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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear  
reargument this morning in Case 08-205, Citizens United  
v. The Federal Election Commission.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE APPELLANT

MR. OLSON: Mr. Chief Justice and may it  
please the Court:

Robust debate about candidates for elective  
office is the most fundamental value protected by the  
First Amendment's guarantee of free speech. Yet that is  
precisely the dialogue that the government has  
prohibited if practiced by unions or corporations, any  
union or any corporation.

The government claims it may do so based  
upon the Austin decision that corporate speech is by its  
nature corrosive and distorting because it might not  
reflected actual public support for the views expressed  
by the corporation. The government admits that that  
radical concept of requiring public support for the  
speech before you can speak would even authorize it to  
criminalize books and signs.

This Court needs no reminding that the

1 government when it is acting to prohibit, particularly  
2 when it is acting to criminalize, speech that is at the  
3 very core of the First Amendment has a heavy burden to  
4 prove that there is a compelling governmental interest  
5 that -- that justifies that prohibition and that the  
6 regulation adopted, in this case a criminal statute, is  
7 the most narrowly tailored necessary to accomplish that  
8 compelling governmental interest.

9 JUSTICE GINSBURG: Mr. Olson, are you taking  
10 the position that there is no difference in the First  
11 Amendment rights of an individual? A corporation, after  
12 all, is not endowed by its creator with inalienable  
13 rights. So is there any distinction that Congress could  
14 draw between corporations and natural human beings for  
15 purposes of campaign finance?

16 MR. OLSON: What the Court has said in the  
17 First Amendment context, *New York Times v. Sullivan*,  
18 *Rose Jean v. Associated Press*, and over and over again,  
19 is that corporations are persons entitled to protection  
20 under the First Amendment.

21 JUSTICE GINSBURG: Would that include --

22 MR. OLSON: Now, Justice --

23 JUSTICE GINSBURG: Would that include  
24 today's mega-corporations, where many of the investors  
25 may be foreign individuals or entities?

1           MR. OLSON: The Court in the past has made  
2 no distinction based upon the nature of the entity that  
3 might own a share of a corporation.

4           JUSTICE GINSBURG: Own many shares?

5           MR. OLSON: Pardon?

6           JUSTICE GINSBURG: Nowadays there are  
7 foreign interests, even foreign governments, that own  
8 not one share but a goodly number of shares.

9           MR. OLSON: I submit that the Court's  
10 decisions in connection with the First Amendment and  
11 corporations have in the past made no such distinction.  
12 However --

13           JUSTICE GINSBURG: Could they in your view,  
14 in the view that you are putting forth, that there is no  
15 distinction between an individual and a corporation for  
16 First Amendment purposes, then any mega-corporation,  
17 even -- even if most of the investors are from abroad,  
18 Congress could not limit their spending?

19           MR. OLSON: I'm not -- I'm not saying that,  
20 Justice Ginsburg. I'm saying that the First Amendment  
21 applies. Then the next step is to determine whether  
22 Congress and the government has established a compelling  
23 governmental interest and a narrowly tailored remedy to  
24 that interest. If the Congress -- and there is no  
25 record of that in this case of which I am aware.

1 Certainly the government has not advanced it in its  
2 briefs: That there is some compelling governmental  
3 interest because of foreign investment in corporations.

4 If there was, then the Court would look at,  
5 determine how serious is that interest, how destructive  
6 has it been to the process and whether the -- maybe the  
7 limitation would have something to do with the ownership  
8 of shares of a corporation or some --

9 JUSTICE SCALIA: Do you think Congress could  
10 prevent foreign individuals from funding speech in  
11 United States elections?

12 MR. OLSON: The -- the --

13 JUSTICE SCALIA: Private individuals,  
14 foreigners who -- who want to --

15 MR. OLSON: That's, of course, a different  
16 question. I haven't studied it, Justice Scalia.

17 JUSTICE SCALIA: Well, it's not different.  
18 I asked it because I thought it was related to the  
19 question you were answering.

20 MR. OLSON: The fundamental point here is --  
21 and let me start with this, and I think we should -- we  
22 should start with this, and the government hardly  
23 mentions this.

24 JUSTICE STEVENS: Before you do, Mr. Olson  
25 --

1 MR. OLSON: The language of the First  
2 Amendment, "Congress shall make" --

3 JUSTICE STEVENS: Mr. Olson -- Mr. Olson,  
4 would you answer Justice Ginsburg's question yes or no?  
5 Can the -- leaving aside foreign investors, can the --  
6 can -- does the First Amendment permit any distinction  
7 between corporate speakers and individual speakers?

8 MR. OLSON: I am not -- I'm not aware of a  
9 case that just --

10 JUSTICE STEVENS: I am not asking you that.  
11 I meant in your view does it permit that distinction?

12 MR. OLSON: My view is based upon the  
13 decisions of this Court and my view would be that unless  
14 there is a compelling governmental interest and a  
15 narrowly --

16 JUSTICE STEVENS: But if there is a  
17 compelling government -- can there be any case in which  
18 there is a different treatment of corporations and  
19 individuals in your judgment?

20 MR. OLSON: I would not rule that out,  
21 Justice Stevens. I mean, there may be. I can't imagine  
22 all of the infinite varieties of potential problems that  
23 might exist, but -- but we would eventually come back to  
24 the narrow tailoring problem anyway.

25 What the government has done here is

1 prohibit speech. I don't know how many unions there are  
2 in this country, but there are something like 6 million  
3 corporations that filed tax returns in 2006.

4 JUSTICE ALITO: Well, Mr. Olson, do you  
5 think that media corporations that are owned or  
6 principally owned by foreign shareholders have less  
7 First Amendment rights than other media corporations in  
8 the United States?

9 MR. OLSON: I don't think so, Justice Alito,  
10 and certainly there is no record to suggest that there  
11 is any kind of problem based upon that. And I come back  
12 to the language of the First Amendment: "Congress shall  
13 make no law." Now, what this Court has repeatedly said  
14 is that there may be laws inhibiting speech if there is  
15 a compelling governmental interest and a narrowly  
16 tailored remedy. But there is no justification for  
17 this.

18 I was going to say that 97 percent of the 6  
19 million corporations that filed tax returns in 2006 had  
20 assets less than \$5 million -- assets, not net worth.  
21 So we are talking about a prohibition that covers every  
22 corporation in the United States, including nonprofit  
23 corporations, limited liability corporations, Subchapter  
24 S corporations and every union in the United States.

25 JUSTICE GINSBURG: But what are the -- you



1 have used the word "prohibition," Mr. Olson. One answer  
2 to that is that no entity is being prohibited, that it  
3 is a question of not whether corporations can contribute  
4 but how. They can use PACs and that way we assure that  
5 the people who contribute are really supportive of the  
6 issue, of the candidate.

7 But so the -- the corporation can give, but  
8 it has to use a PAC.

9 MR. OLSON: I respectfully disagree. The  
10 corporation may not expend money. It might find people,  
11 stockholders or officers, who wanted to contribute to a  
12 separate fund, who could then speak. That in one -- to  
13 use the words of one Justice, that is  
14 ventriloquist-speak. I would say that it is more like  
15 surrogate speech. If you can find some other people  
16 that will say what you want to say and get them to  
17 contribute money through a process that this just --

18 JUSTICE GINSBURG: Who is the "you"? I mean  
19 do you -- you -- those are the directors, the CEO, not  
20 the shareholders? We don't know what they think.

21 MR. OLSON: Well, this statute is not  
22 limited to cases where the shareholders agree or don't  
23 agree with what the corporation says. As the Court said  
24 in the Bellotti case, the prohibition would exist  
25 whether or not the shareholders agree. But let me go

1 back to your question.

2 JUSTICE SCALIA: It -- it covers totally --  
3 totally owned corporations, too, doesn't it?

4 MR. OLSON: Yes.

5 JUSTICE SCALIA: I mean, if I owned all the  
6 stock in a corporation, the corporation still can't --

7 MR. OLSON: Yes. And it includes membership  
8 corporations such as Citizens United that --

9 JUSTICE BREYER: And the individual  
10 contribution also covers people who would like to give  
11 \$2500 instead of \$2400, which is the limit. And maybe  
12 there are 100 million or 200 million people in the  
13 United States who, if they gave 2500 rather than 2400,  
14 nobody could say that that was really an effort to buy  
15 the Senator or the Congressman. So is that  
16 unconstitutional, too?

17 MR. OLSON: No -- well, what this Court has  
18 said is that in connection with contribution limitations  
19 there is a potential compelling governmental interest.

20 JUSTICE BREYER: Yes.

21 MR. OLSON: This is what Buckley says.

22 JUSTICE BREYER: Yes.

23 MR. OLSON: Then that -- in that -- but  
24 expenditures, which is what we are talking about today,  
25 do not concern the -- the question, the actual threat of

1 quid pro quo corruption or the appearance of quid pro  
2 quo corruption. And you know, Justice Breyer, what the  
3 Court said in that case is because it's not inhibiting  
4 someone from actually speaking, it's -- it's giving  
5 money to someone --

6 JUSTICE BREYER: So here the obvious  
7 argument is: Look, they said the compelling interest is  
8 that people think that representatives are being bought,  
9 okay? That's to put it in a caricature, but you  
10 understand what I'm driving at, okay? That's what they  
11 said in Buckley v. Valeo. So Congress now says  
12 precisely that interest leads us to want to limit the  
13 expenditures that corporations can make on  
14 electioneering communication in the last 30 days of a  
15 primary, over-the-air television, but not on radio, not  
16 on books, not on pamphlets, not on anything else. All  
17 right?

18 So in what respect is there not conceptually  
19 at least a compelling interest and narrow tailoring?

20 MR. OLSON: Well, in the first place, I  
21 accept what the Court said in Buckley, that expenditures  
22 do not raise that concern at all. Congress has not made  
23 that finding. You are talking -- and you mentioned just  
24 -- just a matter of radio and television, but in Buckley  
25 v. Valeo the Court specifically said that that is the

1 most important means of communicating concerning  
2 elections --

3 JUSTICE BREYER: It's important --

4 MR. OLSON: And the Court used the word  
5 "indispensable." So what -- and -- and what the Court  
6 said in Buckley v. Valeo is it compared a limitation on  
7 expenditures, independent uncoordinated expenditures,  
8 with the prohibition that the Court addressed when it  
9 had a statute before it that said newspapers couldn't  
10 endorse candidates on the day of election, and the  
11 Torneo case, where it required a right of reply to be  
12 given. And the Court said those restrictions, which  
13 were unconstitutional, were considerably less, and that  
14 the restriction in Buckley v. Valeo on expenditures --

15 JUSTICE KENNEDY: I -- I agree -- I agree  
16 that Buckley made the distinction between contributions  
17 and expenditures, and it seems to me that the  
18 government's argument necessarily wants to water down  
19 that distinction. But in response or just in  
20 furtherance of Justice Breyer's point, you have two  
21 cases, one in which an officeholder goes to a  
22 corporation and says: Will you please give me money?  
23 They say: We can't do that.

24 The other is in which a corporation takes  
25 out an ad for the -- for the candidate, which relieves

1 that candidate of the responsibility of -- of  
2 substantial television coverage. Isn't that about the  
3 same?

4 MR. OLSON: Well, in the first place, if  
5 there is any coordination --

6 JUSTICE KENNEDY: And I -- and I think  
7 Buckley says no.

8 MR. OLSON: Buckley says --

9 JUSTICE KENNEDY: But, as a practical  
10 matter, is that always true?

11 MR. OLSON: Well, it may not always be true.  
12 In the infinite potential applications of something like  
13 that, Justice Kennedy, anything might possibly be true.  
14 And Justice Breyer said, well, what if Congress thought  
15 or what if Congress thought the people might think that  
16 that was kind of somehow suspect? That is not a basis  
17 for prohibiting speech by a whole class of individual --

18 JUSTICE BREYER: Well, of course, it did --  
19 was a basis for prohibiting speech by, in the sense of  
20 giving contributions above \$2,400, by 300 million people  
21 in the United States. But the point, which I think is  
22 the one that Justice Kennedy was picking up, is are we  
23 arguing here between you and my questions, is the  
24 argument in this case about the existence of a  
25 compelling interest? Because Congress seemed to think

1 that there was certainly that; it's this concern about  
2 the perception that people are, say, buying candidates.

3 Are we arguing about narrow tailoring?  
4 Congress thought it was narrow tailoring. Or are we  
5 arguing about whether we should second-guess Congress on  
6 whether there is enough of a compelling interest and the  
7 tailoring is narrow enough?

8 MR. OLSON: You must always second-guess  
9 Congress when the First Amendment is in play. And that  
10 we are arguing -- we are not -- we are discussing --

11 JUSTICE BREYER: Yes.

12 MR. OLSON: -- both the compelling --

13 (Laughter.)

14 MR. OLSON: -- both the compelling  
15 governmental interest and the narrow tailoring, and  
16 what -- what -- there is not a sufficient record. The  
17 reason -- the government has shifted position here. They  
18 were, first of all, talking about the so-called  
19 distortion rationale in Austin, the distortion rationale  
20 which they seem to have abandoned in the -- in the  
21 supplemental briefs filed in connection with this  
22 argument, and they resorted to the corruption,  
23 appearance of corruption. There isn't a sufficient  
24 record of this. There isn't --

25 JUSTICE GINSBURG: But what about the

1 district court's finding? Wasn't there a finding before  
2 the three-judge court that Federal officials know of and  
3 feel indebted to corporations or unions who finance ads  
4 urging their election or the defeat of their opponent?  
5 There was a finding of fact to that effect, was there  
6 not?

7 MR. OLSON: The find -- yes. I -- there is  
8 something to that effect in the district court opinion,  
9 but it doesn't cover all corporations. It didn't focus  
10 in specifically on expenditures.

11 JUSTICE GINSBURG: So if -- so if they just  
12 covered large corporations, so you take out the mom and  
13 pop single shareholder --

14 MR. OLSON: Well, that is 97 percent of the  
15 corporation.

16 JUSTICE GINSBURG: Not 97 percent of the  
17 contributions. I mean, the contributions that count are  
18 the ones from the corporations that can amass these huge  
19 sums in their treasuries.

20 MR. OLSON: I think that goes back to  
21 Justice Kennedy's question, and my response, which  
22 distinguishes between contributions and expenditures.  
23 The point that Justice Kennedy was making in his  
24 question is that under -- under some circumstances an  
25 expenditure might coincide or resonate with what the

1 candidate wishes to do, but the Court looked at that  
2 very carefully in Buckley v. Valeo and said that might  
3 not be the case. It might, in fact, be these  
4 expenditures might be counterproductive when they are  
5 independent, they are not coordinated with the  
6 candidate, they are more directly expression by the  
7 party spending the money, they are not like a  
8 contribution, so they are more of an infringement on the  
9 right to speak.

10 CHIEF JUSTICE ROBERTS: Counsel --

11 MR. OLSON: And they are less of a threat of  
12 corruption because there is less -- there is no quid pro  
13 quo there, and if there is it would be punishable as a  
14 crime.

15 CHIEF JUSTICE ROBERTS: Counsel, in your  
16 discussion of Austin, you rely on its inconsistency with  
17 Bellotti. Bellotti, of course, involved a referendum  
18 and Austin expenditures in an individual election. Why  
19 isn't that a significant distinction?

20 MR. OLSON: Well, it is -- it is -- what the  
21 Bellotti Court said is that we are not deciding that  
22 question.

23 And -- and Austin did address, you are  
24 correct, expenditures, but it based it on a rationale --

25 JUSTICE STEVENS: It more than said we are



1 not deciding. It said they are entirely different  
2 situations. You read that long footnote which has been  
3 cited six or eight times by our later cases.

4 MR. OLSON: Yes. And I also read the  
5 footnote 14 in the Bellotti case that cited case after  
6 case after case that said corporations had rights,  
7 protected rights under the First Amendment. I am not  
8 disagreeing with what you just said, Justice Stevens.  
9 The Court said it was -- it was dicta, because the Court  
10 did not deal with --

11 JUSTICE STEVENS: But it has been  
12 repeated -- that footnote has been repeatedly cited in  
13 subsequent cases, most of which were unanimous.

14 MR. OLSON: Well, because it was -- and I  
15 agree the Bellotti Court was not discussing that. But  
16 The Bellotti Court --

17 JUSTICE STEVENS: It did discuss it  
18 precisely in that footnote and it said it's a different  
19 case.

20 MR. OLSON: I understand and I don't  
21 disagree with what you have just said, Justice Stevens.

22 JUSTICE SCALIA: It didn't say it would come  
23 out differently. It just said, we're not deciding that  
24 case, right?

25 MR. OLSON: That -- that is -- that's the

1 point I'm trying to make.

2 JUSTICE SCALIA: I don't mind citing that.  
3 Bellotti didn't decide that.

4 MR. OLSON: What Bellotti also said is --  
5 and I think this is also in many decisions of this Court  
6 -- the inherent worth of speech in terms of its capacity  
7 for informing the public does not depend upon the  
8 identity of the source, whether corporation,  
9 association, union, or individual.

10 CHIEF JUSTICE ROBERTS: Now that we've  
11 cleared up that Bellotti didn't decide the question,  
12 what is the distinction that -- why don't you think that  
13 distinction makes sense? In other words, a corporate --  
14 you don't have a potential for corruption if a  
15 corporation is simply speaking on a referendum that may  
16 directly affect its interest. If you are dealing with a  
17 candidate, what the Court has said in the past is that  
18 you do have that problem of corruption.

19 MR. OLSON: Well --

20 CHIEF JUSTICE ROBERTS: In other words, why  
21 isn't that distinction a way to reconcile Bellotti and  
22 Austin?

23 MR. OLSON: There is a distinction, but I  
24 think the distinction goes back to, A, expenditures  
25 versus contributions, number one; and then secondly, it

1 goes back to what this Court said in conjunction with  
2 the impossibility of finding a distinction between issue  
3 ads and candidate ads. The line dissolves on practical  
4 application. The interest --

5 CHIEF JUSTICE ROBERTS: Where did we say  
6 that?

7 MR. OLSON: You said that repeatedly,  
8 including most recently in the Wisconsin Right to Life  
9 case. And it first appeared in Buckley itself. The  
10 distinction is very hard to draw between the interest  
11 that the speaker is addressing and whether it's a  
12 candidate or an issue, because issues are wrapped up in  
13 candidates. The corporation interest and the interests  
14 that its fiduciary officers are representing when it  
15 speaks on behalf of the corporation --

16 JUSTICE STEVENS: I don't think you are  
17 correct to say the Court said there was no distinction.  
18 It said the distinction requires the use of magic words.  
19 And that's what they said in Wisconsin Right to Life,  
20 too. Both of them said there is a distinction.

21 MR. OLSON: Well, but the words --

22 JUSTICE STEVENS: It's difficult to draw in  
23 some cases, but nobody said there is no distinction that  
24 I am aware of.

25 MR. OLSON: Well, what the Court -- to

1 use -- to use the words of the Court, which occurred  
2 repeatedly, is that the distinction dissolves  
3 impractical application. That, Justice Stevens, I think  
4 addresses the very commonsense point that when you are  
5 addressing an issue, whether you are addressing a  
6 referendum matter, whether it is a proposed legislation  
7 or a candidate that is going to raise taxes on the  
8 corporation, those distinctions dissolve. It's all  
9 First Amendment freedom.

10 JUSTICE SCALIA: I -- I -- I thought that  
11 Buckley had narrowed the statute precisely to magic  
12 words and still found it unconstitutional as applied to  
13 corporations that made independent expenditures.

14 MR. OLSON: Yes.

15 JUSTICE SCALIA: Isn't that what happened in  
16 Buckley?

17 MR. OLSON: The \$1,000 limit in Buckley was,  
18 first of all, limited to the magic words "candidacy  
19 expression"; then secondly, the Court -- and the -- and  
20 the words of the statute were "any person," which  
21 included corporations found, the statute as narrowed  
22 unconstitutional and said --

23 JUSTICE SCALIA: And some of the plaintiffs  
24 were corporations.

25 MR. OLSON: Some of the plaintiffs were

1 corporations.

2 JUSTICE STEVENS: Yes, but that point wasn't  
3 even discussed in the opinion, was it?

4 MR. OLSON: It was not discussed in the  
5 opinion.

6 JUSTICE STEVENS: No.

7 MR. OLSON: But what was discussed in the  
8 opinion was the breadth of the definition of "person,"  
9 which did include corporation. Corporations were  
10 parties in the case. And in that part of the Buckley  
11 case, the Court repeatedly cites cases involving  
12 corporations, including NAACP v. Alabama and New York  
13 Times v. Sullivan, all cases involving corporations.

14 So while it wasn't specifically discussed,  
15 it was a part of the decision of the Court that a \$1,000  
16 limitation was worse, more restrictive than the -- than  
17 the restriction of editorials appearing on election day  
18 or requiring a newspaper to give a right of reply.

19 The Court in Buckley in fact says, this  
20 is -- with respect to that expenditure limitation, the  
21 words of the Court were this is the most drastic of the  
22 limitations imposed by the Federal Election Campaign  
23 Act. It goes to the core of First Amendment freedom.

24 JUSTICE BREYER: If that is so -- this is a  
25 point that is concerning me. I don't know the answer

1 precisely. But suppose you are right. Suppose we  
2 overrule these two cases. Would that leave the country  
3 in a situation where corporations and trade unions can  
4 spend as much as they want in the last 30 days on  
5 television ads, et cetera, of this kind, but political  
6 parties couldn't, because political parties can only  
7 spend hard money on this kind of expenditure? And  
8 therefore, the group that is charged with the  
9 responsibility of building a platform that will appeal  
10 to a majority of Americans is limited, but the groups  
11 that have particular interests, like corporations or  
12 trade unions, can spend as much as they want?

13 Am I right about the consequence? If I am  
14 right, what do we do about it?

15 MR. OLSON: I think you are wrong about the  
16 consequence. There are 27 States that have no  
17 limitations on either contributions or expenditures and  
18 that -- the Earth is not --

19 JUSTICE BREYER: No, I'm not -- I'm not -- I  
20 am saying am I right in thinking that if you win, the  
21 political party can't spend this money, it's limited to  
22 hard money contributions, but corporations and trade  
23 unions can spend unlimited funds?

24 MR. OLSON: Well, if -- if the Court decides  
25 in favor of the arguments that we are making here, I

1 think what you are suggesting is that because there are  
2 other limitations that someone has not challenged in  
3 this case, that that would be somehow unfair and  
4 unbalanced.

5 JUSTICE BREYER: No, I'm not suggesting  
6 that. I am suggesting we will make a hash of this  
7 statute, and if we are going to make a hash of this  
8 statute, what do we do about it? And that's why I want  
9 you to take a position on another important part of that  
10 statute, and that is the part that says political  
11 parties themselves cannot make these expenditures that  
12 we are talking about except out of hard money.

13 MR. OLSON: What -- I want to address that  
14 in this way, and I said when we were here before the  
15 most fundamental right that we can exercise in a  
16 democracy under the First Amendment is dialogue and  
17 communication about political candidates. We have  
18 wrapped up that freedom, smothered that freedom, with  
19 the most complicated set of regulations and bureaucratic  
20 controls. Last year the Federal Election Commission  
21 that was supposed to be able to give advisory opinions  
22 didn't even have a quorum for 6 months of the year 2008  
23 when people would have needed some help from the Federal  
24 Election Commission.

25 What I am saying, in answer to your

1 question, Justice Breyer, there are, I suspect, all  
2 kinds of problems with Federal election laws where they  
3 apply to parties and where they apply to what candidates  
4 might do and so forth; but that has never been a  
5 justification. We will uphold a prohibition on all  
6 kinds of people speaking because if we allowed them to  
7 speak someone else might complain that they don't get to  
8 speak as much as they would like.

9 JUSTICE KENNEDY: Well, with reference to  
10 any incongruities that might flow from our adopting your  
11 position, are you aware of any case in this Court which  
12 says that we must refrain from addressing an  
13 unconstitutional aspect of the statute because the  
14 statute is flawed in some other respects as well?

15 MR. OLSON: No, I'm not, and that's -- I  
16 think that was what I was attempting to say in response  
17 to what Justice Breyer was asking me.

18 JUSTICE SOTOMAYOR: Mr. Olson, are you  
19 giving up on your earlier arguments that there are ways  
20 to avoid the constitutional question to resolve this  
21 case? I know that we asked for further briefing on this  
22 particular issue of overturning two of our Court's  
23 precedents. But are you giving up on your earlier  
24 arguments that there are statutory interpretations that  
25 would avoid the constitutional question?



1           MR. OLSON: No, Justice Sotomayor. What --  
2 what -- there are all kinds of lines that the Court  
3 could draw which would provide a victory to my client.  
4 There are so many reasons why the Federal Government did  
5 not have the right to criminalize this 90-minute  
6 documentary that had to do with elections, but what the  
7 Court addressed specifically in the Washington Right to  
8 Life case is that the lines if they are to be drawn must  
9 not be lines that are ambiguous, that invite litigation,  
10 that hold the threat of prosecution over an individual;  
11 and in practical application that is what the --

12           JUSTICE SOTOMAYOR: Mr. Olson, my difficulty  
13 is that you make very impassioned arguments about why  
14 this is a bad system that the courts have developed in  
15 its jurisprudence, but we don't have any record  
16 developed below. You make a lot of arguments about how  
17 far and the nature of corporations, single corporations,  
18 single stockholder corporations, et cetera. But there  
19 is no record that I am reviewing that actually goes into  
20 the very question that you're arguing exists, which is a  
21 patchwork of regulatory and jurisprudential guidelines  
22 that are so unclear.

23           MR. OLSON: I would like to answer that.  
24 There are several answers to it and I would like to  
25 reserve the balance of my time for rebuttal. It is the

1 government has the burden to prove the record that  
2 justifies telling someone that wants to make a 90-minute  
3 documentary about a candidate for president that they  
4 will go to jail if they broadcast it. The government  
5 has the obligation and the government had a long  
6 legislative record and plenty of opportunity to produce  
7 that record and it's their obligation to do so.

8 JUSTICE STEVENS: Mr. Olson --

9 JUSTICE SOTOMAYOR: But the facial  
10 challenge --

11 JUSTICE STEVENS: -- may I ask one question  
12 you can answer on rebuttal? No one has commented on the  
13 National Rifle Association's amicus brief. None of the  
14 -- none of the litigants have. That's in response to  
15 Justice Sotomayor's thought that there are narrow ways  
16 of resolving the problem before us. On rebuttal, will  
17 you tell us what your view on their solution to this  
18 problem is?

19 MR. OLSON: I will, Justice Stevens.

20 CHIEF JUSTICE ROBERTS: Why don't you tell  
21 us now. We will give you time for rebuttal.

22 (Laughter.)

23 JUSTICE SCALIA: Don't keep us in suspense.

24 (Laughter.)

25 MR. OLSON: Every line, including the lines

1 that would be drawn in several of the amicus briefs, and  
2 they are not the same, could put the entity who wishes  
3 to speak before you again a year from now. Because the  
4 movie might be shorter, it might be video on demand, it  
5 might be a broadcast, it might have a different tone  
6 with respect to a candidate. Every one of those lines  
7 puts the speaker at peril that he will go to jail or be  
8 prosecuted or there will be litigation, all of which  
9 chills speech and inhibits individual --

10 JUSTICE STEVENS: No, but to answer my  
11 question, the line suggested by the NRA is the line  
12 identified by Congress in the Snowe-Jeffords amendment  
13 dealing with individual financing of speech which would  
14 separate all of these problems. What is your comment on  
15 that possible solution to the problem?

16 MR. OLSON: I would like to take advantage  
17 of Justice Stevens' offer and respond to that during the  
18 rebuttal, Mr. Chief Justice.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
21 Olson.

22 Mr. Abrams.

23 ORAL ARGUMENT OF FLOYD ABRAMS  
24 ON BEHALF OF SENATOR MITCH McCONNELL,  
25 AS AMICUS CURIAE,

1                                   IN SUPPORT OF THE APPELLANT

2                                   MR. ABRAMS: Mr. Chief Justice, and may it  
3 please the Court:

4                                   The first case cited to you by Mr. Olson  
5 happened to be New York Times v. Sullivan, and I would  
6 like to begin by urging two propositions on you from  
7 that case.

8                                   In that case the Court was confronted with a  
9 situation where the Times made three arguments to the  
10 Court. They said -- for us to win, they said, you  
11 either have to revise, basically federalize, libel law  
12 to a considerable degree, which they did; or, they said,  
13 we only sold 390 copies in Alabama, so you could rule in  
14 our favor by saying there was no jurisdiction; or, they  
15 said, we didn't even mention Sheriff Sullivan's name, so  
16 you could rule in our favor on the ground that they  
17 haven't proved a libel case.

18                                   The Court did the first. It did the first,  
19 which is the broader rather than the narrowest way to  
20 address the question, and I suspect they did it -- don't  
21 know, but I suspect they did it -- because they had come  
22 to the conclusion that the degree of First Amendment  
23 danger by the sort of lawsuits which were occurring in  
24 Alabama and elsewhere was something that had to be faced  
25 up to by the Court now, or --

1 JUSTICE GINSBURG: Mr. Abrams, Times v.  
2 Sullivan was not -- did not involve overruling  
3 precedents of this Court that had been followed by this  
4 Court and others. So, I think the situation is quite  
5 different.

6 MR. ABRAMS: That's true, Your Honor. It  
7 did involve overruling 150 years of American  
8 jurisprudence. I mean, there was no law at that point  
9 that said that actual malice --

10 JUSTICE GINSBURG: There was no -- there was  
11 no decision of this Court, I mean --

12 MR. ABRAMS: That's true, Your Honor.

13 JUSTICE GINSBURG: We do tend to adhere to  
14 our precedents --

15 MR. ABRAMS: Yes.

16 JUSTICE GINSBURG: -- especially a case like  
17 Austin which was repeating the business about amassing  
18 large funds in corporate treasuries. It was not a new  
19 idea in Austin, and it was repeated after -- after  
20 Austin. But there was -- so Times v. Sullivan I think  
21 is quite distinct.

22 The question that was posed here is, is it a  
23 proper way to resolve this case, to overrule one  
24 precedent in full and another in part?

25 MR. ABRAMS: And what I'm urging on you,

1 Your Honor, is that by a parity of reasoning, although  
2 not precisely the same situation, that there are cases  
3 in which there is a -- an ongoing threat to freedom of  
4 expression which may lead -- if you were to agree to  
5 that, which may lead the Court to say, rather than  
6 taking a narrower route to the same result, that it is  
7 worth our moving away in this case from looking for the  
8 narrowest way out, and determining it now, rather than  
9 the next as-applied challenge.

10 JUSTICE SCALIA: There are -- there are two  
11 separate questions that -- that have been raised in  
12 opposition to your position. One is -- one is that we  
13 should not resolve a broad constitutional issue where  
14 there are narrower grounds, and that's the question you  
15 are responding to.

16 An entirely separate question is the issue  
17 of stare decisis, and you acknowledge that stare decisis  
18 was not involved in *New York Times v. Sullivan*, but the  
19 first question obviously was.

20 MR. ABRAMS: And stare decisis of course is  
21 a question much -- much briefed by the parties, and it  
22 is one which involves of course a consideration not only  
23 of the merits of the decision, but certain other  
24 factors, the length of time the decision has been in  
25 effect and the like. The time in this case for the

1 McConnell case, of course, is only 6 years. The time  
2 for the Austin case is 19 years, which is less than one  
3 ruling of this Court's just last term.

4 JUSTICE GINSBURG: But what the Court said  
5 in Austin it also said in the NRWC case, which was I  
6 think 8 years before Austin. So Austin was not a new  
7 invention.

8 MR. ABRAMS: Well, Austin was the first time  
9 that corporate speech was barred -- corporate  
10 independent expenditures were barred by a ruling of this  
11 Court. That had not happened prior to Austin, and the  
12 Solicitor General's brief acknowledges that. Now --

13 JUSTICE GINSBURG: But there have been  
14 limits on corporate spending in aid of a political  
15 campaign since the turn of the 20th century.

16 MR. ABRAMS: There had been limits on  
17 corporate contributions since the turn of the century.  
18 Corporate independent expenditures came much later and I  
19 think that is something that I think is worth --

20 JUSTICE STEVENS: Much later than 1947.

21 MR. ABRAMS: Yes, Your Honor. In 1947,  
22 President Truman vetoed that bill, saying that it was a  
23 dangerous intrusion into free speech. That has always  
24 been an area of enormous controversy, not just in the  
25 public sphere but in the judicial sphere. The early

1 cases about Taft-Hartley were ones in which what the  
2 Court did was to basically say in one case after another  
3 that the statute did not govern the particular facts of  
4 the case so as to avoid --

5 JUSTICE STEVENS: But those were union  
6 cases, weren't they, rather than corporate cases?

7 MR. ABRAMS: Yes, they were three union  
8 cases. And the case after that essentially was Buckley.  
9 And Buckley held unconstitutional the limits posed there  
10 to independent expenditures. All I'm saying is that  
11 this is not a situation as if we have an unbroken amount  
12 of years throughout American history in which it has  
13 been accepted that independent expenditures could be  
14 barred. It has always been a matter of high level of  
15 controversy, with courts at first and understandably  
16 shying away from facing up to the issue directly and  
17 then the first ruling on point.

18 JUSTICE STEVENS: But have you read Justice  
19 Rehnquist's dissent in the Bellotti case?

20 MR. ABRAMS: I'm sorry, Your Honor.

21 JUSTICE STEVENS: Have you read Justice  
22 Rehnquist's dissent in the Bellotti case?

23 MR. ABRAMS: Yes, I have.

24 JUSTICE STEVENS: Which is somewhat  
25 inconsistent with what you said.



1 MR. ABRAMS: Yes, it is.

2 CHIEF JUSTICE ROBERTS: And also  
3 inconsistent with his later view, correct?

4 MR. ABRAMS: Yes.  
5 Yes, Justice?

6 JUSTICE SOTOMAYOR: Going back to the  
7 question of stare decisis, the one thing that is very  
8 interesting about this area of law for the last  
9 100 years is the active involvement of both State and  
10 Federal legislatures in trying to find that balance  
11 between the interest of protecting in their views how  
12 the electoral process should proceed and the interests  
13 of the First Amendment.

14 And so my question to you is, once we say  
15 they can't, except on the basis of a compelling  
16 government interest narrowly tailored, are we cutting  
17 off or would we be cutting off that future democratic  
18 process? Because what you are suggesting is that the  
19 courts who created corporations as persons, gave birth  
20 to corporations as persons, and there could be an  
21 argument made that that was the Court's error to start  
22 with, not Austin or McConnell, but the fact that the  
23 Court imbued a creature of State law with human  
24 characteristics.

25 But we can go back to the very basics that

1 way, but wouldn't we be doing some more harm than good  
2 by a broad ruling in a case that doesn't involve more  
3 business corporations and actually doesn't even involve  
4 the traditional nonprofit organization? It involves an  
5 advocacy corporation that has a very particular  
6 interest.

7 MR. ABRAMS: Your Honor, I don't think you'd  
8 be doing more harm than good in vindicating the First  
9 Amendment rights here, which transcend that of Citizens  
10 United.

11 I think that, reading my friend's brief here  
12 on the right, they come -- some of them at least come  
13 pretty close to saying that there must be a way for  
14 Citizens United to win this case other than a broad way.  
15 In my view the principles at stake here are the same.  
16 Citizens United happens to be sort of the paradigmatic  
17 example of the sort of group speaking no less about who  
18 to vote for or not who to vote for or what to think  
19 about a potential ongoing candidate for President of the  
20 United States. But in lots of other situations day by  
21 day there is a blotch to public discourse caused as a  
22 result of this Congressional legislation.

23 And so we think it is not a matter of  
24 cutting off what legislatures can do. They can still  
25 pass legislation doing all sorts of things. They can do

1 public funding. They can do many other things that  
2 don't violate the First Amendment. If we are right in  
3 saying that independent expenditures, that category of  
4 money leading to speech that we are talking about today,  
5 if we are right that that is the sort of speech which is  
6 at the core of the First Amendment, then you would be  
7 doing only good, only good, by ruling that way today  
8 across the board.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
11 Abrams.

12 General Kagan.

13 ORAL ARGUMENT OF ELENA KAGAN

14 ON BEHALF OF THE APPELLEE

15 GENERAL KAGAN: Mr. Chief Justice and may it  
16 please the Court:

17 I have three very quick points to make about the  
18 government position. The first is that this issue has a  
19 long history. For over 100 years Congress has made a  
20 judgment that corporations must be subject to special  
21 rules when they participate in elections and this Court  
22 has never questioned that judgment.

23 Number two --

24 JUSTICE SCALIA: Wait, wait, wait, wait. We  
25 never questioned it, but we never approved it, either.

1 And we gave some really weird interpretations to the  
2 Taft-Hartley Act in order to avoid confronting the  
3 question.

4           GENERAL KAGAN: I will repeat what I said,  
5 Justice Scalia: For 100 years this Court, faced with  
6 many opportunities to do so, left standing the  
7 legislation that is at issue in this case -- first the  
8 contribution limits, then the expenditure limits that  
9 came in by way of Taft-Hartley -- and then of course in  
10 Austin specifically approved those limits.

11           JUSTICE SCALIA: I don't understand what you  
12 are saying. I mean, we are not a self -- self-starting  
13 institution here. We only disapprove of something when  
14 somebody asks us to. And if there was no occasion for  
15 us to approve or disapprove, it proves nothing whatever  
16 that we didn't disapprove it.

17           GENERAL KAGAN: Well, you are not a  
18 self-starting institution. But many litigants brought  
19 many cases to you in 1907 and onwards and in each case  
20 this Court turns down, declined the opportunity, to  
21 invalidate or otherwise interfere with this legislation.

22           JUSTICE KENNEDY: But that judgment was  
23 validated by Buckley's contribution-expenditure line.  
24 And you're correct if you look at contributions, but  
25 this is an expenditure case. And I think that it

1 doesn't clarify the situation to say that for  
2 100 years -- to suggest that for 100 years we would have  
3 allowed expenditure limitations, which in order to work  
4 at all have to have a speaker-based distinction,  
5 exemption from media, content-based distinction,  
6 time-based distinction. We've never allowed that.

7           GENERAL KAGAN: Well, I think  
8 Justice Stevens was right in saying that the expenditure  
9 limits that are in play in this case came into effect in  
10 1947, so it has been 60 years rather than 100 years.  
11 But in fact, even before that the contribution limits  
12 were thought to include independent expenditures, and as  
13 soon as Congress saw independent expenditures going on  
14 Congress closed what it perceived to be illegal. So in  
15 fact for 100 years corporations have made neither  
16 contributions nor expenditures, save for a brief period  
17 of time in the middle 1940's, which Congress very  
18 swiftly reacted to by passing the Taft-Hartley Act.

19           Now, the reason that Congress has enacted  
20 these special rules -- and this is the second point that  
21 I wanted to make --

22           JUSTICE STEVENS: Before you go to your  
23 second point, may I ask you to clarify one part of the  
24 first, namely, your answer to the question I proposed to  
25 Mr. Olson, namely, why isn't the Snowe-Jeffords

1 Amendment, which was picked on by Congress itself, an --  
2 and which is argued by the NRA, an appropriate answer to  
3 this case?

4 GENERAL KAGAN: That was my third point,  
5 Justice Stevens.

6 JUSTICE STEVENS: Oh, I'm sorry.

7 (Laughter.)

8 GENERAL KAGAN: So we will just skip over  
9 the second.

10 My third point is that this is an anomalous  
11 case in part because this is an atypical plaintiff. And  
12 the reason this is an atypical plaintiff is because this  
13 plaintiff is an ideological nonprofit and --

14 CHIEF JUSTICE ROBERTS: So you are giving up  
15 -- you are giving up the distinction from MCFL that you  
16 defended in your opening brief? There you said this  
17 doesn't qualify as a different kind of corporation  
18 because it takes corporate funds, and now you are  
19 changing that position?

20 GENERAL KAGAN: No, I --I don't think we are  
21 changing it. MCFL is the law, and the FEA -- FEC has  
22 always tried to implement MCFL faithfully. And that's  
23 what the FEC has tried to do. But if you --

24 CHIEF JUSTICE ROBERTS: So I guess -- do you  
25 think MCFL applies in this case even though the

1 corporation takes corporate funds from for-profit  
2 corporations?

3 GENERAL KAGAN: I don't think MCFL as  
4 written applies in this case, but I think that the Court  
5 could, as lower courts have done, adjust MCFL  
6 potentially to make it apply in this case, although I  
7 think that would require a remand. What lower courts  
8 have done -- MCFL was set up, it was written in a very  
9 strict kind of way so that the organization had to have  
10 a policy of accepting no corporate funds whatsoever.

11 Some of the lower courts, including the D.C.  
12 Circuit, which, of course, sees a lot of these cases,  
13 have suggested that MCFL is too strict, that it doesn't  
14 --

15 CHIEF JUSTICE ROBERTS: Do you -- do you  
16 think it's too strict?

17 GENERAL KAGAN: I -- I -- the FEC has no  
18 objection to MCFL being adjusted in order to -- to give  
19 it some flexibility. What the --

20 CHIEF JUSTICE ROBERTS: So you want to give  
21 up this case, change your position, and basically say  
22 you lose solely because of the questioning that we have  
23 directed on reargument?

24 GENERAL KAGAN: Solely because? I am sorry?

25 CHIEF JUSTICE ROBERTS: Because of the

1 question we have posed on reargument.

2           GENERAL KAGAN: No, I don't think that that  
3 is fair. We think -- we continue to think that the --  
4 the judgment below should be affirmed. If you are  
5 asking me, Mr. Chief Justice, as to whether the  
6 government has a preference as to the way in which it  
7 loses, if it has to lose, the answer is yes.

8           CHIEF JUSTICE ROBERTS: What case of ours --  
9 what case of ours suggests that there is a hierarchy of  
10 bases on which we should rule against a party when both  
11 of them involve constitutional questions? Extending --  
12 modifying MCFL would be, I assume, by virtue of the  
13 First Amendment. Overruling Austin would be by virtue  
14 of the First Amendment. So what case says we should  
15 prefer one as opposed to the other?

16           GENERAL KAGAN: I think the question really  
17 is the Court's standard practice of deciding as-applied  
18 challenges before facial challenges. And this case  
19 certainly raises a number of tricky as-applied  
20 questions. One is the question of how the -- the  
21 statute applies to nonprofit organizations such as this  
22 one. Another is a question of how it applies to VOD  
23 transmissions. Yet another is the question of how it  
24 applies to a 90-minute infomercial as opposed to smaller  
25 advertisements.



1 JUSTICE KENNEDY: But if you -- if you  
2 insist on the as-applied challenge, isn't that  
3 inconsistent with the whole line of cases that began in  
4 Thornhill v. Alabama and Coates v. Cincinnati? What  
5 about the Thornhill doctrine? It is not cited in the  
6 briefs, but that doctrine is that even a litigant  
7 without standing to object to a particular form of  
8 conduct can raise that if the statute covers it in order  
9 that the statute does not have an ongoing chill against  
10 speech. And there is no place where an ongoing chill is  
11 more dangerous than in the elections context.

12 GENERAL KAGAN: Well, I think even --

13 JUSTICE KENNEDY: So you are asking us to  
14 have an ongoing chill where we have as-applied  
15 challenges which are based on, as I indicated before,  
16 speaker, content, time, and this is the kind of chilling  
17 effect that the Thornhill doctrine stands directly  
18 against.

19 GENERAL KAGAN: You know, I think even in  
20 the First Amendment context, Justice Kennedy, the Court  
21 will not strike down a statute on its face unless it  
22 finds very substantial overbreadth, many applications of  
23 the statute that are unconstitutional, as opposed to  
24 just a few or just some. What I am suggesting here is  
25 that the Court was right in McConnell and then confirmed

1 in WRTL to find that BCRA, which is of course the only  
2 statute directly involved in this case, did not have  
3 that substantial overdraft.

4 JUSTICE KENNEDY: Let me ask you this.  
5 Suppose that we were to rule that nonprofit corporations  
6 could not be covered by the statute. Would that --  
7 would the statute then have substantial overbreadth?

8 GENERAL KAGAN: Well, I would urge you not  
9 to do that in that kind of sweeping way, because the  
10 reason for the nonprofit corporations being covered is  
11 to make sure that the nonprofit corporations don't  
12 function as conduits for the for-profit corporations.

13 JUSTICE KENNEDY: But suppose we were to say  
14 that. Would the statute then not be substantially  
15 overbroad?

16 GENERAL KAGAN: Well, I don't think that the  
17 statute is substantially overbroad right now. So if you  
18 took out certain applications, I can't think --

19 JUSTICE KENNEDY: But I am asking you to  
20 assume that we draw the nonprofit/profit distinction.  
21 Then the statute, it seems to me, clearly has to fall  
22 because, number one, we couldn't sever it based on the  
23 language.

24 GENERAL KAGAN: I see what you are saying.  
25 Well, you could do a couple of things. You could do

1 what Justice Stevens suggested. Justice Stevens  
2 suggested -- I suggested to Chief Justice Roberts --

3 JUSTICE STEVENS: I don't think you -- I  
4 don't think you really caught what I suggested because  
5 you treated it as an enlargement of the MCFL example.

6 GENERAL KAGAN: I was going to go back.

7 JUSTICE STEVENS: But that is not what the  
8 National Rifle Association argues or what Snowe-Jeffords  
9 covers. It covers ads that are financed exclusively by  
10 individuals even though they are sponsored by a  
11 corporation.

12 GENERAL KAGAN: Yes, that's exactly right.  
13 What you are suggesting, Justice Stevens, is essentially  
14 stripping the Wellstone amendment from the --

15 JUSTICE STEVENS: Correct and treating the  
16 Snowe-Jeffords amendment as being the correct test. And  
17 nobody has explained why that wouldn't be a proper  
18 solution, not nearly as drastic as -- as being argued  
19 here.

20 GENERAL KAGAN: Yes, and there are some, you  
21 know -- there are -- there are some reasons that that  
22 might -- that might be appropriate. The Wellstone  
23 amendment was a funny kind of thing. It was passed very  
24 narrowly, but beyond that it was passed with a -- a  
25 really substantial support of many people who voted

1 against the legislation in the end, presumably as a  
2 poison pill.

3 JUSTICE BREYER: Well, if we -- if we go --  
4 if we go that route, what we are doing is creating an  
5 accounting industry, aren't we? Corporations give huge  
6 amounts of money to the C-4 organization, and then  
7 somebody, perhaps the FEC, has to decide whether in fact  
8 that is a way of subverting the prohibition against the  
9 direct payment for the communication, right? Okay, so  
10 Congress said, we don't want that. Congress said,  
11 that's going to be a nightmare, and we decide Wellstone,  
12 for whatever reasons.

13 Now don't we have to focus on whether  
14 Congress can say that or whether it can't?

15 JUSTICE STEVENS: But --

16 JUSTICE BREYER: And I don't know why it  
17 cannot say it.

18 JUSTICE STEVENS: Congress also said if you  
19 strike down the Wellstone amendment, we want the Snowe-  
20 Jeffords amendment.

21 JUSTICE BREYER: That's true.

22 JUSTICE STEVENS: And why shouldn't we  
23 follow that direction?

24 GENERAL KAGAN: If you strike down the  
25 Wellstone amendment, what is left is the Snowe-Jeffords

1 amendment --

2 JUSTICE STEVENS: Right.

3 GENERAL KAGAN: -- which allows nonprofit  
4 organizations of the kind here to fund these ads out of  
5 separate bank accounts, not PACs just separate bank  
6 accounts --

7 JUSTICE STEVENS: Correct.

8 GENERAL KAGAN: -- which include only  
9 individual expenditures.

10 JUSTICE STEVENS: Then why is that not the  
11 -- the wisest narrow solution of the problem before us?

12 GENERAL KAGAN: Well, it is -- it is  
13 certainly a narrower and I think better solution than a  
14 facial invalidation of the whole statute.

15 CHIEF JUSTICE ROBERTS: Counsel, what do you  
16 -- what do you understand to be the compelling interest  
17 that the Court articulated in Austin?

18 GENERAL KAGAN: I think that what the Court  
19 articulated in Austin -- and, of course, in the  
20 government briefs we have suggested that Austin did not  
21 articulate what we believe to be the strongest  
22 compelling interest, which is the anticorruption  
23 interest. But what the Court articulated in Austin was  
24 essentially a concern about corporations using the  
25 corporate form to appropriate other people's money for

1 expressive purposes.

2 CHIEF JUSTICE ROBERTS: Right. So but you  
3 -- you have more or less -- "abandoned" is too strong a  
4 word, but as you say you have relied on a different  
5 interest, the quid pro quo corruption. And you -- you  
6 articulate on page 11 of your brief -- you recognize  
7 that this Court has not accepted that interest as a  
8 compelling interest.

9 So isn't it the case that as you view Austin  
10 it is kind of up for play in the sense that you would  
11 ground it on an interest that the Court has never  
12 recognized?

13 GENERAL KAGAN: Well, a couple of points.  
14 The first thing is, as you say, we have not abandoned  
15 Austin. We have simply said that in addition --

16 CHIEF JUSTICE ROBERTS: Where --

17 GENERAL KAGAN: -- to other people's money  
18 interest that --

19 CHIEF JUSTICE ROBERTS: Where in your --  
20 where in your supplemental briefing do you say that this  
21 aggregation of wealth interest supports Austin?

22 GENERAL KAGAN: I would not really call it  
23 an aggregation of wealth interest. I would say that  
24 it's -- it's a concern about corporate use of other  
25 people's money to --

1 CHIEF JUSTICE ROBERTS: Putting it outside,  
2 putting the quid pro quo interest aside, where in your  
3 supplemental briefing do you support the interest that  
4 was articulated by the Court in Austin?

5 GENERAL KAGAN: Where we talk about  
6 shareholder protection and where we talk about the  
7 distortion of the electoral process that occurs when  
8 corporations use their shareholders' money who may or  
9 may not agree --

10 CHIEF JUSTICE ROBERTS: I understand that to  
11 be a different interest. That is the shareholder  
12 protection interest as opposed to the fact that  
13 corporations have such wealth and they -- they distort  
14 the marketplace.

15 GENERAL KAGAN: Well, I -- I think that they  
16 are connected because both come --

17 CHIEF JUSTICE ROBERTS: So -- so am I right  
18 then in saying that in the supplemental briefing you do  
19 not rely at all on the market distortion rationale on  
20 which Austin relied; not the shareholder rationale, not  
21 the quid pro quo rationale, the market distortion issue.  
22 These corporations have a lot of money.

23 GENERAL KAGAN: We do not rely at all on  
24 Austin to the extent that anybody takes Austin to be  
25 suggesting anything about the equalization of a speech

1 market. So I know that that's the way that many people  
2 understand the distortion rationale of Austin, and if  
3 that's the way the Court understands it, we do not rely  
4 at all on that.

5 JUSTICE GINSBURG: So --

6 CHIEF JUSTICE ROBERTS: So if we have to  
7 preserve -- if we are going to preserve Austin we have  
8 to accept your invitation that the quid pro quo interest  
9 supports the holding there or the shareholder protection  
10 interest.

11 GENERAL KAGAN: I would say either the quid  
12 pro quo interest, the corruption interest or the  
13 shareholder interest, or what I would say is a -- is  
14 something related to the shareholder interest that is in  
15 truth my view of Austin, which is a view that when  
16 corporations use other people's money to electioneer,  
17 that is a harm not just to the shareholders themselves  
18 but a sort of a broader harm to the public that comes  
19 from distortion of the electioneering that is done by  
20 corporations.

21 JUSTICE SCALIA: Let's -- let's talk about  
22 overbreadth. You've -- let's assume that that is a  
23 valid interest. What percentage of the total number of  
24 corporations in the country are not single shareholder  
25 corporations? The local hairdresser, the local auto



1 repair shop, the local new car dealer -- I don't know  
2 any small business in this country that isn't  
3 incorporated, and the vast majority of them are  
4 sole-shareholder-owned.

5 Now this statute makes it unlawful for all  
6 of them to do the things that you are worried about, you  
7 know, distorting other -- the interests of other  
8 shareholders. That is vast overbreadth.

9 GENERAL KAGAN: You know, I think that the  
10 single shareholders can present these corruption  
11 problems. Many, many closed corporations, single  
12 shareholder corporations --

13 JUSTICE SCALIA: I'm not talking about the  
14 corruption interest. You -- you have your quid pro quo  
15 argument, that's another one. We get to that when we  
16 get there. But as far as the interest you are now  
17 addressing, which is those shareholders who don't agree  
18 with this political position are being somehow cheated,  
19 that doesn't apply probably to the vast majority of  
20 corporations in this country.

21 GENERAL KAGAN: You are quite right,  
22 Justice Scalia, when -- we say when it comes to single  
23 shareholders, the kind of "other people's money"  
24 interests, the shareholder protection interests do not  
25 apply. There --

1 JUSTICE SCALIA: So that can't be the  
2 justification --

3 GENERAL KAGAN: There --

4 JUSTICE SCALIA: -- because if it were, the  
5 statute would be vastly overbroad.

6 GENERAL KAGAN: There the strongest  
7 justification is the anticorruption interest.

8 JUSTICE ALITO: Well, with respect to that  
9 what is your answer to the argument that more than half  
10 the States, including California and Oregon, Virginia,  
11 Washington State, Delaware, Maryland, a great many  
12 others, permit independent corporate expenditures for  
13 just these purposes? Now have they all been overwhelmed  
14 by corruption? A lot of money is spent on elections in  
15 California; has -- is there a record that the  
16 corporations have corrupted the political process there?

17 GENERAL KAGAN: I think the experience of  
18 some half the States cannot be more important than the  
19 100-year old judgment of Congress that these  
20 expenditures would corrupt the Federal system, and I  
21 think that --

22 JUSTICE SCALIA: Congress has a  
23 self-interest. I mean, we -- we are suspicious of  
24 congressional action in the First Amendment area  
25 precisely because we -- at least I am -- I doubt that

1 one can expect a body of incumbents to draw election  
2 restrictions that do not favor incumbents. Now is that  
3 excessively cynical of me? I don't think so.

4 GENERAL KAGAN: I think, Justice Scalia,  
5 it's wrong. In fact, corporate and union money go  
6 overwhelmingly to incumbents. This may be the single  
7 most self-denying thing that Congress has ever done. If  
8 you look -- if you look at the last election cycle and  
9 look at corporate PAC money and ask where it goes, it  
10 goes ten times more to incumbents than to challengers,  
11 and in the prior election cycle even more than that.

12 And for an obvious reason, because when  
13 corporations play in the political process, they want  
14 winners, they want people who will produce outcomes for  
15 them, and they know that the way to get those outcomes,  
16 the way to get those winners is to invest in incumbents,  
17 and so that's what they do. As I said, in double digits  
18 times more than they invest in challengers. So I think  
19 that that -- that that rationale, which is undoubtedly  
20 true in many contexts, simply is not the case with  
21 respect to this case.

22 JUSTICE KENNEDY: But under your position,  
23 if corporations A, B, and C, are called to Washington  
24 every Monday morning by a high-ranking administrative  
25 official or a high-ranking member of the Congress with a

1 committee chairmanship and told to tow the line and to  
2 tell their directors and shareholders what the policy  
3 ought to be, some other corporation can't object to that  
4 during the election cycle. The government silences a  
5 corporate objector, and those corporations may have the  
6 most knowledge of this on the subject.

7           Corporations have lots of knowledge about  
8 environment, transportation issues, and you are  
9 silencing them during the election.

10           GENERAL KAGAN: Well --

11           JUSTICE KENNEDY: When other corporations,  
12 via -- because of the very fact you just point out, have  
13 already been used and are being used by the government  
14 to express its views; and you say another corporation  
15 can't object to that.

16           GENERAL KAGAN: Well, to the extent,  
17 Justice Kennedy, that you are talking about what goes on  
18 in the halls of Congress, of course corporations can  
19 lobby members of Congress in the same way that they  
20 could before this legislation. What this legislation is  
21 designed to do, because of its anticorruption interest,  
22 is to make sure that that lobbying is just persuasion  
23 and it's not coercion. But in addition to that, of  
24 course corporations have many opportunities to speak  
25 outside the halls of Congress.

1 JUSTICE STEVENS: One of the amicus briefs  
2 objects to -- responds to Justice Kennedy's problem by  
3 saying that the problem is we have got to contribute to  
4 both parties, and a lot of them do, don't they?

5 GENERAL KAGAN: A lot of them do, which is a  
6 suggestion about how corporations engage the political  
7 process and how corporations are different from  
8 individuals in this respect. You know, an individual  
9 can be the wealthiest person in the world but few of  
10 us -- maybe some -- but few of us are only our economic  
11 interests. We have beliefs, we have convictions; we  
12 have likes and dislikes. Corporations engage the  
13 political process in an entirely different way and this  
14 is what makes them so much more damaging.

15 CHIEF JUSTICE ROBERTS: Well, that's not --  
16 I'm sorry, but that seems rather odd. A large  
17 corporation just like an individual has many diverse  
18 interests. A corporation may want to support a  
19 particular candidate, but they may be concerned just as  
20 you say about what their shareholders are going to think  
21 about that. They may be concerned that the shareholders  
22 would rather they spend their money doing something  
23 else. The idea that corporations are different than  
24 individuals in that respect, I just don't think holds  
25 up.

1                   GENERAL KAGAN: Well, all I was suggesting,  
2 Mr. Chief Justice, is that corporations have actually a  
3 fiduciary obligation to their shareholders to increase  
4 value. That's their single purpose, their goal.

5                   CHIEF JUSTICE ROBERTS: So if a candidate --  
6 take a tobacco company, and a candidate is running on  
7 the platform that they ought to make tobacco illegal,  
8 presumably that company would maximize its shareholders'  
9 interests by opposing the election of that individual.

10                  GENERAL KAGAN: But everything is geared  
11 through the corporation's self-interest in order to  
12 maximize profits, in order to maximize revenue, in order  
13 to maximize value. Individuals are more complicated  
14 than that. So that when corporations engage the  
15 political process, they do it with that set of you know,  
16 blinders -- I don't mean it to be pejorative, because  
17 that's what we want corporations to do, is to --

18                  CHIEF JUSTICE ROBERTS: Well, I suppose some  
19 do, but let's say if you have ten individuals and they  
20 each contribute \$1,000 to a corporation, and they say,  
21 "we want this corporation to convey a particular  
22 message," why can't they do that, when if they did that  
23 as partnership, it would be all right?

24                  GENERAL KAGAN: Well, it sounds to me as  
25 though the corporation that you were describing is a

1 corporation of the kind we have in this case, where one  
2 can assume that the members all sign on to the  
3 corporation's ideological mission, where the corporation  
4 in fact has an ideological mission.

5 JUSTICE SCALIA: General Kagan, most -- most  
6 corporations are indistinguishable from the individual  
7 who owns them, the local hairdresser, the new auto  
8 dealer -- dealer who has just lost his dealership and --  
9 and who wants to oppose whatever Congressman he thinks  
10 was responsible for this happening or whatever  
11 Congressman won't try to patch it up by -- by getting  
12 the auto company to undo it. There is no distinction  
13 between the individual interest and the corporate  
14 interest. And that is true for the vast majority of  
15 corporations.

16 GENERAL KAGAN: Well --

17 JUSTICE SCALIA: Yet this law freezes all of  
18 them out.

19 GENERAL KAGAN: To the extent that we are  
20 only talking about single shareholder corporations, I  
21 guess I would ask why it's any burden on that single  
22 shareholder to make the expenditures to participate in  
23 the political person in the way that person wants to  
24 outside the corporate forum? So single shareholders  
25 aren't suffering any burden here; they can do everything

1 that they could within the corporate form, outside the  
2 corporate form. They probably don't get the tax breaks  
3 that they would get inside the corporate form, but I'm  
4 not sure anything else is very different.

5 JUSTICE SCALIA: Oh, he wants to put up a  
6 sign --

7 JUSTICE STEVENS: Ultra Vires would take  
8 care of about 90 percent of the small corporations that  
9 Justice Scalia is talking about. They can't just --  
10 they can't even give money to charities sometimes  
11 because of Ultra Vires. Giving political contributions  
12 is not typical for corporate activity.

13 JUSTICE BREYER: Is -- I -- I remember  
14 spending quite a few days one summer reading through  
15 1,000 pages of opinion in the D.C. Circuit. And I came  
16 away with the distinct impression that Congress has  
17 built an enormous record of support for this bill in the  
18 evidence.

19 And my recollection is, but it is now a  
20 couple of years old, that there was a lot of information  
21 in that which suggested that many millions of voters  
22 think, at the least, that large corporate and union  
23 expenditures or contributions in favor of a candidate  
24 lead the benefited political figure to decide quite  
25 specifically in favor of the -- of the contributing or



1 expending organization, the corporation or the union.

2 GENERAL KAGAN: Yes, that's --

3 JUSTICE BREYER: Now, it was on the basis of  
4 that, I think, that this Court upheld the law in BCRA.  
5 But we have heard from the other side there isn't much  
6 of a record on this.

7 So, if you could save me some time here,  
8 perhaps you could point me, if I am right, to those  
9 thousand pages of opinion and tens of thousands of  
10 underlying bits of evidence where there might be support  
11 for that proposition?

12 GENERAL KAGAN: Yes, that's exactly right,  
13 Justice Breyer, that in addition to the 100-year old  
14 judgment that Congress believes this is necessary, that  
15 very recently members of Congress and others created a  
16 gigantic record showing that there was corruption and  
17 that there was the appearance of corruption.

18 And in that record, many times senators,  
19 former senators talk about the way in which fundraising  
20 is at the front of their mind in everything that they do  
21 the way in which they grant access, the way in which  
22 they grant influence, and the way in which outcomes  
23 likely change as a result of that fundraising.

24 JUSTICE BREYER: BCRA has changed all that.

25 CHIEF JUSTICE ROBERTS: Counsel, could I

1 ask, it seems -- to your shareholder protection  
2 rationale, isn't it extraordinarily paternalistic for  
3 the government to take the position that shareholders  
4 are too stupid to keep track of what their corporations  
5 are doing and can't sell their shares or object in the  
6 corporate context if they don't like it?

7 GENERAL KAGAN: I don't think so, Mr. Chief  
8 Justice. I mean, I, for one, can't keep track of what  
9 my -- where I hold --

10 CHIEF JUSTICE ROBERTS: You have a busy job.  
11 You can't expect everybody to do that.

12 (Laughter.)

13 GENERAL KAGAN: It's not that -- it's not  
14 that I have a busy job.

15 CHIEF JUSTICE ROBERTS: But it is  
16 extraordinary -- I mean, the -- the idea and as I  
17 understand the rationale, we -- we the government, big  
18 brother, has to protect shareholders from themselves.  
19 They might give money, they might buy shares in a  
20 corporation and they don't know that the corporation is  
21 taking out radio ads. The government has to keep an eye  
22 on their interests.

23 GENERAL KAGAN: I appreciate that. It's not  
24 that I have a busy job, it's that I, like most  
25 Americans, own shares through mutual funds. If you

1 don't know where your mutual funds are investing, so you  
2 don't know where you are --

3 CHIEF JUSTICE ROBERTS: So it is -- I mean,  
4 I understand. So it is a paternalistic interest, we the  
5 government have to protect you naive shareholders.

6 GENERAL KAGAN: In a world in which most  
7 people own stock through mutual funds, in a world where  
8 people own stock through retirement plans in which they  
9 have to invest, they have no choice, I think it's very  
10 difficult for individual shareholders to be able to  
11 monitor what each company they own assets in is doing or  
12 even to know the extent of the --

13 JUSTICE GINSBURG: In that respect, it's  
14 unlike the union, because the -- the worker who does not  
15 want to affiliate with a union cannot have funds from  
16 his own pocket devoted to political causes. But there  
17 is no comparable check for corporations.

18 GENERAL KAGAN: That's exactly right,  
19 Justice Ginsburg. In the union context, of course, it's  
20 a constitutional right that the unions give back  
21 essentially the funds that any union member or employee  
22 in the workplace does not want used for electoral  
23 purposes.

24 JUSTICE GINSBURG: Does that mean that  
25 unions should be taken out, because there isn't the

1 same -- the shareholder protection interest doesn't --  
2 there is no parallel for the union?

3 GENERAL KAGAN: You are right about that.  
4 But I -- the government believes that with respect to  
5 unions, the anticorruption interest is as strong, and  
6 that unions should be kept in.

7 I think what your point suggests, that  
8 the -- that the union member point suggests why Congress  
9 might have thought that there was a compelling interest  
10 to protect corporate shareholders in the same way that,  
11 let's say, dissenting union members are protected by the  
12 Constitution. There is no State action, of course, so  
13 there is no constitutional right in the corporate  
14 context.

15 But Congress made a judgment that it was an  
16 important value that shareholders have this choice, have  
17 the ability both to invest in our country's assets and  
18 also to be able to choose our country's leaders.

19 CHIEF JUSTICE ROBERTS: It's not investing  
20 in our country's --

21 JUSTICE KENNEDY: In the course of this  
22 argument, have you covered point two?

23 (Laughter.)

24 GENERAL KAGAN: I very much appreciate --

25 JUSTICE KENNEDY: And I would like to know

1 what it is, so that I -- my notes are complete.

2 GENERAL KAGAN: I very appreciate that,  
3 Justice Kennedy. I think I did cover point two, which  
4 was an explanation of some of the questions that the  
5 Chief Justice asked me about what interests the  
6 government was suggesting motivated these laws and are  
7 compelling enough such that this Court certainly should  
8 not invalidate these laws.

9 CHIEF JUSTICE ROBERTS: I take it we have  
10 never accepted your shareholder protection interest.  
11 This is a new argument.

12 GENERAL KAGAN: I think that that's fair.  
13 Certainly Bellotti does not accept it. I would think --  
14 you know, National Right to Work is an interesting  
15 opinion, because National Right to Work accepts for a  
16 unanimous court both the shareholder protection argument  
17 and the anticorruption argument with respect to the  
18 section 441b in particular.

19 Now, in later cases the Court has suggested  
20 that National Right to Work was only focused on  
21 contributions. If you read National Right to Work, that  
22 distinction really does not -- it's not evident on the  
23 face of the opinion, and I think Chief Justice Rehnquist  
24 at later -- in a later dissent suggested that he had  
25 never understood it that way.

1                   But -- so National Right to Work is a  
2 confusion on this point. It --

3                   CHIEF JUSTICE ROBERTS: Well, I guess other  
4 than that, and I think there may be some ambiguity  
5 there, but I wouldn't say NRWC is a holding on  
6 shareholder protection. So to the extent that you  
7 abandoned the original rationale in Austin, and  
8 articulated different rationales, you have two, the quid  
9 pro quo corruption interest and the shareholder  
10 protection interest --

11                  GENERAL KAGAN: Which we think is not in  
12 Austin.

13                  CHIEF JUSTICE ROBERTS: Austin, I thought,  
14 was based on the aggregation of immense wealth by  
15 corporations.

16                  GENERAL KAGAN: Again, Austin is not the  
17 most lucid opinion. But the way we understand Austin,  
18 what Austin was suggesting was that the corporate form  
19 gave corporations significant assets, other people's  
20 money that when the corporations spent those assets --

21                  CHIEF JUSTICE ROBERTS: Can you -- can you  
22 give me the citation to the page in Austin where we  
23 accepted the shareholder protection rationale?

24                  GENERAL KAGAN: I think it comes when the --  
25 when the Court is distinguishing MCFL. And the message

1 of that distinction of MCFL is the shareholder  
2 protection interest? But --

3 CHIEF JUSTICE ROBERTS: Do the words  
4 "shareholder" -- I don't know, do the words "shareholder  
5 protection" appear in the Austin opinion?

6 GENERAL KAGAN: I honestly don't know,  
7 Mr. Chief Justice. And -- and I don't want to --

8 CHIEF JUSTICE ROBERTS: If they don't --  
9 let's assume they don't, then I get back to my question,  
10 which is, you are asking us to defend the Austin or  
11 support or continue the Austin opinion on the basis of  
12 two rationales that we have never accepted, shareholder  
13 protection and quid pro quo corruption?

14 GENERAL KAGAN: I would say on the quid pro  
15 quo corruption, of course you have accepted that  
16 rationale --

17 CHIEF JUSTICE ROBERTS: In the context of  
18 contributions, not expenditures.

19 GENERAL KAGAN: That's correct. And I think  
20 what has changed since -- since that time is the BCRA  
21 record that Justice Breyer suggested, which was very  
22 strong on the notion that there was no difference when  
23 it came to corporate contributions and expenditures,  
24 that there actually was no difference between the two.  
25 That they --

1 CHIEF JUSTICE ROBERTS: Is that a yes? Is  
2 that a yes? In other words, you are asking us to uphold  
3 Austin on the basis of two arguments, two principles,  
4 two compelling interests we have never accepted, in  
5 expenditure context.

6 GENERAL KAGAN: In this -- in this  
7 particular context, fair enough. But, you know, I  
8 think --

9 JUSTICE KENNEDY: And to undercut Buckley in  
10 so doing?

11 GENERAL KAGAN: Well, I don't think so,  
12 because I do think Buckley was about individuals rather  
13 than corporations, and Buckley was in 1976, not in 2009,  
14 after the very extensive record that was created in  
15 BCRA.

16 I see my time is up. I don't --

17 JUSTICE GINSBURG: May I ask you one  
18 question that was highlighted in the prior argument, and  
19 that was if Congress could say no TV and radio ads,  
20 could it also say no newspaper ads, no campaign  
21 biographies? Last time the answer was, yes, Congress  
22 could, but it didn't. Is that -- is that still the  
23 government's answer?

24 GENERAL KAGAN: The government's answer has  
25 changed, Justice Ginsburg.



1 (Laughter.)

2 GENERAL KAGAN: It is still true that BCRA  
3 203, which is the only statute involved in this case,  
4 does not apply to books or anything other than  
5 broadcast; 441b does, on its face, apply to other media.  
6 And we took what the Court -- what the Court's -- the  
7 Court's own reaction to some of those other  
8 hypotheticals very seriously. We went back, we  
9 considered the matter carefully, and the government's  
10 view is that although 441b does cover full-length books,  
11 that there would be quite good as-applied challenge to  
12 any attempt to apply 441b in that context.

13 And I should say that the FEC has never  
14 applied 441b in that context. So for 60 years a book  
15 has never been at issue.

16 JUSTICE SCALIA: What happened to the  
17 overbreadth doctrine? I mean, I thought our doctrine in  
18 the Fourth Amendment is if you write it too broadly, we  
19 are not going to pare it back to the point where it's  
20 constitutional. If it's overbroad, it's invalid. What  
21 has happened to that.

22 GENERAL KAGAN: I don't think that it would  
23 be substantially overbroad, Justice Scalia, if I tell  
24 you that the FEC has never applied this statute to a  
25 book. To say that it doesn't apply to books is to take

1 off, you know, essentially nothing.

2 CHIEF JUSTICE ROBERTS: But we don't put our  
3 -- we don't put our First Amendment rights in the hands  
4 of FEC bureaucrats; and if you say that you are not  
5 going to apply it to a book, what about a pamphlet?

6 GENERAL KAGAN: I think a -- a pamphlet  
7 would be different. A pamphlet is pretty classic  
8 electioneering, so there is no attempt to say that 441 b  
9 only applies to video and not to print. It does --

10 JUSTICE ALITO: Well, what if the  
11 particular -- what if the particular movie involved here  
12 had not been distributed by Video on Demand? Suppose  
13 that people could view it for free on Netflix over the  
14 internet? Suppose that free DVDs were passed out.  
15 Suppose people could attend the movie for free in a  
16 movie theater; suppose the exact text of this was  
17 distributed in a printed form. In light of your  
18 retraction, I have no idea where the government would  
19 draw the line with respect to the medium that could be  
20 prohibited.

21 GENERAL KAGAN: Well, none of those things,  
22 again, are covered.

23 JUSTICE ALITO: No, but could they? Which  
24 of them could and which could not? I understand you to  
25 say books could not.

1           GENERAL KAGAN:  Yes, I think what you --  
2 what we're saying is that there has never been an  
3 enforcement action for books.  Nobody has ever  
4 suggested -- nobody in Congress, nobody in the  
5 administrative apparatus has ever suggested that books  
6 pose any kind of corruption problem, so I think that  
7 there would be a good as-applied challenge with respect  
8 to that.

9           JUSTICE SCALIA:  So you're -- you are a  
10 lawyer advising somebody who is about to come out with a  
11 book and you say don't worry, the FEC has never tried to  
12 send somebody to prison for this.  This statute covers  
13 it, but don't worry, the FEC has never done it.  Is that  
14 going to comfort your client?  I don't think so.

15           JUSTICE GINSBURG:  But this -- this statute  
16 doesn't cover.  It doesn't cover books.

17           GENERAL KAGAN:  No, no, that's exactly  
18 right.  The only statute that is involved in this case  
19 does not cover books.  So 441b which --

20           CHIEF JUSTICE ROBERTS:  Does cover books.

21           GENERAL KAGAN:  -- which does cover books,  
22 except that I have just said that there would be a good  
23 as-applied challenge and that there has been no  
24 administrative practice of ever applying it to the  
25 books.  And also only applies to express advocacy,

1 right? 203 has -- is -- is -- has a broader category of  
2 the functional equivalent of express advocacy, but 441b  
3 is only express advocacy, which is a part of the reason  
4 why it has never applied to a book. One cannot imagine  
5 very many books that would meet the definition of  
6 express advocacy as this Court has expressed that.

7 CHIEF JUSTICE ROBERTS: Oh, I'm sorry, we  
8 suggested some in the last argument. You have a history  
9 of union organizing and union involvement in politics,  
10 and the last sentence says in light of all this, vote  
11 for Jones.

12 GENERAL KAGAN: I think that that wouldn't  
13 be covered, Mr. Chief Justice. The FEC is very careful  
14 and says this in all its regulations to view matters as  
15 a whole. And as a whole that book would not count as  
16 express advocacy.

17 CHIEF JUSTICE ROBERTS: Thank you, General.  
18 Mr. Waxman.

19 ORAL ARGUMENT OF SETH WAXMAN  
20 ON BEHALF OF SENATORS JOHN McCAIN, ET AL.,  
21 AS AMICI CURIAE,  
22 IN SUPPORT OF THE APPELLEE

23 MR. WAXMAN: Mr. Chief Justice, and may it  
24 please the Court:

25 The requirement that corporations fund

1 electoral advocacy the same way individuals do, that is  
2 with money voluntarily committed by people associated  
3 with the corporation, is grounded in interests that are  
4 so compelling that 52 years ago, before Buckley was  
5 decided, before FECA was enacted, before Buckley-style  
6 quid pro quo corruption was ever addressed, this Court  
7 explained that, quote: "What is involved here is the  
8 integrity of our electoral process and not less the  
9 responsibility of the individual citizen for the  
10 successful functioning of that process."

11 If the Court now wishes to reconsider the  
12 existence and extent of the interests that underlie that  
13 sentiment expressed for the Court by Justice Frankfurter  
14 in the context of a prosecution of union officials for  
15 running television ads supporting political candidates,  
16 it should do so in a case in which those interests are  
17 forthrightly challenged with a proper and full record  
18 below.

19 CHIEF JUSTICE ROBERTS: One of the amicus  
20 briefs, I'm not -- maybe it's professor Hayward, if I am  
21 getting that right -- suggested the history of this 1947  
22 provision was such that it really wasn't enforced  
23 because people were concerned about the First Amendment  
24 interests and that the courts to the extent cases were  
25 brought did everything they could to avoid enforcing the

1 limitations.

2 MR. WAXMAN: Well, I don't recall who the  
3 professor was either, Mr. Chief Justice, but I do recall  
4 pretty well the history that was recounted -- I would  
5 say the history that was recounted by this Court in the  
6 Auto Workers case, in CIO, in the Pipefitters case,  
7 which is quite inconsistent with that. We've never had  
8 this case -- until this Court's supplemental order, we  
9 never had a case that challenged directly, quote,  
10 "Austin" and Austin-style corruption, which is a term I  
11 think that is quite misleading.

12 When the sober-minded Elihu Root was moved  
13 to stand up in 1894 and urged the people of the United  
14 States, and urged the Congress of the United States, to  
15 enact legislation that would address, quote, "a  
16 constantly growing evil which has done more to shake the  
17 confidence of plain people of small means of this  
18 country in our political institutions than any practice  
19 which has ever obtained since the founding of our  
20 government," he was not engaging in a high level  
21 discussion about political philosophy.

22 JUSTICE KENNEDY: But he was talking about  
23 contributions in that context. That's quite clear.

24 MR. WAXMAN: He -- with all due respect,  
25 Justice Kennedy, I don't think that there was any

1 distinction whatsoever in that time between the  
2 distinction that this Court came to understand as a  
3 result of FECA, and its adjudication of FECA and that --  
4 really the prehistory of Taft-Hartley, between  
5 contributions expenditures.

6           For this reason, Justice Kennedy, was that  
7 what Root said was the idea -- and I am quoting now from  
8 his speech which is also partly reprinted in this  
9 Court's opinion in McConnell -- the idea is to prevent  
10 the great companies, the great aggregations of wealth  
11 from using corporate funds directly or indirectly to  
12 send members of the legislature to these halls in order  
13 to vote for their protection and the advancement of  
14 their interests as against those of the public.

15           JUSTICE SCALIA: Great aggregations of  
16 wealth. The brief by the Chamber of Commerce, the  
17 amicus brief by the Chamber of Commerce points out that  
18 96 percent of its members employ less than 100 people.  
19 These are not aggregations of great wealth. You are not  
20 talking about the railroad barons and the rapacious  
21 trusts of the Elihu Root era; you are talking mainly  
22 about small business corporations.

23           MR. WAXMAN: Justice Scalia, I take your  
24 point and I think you have made this point forceful lily  
25 many times before. A unanimous court in National Right

1 to Work Committee concluded that Congress was entitled  
2 to make the judgment that it would treat in order to  
3 address this root evil, a problem of such concern that  
4 it goes to the very foundation of the democratic  
5 republican exercise, that is, the notion of integrity in  
6 representative government.

7 Now this -- this case, of course, is not a  
8 case --

9 JUSTICE SCALIA: I don't understand that  
10 answer. I mean, if that's what you were concerned  
11 about, what Elihu Root was concerned about, you could  
12 have said all corporations that have a net worth of more  
13 than, you know, so much or whatever. That is not what  
14 Congress did. It said all corporations.

15 MR. WAXMAN: Right. And Justice Scalia, if  
16 a small corporation or even any corporation of any sort  
17 wants to bring an as-applied challenge to 441b or a  
18 State law analogue and say, you know, I am not the  
19 problem that Theodore Roosevelt and Elihu Root was  
20 addressed at; there isn't a compelling interest because  
21 I only have three employees and \$8,000 in my bank  
22 account, that's fine. But what is extraordinary, truly  
23 extraordinary, given the sentiments that underlay the  
24 Tillman Act and the Taft-Hartley Act is that we would be  
25 having a discussion today about the constitutionality of



1 a law that has been on the books forever when no party,  
2 no corporation, has ever raised the challenge. I well  
3 recall --

4 JUSTICE KENNEDY: You say it's been on --  
5 it's been on the books forever. But, No. 1, the  
6 phenomenon of -- of television ads where we get  
7 information about scientific discovery and -- and  
8 environment and transportation issues from corporations  
9 who after all have patents because they know something,  
10 that -- that is different. And the -- the history you  
11 applied apply to contributions, not to those kinds of  
12 expenditures.

13 MR. WAXMAN: Justice Kennedy, first of all,  
14 I -- I think it is actually true that patents are owned  
15 by individuals and not corporations. But be that as it  
16 may, there is no doubt -- I am not here saying that this  
17 Court should reconsider Bellotti on first principles any  
18 more than I am saying that it shouldn't consider Austin  
19 on first principles. Corporations can and do speak  
20 about a wide range of public policy issues, and since  
21 the controlling opinion was issued in Wisconsin Right to  
22 Life, the -- the kind of campaign-related speech that  
23 corporations can't engage in, in the pre-election period  
24 is limited to the functional equivalent of expressed  
25 advocacy and nothing else.

1 JUSTICE ALITO: Mr. Waxman, all of this talk  
2 about 100 years and 50 years is perplexing. It sounds  
3 like the sort of sound bites that you hear on TV. The  
4 -- the fact of the matter is that the only cases that  
5 are being -- that may possibly be reconsidered are  
6 McConnell and Austin. And they don't go back 50 years,  
7 and they don't go back 100 years.

8 MR. WAXMAN: My point here is, Justice Alito  
9 -- and I don't mean to be -- to be demeaning this Court  
10 with sound bites. The point is that what -- Austin was,  
11 to be sure, the very first case in which this Court had  
12 to decide -- actually had to decide whether or not the  
13 prohibition on corporate treasury funded campaign speech  
14 could properly be limited and was supporting by a  
15 compelling interest. All I am suggesting -- and I hope  
16 that if you take nothing else from my advocacy today it  
17 will be this -- is that we have here a case in which the  
18 Court has asked a question that essentially goes to the  
19 bona fides, that is, the factual predicates of the  
20 interests that have been viewed as compelling in Austin,  
21 in MCFL, in McConnell itself, whether you call it the  
22 corrosive effect of corporate wealth, whether you call  
23 it, quote, "shareholder protection" --

24 JUSTICE ALITO: And my point is that there  
25 is nothing unusual whatsoever about a case in which a

1 party before the Court says, my constitutional rights  
2 were violated, and there is no prior decision of this  
3 Court holding that what was done is constitutional. And  
4 in that situation is it an answer to that argument that  
5 this has never been challenged before? The Court has  
6 never held that it was unconstitutional? It has been  
7 accepted up until this point by the general public that  
8 this is -- that this is constitutional? No, that is not  
9 regarded as an answer to that question.

10 MR. WAXMAN: Mr. Olson is -- was quite  
11 right -- either Mr. Olson or Mr. Abrams, I find it so  
12 difficult to tell the two apart. One of them was  
13 saying, well, it's, you know -- yes, I think in response  
14 to Justice Sotomayor's question, you know, about there  
15 is no factual record here. There is absolutely nothing  
16 in this case.

17 And the response was, well, it's the  
18 government's burden. The government has to prove that  
19 any restriction that it imposes passes strict scrutiny.

20 Fair enough, but the question has to be  
21 raised. The issue has to be raised. If the -- if  
22 Austin, Justice Alito, or the compelling interests that  
23 Austin and McConnell relied on were forthrightly  
24 challenged in a case, the government would have the  
25 option --

1 CHIEF JUSTICE ROBERTS: Well, Mr. Waxman,  
2 the government did have that opportunity, and the  
3 government compiled a record. And when the Citizens  
4 United abandoned that position -- you are quite right,  
5 they changed their course -- the government and the  
6 district court complained that it had to go to all this  
7 work to develop this record, and yet we hear nothing  
8 about what the record showed.

9 MR. WAXMAN: Well, that's because the  
10 ultimate -- I assume I have your permission to answer.

11 CHIEF JUSTICE ROBERTS: Go ahead.

12 MR. WAXMAN: The -- the only challenges that  
13 were litigated in the district court -- and they largely  
14 were related to disclosure -- were very direct  
15 as-applied challenges that had -- that did nothing  
16 whatsoever to implicate the foundation of McConnell or  
17 Austin. And all I'm saying is, if you want to re-  
18 examine the predicates, the existence and magnitude of  
19 interests that Congress has, going back a -- whether  
20 it's 60 years or 100 years, and courts, whether it has  
21 been the actual rationale of the decision or a predicate  
22 of the rationale of the decision, you ought to do it in  
23 a case where the -- where the issue is squarely  
24 presented so that the government can do what it did in  
25 McConnell and in another context in Michigan v. Grutter

1 when it suggested that Aderand had undermined this  
2 Court's controlling opinion in Bakke. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
4 Waxman. Mr. Olson five minutes.

5 REBUTTAL ARGUMENT OF THEODORE B. OLSON  
6 ON BEHALF OF THE APPELLANT

7 MR. OLSON: Thank you, Mr. Chief Justice.  
8 The words that I would leave with this Court are the  
9 Solicitor General's. The government's position has  
10 changed. The government's position has changed as to  
11 what media might be covered by congressional power to  
12 censor and -- and ban speech by corporations. Now we  
13 learn, contrary to what we heard in March, that books  
14 couldn't be prohibited but pamphlets could be  
15 prohibited. We also learn --

16 JUSTICE GINSBURG: But that's not -- the --  
17 the statute that we are involved in, in this case does  
18 not cover those.

19 MR. OLSON: Unless they are engaged in,  
20 quote, "expressed advocacy." And the other way in which  
21 the government has changed its position, if I listened  
22 carefully, is what type of corporation might be covered.  
23 The government now says that it wouldn't -- the -- the  
24 FEC is now willing to recede from its regulations which  
25 explicitly covered this corporation, and I don't know as

1 I stand here today what kind of corporations the  
2 government would choose to prosecute.

3 Remember, the Federal Election Commission,  
4 which didn't even have a quorum and couldn't function at  
5 all for six months during the important election year of  
6 2008 --

7 JUSTICE STEVENS: If the FEC chooses to  
8 prosecute only those who do not -- who do not rely  
9 exclusively on individual contributions.

10 MR. OLSON: Well, that's your question from  
11 before.

12 JUSTICE STEVENS: Yes. I want to see he  
13 gets it.

14 MR. OLSON: And that -- (a), it wouldn't --  
15 this corporation accepted a small amount, \$2,000 out of  
16 -- out of the funding of this, so that wouldn't solve  
17 the problem for my corporation, my client's corporation.

18 JUSTICE STEVENS: But it would solve it for  
19 the advertising, and there are two things. There is the  
20 long Hillary document and the advertisements. It would  
21 cover those.

22 MR. OLSON: If -- but the --

23 JUSTICE STEVENS: And they are the only --  
24 only ones that clearly violate the statute.

25 MR. OLSON: My point is that the overbreadth

1 in this statute -- that solves the problem by saying  
2 that corporations still can't speak, and if you don't  
3 have anything to do with them, you -- you -- they wear a  
4 scarlet letter that says "C." If you accept one dollar  
5 of funding, then you had better make darn sure that when  
6 a check comes in for \$100 from the XYZ hardware store in  
7 the neighborhood, that it wasn't a corporation that you  
8 used to -- to make a documentary about a candidate.

9           The other way in which the government's  
10 position has changed is we do not know --

11           JUSTICE STEVENS: Does that mean you  
12 disagree with the NRA's submission?

13           MR. OLSON: I -- I submit that it does not  
14 solve the problem. It would lead exactly --

15           JUSTICE STEVENS: If it solved the problem  
16 as it would for the advertising, would it be an  
17 appropriate solution?

18           MR. OLSON: It -- I can't say that it -- if  
19 it solved the problem, because it doesn't solve the  
20 problem of prohibiting all corporate speech. And I  
21 think -- and I am submitting, Justice Stevens, that that  
22 is unconstitutional. I think what you are suggesting is  
23 that some limitation that -- what -- what you were  
24 suggesting is not a whole lot different than PAC. It  
25 would lead, I think Justice Breyer was saying, to an

1 accounting nightmare. It would be --

2 JUSTICE STEVENS: But it is a nightmare that  
3 Congress endorsed in the Snowe-Jeffords Amendment.

4 MR. OLSON: Well, but the -- but the  
5 Wellstone Amendment sort of in a sense repealed it.

6 JUSTICE STEVENS: We have held the Wellstone  
7 Amendment literally cannot be applied.

8 MR. OLSON: Well --

9 JUSTICE STEVENS: We unanimously held that.

10 MR. OLSON: I think what -- what the -- my  
11 response is that that does not solve the problem of  
12 inhibiting --

13 JUSTICE STEVENS: You do not endorse the  
14 NRA's position?

15 MR. OLSON: No, we don't Justice Stevens,  
16 and -- and, as I said, it would not exempt my clients.  
17 The other -- the third way in which the government has  
18 changed its position is its rationale for this  
19 prohibition in the first place. Is it corruption? Is  
20 it shareholder protection? Is it equalization?

21 There was some dispute. I heard the  
22 Solicitor General say that the equalization rationale  
23 was something the government disavowed. It wasn't what  
24 Austin said, the government -- the government said. And  
25 I --



1 JUSTICE GINSBURG: Justice Marshall said  
2 that he was not trying to equalize all voices in the  
3 political process. He has a sentence that says, well,  
4 that's not what the rationale of this case is.

5 MR. OLSON: I don't -- I don't -- with all  
6 due respect Justice Ginsburg, the words that jump out at  
7 me are the words from page 665 that say the desire to  
8 counterbalance those advantages unique to the corporate  
9 forum is the state's compelling interest in this case.  
10 That sounds to me like -- like equalization.

11 I don't know. I am -- I am representing an  
12 individual who wants to speak about something that's the  
13 most important thing that goes on in our democracy. I'm  
14 told it's a felony. I am not -- and I -- I don't know  
15 what the rational basis is. It's overbroad. Now I hear  
16 about this shareholder -- protecting shareholders.  
17 There is not a word in the congressional record with  
18 respect to the -- which was before the Court in the  
19 McConnell case about protecting shareholders. As the  
20 Bellotti case pointed out, that would be overbroad  
21 anyway because this statute applies to every --

22 JUSTICE BREYER: Actually I read that  
23 sentence that you just read as meaning the corporation  
24 is an artificial person in respect to which the State  
25 creates many abilities and capacities, and the State is

1 free also to create some disabilities and capacities.  
2 Not a statement about balancing rich and poor.

3 MR. OLSON: Well, it -- it -- it strikes me  
4 that it is, because it follows the words that say  
5 corporations are given unique advantages to aggregate  
6 wealth and that we must take away that advantage by  
7 equalizing the process. I think that's the plain  
8 meaning but my point I guess is -- if I may finish this  
9 sentence.

10 CHIEF JUSTICE ROBERTS: Briefly.

11 MR. OLSON: My point is that the government  
12 here has an overbroad statute that covers every  
13 corporation irrespective of what its stockholders think,  
14 irrespective of whether it's big, and whether it's  
15 general -- a big railroad baron or anything like that,  
16 and it doesn't know, as it stands here today two years  
17 after this movie was offered for -- to the public for  
18 its view, what media might be covered, what type of  
19 corporation might be covered and what compelling  
20 justification or narrow standard would be applied to  
21 this form of speech.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
23 The case is submitted.

24 (Whereupon, at 11:34 a.m., the case in the  
25 above-entitled matter was submitted.)

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