



Before the West Virginia Senate Judiciary Committee

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Written testimony of:

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I am submitting testimony on behalf of my organization, the Center for Competitive Politics, detailing the serious concerns we have about the West Virginia State Legislature enacting House Bill 4646 and severely limiting West Virginians' right to free speech.

CCP is a non-partisan, non-profit organization based in Alexandria, Virginia, that is focused on promoting and protecting the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former member and chairman of the Federal Election Commission.

In the wake of the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*, there has been significant speculation as to how the new campaign finance landscape will affect future campaigns and a subsequent rush to enact legislation to "fix" the supposed problem.

However, a review of the current state of affairs, in which 24 states allow direct corporate contributions (which the *Citizens United* decision did not permit), does not demonstrate that corporate political speech damaged democracy, as often claimed by the so called "reform" community. Most state's campaigns, including West Virginia, still allow a vast and varied range of voices to speak on important political issues.

The *Citizens United* decision allows corporations and unions to spend money from their general treasury on independent expenditures in support or opposition of a candidate. By their nature, independent expenditures are made without coordination with a candidate's campaign, so much of the rationale behind campaign finance regulation, which is to prevent corruption or its appearance, does not apply in the case of independent expenditures.

Rather, independent expenditures should be viewed as an important protected First Amendment right of an association of individuals (whether a corporation, union or nonprofit advocacy group), to speak out on important political issues and in support or opposition of their elected officials.

HB 4646 would, directly contrary to the recent Supreme Court decision, unfairly penalize corporations with such overly burdensome restrictions and requirements that the ultimate effect would be an unconstitutional chilling of speech.

For example, requiring a majority of shareholder approval for election spending over \$10,000 runs into several practical implementation issues, which render it a highly questionable and likely unconstitutional provision.

For publicly traded companies, it would take a significant amount of time to conduct a vote of their shareholders. The Court in *Citizens United* apparently precluded such long delays imposed by this type of regulation, noting 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 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.¹

HB 4646 would pose similarly burdensome restrictions of corporate independent speech by requiring shareholder votes. It is unlikely that a court would look more favorably upon these restrictions than they did in the *Citizens United* decision.

This legislation also fails to include unions in the new complex web of restrictions, and this omission presents an equal protection issue. Speaking to this issue, an additional clause in the *Citizens United* decision quotes earlier jurisprudence and states that “the worth of speech ‘does not depend upon the identity of its source, whether corporation, association, union, or individual.’”²

Equally as troublesome, HB 4646 would severely restrict the First Amendment rights of in-state corporations while out-of-state corporations would still be able to fully enjoy their free speech rights while speaking out on issues of importance to West Virginians.

It is clear that the intent of HB 4646 is not to empower citizens, in any type of association, to speak out in campaigns, but rather to punish and criminalize certain types of speech by disfavored speakers: corporations.

Restricting free speech rights is counterproductive to any type of citizen involvement in campaigns, but particularly damaging is valuing certain types of speech, and certain preferred speakers, over others. These unconstitutional provisions would certainly be detrimental to West Virginians and looked upon unfavorably by the courts.

Finally, HB 4646 would hold the head of a corporation “personally liable” for political spending that does not clear the hurdle of shareholder approval. This provision is particularly troublesome in that it goes beyond what is consistently held acceptable for

¹ *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

² *First National Bank of Boston v. Bellotti*, 435 U.S., at 777 (1978), as quoted in *Citizens United*

penalizing speech in any form. The degree to which this legislation criminalizes speech surpasses what has been seen and suggests a complete disregard for First Amendment rights, and also illuminates the true intent of this bill, which is to regulate and punish speech to the extent that individuals in any type of association no longer seek to engage in it.

In no other realm of state law is the head of a corporation held liable for other expenses by the corporation that are not expressly approved by shareholders, such as charitable giving or research grants. Again, this provision makes it impossible to ignore that the intent of this bill is not just to sidestep First Amendment rights, but an overall attempt to silence political speech.

If the legislature enacts HB 4646, it is inviting a lengthy legal battle as courts have not looked favorably upon excessive restriction in the campaign finance arena that does not demonstrate a compelling state interest, such as preventing corruption.

At issue here are independent expenditures, at their nature and as legally defined, made independently of candidates. Independent expenditures as an expression of free speech and rather than rush to enact misguided “fix” legislation, the legislature should instead view independent expenditures for what they are— an effective way for individuals to speak out on important political issues facing the state and its citizens.

As the legislature continues to debate this issue, I would be happy to provide additional commentary or research on these essential First Amendment issues.