Before the Wisconsin Senate Labor, Elections & Urban Affairs Committee:

Hearing on campaign finance legislation
SB 540

Tuesday, March16, 2010

Written testimony of:

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Thank you for the opportunity to submit testimony on Senate Bill 540. My name is Laura Renz, and I am the Government Relations and Research Director for the Center for Competitive Politics, headquartered in Alexandria, Virginia. The Center's mission is to educate the public on the role of money in politics and to protect the First Amendment political rights of speech, assembly, and petition.

In the wake of the Supreme Court's recent decision in the *Citizens United* case, a number of legislators in various states and the federal government have been concerned with the potential impact of the decision and the new campaign finance landscape.

But much of this consternation is unnecessary. Before *Citizens United*, 26 states allowed unlimited corporate spending in elections (and two more allowed limited corporate spending), and these states—representing over sixty percent of the nation's population—were not overwhelmed by corporate or union spending in state elections. Moreover, they include the top five states in *Governing* Magazine's ranking of the best governed states (Utah, Virginia, Washington, Delaware and Georgia).

Examining the independent expenditure evidence in these states even more closely, there's no reason to believe that corporate expenditures have posed a corruption problem. For example, the California Fair Political Practices Commission examined the top ten funders of state independent expenditure committees from 2001-2006 and found that little corporate money was involved.[1]

The top ten contributors were two Native American tribes, two individuals, five labor unions and an association of plaintiffs' attorneys. Unions spent $17 million, tribes spent $9.6 million, two individuals with personal connections to candidates spent $9.6 million and consumer lawyers spent $1.7 million. Ordinary business corporations did not even make the list.

Despite any evidence of a current or impending problem, Wisconsin's Senate Bill 540 would impose burdensome and impractical requirements on corporations and cooperatives by requiring shareholder or member consent before independent expenditures can be made. This barrier to speech is likely to raise serious constitutional issues that will be costly and time consuming for the state to defend.

To this point, the Court in its recent ruling in *Citizens United* noted that:

> Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive

[1] California Fair Political Practices Commission, "Independent Expenditures: The Giant Gorilla in Campaign Finance," June 2008; p. 22, Chart #2. California is a state that allows unlimited corporate political expenditures.

> regulations…PACs, furthermore, must exist before they can speak. Given the onerous restrictions, *a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign*.[2] [emphasis added]

It is clear that requiring shareholder votes on independent expenditures imposes a substantial burden and delay on political speech by corporations, making it unlikely that such a requirement will survive legal challenge.

Additionally, at a recent hearing by a subcommittee of the U.S. House of Representatives Financial Services Committee, veteran campaign finance attorney Jan Baran spoke to this point and highlighted the inherent constitutional problems in imposing new shareholder approval requirements for political expenditures, but not other corporate expenditures of the same amount.[3] Baran wrote in his testimony:

> Let's assume a law requires separate shareholder approval of any expenditure by the corporation for political purposes in excess of $10,000. There is no similar requirement to approve other expenses such as a company's decision to embark on a capital expense for a new plant costing millions of dollars be subject to similar approval. Isn't that latter expense potentially of greater material consequence to stockholders than a $10,000 political ad?[4]

Furthermore, such requirements are unnecessary—shareholders always have the option of voting out board members and removing management who engage in independent expenditures contrary to the interests of the company and its owners, or passing shareholder resolutions to prohibit independent expenditures by corporations.

The provision also raises serious equal protection issues, because similar requirements are not imposed on nonprofit organizations or unions. In the majority opinion in *Citizens United*, Justice Kennedy quoted the Court in an earlier decision, stating: "The worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual.'"[5]

This strongly suggests that the courts are unlikely to uphold a law imposing a major burden on only one type of incorporated entity, for-profit firms, while allowing other incorporated entities and unincorporated associations to remain unburdened when it comes to political speech.

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[2] *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).
[3] Opening Statement of Jan Baran, before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, U.S. House of Representatives, 3/11/2010, ,http://www.house.gov/apps/list/hearing/financialsvcs_dem/baran.pdf
[4] Ibid.
[5] *Bellotti*, 435 U. S., at 777 (1978) as quoted in *Citizens United*

The type of shareholder approval required by this legislation also fails to recognize the diversity of shareholders in most businesses, and in doing so, proposes new requirements under the guise of "shareholder protection" that do little to protect the interests of most shareholders.

Testimony submitted in the Congressional hearing referenced earlier speaks to this fact.[6] It notes that "shareholder protection" legislation actually gives greater power to institutional investors, and does not protect "ordinary Americans holding share through retirement funds and 401(k)s."[7]

The testimony goes on to note that this type of legislation is an outlier in corporate governance, since "the structure of American corporate law rests the authority to manage the day-to-day affairs of the company, including decisions of how to invest the company's funds, with the Board of Directors."[8]

It is well within the scope of the legislature's authority to examine how the *Citizens United* ruling may impact their state and its' citizens. However, vested within that authority is an obligation to examine the problem thoroughly, without bias, and with consideration of all legal and practical implications of any suggested change.

Many states have taken this route, and ultimately decided to advance bills that took a moderate approach to changes related to the *Citizens United* ruling.

For example, the Iowa State Legislature originally introduced a bill which included shareholder approval of independent expenditures, but was later revised to include a more practical option for approval of corporate independent expenditures.[9]

This change both respects the parameters of the Court's ruling, and addresses concerns that some state legislators have expressed. There are several narrowly tailored solutions – including disclosure to shareholders and provisions for management's discretion over ads - which can be broached in order to both assuage fears of some and protect the right to free speech.

I would urge Wisconsin state legislators to take a similar approach to this bill and any "fix" legislation, and act cautiously and with respect to the First Amendment protections afforded corporate speech in the recent ruling. I would be happy to provide additional research and commentary as you continue to debate this important issue.

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[6] Testimony of J.W. Verrett, before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services, U.S. House of Representatives, 3/11/2010http://www.house.gov/apps/list/hearing/financialsvcs_dem/verret%27s_testimony_final_edit_-_03-11-10.pdf

[7] Ibid

[8] Ibid

[9] "Legislature should respect free speech," *Des Moines Register*, March 10, 2010, http://www.desmoinesregister.com/article/20100310/OPINION03/3100328/-1/BUSINESS04/Legislature-should-respect-free-speech