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Prepared Testimony of

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Defining the Future of Campaign Finance in an Age of Supreme Court Activism

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Mr. Chairman and members of the Committee:

Thank you for inviting me to testify on campaign-finance reform in light of the Supreme Court's important recent decision in *Citizens United v. FEC*. I am a senior attorney at the Institute for Justice, a non-profit legal services organization dedicated to increasing constitutional protections for individuals in four core areas: property rights, economic liberty, educational choice, and freedom of speech. I have litigated cases for the Institute for nearly nine years, with the last several years devoted exclusively to campaign finance and freedom of speech, and I have written amicus briefs for several Supreme Court campaign finance cases, including *Citizens United*. I am the lead attorney in *SpeechNow.org v. FEC*, which the Institute is litigating along with the Center for Competitive Politics. That case is currently pending before the United States Court of Appeals for the District of Columbia Circuit.

The Supreme Court's decision in *Citizens United*, which struck down restrictions on corporate spending on speech during elections, has once again ignited a controversy over money in politics. Supporters of stringent campaign finance laws are claiming that the decision will lead to a flood of corporate money in elections, that it will destroy democracy,[1] that corporations

[1] "With a stroke of the pen, five Justices wiped out a century of American history devoted to preventing corporate corruption of our democracy." Statement of Fred Wertheimer, President, Democracy 21, Supreme Court Decision in Citizens United Case is Disaster for American People and Dark Day for the Court (Jan. 21, 2010), *available at* http://democracy21.org.

will buy elections,[2] and that the decision is an example of conservative judicial activism[3] and the worst decision since *Dred Scott*.[4]

All of these claims are vastly overblown. Not only is *Citizens United* not an activist decision, it is based on fundamental First Amendment principles on which courts have relied for decades. Twenty-six states allow corporations to spend money on independent speech during elections. Corporations have not managed to buy elections in these states, nor have these states become hotbeds of corruption. In short, in assessing the impact of *Citizens United* we should follow the Court's own wise counsel and not let rhetoric obscure reality.

Toward that end, I offer the following responses to some of the most prominent myths about *Citizens United*.

Myth 1: *Citizens United* is an Activist Decision That Reverses 100 Years Of Precedent

Citizens United is based on enduring First Amendment principles, nearly all of which were announced or reaffirmed in *Buckley v. Valeo* over thirty years ago. Then, as now, the Court recognized that political speech is at the core of the First Amendment's protections.[5] Then, as now, the Court rejected the notion that government may attempt to equalize all voices, either

[2] "The bottom line is, the Supreme Court has just predetermined the winners of next November's election. It won't be the Republican or the Democrats and it won't be the American people; it will be Corporate America." *GOP Doesn't Run 2010 Census, But Hopes to Count Your Money*, The Post Standard (Syracuse, N.Y.), Jan. 24, 2010, at A9 (quoting Sen. Charles E. Schumer (D–N.Y.)).

[3] "The Supreme Court's 5-4 decision holding that corporations and unions can spend unlimited amounts of money in election campaigns is a stunning example of judicial activism by its five most conservative justices." Erwin Chemerinsky, Dean, University of California, Irvine School of Law, Op-Ed, Conservatives embrace judicial activism in campaign finance ruling, L.A. Times, Jan. 22, 2010, *available at* http://articles.latimes.com/2010/jan/22/opinion/la-oe-chemerinsky22-2010jan22.

[4] "This is the most irresponsible decision by the Supreme Court since the *Dred Scott* decision over a hundred years ago." Rep. Alan Grayson (D–FL), *Countdown with Keith Olbermann* (MSNBC television broadcast Jan. 21, 2010), *available at* http://www.msnbc.msn.com/id/3036677/ns/msnbc_tv-countdown_with_keith_olbermann#34984984.

[5] *Citizens United v. FEC*, No. 08-205, slip op. at 33 (Jan. 21, 2010) ("Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'")(quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

directly, by silencing some voices to make room for others, or indirectly, by restricting the funds that may be devoted to speech.[6]

Indeed, the roots of these principles date back to the founding era. James Madison described the right to free speech as "the right of freely examining public characters and measures . . . which has ever been justly deemed, the only effectual guardian of ever other right."[7] Echoing this view, the Court stated in *Citizens United* that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[8]

The Court recognized, as did the Founders, that special interests—or "factions" in the Founders' words—might try to influence the course of government. But for the Court, as for the Founders, limiting freedom of speech would be like eliminating air to prevent fire.[9] "Factions will necessarily form in our Republic, but the remedy of 'destroying the liberty' of some factions is 'worse than the disease.' . . . Factions should be checked by permitting them all to speak . . . and by entrusting the people to judge what is true and what is false."[10]

To sum up the point, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[11]

Critics of *Citizens United* have said that it was "activism" for the Court to hold that corporations receive the benefit of the First Amendment protections. But, as the Court noted, it has protected freedom of speech for corporations for decades.[12] While it is true that bans on

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[6] *Citizens United*, slip op. at 34 ("The First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).
[7] James Madison, Virginia Resolutions Against the Alien and Sedition Acts, (Dec. 21, 1798), reprinted in JAMES MADISON WRITINGS 590 (Jack N. Rakove ed., 1999).
[8] *Citizens United*, slip op. at 23; *see also id.* ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."); *id.* at 24 ("The First Amendment protects speech and speaker, and the ideas that flow from each.").
[9] *Id.* at 39 (quoting THE FEDERALIST No. 10, at 130 (J. Madison) (B.Wright ed. 1961)).
[10] *Citizens United*, slip op. at 39.
[11] *Id*. at 33.
[12] *Id* at 25-26.

corporate contributions to candidates have been in place for nearly a century, *Citizens United* involved a ban on corporate *independent expenditures*. Congress did not ban corporate independent expenditures until 1947.[13] President Truman vetoed the ban, in part because he saw it as a "dangerous intrusion on free speech," [14] but Congress overrode the veto.

It was not until 1990, in *Austin v. Michigan Chamber of Commerce*, that the Supreme Court squarely addressed the ban on corporate independent expenditures in candidate elections.[15] Although the Court had previously ruled in *First National Bank of Boston v. Bellotti* that a state could not prevent a corporation from spending money on independent advocacy during ballot-issue elections,[16] in *Austin* the Court reversed course and upheld the ban by a narrow 5-4 vote, inventing a new rationale for limiting speech—the alleged "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[17] This "anti-distortion" rationale had never been discussed before and was inconsistent with *Buckley*'s holding that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[18]

Thus, *Austin* was the outlier, and in overturning it and the portion of *McConnell v. FEC* that relied on it, the Supreme Court was returning to core First Amendment principles. As the Court itself noted in *Citizens United*, deference to Congress cannot extend to laws that violate the

[13] Section 314, 61 Stat. 159 (June 23, 1947).
[14] Message from the President of the United States at 9, H.R. Doc. No. 80-334 (1947).
[15] Prior to 1990, the closest the courts came to addressing the ban on corporate independent expenditures was in *United States v. International Union Auto Workers*, 352 U.S. 567 (1957). But in that case, as Professor Allison Hayward notes, the Court "declined to reach the issue of whether. . . prosecution would violate the union's constitutional rights." Revisiting The Fable Of Reform, 45 Harv. J. on Legis. 421, 463 (2008).
[16] 435 U.S. 765 (1978).
[17] 494 U.S. 652, 660 (1990).
[18] 424 U.S. 1, 49 (1976).

First Amendment.[19] Nor is this the first time the Court has overruled prior precedent in modern times. In *Brown v. Board of Education*,[20] for instance, the Court rejected the idea of "separate but equal" it had adopted in *Plessy v. Ferguson*.[21] In *West Virginia State Board of Education v. Barnette*, the Court held that public schools could not compel students to salute the American Flag and recite the Pledge of Allegiance, overruling a decision handed down a mere three years earlier.[22] And, in recent years, the Supreme Court in *Lawrence v. Texas*[23] refused to follow its earlier decision in *Bowers v. Hardwick*[24] despite that decision's seventeen-year pedigree.

Myth 2: Under *Citizens United*, Corporations Will Buy Elections

Corporations can no more buy elections with political advertising than they can buy market share with commercial advertising. If they could, we would all be driving American cars and drinking New Coke; Michael Huffington would have long since been elected Senator and Ross Perot would be President. While it is certainly true that money is necessary to win a campaign, that simply does not translate into victory for the biggest spender.[25] The examples of failed political campaigns that spend millions are as numerous as failed advertising blitzes in the commercial realm.

In fact, the evidence that even direct contributions to candidates cause corruption of the political process is weak at best. Evidence from the political science literature suggests that campaign contributions made directly to candidates have very little to no discernable impact on

[19] *Citizens United*, slip op. at 45; *see also id.* at 12 ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications."); *id.* at 4 (Roberts, C.J., concurring). ("It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.").
[20] 347 U.S. 483 (1952).
[21] 163 U.S. 537 (1896).
[22] 319 U.S. 624 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)).
[23] 539 U.S. 558 (2003).
[24] 478 U.S. 186 (1986).
[25] Gary C. Jacobson, *The Effect of the AFL-CIO's "Voter Education" Campaigns on the 1996 House Elections*, 61 J. OF POL. 185, 186 (1999) ("We also have abundant evidence that money, by itself, does not defeat incumbents. Only in combination with potent issues and high-quality challengers do even the best financed campaigns have a decent chance of succeeding.").

public policy, let alone any undue or corrupt influence.[26] Furthermore, in the only empirical study of which I am aware that examines the effects on the appearance of corruption of limits on direct contributions to candidates, the authors found that contribution limits do not improve citizens' view of government.[27] To date, there have been no scientific studies that attempt to explore the relationship between independent expenditures—by corporations or anyone else—and political corruption. However, 26 states allow corporations to make independent expenditures, but they have not become hotbeds of corruption nor have corporations managed to buy their elections.[28]

But worse than the factual errors implicit in this claim is the negative view of American voters that it betrays. According to this view, voters are incapable of thinking for themselves. Instead, they passively accept whatever thoughts and views they happen to see in slick advertising campaigns. But this is contrary to the central assumption of the First Amendment. As the Court put it in *Citizens United* "[t]he First Amendment confirms the freedom to think for ourselves."[29] That freedom means that citizens get to decide whom to listen to and citizens get to decide how and when to speak, what message to convey, and what means to use to convey it.

Corporate spending does not buy elections; it buys speech. That speech seeks to convince voters to vote one way or another. For those who do not agree with that speech, the First Amendment again provides the answer: "[I]t is our law and our tradition that more speech, not less, is the governing rule."[30]

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[26] Stephen Ansolabehere, Rebecca Lessem & James Snyder, *Why is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003).
[27] David Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23 (2006).
[28] Supplemental Brief of Amicus Curiae Chamber of Commerce of The United States of America in Support of Appellant at 8-12, *Citizens United v. FEC*, No. 08-205 (Jan. 21, 2010).
[29] Slip op. at 40.
[30] *Citizens United*, slip op. at 45.

Corporations do not speak with one voice any more than individuals do. There are nearly six million corporations in this nation, most of them quite small. Allowing them to speak and to provide their unique views and information during elections is not an aberration that will lead to corruption; it is precisely what the First Amendment was designed to do.

Myth 3: Corporations, Unlike People, Have No Free Speech Rights

It is true that corporations are not people. But they are made up of people, like every other association—from partnerships, to marriages, to neighborhood groups, to nonprofits, and all the way up to the New York Times. The First Amendment protects the right of association just as it protects the freedom of speech. If individuals have the right to speak, then they have the right to join with others to speak, whether they join with one person or 10,000. The Court in *Citizens United* recognized that corporations must be protected under the First Amendment because corporations are associations of individuals, and because nothing in the First Amendment exempts particular associations simply because they adopt the corporate form.[31] In that respect, *Citizens United* is not a corporate speech case; it is a case that recognizes the importance of the right of association along with the right to freedom of speech.

It is important to note that the federal campaign-finance laws treat all groups in essentially the same manner. Any group of two or more persons that raises or spends more than $1,000 and has the primary purpose of influencing elections is a "political committee" and is subject to the same restrictions as a corporation.[32] It must register as a political committee and comply with the same burdensome regulations that apply to corporate PACs, including limitations on the source and amounts of funds it may devote to speech.[33] The FEC and campaign-finance reform groups have taken the same approach to unincorporated groups as they

[31] *Id.* at 25.
[32] *See* 2 U.S.C. § 431(4).
[33] *See Citizens United*, slip op. at 21-23.

have to corporations, and have argued that they must register as PACs and comply with the same onerous restrictions that apply to PACs in order to speak.[34] In short, the notion that supporters of campaign finance laws are particularly concerned about corporations is false. They want to prevent *all* groups from spending unregulated funds on independent speech during elections.

Critics of *Citizens United* respond that the laws did not prohibit corporations from speaking, they simply required them to speak through political committees. But this ignores the very real burdens of political committee status. As the Supreme Court noted, the FEC has adopted 568 pages of regulations, 1278 pages of explanations and justifications of those regulations, and 1771 advisory opinions since 1975.[35] These rules define and regulate 71 distinct entities and 33 different types of speech.[36] Ninety-one of these rules, spanning over 100 pages of the federal register, apply to political committees.[37] Political committees must register with the FEC, appoint a treasurer, and forward all receipts to the treasurer within days of their receipt. They must keep detailed records of all funds received and all expenditures made, they must file detailed reports to the FEC disclosing all activities on either a monthly or quarterly basis.[38] Those who operate committees out of their homes or offices must determine the value of the space, utilities, and overhead being allocated to the committee and properly account for and disclose that information to the FEC. Even terminating a political committee requires the FEC's permission.

[34] *See* Brief for the Federal Election Commission at 43, *SpeechNow.org v. FEC*, No. 09-5342 (D.C. Cir. Dec. 15, 2009).
[35] *Citizens United*, slip op. at 18.
[36] *Id*.
[37] *See* 11 C.F.R. parts 1-2-106, 110, 113, 116.
[38] *Citizens United*, slip op. at 21-22.

It is no exaggeration to say that the campaign-finance laws rival the tax code in their complexity.[39] Indeed, last week during oral argument in *SpeechNow.org v. FEC*, I had the surreal experience of debating with several judges on the D.C. Circuit about whether the regulations that apply to groups organized under section 527 of the tax code are more burdensome than the regulations that apply to political committees under the campaign-finance laws. Reasonable minds can disagree on that question, but it ought not be debatable that if Americans come to regard speaking out as equivalent to filing their income tax returns, a lot fewer of them will bother trying to speak out at all.

Conclusion

In today's world, speaking effectively to large numbers of people requires large amounts of money and often some sort of organization. Money and associations are not simply important to political speech, they are indispensable to it. While it is probably true that the Founders could not have imagined the immense corporations that exist today, there is probably little about our world that the Founders could have imagined. But that fact should no more define the reach of our voices than it should limit the scope of our knowledge or the technologies we use to expand it. As Chief Justice Roberts said in his concurring opinion in *Citizens United*, "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."[40] And as the Court stated, "the First Amendment protects speech and speaker."[41] That applies whether the speaker is an individual or a group and whether they use a quill pen, a printing press, or the Internet. That the Supreme Court understands that is cause for celebration.

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[39] *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 296 (4th Cir. 2008) ("For the regulator's hand, once loosed, is not easily leashed. The Code of Federal Regulations, or its state equivalent, is no small thing. It is no unfounded fear that one day the regulation of elections may resemble the Internal Revenue Code, and that impossible complexity may take root in the very area where freedom from intrusive governmental oversight should matter most.").
[40] Slip op. at 1 (Roberts, C.J., concurring).
[41] *Id*. at 24.

Thank you.