October 4, 2010

The Honorable Patrick Leahy
Chairman
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Honorable John Conyers, Jr.
Chairman
United States House of Representatives
Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Russ Feingold
Chairman
Subcommittee on the Constitution
United States Senate Judiciary Committee
506 Hart Senate Office Building
Washington, DC 20510

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution
United States House of Representatives
Judiciary Committee
2334 Rayburn House Office Building
Washington, DC 20515

Re: Citizens United v. FEC

Dear Chairmen Leahy, Conyers, Feingold, and Nadler:

We, the undersigned attorneys and law professors, have previously served the United States, our respective states, or in our law schools in various capacities. While we have all had different practices, interests and clients, we share one thing: we believe the Supreme Court's decision in *Citizens United v. Federal Election Commission* was not only wrongly decided but presents a serious danger to effective self-government of, for and by the American people, a danger which must be addressed.

As former public servants and law professors, we have sworn to uphold and defend the Constitution of the United States of America. We write today because we believe that the Supreme Court's creation of corporate "speech" rights on which the *Citizens United* decision rests is contrary to the First Amendment as we understand it.

The ruling in *Citizens United* not only struck down the federal Bipartisan Campaign Reform Act's restriction on corporate electioneering expenditures, it swept aside decades of Supreme Court law and scores of state laws regulating corporate political expenditures in state elections.

Before *Citizens United*, a long line of Supreme Court cases, backed by two centuries of Constitutional jurisprudence and the basic truth that corporations are not people but creations of state law, had correctly ruled that Congress and the States may regulate corporate political expenditures not because of the type of speech or political goals sought by corporations but because of the very nature of the corporate entity itself.

Corporate political expenditure regulations do not infringe any speech rights of the American people whatsoever. Rather, such regulations reflect the power of the American people to regulate corporations and the rules that govern such entities as the people and our representatives see fit. Justice John Paul Stevens' dissent rightly calls the majority opinion a "radical departure from what has been settled First Amendment law."

The extraordinary response of Americans across the political spectrum to *Citizens United* reflects that this radical and erroneous interpretation of the First Amendment is fundamentally wrong as a matter of constitutional law, history, and our republican principles of self-government. The rejection of the majority's action in *Citizens United* cuts across all partisan lines: 81% of Independents, 76% of Republicans, and 85% of Democrats oppose the decision, and 72% of the people support reinstating the very limits that the Court struck down.[1]

The consequences of the Court's departure from settled law are grave. The data suggest the likely harm to our democracy if the American people do not — or, according to the Court, cannot — control corporate money in politics:

- According to the 2009 Statistical Abstract of the United States, post-tax corporate profits in 2005 were almost $1 **trillion**.
- During the 2008 election cycle, Fortune 100 companies — the 100 largest corporations — alone had combined revenues of $13.1 **trillion** and **profits of $605 billion**.
- In contrast, during the same 2008 cycle, all political parties combined spent $1.5 billion and all of the federal PACs or political action committees, spent $1.2 billion.

If we take only the profit of the 100 largest corporations, those corporations would have needed **less than 2 percent of their $605 billion in profit in 2008** to make political expenditures that would have **doubled** the combined 2008 campaign expenditures by all of the federal election campaigns (presidential and congressional), the political parties and the federal PACs.

The consequences go well beyond federal elections. In Montana, for example, before *Citizens United*, the average state legislator's campaign spent $17,000 to win election to the state legislature.[2] On March 8, 2010, two corporations, citing *Citizens United*, sued the State of Montana to strike down a 1912 law providing that "A corporation may not make a contribution or expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party." It is unlikely that state elections in Montana and elsewhere will remain accessible to most

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[1] Washington Post-ABC News poll, February 2010. In a June 2010 poll about *Citizens United*, 82% of respondents worried that Congress "will not go far enough to keep corporations from having too much influence," and 77% believe that Congress should promote a Constitutional amendment to address the problem.

[2] Testimony of Montana Attorney General Steve Bullock United States Senate Committee on Rules and Administration February 2, 2010

people, or that people will not be alienated by the transformation of state politics into contests among corporate-funded campaigns from competing corporate interests.

Citizens United also will impair the impartiality, and the perceived impartiality, of justice in America. Twenty-one states have elected Supreme Court justices, and thirty-nine states elect at least some appellate or major trial court judges. Even before *Citizens United*, as former Justice Sandra Day O'Connor has said, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."[3] Now corporations will have even greater ability to bring their financial resources to bear on those elections, further undermining the independence of the state judiciaries.

We appreciate that you each have recognized the urgency of addressing the erroneous *Citizens United* decision and that each of your committees has held hearings concerning the matter. We urge that you continue to explore all potential remedies, including proposals for a 28th Amendment to the Constitution to protect our democracy and self-government of the people. We do not take lightly proposals to amend the Constitution, and we recognize, as did James Madison, that we should do so only on "great and extraordinary occasions." We believe this may be one such occasion.

Where such occasions arise, the American people have always used the amendment process to perfect our democracy. Indeed, most of the seventeen amendments adopted since the original Bill of Rights have corrected what the American people understood were obstacles to the equal right of all people to participate in self-government on equal terms. The 13th Amendment ended slavery, the 14th guaranteed liberty, due process and equal protection of all, and the 15th guaranteed the right to vote could not be abridged on account of race. With the 17th Amendment (1913), the people took back the right to elect Senators, who previously were elected by the state legislatures. With the 19th Amendment, the people guaranteed the right of women to vote, overruling the Supreme Court's view that equal protection of all persons under the 14th amendment did not provide equal voting rights for women. The 24th Amendment was adopted in 1964 to eliminate the poll tax, which was used to block poor people, often African Americans, from voting. The 26th Amendment in 1971 ensured that the right to vote included men and women age 18 and older.

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[3] See www.justiceatstake.org. State Supreme Court candidates raised $200.4 million from 1999-2008, compared with an estimated $85.4 million in 1989-1998. Source: National Institute on Money in State Politics. In *Caperton v. Massey,* 556 U.S. ____ (2009) the Supreme Court held that the due process clause required the recusal of a justice who was elected with the help of $3 million in campaign expenditures from a West Virginia coal executive whose corporation was in the midst of appealing a $50 million jury award against his company. The justice, once elected, cast the deciding vote to overturn the suit.

We look forward to joining you and the American people in this critical debate, and to working together to correct the Supreme Court's grave error in *Citizens United v. Federal Election Commission*.

Very truly yours,

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