-*MCFL* corporations as political actors per se, rather than through segregated funds, heightens rather than resolves Appellant's concern about the complexity of campaign finance laws. Oral Arg. Tr. at 3.

C. Segregated Funds Are Narrowly Tailored to Serve State Interests.

Over a century after the Tillman Act and similar state laws, nearly four decades after *Pipefitters* and FECA, and two decades after *Austin*, it is no longer possible to claim that corporate-electioneering laws amount to a prohibition on corporate speech. Importantly, most corporate political speech occurs through *speech* "such as lobbying, testimony, and other direct contacts" rather than "naked corporate money expenditures" to or for candidates. Jill E. Fisch, *How Do Corporations Play Politics: The FedEx Story*, 58 Vand. L. Rev. 1495, 1566 (2005).

Still, the Court's prediction in *Buckley* about "the potential for proliferation" of corporate and union PACs has proven true. *Buckley*, 424 U.S. at 29 n.31. Corporate speech has increased markedly under the segregated-fund requirement. Before *Pipefitters* and FECA, business interest groups spent $1.4 million on federal elections in 1968; a decade later business PACs spent $37 million. Edwin M. Epstein, *The PAC Phenomenon: An Overview*, 22:2 Ariz. L. Rev. 355, 357 (1980). In *Austin* itself, the Michigan Chamber of

Commerce amassed $140,000 of voluntary contributions in a segregated campaign fund. 494 U.S. at 663. Today, at the federal level alone, there are 1,598 corporate PACs, the largest single category of PACs and more than one-third of all PACs. *See* FEC, Number of Federal PACs Increases (Mar. 9, 2009), *available at* http://www.fec.gov/press/press2009/20090309PACcount.shtml. Aside from this increase in corporate speech, the only proven result of the segregated fund is that shareholders, law enforcers, and the public know that the speech belongs to the speakers and has not been purchased with other people's money.

Meanwhile, corporate-electioneering laws reflect the lesson of *MCFL* that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status," while other corporations may "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 263-64. Citizens United may intend to test the line drawn in *MCFL* by accepting as little as $2000 from business corporations in a presidential campaign. (J.A. at 252a.) But this minimal solicitation suggests less a constitutionally cognizable burden than an attempt "to shape litigation, so far as it is within their control, in order to secure [a] comprehensive ruling[ ]." *UAW*, 352 U.S. at 592.

The steady development of the *Segregated Fund Cases* has ensured not only that corporate-electioneering laws are "firmly embedded," *McConnell*, 540 U.S. at 203, but also that they are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Austin*, 494 U.S. at 660. This case presents no reason to call those laws into question.

CONCLUSION

For these reasons, the *amici* States respectfully request that this Court resolve this case without overruling *Austin*.

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APPENDIX TO STATE AMICUS BRIEF

STATE LAWS PROHIBITING CORPORATE ELECTIONEERING

ALASKA: Alaska Stat. § 15.13.074(f)

ARIZONA: Ariz. Const. art. XIV, § 18; Ariz. Rev. Stat. §§ 16-919(A), -920

COLORADO: Colo. Const. XXVIII, § 3(4)(a)

CONNECTICUT: Conn. Gen. Stat. § 9-613(a)

IOWA: Iowa Code § 68A.503

KENTUCKY: Ky. Rev. Stat. § 121.150(20)

MASSACHUSETTS: Mass. Gen. L. ch. 55, § 8

MICHIGAN: Mich. C. L. S. § 169.254(1)

MINNESOTA: Minn. Stat. § 211B.15

MONTANA: Mont. Code Ann. § 13-35-227

NORTH CAROLINA: N.C. Gen. Stat. §§ 163-278.15, -278.19

NORTH DAKOTA: N.D. Cent. Code § 16.1-08.1-03.3

OHIO: Ohio Rev. Code Ann. § 3599.03(A)(1)

OKLAHOMA: Okla. Stat. tit. 21, § 187.2 ch. 62, Appx., 257: 10-1-2(d)

PENNSYLVANIA: 25 Pa. Stat. § 3253(a)

RHODE ISLAND: R.I. Gen. Laws § 17-25-10.1(h), (j)

SOUTH DAKOTA: S.D. Codified Laws § 12-27-18

TENNESSEE: Tenn. Code Ann. § 2-19-132

TEXAS: Tex. Elec. Code § 253.094

WEST VIRGINIA: W. Va. Code § 3-8-8

WISCONSIN: Wis. Stat. § 11.38

WYOMING: Wyo. Stat. § 22-25-102(a)

STATE LAWS LIMITING CORPORATE ELECTIONEERING

ALABAMA: Ala. Code §§ 10-2A-70, 10-2A-70.2

NEW YORK: N.Y. Elec. Law § 14-116.