Transcript:

ORAL ARGUMENT OF THEODORE B. OLSON ON BEHALF OF THE APPELLANT

Chief Justice Roberts: We'll hear reargument this morning in Case 08-205, Citizens United v. The Federal Election Commission.

Mr. Olson.

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

Justice Ginsburg: Mr. Olson, are you taking the position that there is no difference in the First Amendment rights of an individual?

A corporation, after all, is not endowed by its creator with inalienable rights.

So is there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?

Mr. Olson: What the Court has said in the First Amendment context, New York Times v. Sullivan, Rose Jean v. Associated Press, and over and over again, is that corporations are persons entitled to protection under the First Amendment.

Justice Ginsburg: Would that include--

Mr. Olson: Now, Justice--

Justice Ginsburg: --Would that include today's mega-corporations, where many of the investors may be foreign individuals or entities?

Mr. Olson: --The Court in the past has made no distinction based upon the nature of the entity that might own a share of a corporation.

Justice Ginsburg: Own many shares?

Mr. Olson: Pardon?

Justice Ginsburg: Nowadays there are foreign interests, even foreign governments, that own not one share but a goodly number of shares.

Mr. Olson: I submit that the Court's decisions in connection with the First Amendment and corporations have in the past made no such distinction.

However--

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

Mr. Olson: --I'm not -- I'm not saying that, Justice Ginsburg.

I'm saying that the First Amendment applies.

Then the next step is to determine whether Congress and the government has established a compelling governmental interest and a narrowly tailored remedy to that interest.

If the Congress -- and there is no record of that in this case of which I am aware.

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

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

Justice Scalia: Do you think Congress could prevent foreign individuals from funding speech in United States elections?

Mr. Olson: --The -- the--

Justice Scalia: Private individuals, foreigners who -- who want to--

Mr. Olson: --That's, of course, a different question.

I haven't studied it, Justice Scalia.

Justice Scalia: --Well, it's not different.

I asked it because I thought it was related to the question you were answering.

Mr. Olson: The fundamental point here is -- and let me start with this, and I think we should -- we should start with this, and the government hardly mentions this.

Justice Stevens: Before you do, Mr. Olson--

Mr. Olson: The language of the First Amendment, "Congress shall make"--

Justice Stevens: --Mr. Olson -- Mr. Olson, would you answer Justice Ginsburg's question yes or no?

Can the -- leaving aside foreign investors, can the -- can -- does the First Amendment permit any distinction between corporate speakers and individual speakers?

Mr. Olson: --I am not -- I'm not aware of a case that just--

Justice Stevens: I am not asking you that.

I meant in your view does it permit that distinction?

Mr. Olson: --My view is based upon the decisions of this Court and my view would be that unless there is a compelling governmental interest and a narrowly--

Justice Stevens: But if there is a compelling government -- can there be any case in which there is a different treatment of corporations and individuals in your judgment?

Mr. Olson: --I would not rule that out, Justice Stevens.

I mean, there may be.

I can't imagine all of the infinite varieties of potential problems that might exist, but -- but we would eventually come back to the narrow tailoring problem anyway.

What the government has done here is prohibit speech.

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

Justice Alito: Well, Mr. Olson, do you think that media corporations that are owned or principally owned by foreign shareholders have less First Amendment rights than other media corporations in the United States?

Mr. Olson: I don't think so, Justice Alito, and certainly there is no record to suggest that there is any kind of problem based upon that.

And I come back to the language of the First Amendment: "Congress shall make no law".

Now, what this Court has repeatedly said is that there may be laws inhibiting speech if there is a compelling governmental interest and a narrowly tailored remedy.

But there is no justification for this.

I was going to say that 97 percent of the 6 million corporations that filed tax returns in 2006 had assets less than $5 million -- assets, not net worth.

So we are talking about a prohibition that covers every corporation in the United States, including nonprofit corporations, limited liability corporations, Subchapter S corporations and every union in the United States.

Justice Ginsburg: But what are the -- you have used the word Mr. Olson.

One answer to that is that no entity is being prohibited, that it is a question of not whether corporations can contribute but how.

They can use PACs and that way we assure that the people who contribute are really supportive of the issue, of the candidate.

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

Mr. Olson: I respectfully disagree.

The corporation may not expend money.

It might find people, stockholders or officers, who wanted to contribute to a separate fund, who could then speak.

That in one -- to use the words of one Justice, that is ventriloquist-speak.

I would say that it is more like surrogate speech.

If you can find some other people that will say what you want to say and get them to contribute money through a process that this just--

Justice Ginsburg: Who is the "you"?

I mean do you -- you -- those are the directors, the CEO, not the shareholders?

We don't know what they think.

Mr. Olson: --Well, this statute is not limited to cases where the shareholders agree or don't agree with what the corporation says.

As the Court said in the Bellotti case, the prohibition would exist whether or not the shareholders agree.

But let me go back to your question.

Justice Scalia: It -- it covers totally -- totally owned corporations, too, doesn't it?

Mr. Olson: Yes.

Justice Scalia: I mean, if I owned all the stock in a corporation, the corporation still can't--

Mr. Olson: Yes.

And it includes membership corporations such as Citizens United that--

Justice Breyer: And the individual contribution also covers people who would like to give $2500 instead of $2400, which is the limit.

And maybe there are 100 million or 200 million people in the United States who, if they gave 2500 rather than 2400, nobody could say that that was really an effort to buy the Senator or the Congressman.

So is that unconstitutional, too?

Mr. Olson: --No -- well, what this Court has said is that in connection with contribution limitations there is a potential compelling governmental interest.

Justice Breyer: Yes.

Mr. Olson: This is what Buckley says.

Justice Breyer: Yes.

Mr. Olson: Then that -- in that -- but expenditures, which is what we are talking about today, do not concern the -- the question, the actual threat of quid pro quo corruption or the appearance of quid pro quo corruption.

And you know, Justice Breyer, what the Court said in that case is because it's not inhibiting someone from actually speaking, it's -- it's giving money to someone--

Justice Breyer: So here the obvious argument is: Look, they said the compelling interest is that people think that representatives are being bought, okay?

That's to put it in a caricature, but you understand what I'm driving at, okay?

That's what they said in Buckley v. Valeo.

So Congress now says precisely that interest leads us to want to limit the expenditures that corporations can make on electioneering communication in the last 30 days of a primary, over-the-air television, but not on radio, not on books, not on pamphlets, not on anything else.

All right?

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

Mr. Olson: --Well, in the first place, I accept what the Court said in Buckley, that expenditures do not raise that concern at all.

Congress has not made that finding.

You are talking -- and you mentioned just -- just a matter of radio and television, but in Buckley v. Valeo the Court specifically said that that is the most important means of communicating concerning elections--

Justice Breyer: It's important--

Mr. Olson: --And the Court used the word "indispensable".

So what -- and -- and what the Court said in Buckley v. Valeo is it compared a limitation on expenditures, independent uncoordinated expenditures, with the prohibition that the Court addressed when it had a statute before it that said newspapers couldn't endorse candidates on the day of election, and the Tornillo case, where it required a right of reply to be given.

And the Court said those restrictions, which were unconstitutional, were considerably less, and that the restriction in Buckley v. Valeo on expenditures--

Justice Kennedy: I -- I agree -- I agree that Buckley made the distinction between contributions and expenditures, and it seems to me that the government's argument necessarily wants to water down that distinction.

But in response or just in furtherance of Justice Breyer's point, you have two cases, one in which an officeholder goes to a corporation and says: Will you please give me money?

They say: We can't do that.

The other is in which a corporation takes out an ad for the -- for the candidate, which relieves that candidate of the responsibility of -- of substantial television coverage.

Isn't that about the same?

Mr. Olson: --Well, in the first place, if there is any coordination--

Justice Kennedy: And I -- and I think Buckley says no.

Mr. Olson: --Buckley says--

Justice Kennedy: But, as a practical matter, is that always true?

Mr. Olson: --Well, it may not always be true.

In the infinite potential applications of something like that, Justice Kennedy, anything might possibly be true.

And Justice Breyer said, well, what if Congress thought or what if Congress thought the people might think that that was kind of somehow suspect?

That is not a basis for prohibiting speech by a whole class of individual--

Justice Breyer: --Well, of course, it did -- was a basis for prohibiting speech by, in the sense of giving contributions above $2,400, by 300 million people in the United States.

But the point, which I think is the one that Justice Kennedy was picking up, is are we arguing here between you and my questions, is the argument in this case about the existence of a compelling interest?

Because Congress seemed to think that there was certainly that; it's this concern about the perception that people are, say, buying candidates.

Are we arguing about narrow tailoring?

Congress thought it was narrow tailoring.

Or are we arguing about whether we should second-guess Congress on whether there is enough of a compelling interest and the tailoring is narrow enough?

Mr. Olson: --You must always second-guess Congress when the First Amendment is in play.

And that we are arguing -- we are not -- we are discussing--

Justice Breyer: Yes.

Mr. Olson: --both the compelling ----

[Laughter]

--both the compelling governmental interest and the narrow tailoring, and what -- what -- there is not a sufficient record.

The reason -- the government has shifted position here.

They were, first of all, talking about the so-called distortion rationale in Austin, the distortion rationale which they seem to have abandoned in the -- in the supplemental briefs filed in connection with this argument, and they resorted to the corruption, appearance of corruption.

There isn't a sufficient record of this.

There isn't--

Justice Ginsburg: But what about the district court's finding?

Wasn't there a finding before the three-judge court that Federal officials know of and feel indebted to corporations or unions who finance ads urging their election or the defeat of their opponent?

There was a finding of fact to that effect, was there not?

Mr. Olson: --The find -- yes.

I -- there is something to that effect in the district court opinion, but it doesn't cover all corporations.

It didn't focus in specifically on expenditures.

Justice Ginsburg: So if -- so if they just covered large corporations, so you take out the mom and pop single shareholder--

Mr. Olson: Well, that is 97 percent of the corporation.

Justice Ginsburg: --Not 97 percent of the contributions.

I mean, the contributions that count are the ones from the corporations that can amass these huge sums in their treasuries.

Mr. Olson: I think that goes back to Justice Kennedy's question, and my response, which distinguishes between contributions and expenditures.

The point that Justice Kennedy was making in his question is that under -- under some circumstances an expenditure might coincide or resonate with what the candidate wishes to do, but the Court looked at that very carefully in Buckley v. Valeo and said that might not be the case.

It might, in fact, be these expenditures might be counterproductive when they are independent, they are not coordinated with the candidate, they are more directly expression by the party spending the money, they are not like a contribution, so they are more of an infringement on the right to speak.

Chief Justice Roberts: Counsel--

Mr. Olson: And they are less of a threat of corruption because there is less -- there is no quid pro quo there, and if there is it would be punishable as a crime.

Chief Justice Roberts: --Counsel, in your discussion of Austin, you rely on its inconsistency with Bellotti.

Bellotti, of course, involved a referendum and Austin expenditures in an individual election.

Why isn't that a significant distinction?

Mr. Olson: Well, it is -- it is -- what the Bellotti Court said is that we are not deciding that question.

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

Justice Stevens: It more than said we are not deciding.

It said they are entirely different situations.

You read that long footnote which has been cited six or eight times by our later cases.

Mr. Olson: --Yes.

And I also read the footnote 14 in the Bellotti case that cited case after case after case that said corporations had rights, protected rights under the First Amendment.

I am not disagreeing with what you just said, Justice Stevens.

The Court said it was -- it was dicta, because the Court did not deal with--

Justice Stevens: But it has been repeated -- that footnote has been repeatedly cited in subsequent cases, most of which were unanimous.

Mr. Olson: --Well, because it was -- and I agree the Bellotti Court was not discussing that.

But The Bellotti Court--

Justice Stevens: It did discuss it precisely in that footnote and it said it's a different case.

Mr. Olson: --I understand and I don't disagree with what you have just said, Justice Stevens.

Justice Scalia: --It didn't say it would come out differently.

It just said, we're not deciding that case, right?

Mr. Olson: That -- that is -- that's the point I'm trying to make.

Justice Scalia: I don't mind citing that.

Bellotti didn't decide that.

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

Chief Justice Roberts: Now that we've cleared up that Bellotti didn't decide the question, what is the distinction that -- why don't you think that distinction makes sense?

In other words, a corporate -- you don't have a potential for corruption if a corporation is simply speaking on a referendum that may directly affect its interest.

If you are dealing with a candidate, what the Court has said in the past is that you do have that problem of corruption.

Mr. Olson: Well--

Chief Justice Roberts: In other words, why isn't that distinction a way to reconcile Bellotti and Austin?

Mr. Olson: --There is a distinction, but I think the distinction goes back to, A, expenditures versus contributions, number one; and then secondly, it goes back to what this Court said in conjunction with the impossibility of finding a distinction between issue ads and candidate ads.

The line dissolves on practical application.

The interest--

Chief Justice Roberts: Where did we say that?

Mr. Olson: --You said that repeatedly, including most recently in the Wisconsin Right to Life case.

And it first appeared in Buckley itself.

The distinction is very hard to draw between the interest that the speaker is addressing and whether it's a candidate or an issue, because issues are wrapped up in candidates.

The corporation interest and the interests that its fiduciary officers are representing when it speaks on behalf of the corporation--

Justice Stevens: I don't think you are correct to say the Court said there was no distinction.

It said the distinction requires the use of magic words.

And that's what they said in Wisconsin Right to Life, too.

Both of them said there is a distinction.

Mr. Olson: --Well, but the words--

Justice Stevens: It's difficult to draw in some cases, but nobody said there is no distinction that I am aware of.

Mr. Olson: --Well, what the Court -- to use -- to use the words of the Court, which occurred repeatedly, is that the distinction dissolves impractical application.

That, Justice Stevens, I think addresses the very commonsense point that when you are addressing an issue, whether you are addressing a referendum matter, whether it is a proposed legislation or a candidate that is going to raise taxes on the corporation, those distinctions dissolve.

It's all First Amendment freedom.

Justice Scalia: I -- I -- I thought that Buckley had narrowed the statute precisely to magic words and still found it unconstitutional as applied to corporations that made independent expenditures.

Mr. Olson: Yes.

Justice Scalia: Isn't that what happened in Buckley?

Mr. Olson: The $1,000 limit in Buckley was, first of all, limited to the magic words "candidacy expression"; then secondly, the Court -- and the -- and the words of the statute were "any person", which included corporations found, the statute as narrowed unconstitutional and said--

Justice Scalia: And some of the plaintiffs were corporations.

Mr. Olson: --Some of the plaintiffs were corporations.

Justice Stevens: Yes, but that point wasn't even discussed in the opinion, was it?

Mr. Olson: It was not discussed in the opinion.

Justice Stevens: No.

Mr. Olson: But what was discussed in the opinion was the breadth of the definition of "person", which did include corporation.

Corporations were parties in the case.

And in that part of the Buckley case, the Court repeatedly cites cases involving corporations, including NAACP v. Alabama and New York Times v. Sullivan, all cases involving corporations.

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

The Court in Buckley in fact says, this is -- with respect to that expenditure limitation, the words of the Court were this is the most drastic of the limitations imposed by the Federal Election Campaign Act.

It goes to the core of First Amendment freedom.

Justice Breyer: If that is so -- this is a point that is concerning me.

I don't know the answer precisely.

But suppose you are right.

Suppose we overrule these two cases.

Would that leave the country in a situation where corporations and trade unions can spend as much as they want in the last 30 days on television ads, et cetera, of this kind, but political parties couldn't, because political parties can only spend hard money on this kind of expenditure?

And therefore, the group that is charged with the responsibility of building a platform that will appeal to a majority of Americans is limited, but the groups that have particular interests, like corporations or trade unions, can spend as much as they want?

Am I right about the consequence?

If I am right, what do we do about it?

Mr. Olson: I think you are wrong about the consequence.

There are 27 States that have no limitations on either contributions or expenditures and that -- the Earth is not--

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

Mr. Olson: --Well, if -- if the Court decides in favor of the arguments that we are making here, I think what you are suggesting is that because there are other limitations that someone has not challenged in this case, that that would be somehow unfair and unbalanced.

Justice Breyer: No, I'm not suggesting that.

I am suggesting we will make a hash of this statute, and if we are going to make a hash of this statute, what do we do about it?

And that's why I want you to take a position on another important part of that statute, and that is the part that says political parties themselves cannot make these expenditures that we are talking about except out of hard money.

Mr. Olson: What -- I want to address that in this way, and I said when we were here before the most fundamental right that we can exercise in a democracy under the First Amendment is dialogue and communication about political candidates.

We have wrapped up that freedom, smothered that freedom, with the most complicated set of regulations and bureaucratic controls.

Last year the Federal Election Commission that was supposed to be able to give advisory opinions didn't even have a quorum for 6 months of the year 2008 when people would have needed some help from the Federal Election Commission.

What I am saying, in answer to your question, Justice Breyer, there are, I suspect, all kinds of problems with Federal election laws where they apply to parties and where they apply to what candidates might do and so forth; but that has never been a justification.

We will uphold a prohibition on all kinds of people speaking because if we allowed them to speak someone else might complain that they don't get to speak as much as they would like.

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

Mr. Olson: No, I'm not, and that's -- I think that was what I was attempting to say in response to what Justice Breyer was asking me.

Justice Sotomayor: Mr. Olson, are you giving up on your earlier arguments that there are ways to avoid the constitutional question to resolve this case?

I know that we asked for further briefing on this particular issue of overturning two of our Court's precedents.

But are you giving up on your earlier arguments that there are statutory interpretations that would avoid the constitutional question?

Mr. Olson: No, Justice Sotomayor.

What -- what -- there are all kinds of lines that the Court could draw which would provide a victory to my client.

There are so many reasons why the Federal Government did not have the right to criminalize this 90-minute documentary that had to do with elections, but what the Court addressed specifically in the Washington Right to Life case is that the lines if they are to be drawn must not be lines that are ambiguous, that invite litigation, that hold the threat of prosecution over an individual; and in practical application that is what the--

Justice Sotomayor: Mr. Olson, my difficulty is that you make very impassioned arguments about why this is a bad system that the courts have developed in its jurisprudence, but we don't have any record developed below.

You make a lot of arguments about how far and the nature of corporations, single corporations, single stockholder corporations, et cetera.

But there is no record that I am reviewing that actually goes into the very question that you're arguing exists, which is a patchwork of regulatory and jurisprudential guidelines that are so unclear.

Mr. Olson: --I would like to answer that.

There are several answers to it and I would like to reserve the balance of my time for rebuttal.

It is the government has the burden to prove the record that justifies telling someone that wants to make a 90-minute documentary about a candidate for president that they will go to jail if they broadcast it.

The government has the obligation and the government had a long legislative record and plenty of opportunity to produce that record and it's their obligation to do so.

Justice Stevens: Mr. Olson--

Justice Sotomayor: But the facial challenge--

Justice Stevens: --may I ask one question you can answer on rebuttal?

No one has commented on the National Rifle Association's amicus brief.

None of the -- none of the litigants have.

That's in response to Justice Sotomayor's thought that there are narrow ways of resolving the problem before us.

On rebuttal, will you tell us what your view on their solution to this problem is?

Mr. Olson: I will, Justice Stevens.

Chief Justice Roberts: Why don't you tell us now.

We will give you time for rebuttal.

[Laughter]

Justice Scalia: Don't keep us in suspense.

[Laughter]

Mr. Olson: Every line, including the lines that would be drawn in several of the amicus briefs, and they are not the same, could put the entity who wishes to speak before you again a year from now.

Because the movie might be shorter, it might be video on demand, it might be a broadcast, it might have a different tone with respect to a candidate.

Every one of those lines puts the speaker at peril that he will go to jail or be prosecuted or there will be litigation, all of which chills speech and inhibits individual--

Justice Stevens: No, but to answer my question, the line suggested by the NRA is the line identified by Congress in the Snowe-Jeffords amendment dealing with individual financing of speech which would separate all of these problems.

What is your comment on that possible solution to the problem?

Mr. Olson: --I would like to take advantage of Justice Stevens' offer and respond to that during the rebuttal, Mr. Chief Justice.

[Laughter]

Chief Justice Roberts: Thank you, Mr. Olson.

Mr. Abrams.

ORAL ARGUMENT OF FLOYD ABRAMS ON BEHALF OF SENATOR MITCH McCONNELL, AS AMICUS CURIAE, IN SUPPORT OF THE APPELLANT

Mr. Abrams: Mr. Chief Justice, and may it please the Court: The first case cited to you by Mr. Olson happened to be New York Times v. Sullivan, and I would like to begin by urging two propositions on you from that case.

In that case the Court was confronted with a situation where the Times made three arguments to the Court.

They said -- for us to win, they said, you either have to revise, basically federalize, libel law to a considerable degree, which they did; or, they said, we only sold 390 copies in Alabama, so you could rule in our favor by saying there was no jurisdiction; or, they said, we didn't even mention Sheriff Sullivan's name, so you could rule in our favor on the ground that they haven't proved a libel case.

The Court did the first.

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

Justice Ginsburg: Mr. Abrams, Times v. Sullivan was not -- did not involve overruling precedents of this Court that had been followed by this Court and others.

So, I think the situation is quite different.

Mr. Abrams: --That's true, Your Honor.

It did involve overruling 150 years of American jurisprudence.

I mean, there was no law at that point that said that actual malice--

Justice Ginsburg: There was no -- there was no decision of this Court, I mean--

Mr. Abrams: --That's true, Your Honor.

Justice Ginsburg: --We do tend to adhere to our precedents--

Mr. Abrams: Yes.

Justice Ginsburg: --especially a case like Austin which was repeating the business about amassing large funds in corporate treasuries.

It was not a new idea in Austin, and it was repeated after -- after Austin.

But there was -- so Times v. Sullivan I think is quite distinct.

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

Mr. Abrams: And what I'm urging on you, Your Honor, is that by a parity of reasoning, although not precisely the same situation, that there are cases in which there is a -- an ongoing threat to freedom of expression which may lead -- if you were to agree to that, which may lead the Court to say, rather than taking a narrower route to the same result, that it is worth our moving away in this case from looking for the narrowest way out, and determining it now, rather than the next as-applied challenge.

Justice Scalia: There are -- there are two separate questions that -- that have been raised in opposition to your position.

One is -- one is that we should not resolve a broad constitutional issue where there are narrower grounds, and that's the question you are responding to.

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

Mr. Abrams: And stare decisis of course is a question much -- much briefed by the parties, and it is one which involves of course a consideration not only of the merits of the decision, but certain other factors, the length of time the decision has been in effect and the like.

The time in this case for the McConnell case, of course, is only 6 years.

The time for the Austin case is 19 years, which is less than one ruling of this Court's just last term.

Justice Ginsburg: But what the Court said in Austin it also said in the NRWC case, which was I think 8 years before Austin.

So Austin was not a new invention.

Mr. Abrams: Well, Austin was the first time that corporate speech was barred -- corporate independent expenditures were barred by a ruling of this Court.

That had not happened prior to Austin, and the Solicitor General's brief acknowledges that.

Now--

Justice Ginsburg: But there have been limits on corporate spending in aid of a political campaign since the turn of the 20th century.

Mr. Abrams: --There had been limits on corporate contributions since the turn of the century.

Corporate independent expenditures came much later and I think that is something that I think is worth--

Justice Stevens: Much later than 1947.

Mr. Abrams: --Yes, Your Honor.

In 1947, President Truman vetoed that bill, saying that it was a dangerous intrusion into free speech.

That has always been an area of enormous controversy, not just in the public sphere but in the judicial sphere.

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

Justice Stevens: But those were union cases, weren't they, rather than corporate cases?

Mr. Abrams: --Yes, they were three union cases.

And the case after that essentially was Buckley.

And Buckley held unconstitutional the limits posed there to independent expenditures.

All I'm saying is that this is not a situation as if we have an unbroken amount of years throughout American history in which it has been accepted that independent expenditures could be barred.

It has always been a matter of high level of controversy, with courts at first and understandably shying away from facing up to the issue directly and then the first ruling on point.

Justice Stevens: But have you read Justice Rehnquist's dissent in the Bellotti case?

Mr. Abrams: I'm sorry, Your Honor.

Justice Stevens: Have you read Justice Rehnquist's dissent in the Bellotti case?

Mr. Abrams: Yes, I have.

Justice Stevens: Which is somewhat inconsistent with what you said.

Mr. Abrams: Yes, it is.

Chief Justice Roberts: And also inconsistent with his later view, correct?

Mr. Abrams: Yes.

Yes, Justice?

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

And so my question to you is, once we say they can't, except on the basis of a compelling government interest narrowly tailored, are we cutting off or would we be cutting off that future democratic process?

Because what you are suggesting is that the courts who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court's error to start with, not Austin or McConnell, but the fact that the Court imbued a creature of State law with human characteristics.

But we can go back to the very basics that way, but wouldn't we be doing some more harm than good by a broad ruling in a case that doesn't involve more business corporations and actually doesn't even involve the traditional nonprofit organization?

It involves an advocacy corporation that has a very particular interest.

Mr. Abrams: Your Honor, I don't think you'd be doing more harm than good in vindicating the First Amendment rights here, which transcend that of Citizens United.

I think that, reading my friend's brief here on the right, they come -- some of them at least come pretty close to saying that there must be a way for Citizens United to win this case other than a broad way.

In my view the principles at stake here are the same.

Citizens United happens to be sort of the paradigmatic example of the sort of group speaking no less about who to vote for or not who to vote for or what to think about a potential ongoing candidate for President of the United States.

But in lots of other situations day by day there is a blotch to public discourse caused as a result of this Congressional legislation.

And so we think it is not a matter of cutting off what legislatures can do.

They can still pass legislation doing all sorts of things.

They can do public funding.

They can do many other things that don't violate the First Amendment.

If we are right in saying that independent expenditures, that category of money leading to speech that we are talking about today, if we are right that that is the sort of speech which is at the core of the First Amendment, then you would be doing only good, only good, by ruling that way today across the board.

Thank you, Your Honor.

Chief Justice Roberts: Thank you, Mr. Abrams.

General Kagan.

ORAL ARGUMENT OF ELENA KAGAN ON BEHALF OF THE APPELLEE

General Kagan: Mr. Chief Justice and may it please the Court: I have three very quick points to make about the government position.

The first is that this issue has a long history.

For over 100 years Congress has made a judgment that corporations must be subject to special rules when they participate in elections and this Court has never questioned that judgment.

Number two--

Justice Scalia: Wait, wait, wait, wait.

We never questioned it, but we never approved it, either.

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

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

Justice Scalia: I don't understand what you are saying.

I mean, we are not a self -- self-starting institution here.

We only disapprove of something when somebody asks us to.

And if there was no occasion for us to approve or disapprove, it proves nothing whatever that we didn't disapprove it.

General Kagan: Well, you are not a self-starting institution.

But many litigants brought many cases to you in 1907 and onwards and in each case this Court turns down, declined the opportunity, to invalidate or otherwise interfere with this legislation.

Justice Kennedy: But that judgment was validated by Buckley's contribution-expenditure line.

And you're correct if you look at contributions, but this is an expenditure case.

And I think that it doesn't clarify the situation to say that for 100 years -- to suggest that for 100 years we would have allowed expenditure limitations, which in order to work at all have to have a speaker-based distinction, exemption from media, content-based distinction, time-based distinction.

We've never allowed that.

General Kagan: Well, I think Justice Stevens was right in saying that the expenditure limits that are in play in this case came into effect in 1947, so it has been 60 years rather than 100 years.

But in fact, even before that the contribution limits were thought to include independent expenditures, and as soon as Congress saw independent expenditures going on Congress closed what it perceived to be a loophole.

So in fact for 100 years corporations have made neither contributions nor expenditures, save for a brief period of time in the middle 1940's, which Congress very swiftly reacted to by passing the Taft-Hartley Act.

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

Justice Stevens: Before you go to your second point, may I ask you to clarify one part of the first, namely, your answer to the question I proposed to Mr. Olson, namely, why isn't the Snowe-Jeffords Amendment, which was picked on by Congress itself, an -- and which is argued by the NRA, an appropriate answer to this case?

General Kagan: --That was my third point, Justice Stevens.

Justice Stevens: Oh, I'm sorry.

[Laughter]

General Kagan: So we will just skip over the second.

My third point is that this is an anomalous case in part because this is an atypical plaintiff.

And the reason this is an atypical plaintiff is because this plaintiff is an ideological nonprofit and--

Chief Justice Roberts: So you are giving up -- you are giving up the distinction from MCFL that you defended in your opening brief?

There you said this doesn't qualify as a different kind of corporation because it takes corporate funds, and now you are changing that position?

General Kagan: --No, I -- I don't think we are changing it.

MCFL is the law, and the FEA -- FEC has always tried to implement MCFL faithfully.

And that's what the FEC has tried to do.

But if you--

Chief Justice Roberts: So I guess -- do you think MCFL applies in this case even though the corporation takes corporate funds from for-profit corporations?

General Kagan: --I don't think MCFL as written applies in this case, but I think that the Court could, as lower courts have done, adjust MCFL potentially to make it apply in this case, although I think that would require a remand.

What lower courts have done -- MCFL was set up, it was written in a very strict kind of way so that the organization had to have a policy of accepting no corporate funds whatsoever.

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

Chief Justice Roberts: Do you -- do you think it's too strict?

General Kagan: --I -- I -- the FEC has no objection to MCFL being adjusted in order to -- to give it some flexibility.

What the--

Chief Justice Roberts: So you want to give up this case, change your position, and basically say you lose solely because of the questioning that we have directed on reargument?

General Kagan: --Solely because?

I am sorry?

Chief Justice Roberts: Because of the question we have posed on reargument.

General Kagan: No, I don't think that that is fair.

We think -- we continue to think that the -- the judgment below should be affirmed.

If you are asking me, Mr. Chief Justice, as to whether the government has a preference as to the way in which it loses, if it has to lose, the answer is yes.

Chief Justice Roberts: What case of ours -- what case of ours suggests that there is a hierarchy of bases on which we should rule against a party when both of them involve constitutional questions?

Extending -- modifying MCFL would be, I assume, by virtue of the First Amendment.

Overruling Austin would be by virtue of the First Amendment.

So what case says we should prefer one as opposed to the other?

General Kagan: I think the question really is the Court's standard practice of deciding as-applied challenges before facial challenges.

And this case certainly raises a number of tricky as-applied questions.

One is the question of how the -- the statute applies to nonprofit organizations such as this one.

Another is a question of how it applies to VOD transmissions.

Yet another is the question of how it applies to a 90-minute infomercial as opposed to smaller advertisements.

Justice Kennedy: But if you -- if you insist on the as-applied challenge, isn't that inconsistent with the whole line of cases that began in Thornhill v. Alabama and Coates v. Cincinnati?

What about the Thornhill doctrine?

It is not cited in the briefs, but that doctrine is that even a litigant without standing to object to a particular form of conduct can raise that if the statute covers it in order that the statute does not have an ongoing chill against speech.

And there is no place where an ongoing chill is more dangerous than in the elections context.

General Kagan: Well, I think even--

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

General Kagan: --You know, I think even in the First Amendment context, Justice Kennedy, the Court will not strike down a statute on its face unless it finds very substantial overbreadth, many applications of the statute that are unconstitutional, as opposed to just a few or just some.

What I am suggesting here is that the Court was right in McConnell and then confirmed in WRTL to find that BCRA, which is of course the only statute directly involved in this case, did not have that substantial overdraft.

Justice Kennedy: Let me ask you this.

Suppose that we were to rule that nonprofit corporations could not be covered by the statute.

Would that -- would the statute then have substantial overbreadth?

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

Justice Kennedy: But suppose we were to say that.

Would the statute then not be substantially overbroad?

General Kagan: Well, I don't think that the statute is substantially overbroad right now.

So if you took out certain applications, I can't think--

Justice Kennedy: But I am asking you to assume that we draw the nonprofit/profit distinction.

Then the statute, it seems to me, clearly has to fall because, number one, we couldn't sever it based on the language.

General Kagan: --I see what you are saying.

Well, you could do a couple of things.

You could do what Justice Stevens suggested.

Justice Stevens suggested -- I suggested to Chief Justice Roberts--

Justice Stevens: I don't think you -- I don't think you really caught what I suggested because you treated it as an enlargement of the MCFL example.

General Kagan: --I was going to go back.

Justice Stevens: But that is not what the National Rifle Association argues or what Snowe-Jeffords covers.

It covers ads that are financed exclusively by individuals even though they are sponsored by a corporation.

General Kagan: Yes, that's exactly right.

What you are suggesting, Justice Stevens, is essentially stripping the Wellstone amendment from the--

Justice Stevens: Correct and treating the Snowe-Jeffords amendment as being the correct test.

And nobody has explained why that wouldn't be a proper solution, not nearly as drastic as -- as being argued here.

General Kagan: --Yes, and there are some, you know -- there are -- there are some reasons that that might -- that might be appropriate.

The Wellstone amendment was a funny kind of thing.

It was passed very narrowly, but beyond that it was passed with a -- a really substantial support of many people who voted against the legislation in the end, presumably as a poison pill.

Justice Breyer: Well, if we -- if we go -- if we go that route, what we are doing is creating an accounting industry, aren't we?

Corporations give huge amounts of money to the C-4 organization, and then somebody, perhaps the FEC, has to decide whether in fact that is a way of subverting the prohibition against the direct payment for the communication, right?

Okay, so Congress said, we don't want that.

Congress said, that's going to be a nightmare, and we decide Wellstone, for whatever reasons.

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

Justice Stevens: But--

Justice Breyer: And I don't know why it cannot say it.

Justice Stevens: --Congress also said if you strike down the Wellstone amendment, we want the Snowe -- Jeffords amendment.

Justice Breyer: That's true.

Justice Stevens: And why shouldn't we follow that direction?

General Kagan: If you strike down the Wellstone amendment, what is left is the Snowe-Jeffords amendment--

Justice Stevens: Right.

General Kagan: --which allows nonprofit organizations of the kind here to fund these ads out of separate bank accounts, not PACs just separate bank accounts--

Justice Stevens: Correct.

General Kagan: --which include only individual expenditures.

Justice Stevens: Then why is that not the -- the wisest narrow solution of the problem before us?

General Kagan: Well, it is -- it is certainly a narrower and I think better solution than a facial invalidation of the whole statute.

Chief Justice Roberts: Counsel, what do you -- what do you understand to be the compelling interest that the Court articulated in Austin?

General Kagan: I think that what the Court articulated in Austin -- and, of course, in the government briefs we have suggested that Austin did not articulate what we believe to be the strongest compelling interest, which is the anticorruption interest.

But what the Court articulated in Austin was essentially a concern about corporations using the corporate form to appropriate other people's money for expressive purposes.

Chief Justice Roberts: Right.

So but you -- you have more or less -- "abandoned" is too strong a word, but as you say you have relied on a different interest, the quid pro quo corruption.

And you -- you articulate on page 11 of your brief -- you recognize that this Court has not accepted that interest as a compelling interest.

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

General Kagan: Well, a couple of points.

The first thing is, as you say, we have not abandoned Austin.

We have simply said that in addition--

Chief Justice Roberts: Where--

General Kagan: --to other people's money interest that--

Chief Justice Roberts: --Where in your -- where in your supplemental briefing do you say that this aggregation of wealth interest supports Austin?

General Kagan: --I would not really call it an aggregation of wealth interest.

I would say that it's -- it's a concern about corporate use of other people's money to--

Chief Justice Roberts: Putting it outside, putting the quid pro quo interest aside, where in your supplemental briefing do you support the interest that was articulated by the Court in Austin?

General Kagan: --Where we talk about shareholder protection and where we talk about the distortion of the electoral process that occurs when corporations use their shareholders' money who may or may not agree--

Chief Justice Roberts: I understand that to be a different interest.

That is the shareholder protection interest as opposed to the fact that corporations have such wealth and they -- they distort the marketplace.

General Kagan: --Well, I -- I think that they are connected because both come--

Chief Justice Roberts: So -- so am I right then in saying that in the supplemental briefing you do not rely at all on the market distortion rationale on which Austin relied; not the shareholder rationale, not the quid pro quo rationale, the market distortion issue.

These corporations have a lot of money.

General Kagan: --We do not rely at all on Austin to the extent that anybody takes Austin to be suggesting anything about the equalization of a speech market.

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

Justice Ginsburg: So--

Chief Justice Roberts: So if we have to preserve -- if we are going to preserve Austin we have to accept your invitation that the quid pro quo interest supports the holding there or the shareholder protection interest.

General Kagan: I would say either the quid pro quo interest, the corruption interest or the shareholder interest, or what I would say is a -- is something related to the shareholder interest that is in truth my view of Austin, which is a view that when corporations use other people's money to electioneer, that is a harm not just to the shareholders themselves but a sort of a broader harm to the public that comes from distortion of the electioneering that is done by corporations.

Justice Scalia: Let's -- let's talk about overbreadth.

You've -- let's assume that that is a valid interest.

What percentage of the total number of corporations in the country are not single shareholder corporations?

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

Now this statute makes it unlawful for all of them to do the things that you are worried about, you know, distorting other -- the interests of other shareholders.

That is vast overbreadth.

General Kagan: You know, I think that the single shareholders can present these corruption problems.

Many, many closed corporations, single shareholder corporations--

Justice Scalia: I'm not talking about the corruption interest.

You -- you have your quid pro quo argument, that's another one.

We get to that when we get there.

But as far as the interest you are now addressing, which is those shareholders who don't agree with this political position are being somehow cheated, that doesn't apply probably to the vast majority of corporations in this country.

General Kagan: --You are quite right, Justice Scalia, when -- we say when it comes to single shareholders, the kind of "other people's money" interests, the shareholder protection interests do not apply.

There--

Justice Scalia: So that can't be the justification--

General Kagan: --There--

Justice Scalia: --because if it were, the statute would be vastly overbroad.

General Kagan: --There the strongest justification is the anticorruption interest.

Justice Alito: Well, with respect to that what is your answer to the argument that more than half the States, including California and Oregon, Virginia, Washington State, Delaware, Maryland, a great many others, permit independent corporate expenditures for just these purposes?

Now have they all been overwhelmed by corruption?

A lot of money is spent on elections in California; has -- is there a record that the corporations have corrupted the political process there?

General Kagan: I think the experience of some half the States cannot be more important than the 100-year old judgment of Congress that these expenditures would corrupt the Federal system, and I think that--

Justice Scalia: Congress has a self-interest.

I mean, we -- we are suspicious of congressional action in the First Amendment area precisely because we -- at least I am -- I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents.

Now is that excessively cynical of me?

I don't think so.

General Kagan: --I think, Justice Scalia, it's wrong.

In fact, corporate and union money go overwhelmingly to incumbents.

This may be the single most self-denying thing that Congress has ever done.

If you look -- if you look at the last election cycle and look at corporate PAC money and ask where it goes, it goes ten times more to incumbents than to challengers, and in the prior election cycle even more than that.

And for an obvious reason, because when corporations play in the political process, they want winners, they want people who will produce outcomes for them, and they know that the way to get those outcomes, the way to get those winners is to invest in incumbents, and so that's what they do.

As I said, in double digits times more than they invest in challengers.

So I think that that -- that that rationale, which is undoubtedly true in many contexts, simply is not the case with respect to this case.

Justice Kennedy: But under your position, if corporations A, B, and C, are called to Washington every Monday morning by a high-ranking administrative official or a high-ranking member of the Congress with a committee chairmanship and told to tow the line and to tell their directors and shareholders what the policy ought to be, some other corporation can't object to that during the election cycle.

The government silences a corporate objector, and those corporations may have the most knowledge of this on the subject.

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

General Kagan: Well--

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

General Kagan: --Well, to the extent, Justice Kennedy, that you are talking about what goes on in the halls of Congress, of course corporations can lobby members of Congress in the same way that they could before this legislation.

What this legislation is designed to do, because of its anticorruption interest, is to make sure that that lobbying is just persuasion and it's not coercion.

But in addition to that, of course corporations have many opportunities to speak outside the halls of Congress.

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

General Kagan: A lot of them do, which is a suggestion about how corporations engage the political process and how corporations are different from individuals in this respect.

You know, an individual can be the wealthiest person in the world but few of us -- maybe some -- but few of us are only our economic interests.

We have beliefs, we have convictions; we have likes and dislikes.

Corporations engage the political process in an entirely different way and this is what makes them so much more damaging.

Chief Justice Roberts: Well, that's not -- I'm sorry, but that seems rather odd.

A large corporation just like an individual has many diverse interests.

A corporation may want to support a particular candidate, but they may be concerned just as you say about what their shareholders are going to think about that.

They may be concerned that the shareholders would rather they spend their money doing something else.

The idea that corporations are different than individuals in that respect, I just don't think holds up.

General Kagan: Well, all I was suggesting, Mr. Chief Justice, is that corporations have actually a fiduciary obligation to their shareholders to increase value.

That's their single purpose, their goal.

Chief Justice Roberts: So if a candidate -- take a tobacco company, and a candidate is running on the platform that they ought to make tobacco illegal, presumably that company would maximize its shareholders' interests by opposing the election of that individual.

General Kagan: But everything is geared through the corporation's self-interest in order to maximize profits, in order to maximize revenue, in order to maximize value.

Individuals are more complicated than that.

So that when corporations engage the political process, they do it with that set of you know, blinders -- I don't mean it to be pejorative, because that's what we want corporations to do, is to--

Chief Justice Roberts: Well, I suppose some do, but let's say if you have ten individuals and they each contribute $1,000 to a corporation, and they say,

"we want this corporation to convey a particular message. "

why can't they do that, when if they did that as partnership, it would be all right?

General Kagan: --Well, it sounds to me as though the corporation that you were describing is a corporation of the kind we have in this case, where one can assume that the members all sign on to the corporation's ideological mission, where the corporation in fact has an ideological mission.

Justice Scalia: General Kagan, most -- most corporations are indistinguishable from the individual who owns them, the local hairdresser, the new auto dealer -- dealer who has just lost his dealership and -- and who wants to oppose whatever Congressman he thinks was responsible for this happening or whatever Congressman won't try to patch it up by -- by getting the auto company to undo it.

There is no distinction between the individual interest and the corporate interest.

And that is true for the vast majority of corporations.

General Kagan: Well--

Justice Scalia: Yet this law freezes all of them out.

General Kagan: --To the extent that we are only talking about single shareholder corporations, I guess I would ask why it's any burden on that single shareholder to make the expenditures to participate in the political person in the way that person wants to outside the corporate forum?

So single shareholders aren't suffering any burden here; they can do everything that they could within the corporate form, outside the corporate form.

They probably don't get the tax breaks that they would get inside the corporate form, but I'm not sure anything else is very different.

Justice Scalia: Oh, he wants to put up a sign--

Justice Stevens: Ultra Vires would take care of about 90 percent of the small corporations that Justice Scalia is talking about.

They can't just -- they can't even give money to charities sometimes because of Ultra Vires.

Giving political contributions is not typical for corporate activity.

Justice Breyer: Is -- I -- I remember spending quite a few days one summer reading through 1,000 pages of opinion in the D.C. Circuit.

And I came away with the distinct impression that Congress has built an enormous record of support for this bill in the evidence.

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

General Kagan: Yes, that's--

Justice Breyer: Now, it was on the basis of that, I think, that this Court upheld the law in BCRA.

But we have heard from the other side there isn't much of a record on this.

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

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

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

Justice Breyer: BCRA has changed all that.

Chief Justice Roberts: Counsel, could I ask, it seems -- to your shareholder protection rationale, isn't it extraordinarily paternalistic for the government to take the position that shareholders are too stupid to keep track of what their corporations are doing and can't sell their shares or object in the corporate context if they don't like it?

General Kagan: I don't think so, Mr. Chief Justice.

I mean, I, for one, can't keep stack of what my -- where I hold--

Chief Justice Roberts: You have a busy job.

You can't expect everybody to do that.

[Laughter]

General Kagan: --It's not that -- it's not that I have a busy job.

Chief Justice Roberts: But it is extraordinary -- I mean, the -- the idea and as I understand the rationale, we -- we the government, big brother, has to protect shareholders from themselves.

They might give money, they might buy shares in a corporation and they don't know that the corporation is taking out radio ads.

The government has to keep an eye on their interests.

General Kagan: I appreciate that.

It's not that I have a busy job, it's that I, like most Americans, own shares through mutual funds.

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

Chief Justice Roberts: So it is -- I mean, I understand.

So it is a paternalistic interest, we the government have to protect you naive shareholders.

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

Justice Ginsburg: --In that respect, it's unlike the union, because the -- the worker who does not want to affiliate with a union cannot have funds from his own pocket devoted to political causes.

But there is no comparable check for corporations.

General Kagan: --That's exactly right, Justice Ginsburg.

In the union context, of course, it's a constitutional right that the unions give back essentially the funds that any union member or employee in the workplace does not want used for electoral purposes.

Justice Ginsburg: Does that mean that unions should be taken out, because there isn't the same -- the shareholder protection interest doesn't -- there is no parallel for the union?

General Kagan: You are right about that.

But I -- the government believes that with respect to unions, the anticorruption interest is as strong, and that unions should be kept in.

I think what your point suggests, that the -- that the union member point suggests why Congress might have thought that there was a compelling interest to protect corporate shareholders in the same way that, let's say, dissenting union members are protected by the Constitution.

There is no State action, of course, so there is no constitutional right in the corporate context.

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

Chief Justice Roberts: It's not investing in our country's--

Justice Kennedy: In the course of this argument, have you covered point two?

[Laughter]

General Kagan: I very much appreciate--

Justice Kennedy: And I would like to know what it is, so that I -- my notes are complete.

General Kagan: --I very appreciate that, Justice Kennedy.

I think I did cover point two, which was an explanation of some of the questions that the Chief Justice asked me about what interests the government was suggesting motivated these laws and are compelling enough such that this Court certainly should not invalidate these laws.

Chief Justice Roberts: --I take it we have never accepted your shareholder protection interest.

This is a new argument.

General Kagan: I think that that's fair.

Certainly Bellotti does not accept it.

I would think -- you know, National Right to Work is an interesting opinion, because National Right to Work accepts for a unanimous court both the shareholder protection argument and the anticorruption argument with respect to the section 441b in particular.

Now, in later cases the Court has suggested that National Right to Work was only focused on contributions.

If you read National Right to Work, that distinction really does not -- it's not evident on the face of the opinion, and I think Chief Justice Rehnquist at later -- in a later dissent suggested that he had never understood it that way.

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

It--

Chief Justice Roberts: Well, I guess other than that, and I think there may be some ambiguity there, but I wouldn't say NRWC is a holding on shareholder protection.

So to the extent that you abandoned the original rationale in Austin, and articulated different rationales, you have two, the quid pro quo corruption interest and the shareholder protection interest--

General Kagan: --Which we think is not in Austin.

Chief Justice Roberts: --Austin, I thought, was based on the aggregation of immense wealth by corporations.

General Kagan: Again, Austin is not the most lucid opinion.

But the way we understand Austin, what Austin was suggesting was that the corporate form gave corporations significant assets, other people's money that when the corporations spent those assets--

Chief Justice Roberts: Can you -- can you give me the citation to the page in Austin where we accepted the shareholder protection rationale?

General Kagan: --I think it comes when the -- when the Court is distinguishing MCFL.

And the message of that distinction of MCFL is the shareholder protection interest?

But--

Chief Justice Roberts: Do the words "shareholder" -- I don't know, do the words "shareholder protection" appear in the Austin opinion?

General Kagan: --I honestly don't know, Mr. Chief Justice.

And -- and I don't want to--

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

General Kagan: --I would say on the quid pro quo corruption, of course you have accepted that rationale--

Chief Justice Roberts: In the context of contributions, not expenditures.

General Kagan: --That's correct.

And I think what has changed since -- since that time is the BCRA record that Justice Breyer suggested, which was very strong on the notion that there was no difference when it came to corporate contributions and expenditures, that there actually was no difference between the two.

That they--

Chief Justice Roberts: Is that a yes?

Is that a yes?

In other words, you are asking us to uphold Austin on the basis of two arguments, two principles, two compelling interests we have never accepted, in expenditure context.

General Kagan: --In this -- in this particular context, fair enough.

But, you know, I think--

Justice Kennedy: And to undercut Buckley in so doing?

General Kagan: --Well, I don't think so, because I do think Buckley was about individuals rather than corporations, and Buckley was in 1976, not in 2009, after the very extensive record that was created in BCRA.

I see my time is up.

I don't--

Justice Ginsburg: May I ask you one question that was highlighted in the prior argument, and that was if Congress could say no TV and radio ads, could it also say no newspaper ads, no campaign biographies?

Last time the answer was, yes, Congress could, but it didn't.

Is that -- is that still the government's answer?

General Kagan: --The government's answer has changed, Justice Ginsburg.

[Laughter]

It is still true that BCRA 203, which is the only statute involved in this case, does not apply to books or anything other than broadcast; 441b does, on its face, apply to other media.

And we took what the Court -- what the Court's -- the Court's own reaction to some of those other hypotheticals very seriously.

We went back, we considered the matter carefully, and the government's view is that although 441b does cover full-length books, that there would be quite good as-applied challenge to any attempt to apply 441b in that context.

And I should say that the FEC has never applied 441b in that context.

So for 60 years a book has never been at issue.

Justice Scalia: --What happened to the overbreadth doctrine?

I mean, I thought our doctrine in the Fourth Amendment is if you write it too broadly, we are not going to pare it back to the point where it's constitutional.

If it's overbroad, it's invalid.

What has happened to that.

General Kagan: I don't think that it would be substantially overbroad, Justice Scalia, if I tell you that the FEC has never applied this statute to a book.

To say that it doesn't apply to books is to take off, you know, essentially nothing.

Chief Justice Roberts: But we don't put our -- we don't put our First Amendment rights in the hands of FEC bureaucrats; and if you say that you are not going to apply it to a book, what about a pamphlet?

General Kagan: I think a -- a pamphlet would be different.

A pamphlet is pretty classic electioneering, so there is no attempt to say that 441 b only applies to video and not to print.

It does--

Justice Alito: Well, what if the particular -- what if the particular movie involved here had not been distributed by Video on Demand?

Suppose that people could view it for free on Netflix over the internet?

Suppose that free DVDs were passed out.

Suppose people could attend the movie for free in a movie theater; suppose the exact text of this was distributed in a printed form.

In light of your retraction, I have no idea where the government would draw the line with respect to the medium that could be prohibited.

General Kagan: --Well, none of those things, again, are covered.

Justice Alito: No, but could they?

Which of them could and which could not?

I understand you to say books could not.

General Kagan: Yes, I think what you -- what we're saying is that there has never been an enforcement action for books.

Nobody has ever suggested -- nobody in Congress, nobody in the administrative apparatus has ever suggested that books pose any kind of corruption problem, so I think that there would be a good as-applied challenge with respect to that.

Justice Scalia: So you're -- you are a lawyer advising somebody who is about to come out with a book and you say don't worry, the FEC has never tried to send somebody to prison for this.

This statute covers it, but don't worry, the FEC has never done it.

Is that going to comfort your client?

I don't think so.

Justice Ginsburg: But this -- this statute doesn't cover.

It doesn't cover books.

General Kagan: No, no, that's exactly right.

The only statute that is involved in this case does not cover books.

So 441b which--

Chief Justice Roberts: Does cover books.

General Kagan: --which does cover books, except that I have just said that there would be a good as-applied challenge and that there has been no administrative practice of ever applying it to the books.

And also only applies to express advocacy, right?

203 has -- is -- is -- has a broader category of the functional equivalent of express advocacy, but 441b is only express advocacy, which is a part of the reason why it has never applied to a book.

One cannot imagine very many books that would meet the definition of express advocacy as this Court has expressed that.

Chief Justice Roberts: Oh, I'm sorry, we suggested some in the last argument.

You have a history of union organizing and union involvement in politics, and the last sentence says in light of all this, vote for Jones.

General Kagan: I think that that wouldn't be covered, Mr. Chief Justice.

The FEC is very careful and says this in all its regulations to view matters as a whole.

And as a whole that book would not count as express advocacy.

Chief Justice Roberts: Thank you, General.

Mr. Waxman.

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

Mr. Waxman: Mr. Chief Justice, and may it please the Court: The requirement that corporations fund electoral advocacy the same way individuals do, that is with money voluntarily committed by people associated with the corporation, is grounded in interests that are so compelling that 52 years ago, before Buckley was decided, before FECA was enacted, before Buckley-style quid pro quo corruption was ever addressed, this Court explained that, quote:

"What is involved here is the integrity of our electoral process and not less the responsibility of the individual citizen for the successful functioning of that process. "

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

Chief Justice Roberts: One of the amicus briefs, I'm not -- maybe it's professor Hayward, if I am getting that right -- suggested the history of this 1947 provision was such that it really wasn't enforced because people were concerned about the First Amendment interests and that the courts to the extent cases were brought did everything they could to avoid enforcing the limitations.

Mr. Waxman: Well, I don't recall who the professor was either, Mr. Chief Justice, but I do recall pretty well the history that was recounted -- I would say the history that was recounted by this Court in the Auto Workers case, in CIO, in the Pipefitters case, which is quite inconsistent with that.

We've never had this case -- until this Court's supplemental order, we never had a case that challenged directly, quote, "Austin" and Austin-style corruption, which is a term I think that is quite misleading.

When the sober-minded Elihu Root was moved to stand up in 1894 and urged the people of the United States, and urged the Congress of the United States, to enact legislation that would address, quote,

"a constantly growing evil which has done more to shake the confidence of plain people of small means of this country in our political institutions than any practice which has ever obtained since the founding of our government. "

he was not engaging in a high level discussion about political philosophy.

Justice Kennedy: But he was talking about contributions in that context.

That's quite clear.

Mr. Waxman: He -- with all due respect, Justice Kennedy, I don't think that there was any distinction whatsoever in that time between the distinction that this Court came to understand as a result of FECA, and its adjudication of FECA and that -- really the prehistory of Taft-Hartley, between contributions expenditures.

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

Justice Scalia: Great aggregations of wealth.

The brief by the Chamber of Commerce, the amicus brief by the Chamber of Commerce points out that 96 percent of its members employ less than 100 people.

These are not aggregations of great wealth.

You are not talking about the railroad barons and the rapacious trusts of the Elihu Root era; you are talking mainly about small business corporations.

Mr. Waxman: Justice Scalia, I take your point and I think you have made this point forceful lily many times before.

A unanimous court in National Right to Work Committee concluded that Congress was entitled to make the judgment that it would treat in order to address this root evil, a problem of such concern that it goes to the very foundation of the democratic republican exercise, that is, the notion of integrity in representative government.

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

Justice Scalia: I don't understand that answer.

I mean, if that's what you were concerned about, what Elihu Root was concerned about, you could have said all corporations that have a net worth of more than, you know, so much or whatever.

That is not what Congress did.

It said all corporations.

Mr. Waxman: --Right.

And Justice Scalia, if a small corporation or even any corporation of any sort wants to bring an as-applied challenge to 441b or a State law analogue and say, you know, I am not the problem

that Theodore Roosevelt and Elihu Root was addressed at; there isn't a compelling interest because I only have three employees and $8,000 in my bank account, that's fine.

But what is extraordinary, truly extraordinary, given the sentiments that underlay the Tillman Act and the Taft-Hartley Act is that we would be having a discussion today about the constitutionality of a law that has been on the books forever when no party, no corporation, has ever raised the challenge.

I well recall--

Justice Kennedy: You say it's been on -- it's been on the books forever.

But, No. 1, the phenomenon of -- of television ads where we get information about scientific discovery and -- and environment and transportation issues from corporations who after all have patents because they know something, that -- that is different.

And the -- the history you applied apply to contributions, not to those kinds of expenditures.

Mr. Waxman: --Justice Kennedy, first of all, I -- I think it is actually true that patents are owned by individuals and not corporations.

But be that as it may, there is no doubt -- I am not here saying that this Court should reconsider Bellotti on first principles any more than I am saying that it shouldn't consider Austin on first principles.

Corporations can and do speak about a wide range of public policy issues, and since the controlling opinion was issued in Wisconsin Right to Life, the -- the kind of campaign-related speech that corporations can't engage in, in the pre-election period is limited to the functional equivalent of expressed advocacy and nothing else.

Justice Alito: Mr. Waxman, all of this talk about 100 years and 50 years is perplexing.

It sounds like the sort of sound bites that you hear on TV.

The -- the fact of the matter is that the only cases that are being -- that may possibly be reconsidered are McConnell and Austin.

And they don't go back 50 years, and they don't go back 100 years.

Mr. Waxman: My point here is, Justice Alito -- and I don't mean to be -- to be demeaning this Court with sound bites.

The point is that what -- Austin was, to be sure, the very first case in which this Court had to decide -- actually had to decide whether or not the prohibition on corporate treasury funded campaign speech could properly be limited and was supporting by a compelling interest.

All I am suggesting -- and I hope that if you take nothing else from my advocacy today it will be this -- is that we have here a case in which the Court has asked a question that essentially goes to the bona fides, that is, the factual predicates of the interests that have been viewed as compelling in Austin, in MCFL, in McConnell itself, whether you call it the corrosive effect of corporate wealth, whether you call it, quote, "shareholder protection"--

Justice Alito: And my point is that there is nothing unusual whatsoever about a case in which a party before the Court says, my constitutional rights were violated, and there is no prior decision of this Court holding that what was done is constitutional.

And in that situation is it an answer to that argument that this has never been challenged before?

The Court has never held that it was unconstitutional?

It has been accepted up until this point by the general public that this is -- that this is constitutional?

No, that is not regarded as an answer to that question.

Mr. Waxman: --Mr. Olson is -- was quite right -- either Mr. Olson or Mr. Abrams, I find it so difficult to tell the two apart.

One of them was saying, well, it's, you know -- yes, I think in response to Justice Sotomayor's question, you know, about there is no factual record here.

There is absolutely nothing in this case.

And the response was, well, it's the government's burden.

The government has to prove that any restriction that it imposes passes strict scrutiny.

Fair enough, but the question has to be raised.

The issue has to be raised.

If the -- if Austin, Justice Alito, or the compelling interests that Austin and McConnell relied on were forthrightly challenged in a case, the government would have the option--

Chief Justice Roberts: Well, Mr. Waxman, the government did have that opportunity, and the government compiled a record.

And when the Citizens United abandoned that position -- you are quite right, they changed their course -- the government and the district court complained that it had to go to all this work to develop this record, and yet we hear nothing about what the record showed.

Mr. Waxman: --Well, that's because the ultimate -- I assume I have your permission to answer.

Chief Justice Roberts: Go ahead.

Mr. Waxman: The -- the only challenges that were litigated in the district court -- and they largely were related to disclosure -- were very direct as-applied challenges that had -- that did nothing whatsoever to implicate the foundation of McConnell or Austin.

And all I'm saying is, if you want to reexamine the predicates, the existence and magnitude of interests that Congress has, going back a -- whether it's 60 years or 100 years, and courts, whether it has been the actual rationale of the decision or a predicate of the rationale of the decision, you ought to do it in a case where the -- where the issue is squarely presented so that the government can do what it did in McConnell and in another context in Michigan v. Grutter when it suggested that Aderand had undermined this Court's controlling opinion in Bakke.

Thank you.

Chief Justice Roberts: Thank you, Mr. Waxman.

Mr. Olson five minutes.

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

Mr. Olson: Thank you, Mr. Chief Justice.

The words that I would leave with this Court are the Solicitor General's.

The government's position has changed.

The government's position has changed as to what media might be covered by congressional power to censor and -- and ban speech by corporations.

Now we learn, contrary to what we heard in March, that books couldn't be prohibited but pamphlets could be prohibited.

We also learn--

Justice Ginsburg: But that's not -- the -- the statute that we are involved in, in this case does not cover those.

Mr. Olson: --Unless they are engaged in, quote, "expressed advocacy".

And the other way in which the government has changed its position, if I listened carefully, is what type of corporation might be covered.

The government now says that it wouldn't -- the -- the FEC is now willing to recede from its regulations which explicitly covered this corporation, and I don't know as I stand here today what kind of corporations the government would choose to prosecute.

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

Justice Stevens: If the FEC chooses to prosecute only those who do not -- who do not rely exclusively on individual contributions.

Mr. Olson: --Well, that's your question from before.

Justice Stevens: Yes.

I want to see he gets it.

Mr. Olson: And that -- (a), it wouldn't -- this corporation accepted a small amount, $2,000 out of -- out of the funding of this, so that wouldn't solve the problem for my corporation, my client's corporation.

Justice Stevens: But it would solve it for the advertising, and there are two things.

There is the long Hillary document and the advertisements.

It would cover those.

Mr. Olson: If -- but the--

Justice Stevens: And they are the only -- only ones that clearly violate the statute.

Mr. Olson: --My point is that the overbreadth in this statute -- that solves the problem by saying that corporations still can't speak, and if you don't have anything to do with them, you -- you -- they wear a scarlet letter that says C.> ["] If you accept one dollar of funding, then you had better make darn sure that when a check comes in for $100 from the XYZ hardware store in the neighborhood, that it wasn't a corporation that you used to -- to make a documentary about a candidate.

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

Justice Stevens: Does that mean you disagree with the NRA's submission?

Mr. Olson: --I -- I submit that it does not solve the problem.

It would lead exactly--

Justice Stevens: If it solved the problem as it would for the advertising, would it be an appropriate solution?

Mr. Olson: --It -- I can't say that it -- if it solved the problem, because it doesn't solve the problem of prohibiting all corporate speech.

And I think -- and I am submitting, Justice Stevens, that that is unconstitutional.

I think what you are suggesting is that some limitation that -- what -- what you were suggesting is not a whole lot different than PAC.

It would lead, I think Justice Breyer was saying, to an accounting nightmare.

It would be--

Justice Stevens: But it is a nightmare that Congress endorsed in the Snowe-Jeffords Amendment.

Mr. Olson: --Well, but the -- but the Wellstone Amendment sort of in a sense repealed it.

Justice Stevens: We have held the Wellstone Amendment literally cannot be applied.

Mr. Olson: Well--

Justice Stevens: We unanimously held that.

Mr. Olson: --I think what -- what the -- my response is that that does not solve the problem of inhibiting--

Justice Stevens: You do not endorse the NRA's position?

Mr. Olson: --No, we don't Justice Stevens, and -- and, as I said, it would not exempt my clients.

The other -- the third way in which the government has changed its position is its rationale for this prohibition in the first place.

Is it corruption?

Is it shareholder protection?

Is it equalization?

There was some dispute.

I heard the Solicitor General say that the equalization rationale was something the government disavowed.

It wasn't what Austin said, the government -- the government said.

And I--

Justice Ginsburg: Justice Marshall said that he was not trying to equalize all voices in the political process.

He has a sentence that says, well, that's not what the rationale of this case is.

Mr. Olson: --I don't -- I don't -- with all due respect Justice Ginsburg, the words that jump out at me are the words from page 665 that say the desire to counterbalance those advantages unique to the corporate forum is the state's compelling interest in this case.

That sounds to me like -- like equalization.

I don't know.

I am -- I am representing an individual who wants to speak about something that's the most important thing that goes on in our democracy.

I'm told it's a felony.

I am not -- and I -- I don't know what the rational basis is.

It's overbroad.

Now I hear about this shareholder -- protecting shareholders.

There is not a word in the congressional record with respect to the -- which was before the Court in the McConnell case about protecting shareholders.

As the Bellotti case pointed out, that would be overbroad anyway because this statute applies to every--

Justice Breyer: Actually I read that sentence that you just read as meaning the corporation is an artificial person in respect to which the State creates many abilities and capacities, and the State is free also to create some disabilities and capacities.

Not a statement about balancing rich and poor.

Mr. Olson: --Well, it -- it -- it strikes me that it is, because it follows the words that say corporations are given unique advantages to aggregate wealth and that we must take away that advantage by equalizing the process.

I think that's the plain meaning but my point I guess is -- if I may finish this sentence.

Chief Justice Roberts: Briefly.

Mr. Olson: My point is that the government here has an overbroad statute that covers every corporation irrespective of what its stockholders think, irrespective of whether it's big, and whether it's general -- a big railroad baron or anything like that, and it doesn't know, as it stands here today two years after this movie was offered for -- to the public for its view, what media

might be covered, what type of corporation might be covered and what compelling justification or narrow standard would be applied to this form of speech.

Chief Justice Roberts: Thank you, counsel.

The case is submitted.

Unidentified Justice: The Honorable Court is now adjourned until Monday, the 5th of October at 10 a.m..