Before the Michigan House Committee on Ethics and Elections

Hearing on Campaign Finance Legislation

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Written testimony of:

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Thank you for the opportunity to submit testimony on these important campaign finance issues. I am submitting testimony on behalf of the Center for Competitive Politics, based 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, petition, and assembly.

INTRODUCTION

The breadth of the legislation before the committee today represents a misguided approach to campaign finance law and a direct challenge to the U.S. Supreme Court's recent ruling in *Citizens United v. Federal Election Commission*. The desire to appease public disapproval of government at almost every level continues to lead legislators to introduce legislation that threatens to curtail important First Amendment rights, and the legislation being considered today represents nothing less than an all-out assault on the right of citizens to collectively speak out in politics.

This assault is not only misguided, but the experience of other states shows little need for concern about allowing corporations, unions, and advocacy groups from speaking freely. Prior to *Citizens United*, 24 states permitted corporations, unions, and advocacy groups to engage in independent expenditures. Those states did not experience a flood of corporate and union money drowning out individual voices and they do not have legislatures composed of corporate-sponsored elected officials. The laws in those states simply allowed a greater and more open debate on important issues effecting voters, and believed voters could hear a variety of points of view and decide for themselves who the best candidate was.

This testimony will address each piece of legislation on the agenda today separately and analyze any possible detrimental effects each bill would have on the First Amendment rights of Michigan voters.

HB 6182-(Lipton)-Campaign finance; other; independent expenditures; require compliance with campaign finance act.

This particular bill would simply update existing Michigan campaign finance laws to account for the *Citizens United* decision, and ensure that corporations, unions, and other entities are treated similarly for the purposes of the law. This is an appropriate response to the *Citizens United* decision.

HB 6183-(Scripps)-Campaign finance; other; independent expenditures by corporations; require certain reports and disclaimers.

This bill would impose substantial burdens on corporations and other forms of business organizations in an effort to deny them their First Amendment rights as recognized in *Citizens United*. As such, there is little chance of it surviving in court.

The requirement that corporations engaging in independent expenditures reveal their 5 largest "contributors to the expenditure" could pose serious constitutional issues if it requires disclosure not only of contributors who give specifically to fund a particular expenditure, but also of donors who give to the general treasury of the organization without specifying support of independent expenditures. If applied in this manner, it would quite likely contradict the U.S. Supreme Court's holding in *NAACP v. Alabama* that found a right to private association.[1]

Similarly, the requirement that an organization file with the Secretary of State five days before engaging in political speech likely constitutes prior restraint of speech. It represents an affront to the right of groups to exercise their free speech rights unencumbered by onerous government restrictions. This type of prior restraint provisions as applied to political speech has been addressed and struck down repeatedly in constitutional jurisprudence.

HB 6183 would also impose disclaimer requirements that would limit the ability of a sponsoring organization to productively utilize the purchased ad time. By requiring a written disclaimer on all electronic communications, including televisions and internet ads, that must be "readable the entire broadcast of the advertisement," the legislation effectively dictates the content of an ad to an unreasonable degree.

Additionally, there is no additional informational interest satisfied by another requirement in the legislation, that a photo of the president of the sponsoring organization be included. There is no informational interest gained by the public in knowing what the top official of a company or organization looks like, except for those who base their decisions on the perceived race, gender, or age of the head of an organization.

Finally, the fact that these requirements apply to corporations and joint-stock companies, but not labor organizations or other unincorporated entities, means that one type of speaker is being singled out for enhanced regulation and intrusion while others who engage in identical actions are left unburdened. This also raises serious constitutional issues, as the Court said in *Citizens United* that the government could not disfavor speech from certain sources.

To that point, Justice Kennedy stated: "We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[2]

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[1] *NAACP v. Alabama*, 357 U.S. 449 (1958).
[2] *Citizens United v. Federal Election Commission*, 558 U.S. 57 (2010).

HB 6184-(Miller)-Campaign finance; contributions and expenditures; independent expenditures by corporations; require disclosure to and approval by shareholders.
The requirements of this bill are clearly a measure designed to make political speech impossible for corporations and other forms of business.

Forcing corporations to notify shareholders 30 days prior to the airing of an independent expenditure constitutes an even greater prior restraint than HB 6183, which only forces companies and organizations to wait 5 days before speaking. Furthermore, when shares are continuously traded on exchanges around the world, the task of regularly identifying the shareholders of a corporation in order to contact them regarding political spending is simply not feasible.

Aside from constituting prior restraint, the 30-day delay also ensures that by the time a company has fulfilled the requirement, in many cases the opportunity to effectively speak will have passed.

Justice Kennedy addressed a similar issue in the *Citizens United* opinion relating to the burdensome requirements of political action committees as a deterrent to speech, noting that "...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."[3]

Finally, HB 6185 imposes this burden solely on incorporated entities, not unions, again raising equal protection issues and demonstrating that the intent of this bill is to silence only certain voices while leaving other, presumably more welcome organizations free to speak. It is unlikely that this provision would survive a legal challenge.

HB 6185-(Bledsoe)-Campaign finance; contributions and expenditures; certain independent expenditures by corporations; prohibit.
The extensive bans outlined in HB 6185 unfairly and arbitrarily punish a large number of constituencies simply because they are government contractors, engaging in entirely legal commercial transactions with the State. It discourages political participation by a significant number of entities affected by public policy with no justification.

The Supreme Court held in *Citizens United* that indirect political expenditures, or independent expenditures, unlike direct contributions to candidates, cannot pose a *quid pro quo* risk of corruption or its appearance. Such *quid pro quo* corruption is in fact the only justification the Court has ever accepted for government limits of political speech. By seeking to prohibit

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[3] *Citizens United,* 558 U.S. at 50.

independent political speech that the Court has ruled cannot be corrupting, HB 6185 is quite likely unconstitutional.

Additionally, the inclusion in the legislation of natural gas, utility companies and insurers punishes businesses regardless of whether or not they choose to bid on or enter into a contract or grant with the government, presumably simply because they are heavily regulated entities. This type of arbitrary singling out of industries shows a blatant disregard for the First Amendment and is almost certain to be struck down in court.

HB 6186-(Haase)-Campaign finance; contributions and expenditures; contributions by certain foreign corporations; prohibit.
HB 6186 would go well beyond existing federal law banning any foreign influence over political spending in U.S. federal, state, or local elections. It is also entirely unworkable, and again seems like an effort to prohibit a large number of disfavored entities from speaking while permitting similarly situated entities to engage in independent expenditures.

The prohibition on speaking for businesses with even one foreign shareholder out of millions is clearly designed to stifle the speech of businesses, who have no way on any given day of knowing the nationality of their shareholders if their shares are traded on exchanges.

And once more, because this proposal only applies to corporations and joint stock companies—and not unions, which often have foreign members and even directors—the bill likewise impermissibly distinguishes between the two entities, an unconstitutional measure according to the *Citizens United* decision.

HB 6187-(Tlaib)-Campaign finance; violations; improper independent expenditures by a corporation; hold officers and shareholders liable in certain circumstances.
On top of the outright prohibitions and impossible burdens included in the other bills of this package, HB 6187 seeks to threaten business entities with serious financial consequences should they in any way fall afoul of an already-complex system of campaign finance regulations, even unintentionally. Such intimidation is simply designed to prevent businesses from speaking, while again leaving unions free of similar penalties should they likewise violate any of the laws.

HB 6188-(Byrnes)-Campaign finance; contributions and expenditures; independent expenditure provisions in the campaign finance act; update.
HB 6188 provides for corporations, joint stock companies, domestic dependent sovereigns, and labor organizations to make unlimited independent expenditures in support of or opposition to a ballot question—an unnecessary provision as this right is already granted in *First National Bank of Boston v. Bellotti*.[4] The act also considers the above named organizations ballot question

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[4] *First National Bank of Boston v. Bellotti*, 435 U.S.765 (1978).

committees when making expenditures for this purpose, which is in direct defiance of the major purpose requirement in *Buckley v. Valeo*, since these organizations have only made an independent expenditure regarding a ballot question and have not such advocacy their primary function.[5]

The Supreme Court has routinely struck down statutes which attempt to do indirectly what the government is prohibited from doing directly. House Bills 6182-6188 almost certainly meet this criterion.

Conclusion

This package of bills is almost entirely unnecessary, as there is little reason to believe that allowing corporations, unions, advocacy groups, and others to freely speak out in politics poses any sort of threat Michigan's voters, who must ultimately decide whether to accept or reject the multitude of voices they will hear.

In addition to being unnecessary, however, these legislative proposals face little chance of survival in court, and seem explicitly designed to deter the business community from speaking while permitting unions to speak freely. Such an unconscionable assault on the First Amendment in pursuit of partisan and ideological gains should be rejected.

Thank you again for allowing me to submit testimony. I am happy to respond to any questions or requests for further information that the committee may have; I may be reached at lrenz@campaignfreedom.org or (703) 894-6822.

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[5] *Buckley v. Valeo*, 424 U.S. at 79.