

United States Senate Committee on the Judiciary

June 3, 2014

Written Testimony of John C. Bonifaz, Co-Founder and President,
Free Speech For People, for the Committee hearing:

*Examining a Constitutional Amendment
to Restore Democracy to the American People*

Chairman Leahy, Ranking Member Grassley, and Members of the Senate Judiciary Committee:

Thank you for holding this hearing on one of the most important subjects facing our Republic today. I appreciate the opportunity to submit this written testimony on behalf of Free Speech For People (www.freespeechforpeople.org).

Free Speech For People, launched on the day of the US Supreme Court's ruling in *Citizens United v. FEC*, works to challenge the misuse of corporate power and restore republican democracy to the people. We help to catalyze and lead the movement to amend the U.S. Constitution to overturn the *Citizens United v. FEC*, *McCutcheon v. FEC*, and *Buckley v. Valeo* rulings and the legal doctrines underlying those rulings, and we advance a new jurisprudence on money in politics and American self-government.

American democracy is in crisis. Big money interests dominate our elections and our government, drowning out the voices of ordinary citizens. Five justices of the US Supreme Court have hijacked the First Amendment for the wealthy few, distorting the very essence of the First Amendment's guarantee of an open and unfettered exchange of ideas and undermining the fundamental promise of republican self-government and political equality for all.

The American people recognize this and, in just four years since the *Citizens United* ruling, millions of citizens across the country have propelled a growing grassroots movement for a constitutional amendment to overturn the Supreme Court and to defend our democracy. Sixteen states have already gone on record calling for such an amendment, including the states of Montana and Colorado where 75% of the voters in the 2012 election supported ballot initiatives demanding an amendment. More than 500 cities and towns and more than 160 Members of Congress are also already on record.

This hearing today marks a critical step forward toward the enactment of a 28th Amendment to our Constitution which would end the big money dominance of our politics and restore that basic vision of our Republic: government of, by, and for the people. Free Speech For People strongly supports the constitutional amendment bill, S.J. Res. 19, and urges this Committee to pass it and send it to the full Senate for a vote.

In this written testimony, I will address four central points as to why the Supreme Court's rulings in *Buckley*, *Citizens United*, and *McCutcheon* are wrong and why we must fight to overturn them in the name of the First Amendment and our democracy.

- I. **Money does not equal speech.** In its 1976 ruling in *Buckley v. Valeo*,¹ the Supreme Court equated money with speech and struck down campaign spending limits passed in the wake of the Watergate scandal. The ruling set us on our current course today of unlimited campaign spending where our elections are sold to the highest bidders. But, as former Supreme Court Justice John Paul Stevens has said: "Money is property; it is not speech."² Money, in fact, amplifies speech, and for the very wealthy in our society, money enables them to be heard at the loudest decibels at the expense of the rest of us. The campaign spending limits at issue in *Buckley* were reasonable regulations on the manner of speech, not on speech itself. By equating money with speech, the *Buckley* Court sanctioned a system which allows the very wealthy – and now corporations – to distort our political process and the very meaning of the First Amendment.

- II. **No one has a First Amendment right to drown out other people's speech.** The Supreme Court stated this clearly in its 1949 case in *Kovacs v. Cooper*.³ In *Kovacs*, a union in the city of Trenton was blaring its message with a soundtrack going down every street. In response, the city passed an ordinance requiring that sound trucks could only go down every third street. The Supreme Court upheld the ordinance as a reasonable regulation on the manner of speech. It found that public streets served other public purposes that needed to be protected and, as Justice Jackson wrote in his concurrence, "freedom of speech for Kovacs does not...include freedom to use sound amplifiers to drown out the natural speech of others."⁴ The DC Circuit Court of Appeals in the *Buckley* case recognized this very point in finding the campaign spending limits to be constitutional: "It would be strange indeed," the appellate court said, "if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited."⁵ Campaign spending limits ensure that big money interests may not drown out the voices of everyone else in our political process.

¹ *Buckley v. Valeo*, 424 U.S. 1 (1976).

² *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

³ *Kovacs v. Cooper*, 336 U.S. 77 (1949).

⁴ *Id.* at 97 (Jackson, J., concurring).

⁵ *Buckley v. Valeo*, 519 F. 2d 821, 841 (D.C. Cir. 1975), affirmed in part and reversed in part, 424 U.S. 1 (1976).

III. **Today’s campaign finance system violates the equal protection rights of nonwealthy voters and candidates.** The Supreme Court has long held that wealth cannot be a determinant factor in our elections. In 1966, in *Harper v. Virginia Board of Elections*,⁶ the Court struck down the poll tax as unconstitutional on equal protection grounds, and in 1972, in *Bullock v. Carter*,⁷ it struck down high candidate filing fees on that same basis. The Supreme Court also made clear, in the exclusionary white primary cases, that a process which has become a critical part of the machinery for getting elected must be open to all.⁸ Today’s campaign finance system operates as an exclusionary wealth primary in violation of the Equal Protection Clause. Voters and candidates lacking access to wealth are effectively barred from the wealth primary. And, this wealth primary has become a critical part of the machinery for getting elected. Almost invariably, those candidates who win the wealth primary – who outraise and outspend their opponents – go on to win election. A system that pre-selects candidates based on their access to wealth is contrary to equal protection in the political process and offensive to the basic principle of one person, one vote.⁹ Writing for the Court in *Bullock* in striking down high candidate filing fees in the State of Texas, Chief Justice Burger said: “[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.”¹⁰ We would ignore reality today were we not to recognize that this campaign finance system falls with unequal weight on voters, as well as candidates, according to their economic status.

IV. **Corporations are not people.** In *Citizens United*, the Court equated corporations with people and swept away a century of precedent barring corporate money in our elections. But, corporations are not, as some have argued, merely associations of people. Such an argument would not pass a basic corporate law exam in law school. Corporations are artificial creatures of the state. Unlike a voluntary unincorporated association of people, corporations have state-based advantages that real, live human beings do not have. Limited liability. Perpetual life. The ability to aggregate wealth and distribute wealth. And, for those very reasons, the Framers understood that they were not to be treated as people under our Constitution. James Madison said corporations are “a necessary evil” subject to “proper limitations and guards.”¹¹ Thomas Jefferson hoped to “crush in its birth the aristocracy of our monied

⁶ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

⁷ *Bullock v. Carter*, 405 U.S. 134 (1972).

⁸ *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

⁹ See generally Jamin Raskin and John Bonifaz, “Equal Protection and the Wealth Primary,” *Yale Law & Policy Review*, Vol. 11: 273-332 (1993).

¹⁰ *Bullock*, 405 U.S. at 144.

¹¹ James Madison, “To J.K. Paulding,” March 10, 1827, in Gaillard Hunt, ed., *The Writings of James Madison* (New York: Putnam, 1900), Vol. 9.

corporations...”¹² Yet now, as a result of *Citizens United*, five Justices of the Court have unleashed unlimited corporate and union dollars into our elections, making a dangerously corrupting system exponentially worse and extending further the fabrication of corporate claims of constitutional rights. Under our Constitution and under our Republic, we the people shall govern over corporations, not the other way around.¹³

In the face of this crisis, we must now use our power under Article V of the Constitution to enact a constitutional amendment to overturn the Supreme Court and to defend our democracy and our Republic. We have done this before in our nation’s history. Twenty-seven times before. Seven of those times to overturn egregious Supreme Court rulings. We can and we must do it again.

And, we will. For as dangerous as this moment is for our democracy, it also presents a unique and historic opportunity to unite around our common vision of America. The country may be divided on many public policy questions of the day, but we are united behind that basic and powerful idea: government of, by, and for the people. That common vision fuels the current movement for a constitutional amendment to reclaim our democracy.

As James Madison wrote in *The Federalist Papers*, No. 57:

*Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.*¹⁴

In the name of James Madison, it is time for a 28th Amendment to the Constitution that lifts up the fundamental promise of our democracy and makes clear that we the people, not the corporations nor the big money interests, rule in America. We urge you to support S.J. Res. 19.

¹² Thomas Jefferson, “To George Logan,” November 12, 1816, in *The Works of Thomas Jefferson* (New York: Putnam, 1904-05), Vol. 12.

¹³ See generally Jeffrey D. Clements, *Corporations Are Not People*, with a foreword by Bill Moyers, (San Francisco: Berrett-Koehler, 2012).

¹⁴ James Madison, *The Federalist*, No. 57.