

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 OF AMICUS CURIAE
CHAMBER OF COMMERCE OF THE UNITED
STATES OF AMERICA IN SUPPORT OF APPELLANT**

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

STEVEN J. LAW
*Chief Legal Officer and
General Counsel*
JUDITH K. RICHMOND
*Vice President and
Associate General Counsel*
U.S. CHAMBER OF COMMERCE
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5576

Counsel for Amicus Curiae

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. FEC*, 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?

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INTEREST OF THE AMICUS¹

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest not-for-profit business federation, representing an underlying membership of over 3,000,000 businesses and business associations. For almost a century, the Chamber has played a key role in advocating on behalf of its membership, which is composed mostly of business corporations. The Chamber’s interests in this case are set out in more detail in its initial brief in this action. *See Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant (“Chamber Br.”) at 1-3.*

SUMMARY OF ARGUMENT

On December 7, 1911, President (later Chief Justice) William Howard Taft called for a national organization to increase involvement of American business in national governance, particularly government policies affecting foreign commerce. 48 Cong. Rec. 75 (1912). A year later, the Chamber was founded.

Unfortunately, government has not always shared President Taft’s openness to business participation. At all levels of government, elected officials who oppose

1. All parties have consented to the filing of this amicus curiae brief as indicated by letters of consent filed with the Court. 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.

business viewpoints have sought to keep them from being expressed, particularly when their reelections are at stake. Rather than explicitly taking an anti-business stance, these restrictions often target speech by “corporations” to suppress the business viewpoint.² Corporate speech is suppressed even though it is independent of any candidate, campaign, or political party and presents no threat or appearance of quid pro quo corruption. (The viewpoints of other groups, such as labor unions, often have been similarly suppressed.)

That categorical suppression of corporate electoral advocacy rests on *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). There, for the first time, a divided Court sustained a wholesale statutory ban on corporate candidate advocacy. *See* Brief for the Appellee at 33 n.11 (no prior cases so held).

Austin rests in fundamental conflict with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which rejected a categorical ban on corporate advocacy concerning ballot initiatives. Strikingly, *Austin* did not rely on the involvement of candidates to distinguish *Bellotti*. Instead, it held that, because all corporations have the structural potential to achieve immense wealth,

2. Speaking broadly, a “corporation” is an association that is treated in law as a “person” with existence, interests, and powers distinct from its owners, founders, or members. *See Black’s Law Dictionary* (9th ed. 2009); *Hancock v. Louisville & N. R. Co.*, 145 U.S. 409, 415-16 (1892). Many limited liability companies (“LLCs”) are treated as corporations by the FEC. *See* 11 C.F.R. § 110.1(g). An LLC has those basic corporate attributes and, for purposes of this brief, is considered a corporation.

which could distort elections, there was a compelling need to ban all public corporate communications expressly advocating for or against a candidate. 494 U.S. at 659-60. It based this ruling on mere assertion, even though *Bellotti* had held that, in the absence of a factual demonstration, a theory of distortion caused by corporate wealth could not even be considered. 435 U.S. at 789.

As years passed and *Austin* proved impossible to reconcile with basic First Amendment principles, one member of the *Austin* majority disavowed his vote, *McConnell*, 540 U.S. 350 (2003) (Rehnquist, C.J., dissenting) (adopting Justice Kennedy’s opinion in full), and other Justices expressed willingness to reconsider the case. Nevertheless, *Austin* became the foundation for sweeping restrictions on the speech of business corporations. In particular, the electoral advocacy of the Chamber – a not-for-profit corporation – and of millions of its corporate members has been suppressed. This has occurred even though 96% of Chamber members are businesses with fewer than 100 employees, far from the immense aggregations of wealth hypothesized in *Austin*. Suppression has been imposed even when candidates have directly attacked business interests and when corporations have unique and valuable insight into the likely consequences of electing or defeating particular candidates. Although this Court has protected the ability of corporations to discuss “issues,” that is no substitute for direct and explicit speech about candidates. Nor is the clumsy and expensive “PAC” option equivalent to the right to publicly, swiftly, and freely address candidates and campaigns. *See Austin*, 494 U.S. at 652; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-54 (1986) (“*MCFL*”).

The Court now has asked if *Austin* should be overruled. Strongly interested in restoring free corporate speech, the Chamber submits this amicus brief urging this Court to overrule *Austin* and hold that the corporate form of a speaker is not a constitutional basis for banning core speech. *Austin* should be overruled because:

- *Austin* erroneously allowed the Government to assume, rather than prove, that independent corporate candidate advocacy will distort elections when, in fact, the experience of the majority of states – which allow free independent advocacy by corporations – is to the contrary, and the Government now has abandoned *Austin*'s distortion rationale.
- *Austin*'s professed interest in eliminating “distortions” due to “wealth” boils down to an attempt to “equalize” speech through suppression that is forbidden by the First Amendment.
- *Austin*'s categorical ban on corporate speech is not narrowly tailored to prevent the effects of immense wealth because (a) the great majority of corporations are not and never become wealthy, and (b) wealthy individuals spend freely on candidate advocacy, even if their wealth derives from corporations.

This is a proper case in which to overrule *Austin* because the Government relied exclusively on *Austin* to carry its burden of justifying suppression of Citizens

United’s speech. Overruling *Austin* will both provide full relief to Citizens United and correct ongoing First Amendment public injury flowing from *Austin*’s erroneous holding.

ARGUMENT

I. THE GOVERNMENT MUST PROVE THAT ANY RESTRICTION ON CORPORATE ELECTORAL ADVOCACY IS NARROWLY TAILORED TO MEET A TRULY COMPELLING NEED.

A “major purpose of [the First Amendment] was to protect the free discussion of government affairs.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). “Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally” *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). Indeed, the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). First Amendment protection for such speech serves the interests of the entire country, not just would-be speakers. “[S]elf-government suffers when those in power suppress competing views on public issues ‘from diverse and antagonistic sources.’” *Bellotti*, 435 U.S. at 777 n.12 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

“The inherent worth of [such] speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual.” *Id.* at 777. Thus, before the government can suppress corporate

speech (or spending for speech) concerning public issues or candidates, it must prove a “compelling” need will be met by means that are “closely drawn.” *Id.* at 786 (collecting authority); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (controlling opinion) (“*WRTL II*”).³

Austin paid lip-service to these settled principles. 494 U.S. at 654, 657. Thus, it held the test was whether a statute banning independent express advocacy by corporations was “narrowly tailored to serve a compelling state interest.” *Id.* at 657. But having recognized the test, *Austin* failed to properly apply it.

II. AUSTIN’S ASSUMPTION THAT IMMENSE CORPORATE WEALTH DISTORTS ELECTIONS WAS FACTUALLY UNSUPPORTED AND IS UNSUPPORTABLE.

The statute at issue in *Austin* banned *independent* corporate advocacy, as opposed to speech coordinated with a candidate or campaign. The *Austin* majority did not attempt to justify the ban as necessary to avoid the quid pro quo “corruption or appearance of corruption” that were “the only legitimate and compelling government interests” that had been accepted as a

3. Proof is necessary. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129-30 (1989). If legislative findings are proffered, the record must prove that the legislature “has drawn reasonable inferences based on substantial evidence.” *Turner*, 512 U.S. at 666; see also *Sable*, 492 U.S. at 129; *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (no deference to “legislative finding” unsupported by “actual facts”).

sufficient basis to limit core First Amendment speech. 494 U.S. at 658-59 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)); see also *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008).

Instead, *Austin* relied on “a different type of corruption.” *Id.* at 660. This “corruption” was said to result from “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.* *Austin* was mistaken.

A. *Bellotti* Held That *Austin*’s Theory Of Corruption Could Not Even Be Considered Without A Supporting Demonstration.

Austin’s theory that corporate wealth would distort and impair the integrity of elections previously had been asserted in *Bellotti* in an effort to justify forbidding corporations to support or oppose ballot initiatives. In *Bellotti*, the State had claimed corporate “participation would exert an undue influence on the outcome of a referendum vote, and – in the end – destroy the confidence of the people in the democratic process and the integrity of government.” 435 U.S. at 789. The State asserted “corporations are wealthy and powerful and their views may drown out other points of view.” *Id.* But *Bellotti* responded by demanding proof:

[T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any

threat to the confidence of the citizenry in government.

Id. at 789-90 (footnote omitted). Since there was no proof, *Bellotti* held that the asserted compelling interest did not even “merit our consideration.” *Id.* at 789.

Austin cited *Bellotti* for the proposition that “a legislature might demonstrate” that corporate wealth is corruptive. But *Austin* then failed to require such a demonstration; instead it was content that “the State has articulated a sufficiently compelling rationale.” *Id.* at 660. By disregarding *Bellotti*’s demand for a *demonstrated* need – a holding supported by abundant other authority⁴ – *Austin* committed fundamental error.

B. Readily Available Evidence Does Not Support The Compelling Interest Assumed To Exist In *Austin*.

There was and is no reason for the government to rely on assertion instead of proof. At least 26 states and the District of Columbia permit corporations (as well as labor unions, and similar groups) to engage freely in independent electoral advocacy on the same basis as individuals.⁵ If *Austin* were correct in speculating that

4. *See supra* p. 5-6 and note 3.

5. The following twenty-seven jurisdictions permit both direct corporate contributions to candidates and unlimited corporate independent expenditures: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland,

(Cont’d)

corporate speech would result in distortions due to the deployment of immense corporate wealth, such effects should appear in these states. The Government offered no such demonstration, nor has the Chamber identified any. Instead, the two reports identified by the Chamber and discussed below show no basis for suppressing corporate speech.

California allows corporations (and labor and other groups) to engage freely in independent campaign advocacy. In June 2008, the California Fair Political Practices Commission (“FPPC”) issued a report entitled *Independent Expenditures: The Giant Gorilla in Campaign Finance*.⁶ The report was hostile to all independent expenditures, portraying them as a “loophole” that “circumvent[s] state limits on direct campaign contributions.” *Id.* at 6. It speculated that candidates may tend to favor those whose independent speech supports them, but it did not suggest that this concern applies more to corporations than to other speakers. To the contrary, it reported that the highest-

(Cont’d)

Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey (for corporations in non-regulated industries), New Mexico, Oregon, South Carolina, Utah, Vermont, Virginia, and Washington. Research identified no statutory or regulatory prohibition on corporate independent advocacy in these states, and that research was confirmed by telephoning the state regulatory bodies. The Supplemental Brief for the Appellee (at 18 n.3) reports a consistent count. This demonstrates that overruling *Austin* would not affect a majority of the states.

6. Available at <http://www.fppc.ca.gov/ie/IEReport2.pdf>.

spending independent group received 80% of its funding from two wealthy individuals. *Id.* at 11. And it found that none of the primary supporters of the three highest spending independent advocacy groups were corporations. *Id.* at 11-12. Instead, they were individuals, Indian tribes, and labor unions. *Id.* None of its five recommendations involved banning independent candidate advocacy by corporations. *Id.* at 82-83.

All 80 California Assembly districts and 20 Senate districts held elections in 2008, <http://www.joincalifornia.com/election/2006-11-07>. The report discussed the ten state legislative primary races in 2008 in which the highest levels of independent spending occurred. *Id.* at 61-67. Those ten races accounted for 78% (\$9.4 million) of the statewide total of \$12 million in independent expenditures on the primary races. Thus, in the great majority of these legislative races (90 of 100), there was little independent spending by corporations or anyone else. Strikingly, in six of the ten analyzed races, the candidate who received the highest level of independent advocacy support lost. *Id.* at 62-67.

California held over one thousand legislative and executive elections between January 1, 2001, and December 31, 2006.⁷ The report analyzed twelve races where total independent spending from all sources exceeded candidate/campaign spending. *Id.* at 23-36. In seven of those twelve, the candidate who benefited from the highest level of independent spending lost the election. *Id.* at 26, 27, 30-32, 35, 36. In four of those seven races, the winner had less than approximately 1/3 the independent

7. This information is available from the Secretary of State's website at: http://www.sos.ca.gov/elections/elections_elections.htm.

advocacy support of the loser. *Id.* at 26, 30, 31, 36. Indeed, in the 2004 general election in the 76th Assembly District, the winner was supported by only \$24,108 in independent spending, while the loser benefited from \$906,145, or forty times more. *Id.* at 30.

The report identified just three races in which independent spending allegedly “may” have provided the margin of victory. *Id.* at 37-40. It apparently reasoned that, because these races were close, the large independent expenditures may have swayed enough voters to tip the outcome. If this tenuous inference were accurate, it would not matter since “the fact that advocacy may persuade the electorate is hardly a reason to suppress it.” *Bellotti*, 435 U.S. at 790-91. There was no claim or showing that, in these races, other voices were not also heard. In short, the report does not show – and actually refutes – any claim that corporate wealth dominates or distorts California elections.

The aggregate numbers in California tell a similar story. According to a 2009 FPPC report entitled *The Billion Dollar Money Train* (at 10, 24),⁸ California candidates and officeholders raised over \$721 million for their campaigns from January of 2001 until December of 2008. During that same period, independent expenditures from all sources amounted to less than one-sixth of that amount, or approximately \$110 million.

The State of Washington also allows independent corporate campaign advocacy. Washington’s Public Disclosure Commission collected data on spending in 2008

8. Available at: http://www.fppc.ca.gov/reports/billion_dollar_money_train.pdf.

legislative and executive elections.⁹ Legislative candidate campaigns spent \$21,127,152. By comparison, total independent expenditures from all sources supporting or opposing candidates was \$2,179,447. State executive candidates and campaigns spent \$31,693,004. Independent expenditures supporting and opposing candidates totaled \$21,279,612. As with California, there was no showing that corporate spending dominated or distorted the elections.

In sum, for the 19 years since *Austin*, a majority of the states have continued to allow corporations to spend freely on independent candidate advocacy. Contrary to *Austin*'s hypothesis, there is no evidence that elections in those states have been corroded and distorted by immense corporate wealth. Indeed, the Government's supplemental brief no longer defends a distortion rationale.

C. *Austin*'s Professed Concern With Preventing "Distortion" Really Is A Constitutionally Forbidden Effort To "Level The Playing Field."

Austin never clearly explained the "distorting effects" that it feared from advocacy funded by "immense aggregations" of corporate wealth. 494 U.S. at 660. Its basic concern, however, was that corporations could "unfairly" dominate "in the form of independent expenditures." *Id.* In other words, some speakers and ideas would receive more support than others.

However, efforts to "level the playing field" by hobbling speakers with greater assets are forbidden by the First Amendment. *Buckley* rejected any compelling

9. The data is available at: <http://www.pdc.wa.gov/QuerySystem/candidates.aspx>.

governmental interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.” 424 U.S. at 48-49. Its holding was strongly reaffirmed in *Davis v. FEC*, 128 S. Ct. 2759 (2008) (noting the “ominous implications” of leveling). See Samuel Gedge, Comment, “*Wholly Foreign to the First Amendment*”: *The Demise of Campaign Finance’s Equalizing Rationale in Davis v. Federal Election Commission*, 32 Harv. J. L. & Pub. Pol’y 1197 (2009).

Davis is striking because the imbalance involved candidate spending central to the campaign. By contrast, this case involves independent speech, not coordinated with any candidate. Moreover, in *Davis* the candidate’s great wealth derived from his successful corporation – I Squared R Element Co. See *id.* at 1206. Yet his benefit from exploiting the corporate structure was not proffered as a reason to subject him to “leveling.”

Thus, *Austin*’s speculative “compelling interest” boils down to “leveling,” which the First Amendment forbids.

D. *Austin*’s Professed Interest In Limiting Corporate Speech To Ideas The Public Supports Is Contrary To The First Amendment.

Austin comments that corporate advocacy may “have little or no correlation to the public’s support for the corporation’s political ideas” and praises the speech ban for “ensur[ing] that expenditures reflect actual public support for the political ideas espoused by corporations.” 494 U.S. at 660. Throughout history, many governments have sought to limit independent speech to ideas the public

already supports.¹⁰ But the First Amendment’s vision assures competing views on public issues from “diverse and antagonistic sources.” *Associated Press v. United States*, 326 U.S. 1, 20 (1945). *Austin*’s endeavor to ensure that corporations say only those things the public already supports is another reason it should be overruled.

III. AUSTIN’S CATEGORICAL BAN ON CORPORATE ADVOCACY IS NOT NARROWLY TAILORED TO PREVENT GREAT WEALTH FROM DISTORTING ELECTIONS.

The “compelling” interest *Austin* relies upon is “the corrosive and distorting effects of immense aggregations of wealth . . . when it is deployed in the form of independent expenditures.” 494 U.S. at 660. Yet the remedy it approves is not narrowly tailored to address such wealth.

After all, most corporations are of modest size and wealth. According to the Small Business Administration, 56% of new employer businesses close within four years, and more than 70% close within seven years.¹¹ If the mere

10. *Austin* does not find that protecting dissenting shareholders is a compelling interest. 494 U.S. at 663. It mentions that issue only to distinguish *MCFL*, 479 U.S. at 263, in which the basic rule later adopted by *Austin* was not challenged. Proper use of corporate assets is a matter of internal corporate governance. The government has shown no compelling need to resort to categorical bans on core corporate speech. *Bellotti*, 435 U.S. at 794-95. Given the wide range of political corporate speech protected by *Bellotti* and *WRTL II*, a ban on candidate advocacy is underinclusive and untailored.

11. U.S. Small Business Administration, *FAQs: Frequently Asked Questions*, Sept. 2008, at 1, <http://www.sba.gov/advo/stats/sbfaq.pdf>.

fact of incorporation guaranteed vast wealth, those figures would be very different. Few of the successful florists, retail shops, restaurants, service stations, and myriad other commonly incorporated businesses that surround us have aggregated immense wealth. The same is true of the 96% of the Chamber's members that have fewer than 100 employees. In short, immensely wealthy corporations are very much the exception, rather than the rule.

At the same time, immensely wealthy individuals play a significant role in our political process.¹² For example, during the 2003-04, 2005-06, and 2007-08 election cycles, the following individuals made the following donations to other organizations to fund their independent advocacy, drawing on personal wealth derived from business corporations:

12. This Court recently dealt with issues arising from large sums spent by an individual in a state judicial race. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009). Although that individual's wealth derived from a corporation, the Court did not suggest that the speech should or could have been banned. Instead, it adopted the tailored remedy of judicial disqualification.

**Spending By Wealthy Individuals
For Independent Advocacy 2003-08¹³**

Donor	Amount 2003-08	Corporation
George Soros	\$36,600,000	Soros Fund Management LLC
Peter Lewis	\$25,000,000	Progressive Casualty Insurance Company
Stephen Bing	\$19,000,000	Shangri-La Entertainment
Bob Perry	\$18,900,000	Perry Homes
Herbert & Marion Sandler	\$13,700,000	Golden West Financial Corporation
Jerrold Perenchio	\$10,200,000	Univision
Linda Pritzker	\$5,900,000	Hyatt & Marmon
Alida Messinger	\$5,000,000	Rockefeller heir (Standard Oil)
Sheldon Adelson	\$4,300,000	Las Vegas Sands Corp.
Carl Lindner	\$4,000,000	American Financial Group

13. Matt Kelley and Fredreka Schouten, *Wealthy Few Provide Cash for Independent Political Groups*, USA Today, July 22, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-07-21-donorinside_N.htm. In this and the next table, listed corporations are those commonly identified as the foundation of the donor's wealth, though many wealthy persons have complex investments.

Similarly, this table lists some candidates with corporation-based wealth and their personal spending directly on identified campaigns:

Personal Funds Spent By Wealthy Candidates¹⁴

Name	Race	Amount	Corporation
Jon Corzine	2000 Sen. N.J. 2005 Gov. N.J.	\$63,000,000 \$43,000,000	The Goldman Sachs Group, Inc.
Michael Bloomberg	2001 NYC Mayor 2005 NYC Mayor	\$73,000,000 \$85,000,000	Bloomberg L.P. ¹⁵

14. *10 Candidates Who Spent Giant Sums of Their Personal Wealth*, Real Clear Politics, July 9, 2009, http://www.realclearpolitics.com/lists/candidate_spenders. This list is not exhaustive. Other candidates for state office have spent more than \$20 million on their campaigns, including: Tom Golisano (\$100 million on three New York gubernatorial bids, plus \$5 million for other state campaigns, Paychex, Inc.); Tony Sanchez (\$60 million in a 2002 bid for Texas Governor, Sanchez Oil & Gas Corporation); and Al Checchi (\$40 million in the 1998 California Democratic primary for Governor, Northwest Airlines). Tom Precious, *Golisano Bids to Finance Reforms*, Buffalo News, July 9, 2008; R.G. Ratcliffe, *Millionaires Gave a Third of All Money Raised for '06 State Races*, Houston Chronicle, Sept. 27, 2007; Norman Solomon, *Calculating How Much Candidates Spend for Every Vote*, Cleveland Plain Dealer, June 5, 1998.

15. It is an interesting question whether *Austin's* holding applies to a limited partnership. In any event, Bloomberg L.P. holds ownership interests in business corporations.

Jay Rockefeller	1984 Sen. W. Va.	\$9,000,000	Rockefeller heir (Standard Oil)
Jared Polis	2008 Cong. CO	\$5,992,550	Provide Commerce, Inc.
Herb Kohl	1988 Sen. WI 1994 Sen. WI 2000 Sen. WI 2006 Sen. WI	\$7,491,000 \$6,500,000 \$5,000,000 \$6,000,000	BATUS Inc. & Kohl's
Michael Huffington	1994 Sen. CA	\$28,000,000	Huffco
Ross Perot	1992 President	\$63,500,000	EDS
Steve Forbes	1996 President 2000 President	\$37,900,000 \$38,700,000	Forbes, Inc.
Ned Lamont	2006 Sen. CT	\$12,700,000	J.P. Morgan & Co. (heir)
Blair Hull	2004 Sen. IL	\$28,000,000	Hull Trading Company

In short, banning speech by corporations is not a tailored way to address the effects of wealth on elections, assuming “distortion” is a compelling justification for a ban. Attempting a work-around, *Austin* stated that all corporations benefit from “the unique state-conferred corporate structure that facilitates the amassing of large treasuries [and this] warrants the limit.” 494 U.S. at 660. On that theory, *Austin* ruled that the categorical ban was “precisely targeted to eliminate the distortion caused by corporate spending.” *Id.*

But immense wealth cannot distort until it first has been aggregated and spent. *Austin* actually recognizes as much, saying that “corporate wealth can unfairly influence elections when it is *deployed*.” *Id.* (emphasis added). Banning all corporate candidate advocacy because some corporations some day may become wealthy is not a tailored response to distortions caused by the spending of great wealth.

IV. THIS IS A PROPER CASE IN WHICH TO OVERRULE *AUSTIN*.

To defeat this “as applied” challenge, “the *Government* must prove that applying [the challenged statute to Citizens United] furthers a compelling interest and is narrowly tailored” *WRTL II*, 127 S.Ct. at 2664. The Jurisdictional Statement brought that issue before this Court, asking if Citizens United’s speech was properly “subject to regulation as an electioneering communication,” and it now has been fully briefed. To meet its burden, the Government argued that, because Citizens United is a corporation and received corporate funds, suppressing its speech is justified by the compelling interest and categorical ban approved by *Austin*. Brief for the Appellee at 15. Thus, the Government placed *Austin* at issue.

As demonstrated above, *Austin* is deeply flawed, irreconcilable with settled precedent, and deprives the public of core speech by a wide range of corporations. Rather than building a Rube Goldberg edifice based on special (and disputed) characteristics of Citizens United – defeating the “imperative for clarity,” *WRTL II*, 127 S. Ct. at 2669 n.7 – the Court should rule that *Austin*

erred and that the fact that a speaker is a corporation is not a constitutional basis for suppressing its independent political speech. Such a holding will provide full relief to Appellant and correct the ongoing First Amendment injury *Austin* is inflicting on the public, which is being deprived of the views of the Chamber, its corporate members, and corporations generally.

Overruling any holding of this Court is a serious step. At the same time, the Court recognizes its special obligation to assure that its constitutional holdings, which are not subject to correction by anyone else, are faithful to the Constitution the Court is sworn to uphold. *See Smith v. Allwright*, 321 U.S. 649, 665 (1944); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07, 410 (1932) (Brandeis, J., dissenting). Where a constitutional ruling is “badly reasoned” or rests on “a misreading of precedent,” this Court “has never felt constrained” to perpetuate constitutional error. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (collecting authority); *Allwright*, 321 U.S. at 665 (overruling is particularly appropriate where the error lies in applying a constitutional principle, rather than in discerning it). Instead, the proper step is to overrule the erroneous decision and restore the constitutional rights of appellant and many others. *See Agostini v. Felton*, 521 U.S. 203, 239 (1997) (declining to wait for a “better vehicle”).

CONCLUSION

For the foregoing reasons, *Austin* should be overruled and the Court should hold that the facts that Appellant Citizens United is incorporated and has received money from business corporations provide no basis for restricting its core First Amendment right to engage in independent electoral advocacy.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CALEB P. BURNS
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

STEVEN J. LAW
*Chief Legal Officer and
General Counsel*
JUDITH K. RICHMOND
*Vice President and
Associate General Counsel*
U.S. CHAMBER OF COMMERCE
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5576

Counsel for Amicus Curiae