No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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MISCELLANEOUS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 56 national and international labor organizations with a total membership of 11 million working men and women, files this brief *amicus curiae* in support of Appellant with the consent of the parties as provided for in the Rules of this Court.[1]

INTEREST OF *AMICUS*

As plaintiffs in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the AFL-CIO and its federal political committee ("the AFL-CIO Plaintiffs") brought a facial First Amendment challenge to § 203 of the Bipartisan Campaign Reform Act ("BCRA") of 2002, 2 U.S.C. § 441b(b)(2) and (c) (amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq*.), which proscribes union and corporate funding of "electioneering communications." The AFL-CIO Plaintiffs did so because this provision criminalized the AFL-CIO's use of the broadcast medium as a legislative and policy advocacy tool, falsely characterized substantial labor organization speech on matters of public concern as wholly or substantially electoral, and impaired union political participation as a matter of law.

The AFL-CIO Plaintiffs placed in the *McConnell* record approximately 85 different television and radio advertisements that the AFL-CIO had sponsored throughout every year from 1995 through 2001, many of which would have been prohibited by § 203

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

because they referred to incumbent Members of Congress. See Joint Appendix ("J.A."), Vol. I, pp. 440-62 (Declaration of Denise Mitchell); J.A. Vol. II, pgs. 464-587 (Index of AFL-CIO Issue Advertising, 1995-2001); Brief of AFL-CIO Appellants/Cross-Appellees at 1-7, *McConnell v. Federal Election Commission*, No. 02-1775. Without specifically addressing that evidence or the other plaintiffs' evidence of overbreadth, however, this Court held that the various *McConnell* plaintiffs had not "carried their heavy burden of proving that [§ 203] is overbroad" and that § 203 constitutionally proscribed advertising "to the extent that [it was] the functional equivalent of express advocacy." *See* 540 U.S. at 203-11.

The AFL-CIO subsequently filed briefs *amicus curiae* in support of a tax-exempt, non-profit corporation in *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006), and *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), in order to preserve its own right to make as-applied challenges to § 203 and to undertake advertising that was structurally similar to that which the Government sought to ban in those cases.

Because the controlling opinion in *WRTL II* still leaves the AFL-CIO uncertain as to which of its public speech is potentially criminal, it has a direct interest in whether *McConnell's* facial upholding of § 203 stands. And, because the AFL-CIO and other labor organizations have fundamental interests in communicating with the general public about candidates and elections, it has a commensurate interest in the fate and interpretation of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

SUMMARY OF ARGUMENT

McConnell should be overruled as to §203's facial constitutionality. *McConnell* endorsed record evidence and theories that treated virtually all advertising literally described by §203 as bearing an "electioneering purpose" or a likely electoral "effect" that justifies its prohibition as the "functional equivalent" of express advocacy. But *WRTL II* rightly rejects these as permissible bases for censorship, eliminating the analytical underpinning of *McConnell*'s overbreadth holding. And, as construed in *WRTL II*, §203 covers an insufficiently defined realm of speech that the FEC's regulatory implementation cannot satisfactorily define. Only express advocacy itself avoids undue vagueness.

The Court need not reconsider *Austin* to decide this case. The Government does not even defend *Austin*'s anti-corruption rationale, instead contending that union and corporate independent speech may be prohibited if candidates and officeholders react favorably to it. But that proposition threatens the established constitutional line between contributions and independent expenditures, and its reliance on the *McConnell* record would justify censorship of speech well beyond even that captured by §203 as written.

The Government cannot demonstrate any other compelling governmental interest in prohibiting union independent expenditures. *Austin* aptly distinguished unions from corporations, and the Government's suggestion that such a prohibition is warranted to protect dissident employees is incorrect because federal constitutional and statutory law fully enable non-members to avoid paying for union political activities they oppose and empower union mem-

bers to form and operate unions democratically with full voting and other participatory rights.

ARGUMENT

I. THE COURT SHOULD OVERRULE *McCONNELL* AND HOLD THAT § 203 IS FACIALLY UNCONSTITUTIONAL

A. *McConnell* upheld §203 on the ground that it was not overbroad, and *WRTL II* declined to revisit that holding in deciding an as-applied challenge. See 127 S. Ct. at 2670 n. 8. But the two decisions coexist in hopeless tension, as *WRTL II's* diligent effort to make constitutional sense of § 203 rebuts *McConnell*'s ill-founded departures from sound and established First Amendment principles. The result is that labor organizations, including the AFL-CIO, and corporations, including Citizens United, remain subject to an unworkable censorship regime that can be redressed only by overruling *McConnell*'s facial upholding of § 203.

McConnell concluded that "the vast majority of ads" that "clearly identified a [federal] candidate" and aired during the 30- and 60- day periods preceding recent general elections had "an electioneering purpose," 540 U.S. at 206, and "BCRA's application to pure issue ads is [in]substantial." *Id*. at 207. *WRTL II* states that *McConnell's* "vast majority" statement was "beside the point" because the Court "did not find that a 'vast majority' of the issue ads considered were the functional equivalent of express advocacy." 127 S. Ct. at 2670 n.8. But *WRTL II* rejects the analytical linchpins of McConnell's cursory overbreadth analysis, stating both that "electioneer-

ing purpose" was *not* "the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy," *id.* (emphasis added), and that "this Court in *Buckley* [*v. Valeo*, 424 U.S. 1, 43-44 (1976),] had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates," a holding that *McConnell* "did not…address." 127 S. Ct. at 2665.

If "electioneering purpose" and "intent-and-effect" are not proxies for "functional equivalen[ce]," then no empirical underpinning remains for *McConnell*'s overbreadth holding, which relied on "studies [that] classified the ads in terms of intent and effect." 127 S. Ct. at 2665. *McConnell* plainly endorsed the explicit position of the Government and the BCRA sponsor-intervenors that, with *rare* exception, § 203's primary definition of "electioneering communication" – a mere "refer[ence] to a clearly identified candidate for federal office" broadcast during the pre-election period and receivable by the requisite electorate, see 2 U.S.C. § 434(f)(3)(A)(i)(I) – *literally* identified "the functional equivalent of express advocacy," with "[in]substantial" exceptions. The *McConnell* majority pointed to four specific portions of the record to support its holding, see 540 U.S. at 206, and all treated § 203's "bright line" capaciously:

- The referenced pages of Annenberg Public Policy Center, "Issue Advertising in the 1999-2000 Election Cycle," termed *all* ads that *referred* to a candidate as "candidate-centered," and stated that they "usually present a candidate in a favorable or unfavorable light and then urge the audience to contact the candidate and tell him or her to support the sponsoring organization's policy position. Though

the intent of these ads is to encourage voters to favor or oppose a candidate, because they do so implicitly instead of explicitly these ads fall outside the current regulatory jurisdiction of federal election law." *Id.* at 13 (emphasis added).

- The referenced pages of J. Krasno and F. Sorauf, "Evaluating the Bipartisan Campaign Reform Act (BCRA)," endorsed the work of student coders who reviewed ads and then answered this question: "In your opinion, is *the* purpose of the ad to provide information about or urge action on a bill or issue, *or* is it to generate support or opposition for a particular candidate?" J.A., Vol. III, p. 1336, *McConnell v. Federal Election Commission* (emphasis added). The few ads that these coders decided were "pure issue ads" "rarely mention[ed] federal candidates." *Id.* at 1339.
- The referenced pages of Judge Kollar-Kotelly's opinion rejected the plaintiffs' overbreadth claim by reasoning that it was "very likely that these eight advertisements did influence federal elections because they refer to a federal candidate in a broadcast advertisement aired in close proximity to a federal election, and targeted to the candidate's electorate" -- enough, she concluded, to warrant prohibition. See 251 F. Supp. 2d 176, 575 (D.D.C. 2003). For example, an ad that "[c]riticized a candidate on past votes in the period immediately before a federal election with no indication of future legislation on the issue likely serves no purpose other than to affect the outcome of the election" and so constitutes prohibitable "electioneering." *Id.*

- The referenced portion of Judge Leon's opinion, which discussed only *political party* advertisements, deemed as "electioneering" those that either "focused on the positions, past actions, or general character traits of federal candidates" or "compared the positions or past actions, of two competing federal candidates," rather than "focusing" on pending legislation or executive action. *Id*. at 826-87.

During the *McConnell* litigation, neither the Government, the BCRA sponsor-intervenors nor their *amici* subjected the advertisements in the record to anything resembling the *WRTL II* test, namely, that irrespective of an ad's actual or likely intent or effect, and irrespective of its context (other than timing and audience), whether the message was "susceptible of *no reasonable interpretation other than* as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2666 (emphasis added). To the contrary, they emphasized § 203's "bright line" and explicitly urged the Court to embrace the view that all candidate-referencing ads broadcast to the electorate close to elections were "functional[ly] equivalent to express advocacy" and so could be prohibited, subject only to rare as-applied challenges regarding ads that, in an inversion of *WRTL II*'s holding, were susceptible of no reasonable interpretation other than as an *entirely non-electoral* legislative or other issue appeal – a so-called "pure" issue ad. Like the student coders' question, they and *McConnell* presumed away the constitutionally critical fact that "'the distinction between discussion of issues and candidates and advocacy of election or defeat may often dissolve in practical application.'" *WRTL II*, 127 S. Ct. at 2669, quoting *Buckley*, 424 U.S. at 42. The Government relies upon the *McConnell* record, see Gov. Br. at 21, but,

as we and other *McConnell* plaintiffs demonstrated through our submissions of actual advertisements in that case, *McConnell* erred in concluding that § 203 was not unconstitutionally overbroad, and the Court should overrule that determination.

B. As a category of speech whose utterance may be either prosecuted as "a federal crime," *WRTL II*, 127 S. Ct. at 2658; see 2 U.S.C. § 437g(a)(5)(C) and (D), or subjected to a wide-ranging FEC investigation and then to "burdensome [civil] litigation," *WRTL II*, 127 S. Ct. at 2666; see 2 U.S.C. § 437g(a)(4)-(6), *WRTL II's* "appeal to vote" standard is unduly vague and therefore unworkable. Relying as it does upon illustrative features that are, respectively, "consistent with that of a genuine issue ad" and "indicia of express advocacy," 127 S. Ct. at 2667, the standard introduces the kind of subjective analysis that the Court eschewed in *Buckley* and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 248-49 (1986). The resulting uncertainty is well captured by the FEC's ensuing regulation, which offers a grudgingly narrow "safe harbor" and then "rules of interpretation" to determine whether, "on balance," the "appeal to vote" standard is satisfied. See 11 C.F.R. § 114.15. The agency has already failed to achieve a majority when it sought to apply this regulation during the very advisory opinion process that *McConnell* confidently predicted would suffice to "clarif[y]" other BCRA language "and thereby remove any doubt there may be as to the meaning of the law." 540 U.S. at 170 n.64 (citation and interior quotation marks omitted). See FEC Advisory Opinion 2008-15 (2009). Although this Court does not now sit in judgment of the FEC's regulatory implementation of *WRTL II*, it is an inevi-

table administrative consequence of an inherently uncertain standard for permissible speech.

Only express advocacy itself marks an *electoral* speech category that is precise enough to avoid "[t]he constitutional deficiencies" of vagueness: it unacceptably "'puts the speaker wholly at the mercy of the varied understanding of his hearers,'" "'blankets with uncertainly whatever may be said,'" and "'compels the speaker to hedge and trim.'" *Buckley v. Valeo*, 424 U.S. at 43, quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945). *See also Buckley*, 424 U.S. at 79-80*; MCFL*, 479 U.S. at 249; *WRTL II*, 127 S. Ct. at 2682 (Scalia, J. concurring) ("If a permissible test short of the magic-words test existed*, Buckley* would surely have adopted it."). If salvaging § 203 requires the delineation of a category of speech that defies comparably clear application, the Court should invalidate the restriction outright.

II. THE ANTI-CORRUPTION INTEREST THAT SUPPORTS RESTRICTIONS ON CONTRIBUTIONS DOES NOT JUSTIFY RESTRICTIONS ON INDEPENDENT SPEECH

Because the Government does not contend that *Hillary: The Movie* contains express advocacy, and because the Court can and should overrule *McConnell* irrespective of *McConnell*'s reliance on *Austin*, it is unnecessary in this case for the Court to reconsider *Austin*. Moreover, the Government neither directly acknowledges nor defends *Austin*'s holding concerning Michigan's prohibition of corporate independent expenditures, and instead contends that a prohibition of both corporate *and union* expenditures

is warranted by concerns about *quid-pro-quo* corruption that, since *Buckley*, the Court has consistently held warrant restrictions *only* on *contributions*. *See generally Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 441-42 (2001).

The Government supports that proposition with a fraction of the *McConnell* record and asserts that it "indicated that… federal office-holders and candidates were aware of and felt indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents." Gov. Br. at 8; see also *id.* at 11 (independent speech "has come to be used as a means of currying favor with and attempting to influence federal office-holders"). The Court should reject this invitation.

First, the Government fails to explain why that anecdotal record suffices to eliminate "the fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to a candidate to be spent on his campaign." *Federal Election Commission v. National Conservative Political Action Committee ("NCPAC"),* 470 U.S. 480, 497 (1985). *Buckley* so distinguished expenditures from contributions in invalidating FECA § 608(e)(l), which limited to $1,000/yr. "any expenditure… advocating the election or defeat of [a] candidate" by any "person," including unions and corporations. 424 U.S. at 44-45 and n.45. After construing this provision to mean only express advocacy in order to "preserve the provision against invalidation on vagueness grounds," *id.* at 46-47, the Court held that the prohibition "inadequate[ly]" served "the governmental interest in preventing corruption and [its] appearance" in part because the in-

dependence of the speech did *not* pose the danger that contributions did, namely, the risk of a "*quid pro quo* for improper commitments from the candidate," and, in fact, uncoordinated speech "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id*. at 48.

Moreover, "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for [independently] by [others] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *NCPAC*, 470 U.S. at 498. And, independent speech is as likely to curry disfavor as any "favor"; § 203 was fueled by caustic congressional denunciations of advertisements, from "negative" to "nightmare." *McConnell*, 540 U.S. at 260 (Scalia, J.) (collecting examples). All speech risks reaction, and the decision to undertake that risk is the speaker's constitutional prerogative.

Second, *the McConnell union and corporate advertising record, including the portions referenced by the Government, was comprised entirely of independent speech that did not contain express advocacy at all, because 2 U.S.C. § 441b then, as now, prohibited it* – indeed, the point of the Government and the BCRA sponsor-intervenors in compiling that record was to justify banning vast swaths of speech *in addition to* express advocacy, because, it was claimed, they were "functionally equivalent" to each other. The Government's contention now proves far too much and, if accepted, would lay the foundation for Congress and state legislatures to engulf in prohibition both the very independent speech that *WRTL II* held was immune from § 203 and much more.

The spillover in the Government's arguments from express advocacy to other speech on matters of public concern is also reflected in its dismissive contention that advertisements are often "unrelated to the mission of the financing corporation," or, for example, "focus[] on [judicial] candidates' records on crime rather than on issues of special concern to the corporate or union speaker," so their "electoral advocacy is a means to an end rather than an expression of political conviction." Gov. Br. at 10-11 n. 2. But "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978). The Government does not even acknowledge *Bellotti*, which invalidated a state statute that prohibited corporations from spending on any ballot measure "other than one materially affecting any of [their] property, business or assets[.]" *Id.* at 768 n. 2 (interior quotation marks omitted). *See also Buckley*, 424 U.S. at 57.

The Government's casual dismissal of union political and social concerns brings to mind Justice Frankfurter's observation that "[to] write the history of the [railroad] Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation." *Machinists v. Street*, 367 U.S. 740, 814-15 (1961) (dissenting opinion). "[U]nions have traditionally aligned themselves with a wide range of social, political and ideological viewpoints," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), "expended funds in the support of political

candidates and issues," *Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 447 (1984), and played a vital role in the public arena as advocates for both their members and all workers. *See generally Eastex, Inc. v. NLRB*. 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Board of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States*, 407 U.S. 385, 402-32 (1972); *Machinists v. Street*, 367 U.S. at 767. "[T]his Court accepts briefs from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense," *id.* at 814 (Frankfurter, J., dissenting), an observation that still holds true. See, *e.g.*, Brief of AFL-CIO as *Amicus Curiae*, *Grutter v. Bollinger*, 539 U.S. 306 (2003). The Government simply lacks constitutional authority to designate and enforce its view of what are a union's "mission" or "special concern[s]."

III. NO OTHER COMPELLING GOVERNMENTAL INTEREST WARRANTS PROHIBITION OF UNION INDEPENDENT EXPENDITURES

Nor can the Government point to any other compelling governmental interest that could justify restricting union-financed express advocacy to the general public, and, except inferentially in *McConnell*, the Court has never held that there is one. *See*, *e.g.*, *Federal Election Commission v. National Right to Work Committee ("NRWC"),* 459 U.S. 197, 208 (1982) (discussing unions with respect to *contributions*, not expenditures). Indeed, even before *Buckley*, indictments of labor organizations for allegedly violating the 1947 Taft-Hartley Act's proscription of union and corporate "expenditures" led every Justice who ad-

dressed its constitutionality to conclude that it violated the First Amendment.

In *United States v. Congress of Industrial Organizations* ("*CIO*"), 335 U.S. 106 (1948), the Court reviewed an indictment of the CIO and its president for making "expenditures" by endorsing a congressional candidate in the CIO's weekly newspaper. Reviewing the 1947 enactment, the Court concluded that the term "expenditure" "has no definitely defined meaning," *id*. at 112, and the "congressional explanation of [its] intended scope…[was] scanty and indecisive." *Id*. at 116. *See also id.* at 134 (Rutledge, J., concurring) (describing legislative history as "a veritable fog of contradictions relating to specific possible applications"). The majority dismissed the indictment by finding that it was not intended to apply to electoral publications by unions and corporations to their "members, stockholders or customers," because otherwise "the gravest doubt would arise in our minds as to its constitutionality." *Id*. at 121. And, four concurring Justices – as urged by the CIO and *amici* AFL and the Machinists Union – concluded that the "expenditure" prohibition should be invalidated because it was unduly vague, the justification that it was necessary to counter unions' "undue influence" was inadequate, and the asserted "minority protection" interest was trumped by its unwarranted "majority prohibition" since unions operated on "the principle of majority rule" in matters of "public advocacy." *See id.* at 147-48.

The Court returned to this prohibition nine years later when it considered another indictment of another labor organization for allegedly violating the expenditure provision in a television broadcast. *United States v. United Auto Workers ("UAW")*, 352

U.S. 567 (1957). Uncertain of the facts, the Court allowed the indictment to proceed and declined to address the union's constitutional claims. *Id.* at 590-93. The three dissenters echoed Justice Rutledge's *CIO* concurrence, *id.* at 593 (Douglas, J., dissenting), and *Buckley* 424 U.S. at 43, approvingly cited that dissent where it rejected the notion that union speech could be prohibited because it might "incite to action," including with the "purpose" "to sway voters." *UAW*, 352 U.S. at 595-96.

In upholding § 203, *McConnell* recited concern about "the special characteristics of the *corporate* structure [that] require particularly careful regulation" but recited none about unions. See *id.* at 205 (emphasis added) (quotation marks and citations omitted). Between *UAW* and *McConnell*, *Austin* was the Court's only decision holding any interest sufficient to warrant such a restriction on any group, there the non-profit Michigan Chamber of Commerce, which was primarily composed and funded by for-profit corporate members. See 494 U.S. at 656.[2] *Austin* identified "a different form of corruption" than had *Buckley*, namely, "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660.

Whatever the correctness of this holding as to the Chamber, the Court squarely rejected its applicability to *unions* in denying the Chamber's equal-

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[2] *McConnell* erred in saying that, since *Buckley*, Congress's power to prohibit union and corporate express advocacy "has been firmly embedded in our law." 540 U.S. at 203. See *Austin*, 494 U.S. at 682-83 (Scalia, J., dissenting); *MCFL*, 479 U.S. at 263; *NCPAC,* 470 U.S. at 496.

protection claim that the state law under-inclusively failed also to apply to unincorporated labor organizations. The Court reasoned that unions have "crucial differences" from corporations: first, although unions too "may be able to amass large treasuries, they do so without the significant state-conferred advantage of the corporate structure"; and, second, "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury" because a union may not compel represented non-members to support, with dues or other fees, the union's political, legislative and other ideological spending that is not directly germane to "'collective bargaining, contract administration and germane adjustment.'" *Id.* at 665-66, quoting *Communications Workers of America v. Beck*, 487 U.S. 735, 746 (1988).

The legal framework governing unions, members, and other workers confirms that conclusion. "[T]he union is obliged 'fairly and equitably to represent all employees…, union and nonunion,' within the relevant unit." *Abood v. Detroit Board of Education*, 431 U.S. at 221, *quoting Machinists v. Street*, 367 U.S. at 761. "Wherever necessary to that end, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944). In 28 states and the District of Columbia, private sector unions and employers may lawfully reach "union-security" agreements under which non-members pay "agency fees" reflecting their fair share for that representation. See W. Osborne, *ed.*, *Labor Union Law and Regula-*

tion 518 (2003). But these non-members cannot be compelled to contribute toward a union's partisan political activities or its legislative, ideological and other activities unrelated to collective bargaining and contract administration. *Communications Workers of America v. Beck.* And, their dissent "is not to be presumed – it must affirmatively be made known by the dissenting employee." *Machinists v. Street*, 367 U.S. at 774. Meanwhile, in the other 22 states, so-called "right-to-work" laws preclude *any* requirement in the private sector that non-members pay *any* fees to their exclusive union representative for *any* purpose, yet the union's duty of fair representation nonetheless applies. See Osborne, *supra*.

Moreover, from their inception unions are democratic, member-controlled organizations. A union forms by its "designat[ion] or select[ion] for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purpose." 29 U.S.C. § 159(a). Following this voluntary formation, members elect their officers and national convention delegates by secret ballot, see 29 U.S.C. §§ 481-483; members determine their dues rates by these same methods, see 29 U.S.C. § 411(a)(3); all members enjoy equal rights to nominate candidates for union office, vote in union elections and otherwise participate in union affairs, and they have rights of speech and association. See 29 U.S.C. §§ 411, 481(e). Membership itself is completely voluntary, and resignation cannot be restricted. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

These laws and practices, which set unions apart from other entities subject to FECA's speech prohibitions, completely undermine the Government's only other proffered rationale for restricting union inde-

pendent expenditures, namely, to protect individuals "'who have paid money into a …union for purposes other than the support of candidates from having that money used to support political candidates to whom they are opposed.'" See Gov. Br. at 12, quoting *NRWC, supra.* *See also* Gov. Br. at 13 ("protections against the use of compulsory union dues for political purposes"). Even so, the Government tepidly terms that interest as merely "legitimate," *id*. at 12, 13, but only a *compelling* governmental interest can justify such a restriction on any speaker, *WRTL II*, 127 S. Ct. at 2671, and the Court has never held this interest to justify prohibiting union-financed speech outright. However the Court addresses *Austin*, it should recognize no compelling governmental interest in criminalizing independent union electoral speech.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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