No. 12-579

IN THE

Supreme Court of the United States

WILLIAM P. DANIELCZYK, JR. AND EUGENE R. BIAGI,
Petitioners,
v.
UNITED STATES, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF CITIZENS UNITED, FREE SPEECH COALITION, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, U.S. JUSTICE FOUNDATION, DOWNSIZE DC FOUNDATION, DOWNSIZEDC.ORG, GUN OWNERS FOUNDATION, GUN OWNERS OF AMERICA, INC., INSTITUTE ON THE CONSTITUTION, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

GARY G. KREEP
U.S. JUSTICE FOUNDATION
Ramona, CA 92065
Attorney for U.S. Justice Foundation

MARK B. WEINBERG
WEINBERG, JACOBS & TOLANI, LLP
Bethesda, MD 20817
Attorney for FSC and FSDEF

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, Free Speech Coalition, Inc., DownsizeDC.org, and Gun Owners of America, Inc., are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). The U.S. Justice Foundation, Free Speech Defense and Education Fund, Downsize DC Foundation, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). Institute on the Constitution is an educational organization.

Each of these *amici* have filed *amicus curiae* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes. *Amicus* Citizens United was the plaintiff/petitioner in Citizens United v. FEC, 558 U.S. 310 (2010), which Judge James C. Cacheris (in the district court below) believed to be controlling in this case. Most of the other *amici* herein were *amici* in that case. *Amici* DownsizeDC.org (then known as RealCampaignReform.org), Conservative Legal Defense and Education Fund, Gun Owners of America and U.S. Justice Foundation filed an *amicus curiae* brief in FEC v. Beaumont, 539 U.S. 146 (2003), which

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

the panel below believed was controlling in this case.

SUMMARY OF ARGUMENT

The Court's summary reversal of the Montana Supreme Court in American Traditional Partnership v. Bullock confirmed that Citizens United v. FEC had ruled that the First Amendment speech and press guarantees establish a categorical rule against any law abridging corporate political speech. The court of appeals below, like the Montana Supreme Court, mistakenly assumed that in Citizens United, the Government had simply flunked the "strict scrutiny" test — the test normally applied to bans on expenditures supporting or opposing candidates for election to federal office. Having made that erroneous assumption, the court of appeals incorrectly assumed that Citizens United left intact prior precedents whereby this Court applied the test of "intermediate scrutiny" — requiring the Government only to factually demonstrate an important interest — to sustain the ban on direct corporate contributions to a federal election campaign.

In fact, however, Citizens United discarded the strict scrutiny test in favor of a categorical rule that the First Amendment "prohibits the suppression of political speech based upon speaker's identity." That First Amendment principle applies across the board, including to corporate political speech, whether it is in the form of an independent expenditure related to a political campaign, as in Citizens United, or a direct contribution to a candidate's campaign, as in this case. Because the decision of the court below conflicts

directly with Citizens United, the petition should be granted.

The petition should also be granted to address the question whether speech and press rights can be overridden by judicially invented tests, subordinating those constitutional guarantees to overriding governmental interests. This question is an important one that can only be settled by this Court. Citizens United broke from earlier precedents that permitted prohibitions against full participation of corporate entities in the marketplace of ideas. Citizens United also, as previously noted, abandoned the balancing test that had been used to justify the ban on corporate expenditures in election campaigns, overruling Austin v. Michigan Chamber of Commerce. To justify this change of direction, Citizens United reaffirmed the principle that its First Amendment speech and press jurisprudence should be conformed to the constitutional text, devoid of any competing governmental interests.

To be sure, Citizens United also found that the federal ban on corporate expenditures for electioneering communications failed to demonstrate the requisite "compelling governmental interest," but it did not formulate a rule based on what was essentially a factual finding. And for good reason. Recognizing that the Court is "bound by the First Amendment" just like the legislative and executive branches, Citizens United refused to embrace judicially crafted tests divorced from the text and historic context of the speech and press guarantees. In short, as it had already done in the Second

Amendment case of District of Columbia v. Heller, the Court in Citizens United shed the judicially invented "baggage" of "a free standing interest balancing approach." By doing so, it recognized the sovereignty of the people whose will, as stated in the original written United States Constitution, may be overridden only by the Amendment processes spelled out in Article V, and not by judicial fiat based on a governmental interest, compelling or otherwise.

For all these reasons the writ should be granted. It is time to cut completely the Gordian Knot by which constitutional rights have been sacrificed based on atextual judicial balancing tests.

ARGUMENT

I. THE COURT BELOW FAILED TO APPLY THE CATEGORICAL FIRST AMENDMENT RIGHT OF CORPORATE ENTITIES TO ENGAGE IN POLITICAL SPEECH ESTABLISHED BY THE U.S. CONSTITUTION AND REAFFIRMED IN CITIZENS UNITED.

Prior to Citizens United, the Constitutional right of corporations to engage in political speech was subject to a balancing test, whereby the Government was required to demonstrate a sufficiently strong interest to override a corporation's right to full participation in the free marketplace of ideas, as secured by the First Amendment. *See generally* Citizens United v. FEC, 558 U.S. 310, 130 S.Ct. 876, 899-911 (2010). Even when applying the most

stringent "strict scrutiny" test, requiring a "compelling state interest" which was "narrowly tailored," and using the "least restrictive means," this Court permitted governmental restrictions on much corporate political speech, notwithstanding the First Amendment's general categorical ban on discriminatory laws based upon the identity of the speaker. *See id.*, 130 S.Ct. at 898-99. In Citizens United, this Court took the initiative to revisit the electoral exception to the general rule, addressing the question of whether Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), should be overruled, because "Austin had held that political speech may be banned based on the speaker's corporate identity." *See* Citizens United, 130 S.Ct. at 886.[2]

According to the Citizens United Court, Austin, applying the "strict scrutiny" test, found that the State of Michigan had "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *See* Citizens United, 130 S.Ct. at 903. In Citizens United, however, the Court abandoned the "strict scrutiny" test, refusing to apply a balancing test, and asserting that "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment." *Id.* 130 S.Ct. at 906. In essence,

[2] At the request of the Court, the issue of overruling Austin and portions of McConnell v. FEC, 540 U.S. 93 (2003), was set for reargument (174 L.Ed.2d 599 (2009)), and then reargued on September 9, 2009.

the Citizens United Court reasoned that:

> [t]he First Amendment does not permit Congress to make ... categorical distinctions based on the corporate identity of the speaker and the content of the political speech. [*Id.*, 130 S.Ct. at 913.]

By overruling Austin, the Court "return[ed] to the principle":

> 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. [*Id.*]

Under the Citizens United precedent, no court can justify any law that discriminates on the basis of the speaker's identity, no matter how strong the government's countervailing interest — compelling, important, or otherwise.

Earlier this year, the Court made this point crystal clear, summarily reversing the Montana State Supreme Court's decision upholding a state law ban on corporate political speech. *See* American Tradition Partnership, Inc. v. Bullock, __ U.S. _, 132 S.Ct. 2490 (2012). In that case, the Montana State Supreme Court had attempted to cabin Citizens United as a narrow factual ruling where Congress had failed to demonstrate a compelling interest to impose a nationwide ban on corporate electioneering communications with respect to federal election

campaigns. The state court found that Montana's ban on corporate speech rested upon a very different factual base — Montana's special historic experience of corporate corruption of state elections of government officials. *See* Western Tradition Partnership, Inc. v. Attorney General, 363 Mont. 220, 271 P.3d 1, 11-48 (2011). The Montana court explained:

> *Citizens United* was decided under its **facts** or lack of facts.... Therefore, the **factual record** before a court is critical in determining the validity of a governmental provision **restricting speech**.... The Supreme Court held [in Citizens United] that laws that burden political speech are subject to **strict scrutiny**, which requires government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest. The Court ... clearly endorsed an analysis of restrictions on speech, placing the burden upon the government to establish a compelling interest.... Here the government met that burden. [*Id.*, 271 P.3d at 15 (emphasis added).]

In its opinion announcing summary reversal, this Court relied first upon the Constitution's Article VI supremacy clause, thereby verifying that the Citizens United "holding" rested upon a fixed rule of law, not upon a flexible standard of review dependent upon variances of fact. *See* American Tradition, 132 S.Ct. 2490 at 2491. Second, the Court explained that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*,

or fail to meaningfully distinguish that case." *Id.* In a last-ditch effort to preserve the power of the courts to balance government interests against First Amendment rights, Justice Breyer dissented, protesting that:

> this Court's legal conclusion [in Citizens United] should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court concluded that the State had a **compelling interest** in limiting independent expenditures by corporations. [*Id.* (emphasis added).]

By refusing even to entertain arguments based upon the Montana ruling, this Court sent an unequivocal message that Citizens United had not been decided on the ground that there was insufficient factual evidence of a compelling governmental interest. Rather, the Court ruled that, because corporate expenditures do not, per se, constitute "*quid pro quo* corruption," such speech could not be found to be outside the protection of the First Amendment. *See* Citizens United, 132 S.Ct. at 909-11. Indeed, this Court found that "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy," Congress having "created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption." *Id.* at 911.

Having carefully reviewed this portion of Citizens

United, Judge James C. Cacheris concluded in the District Court below:

> That logic remains inescapable. If human beings can directly contribute *within FECA's limits* without risking quid pro quo corruption or its appearance, and if "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity," Citizens United, 130 S. Ct. at 903, then corporations like Galen must be able to do the same. [*See* United States v. Danielczyk, 791 F. Supp. 2d 513, 515 (2011).]

Although the Constitutional principle involved in the instant case is of enormous significance, it is of no great import from a political standpoint. Under Citizens United, Exxon Mobil already has the liberty to spend $1 million or more on an independent expenditure to support a candidate. The only question now is whether Exxon Mobil also may make a direct contribution of $2,500 per election to that candidate. If the political map was not radically altered by the legalization of unlimited corporate expenditures, it is beyond question that it will not be changed by legalizing a $2,500 corporate contribution.

The court of appeals below failed to apply the clean-cut reasoning of Citizens United to the FECA federal statutory ban on corporate contributions to individual political campaigns for election to federal

office.[3] Instead, the Fourth Circuit panel misread Citizens United in much the same way as the Montana State Supreme Court had done. The panel assumed that Citizens United had employed a balancing test to overrule Austin, purportedly having found that the alleged government interests were insufficiently weighty to meet the strict scrutiny test of a compelling state interest — whether that interest was to level the playing field in the marketplace of ideas, protect corporate shareholder interests, or protect against corruption or the appearance of corruption. *See* Danielczyk v. United States, 683 F.3d 611, 617-19 (4th Cir. 2012). Further, the court of appeals measured the constitutionality of corporate contributions to individual candidates by the lower standard of "intermediate scrutiny," requiring only an "important" government interest. For this reason, the court of appeals concluded that the Citizens United ruling — that a ban on corporate electoral speech violated the speech and press guarantees — simply did not apply. *Id.*, 683 U.S. at 618-19.

But the Citizens United rule, protecting corporate

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[3] While the panel below sweepingly referred to "Congress's legitimate interests in regulating direct contributions made by *all* corporations" United States v. Danielczyk, 683 F.3d at 616 (4th Circ. 2012) (italics original), there are numerous exceptions to this general principle which, like all campaign finance rules, are designed to favor incumbents seeking re-election. For a list of these types of permissible corporate contributions, see Brief *Amicus Curiae* of RealCampaignReform.org, *et al.*, FEC v. Beaumont, No. 02-403 (U.S. Supreme Court) (February 11, 2003), pp. 8-13, http://www.lawandfreedom.com/site/election/Beaumont.pdf.

speech, was adopted not because the Federal Election Commission had failed to demonstrate a sufficiently strong governmental interest. To the contrary, the federal ban on such corporate expenditures was struck down because, categorically, the "First Amendment ... prohibits the suppression of political speech based on the speaker's identity." Citizens United, 130 S.Ct. at 905.

Because the court of appeals ruled contrary to this categorical principle, its decision is in conflict with Citizens United, and the petition should be granted to address the merits. *See* Rule 10(c), Rules of the United States Supreme Court.

II. THE QUESTIONS PRESENTED SHOULD BE EXTENDED TO INCLUDE WHETHER CAMPAIGN FINANCE RESTRICTIONS ON SPEECH AND PRESS SHOULD EVER BE PERMITTED BASED ON OVERRIDING GOVERNMENTAL INTERESTS.

The Petition for a Writ of Certiorari herein submits for consideration two questions. First is the question of whether the ban on corporate contributions violates the First Amendment. That question concerns whether such a ban violates the Citizens United categorical rule protecting corporate speech and press rights. For the reasons stated in Part I, *supra*, these *amici* support the granting of the petition on that question. However, the petition also presents a second question, whether the First Amendment rights of speech and press may be overridden, under either a strict scrutiny standard of review, or under a less

protective standard of intermediate scrutiny. These *amici* would urge this Court to amend the second question presented by petitioners to include whether either standard of review, or any other "free standing 'interest balancing'"[4] test, ought to be applied to a speech or press right otherwise secured by the First Amendment. In light of Citizens United, and the summary reversal in American Tradition, these *amici* believe that the question of whether First Amendment rights are ever to be balanced against alleged governmental interests is an important question of federal law that should be settled by this Court. *See* Rule 10(b), Rules of the United States Supreme Court.

Properly understood, the Citizens United decision does not rest upon any judicially invented balancing test, but rather upon the First Amendment principles embodied in the speech and press textual guarantees. This Court maintained that corporate "political speech simply cannot be banned or restricted as a categorical matter." *See* Citizens United, 130 S.Ct. at 898. Nevertheless, the Citizens United Court did not make a clean break from the strict scrutiny test, and invoked that test — but only as a back-up for what it had already determined — that the ban on corporate political speech was categorically unconstitutional (*see id.*, 130 S.Ct. at 898-99):

> Premised on a **mistrust of governmental power**, the First Amendment stands **against attempts to disfavor certain subjects or**

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[4] *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

> **viewpoints**.... Prohibited, too, are **restrictions distinguishing among different speakers**, allowing speech by some but not others. As instruments to **censor**, these **categories** are interrelated: **Speech restrictions** based on the identity of the speaker are all too often simply a means to **control content**. [*Id.* (emphasis added).]

Indeed, prior to summarizing these two established speech and press principles, the Court had already rejected several invitations to "resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment." *Id.*, 130 S.Ct. at 892. First, the Court wisely declined an invitation to "carve out an exception ... for nonprofit corporate political speech funded overwhelmingly by individuals." *Id.*, 130 S.Ct. at 891. It reasoned that to do so "would thus require case-by-case determinations," while "in the meantime," "archetypical political speech would be chilled." *Id.*, 130 S.Ct. at 892. Second, the Court correctly rejected a proposed distinction between types of media offerings based upon the degree of "risk of distorting the political process," noting that the "interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech...." *Id.,* 130 S. Ct. at 890-91. The Court's First Amendment objections to deciding the case on such narrow grounds are equally applicable to the administration of the various judicial balancing tests.

In FEC v. Massachusetts Citizens for Life, Inc.

("MCFL"), 479 U.S. 238 (1986), this Court ruled that certain nonprofit corporations retained their First Amendment rights of speech and press because the state could not demonstrate to the court's satisfaction that it had a compelling interest to override MCFL's First Amendment interest. While the litigants sought a "bright-line rule," the Court demurred, in light of factual variables that, when combined, might reveal that the state could demonstrate a compelling state interest in some cases. *See id.*, 479 U.S. at 260-65. In response to this fluid MCFL ruling, the Federal Election Commission promulgated detailed rules by which it sought to distinguish which particular nonprofit corporations were entitled to the MCFL exception. *See* 11 CFR § 114.10. The result of MCFL was to create two layers of review, one administrative and another judicial. In the meantime, there could be no doubt that "archetypical political speech" was being "chilled." In Citizens United, this Court observed that:

> [t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People of "common intelligence must necessarily guess at [the law's] meaning and differ as to its application...." The government may not render a ban on political speech constitutional by carrying out a limited exemption through an amorphous regulatory interpretation. [*Id.* 130 S. Ct. at 889.]

Of course, that is exactly what the MCFL Court had done, employing its balancing test to permit only some corporate speakers to engage in political speech, thereby opening the door to government censorship over all who were not clearly protected. The administration of the MCFL exemption is not the exception, but reflects standard protocol in the overall administration of the federal campaign finance laws. As the Citizens United case unveiled:

> Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities".... These entities are subject to separate rules for 33 different types of political speech.... The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975.... [and] a two-part, 11-factor **balancing test** to implement WRTL's ruling. [*Id.*, 130 S.Ct. at 895 (emphasis added).]

"These onerous restrictions," the Court continued, "thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." *Id.*, 130 S. Ct. at 896. Not only are the FEC's powers analogous to the powers of the 17th century English Star Chamber, but they also parallel that horrid institution's practice of policing "the conduct of municipal elections." *See* Sources of Our Liberties 130 (R. Perry and J. Cooper, eds., American Bar Foundation, Rev. Ed.: 1978)

("Sources"). Additionally, it was the Star Chamber that administered the licensing of printing (Sources at 130), whereby the Government exercised censorship over publications, keeping them out of the hands of the people by refusing the requisite permit — a practice which this Court has flat-out recognized in Citizens United to be, without exception, an invalid restriction. *See* Citizens United, 130 S.Ct. at 896.

Indeed, the freedom of the press, a freedom recognized and reaffirmed in Citizens United (*id.* at 905-06), originally embraced the absolute right to publish whatever opinion he chose without any prior restraint, such "liberty of the press [being] indeed essential to the nature of a free state." *See* IV. W. Blackstone, Commentaries on the Laws of England 151 (U. Chi. Facsimile ed.: 1769). Thus, the Citizens United Court, rejecting the notion that the government could censor "media corporations," asserted:

> There is simply no support for the view that the First Amendment, as **originally understood**, would permit the suppression of political speech by media corporations [or any other] salient media. [*Id.*, 130 S.Ct. at 906 (emphasis added).][5]

Nor is there any support in the First Amendment

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[5] By this statement Citizens United appeared to adopt the anti-balancing views of the freedoms of speech and press expressed by Justices Hugo Black and William O. Douglas in the 1950's, '60's and '70's. *See* Citizens United, 130 S.Ct. at 901. *See also* New York Times v. United States, 403 U.S. 713, 720 (1971).

for the proposition that the government may override the freedom of speech in order to protect the government's reputation. It has long been settled that the freedom of speech forbids prosecutions for seditious libel, which has that purpose. *See* New York Times v. Sullivan, 376 U.S. 254 (1964). As James Madison put it, "the censorial power is in the people over the Government, and not in the Government over the people." *See* J. Madison, Speech in Congress, 4 Annals of Congress 934 (November 27, 1794), as quoted in Sullivan, 376 U.S. at 275.

As Citizens United has reminded us, there is nothing wrong with efforts by persons, groups, and organizations to seek to influence the outcome of elections, and to seek thereafter to obtain political outcomes that the supporter favors. *Id.*, 130 S.Ct. at 909-10. What is impermissible, the Court continued, is "'the financial *quid pro quo:* dollars for political favors.'" *Id.*, 130 S.Ct. at 910. Any governmental interest beyond that narrow definition of "corruption or the appearance of corruption" is, as the Citizens United Court ruled, "at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.*, 130 S.Ct. at 910. Moreover, the oft-claimed government interest in protecting government officials from the "appearance of corruption" is, in reality, an effort by incumbent[6]

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[6] The manner in which the campaign finance laws are manipulated by incumbents to present obstacles to challenges is explained by Dr. James C. Miller II in his expert witness report in Paul v. FEC, consolidated with McConnell v. FEC. *See* Brief for Appellants Congressman Ron Paul *et al.*, pp. 17a–36a,

legislators to portray themselves as free from improper influence:

> [l]est the people lose faith in their government officials and in their current system of government.... When government is perceived as corrupt, it is the **incumbents**, not the challengers, who are at risk. Combating the "appearance of corruption," then, is a ruse designed by incumbents to justify limits on the freedom of others to further their own interests. [*See* Brief for Appellants Congressman Ron Paul, *et al.,* Paul v. FEC, pp. 13, 15 (U.S. Supreme Court, No. 02-1747. July 8, 2003)[7] (bold original).]

The Citizens United opinion has opened the door to a reexamination of the "corruption or appearance of corruption" rationale undergirding campaign finance reform legislation, by asserting "that interest [is] **limited** to *quid pro quo* corruption." *Id.*, 130 S.Ct. at 909. In fashioning remedies to combat such corruption, the Court ruled that they "must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule." *Id.*, 130 S.Ct. at 911.

III. THE VARIOUS STANDARDS OF REVIEW, WHICH ENABLE THE GOVERNMENT TO OVERRIDE THE SPEECH AND PRESS

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http://lawandfreedom.com/site/election/PaulApp.pdf.

[7] http://lawandfreedom.com/site/election/PaulApp.pdf.

GUARANTEES OF THE FIRST AMENDMENT, ARE ILLEGITIMATE ENCROACHMENTS UPON THE SOVEREIGN POWER OF THE PEOPLE TO CONSTITUTE AND, WHEN NECESSARY, RECONSTITUTE THEIR GOVERNMENT.

Early in the Citizens United opinion, the Court expressed concern about the role of the courts in interpreting the free speech and press guarantees of the First Amendment. In response to Citizens United's argument that 2 U.S.C. section 441b should be invalidated as applied to a pay-for-view movie on demand, because that delivery system "has a lower risk of distorting the political process," the Court responded:

> [A]ny effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own **lawful authority.** Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. [*Id.,* 130 S.Ct. at 890 (emphasis added).]

Not only did the Citizens United Court decline the invitation, but it also candidly reminded itself that "[c]ourts, too, are bound by the First Amendment." Citizens United, 130 S. Ct. at 891. Indeed, the very foundation for judicial review of a statute, federal or state, under the U.S. Constitution, is that "*courts*, as

well other departments, are bound by that instrument." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (italics original). Thus, in exercising its "province and duty to say what the law is" (*id.*, 5 U.S. at 177), the judiciary must be careful not to adopt rules of interpretation that stray from the constitutional text, and thus substitute its own will for that of the people, who alone have the sovereign power to lay down the binding rules upon those authorized to govern. *See id.* at 176-78. Yet, that is precisely what this Court has done with its interest-balancing standards of review in First Amendment speech and press cases.

In his treatise on American Constitutional Law, Lawrence Tribe revisits the "recurring debate in first amendment jurisprudence ... whether first amendment rights are 'absolute' in the sense that government may 'abridge' them at all, or whether the first amendment requires the 'balancing' of competing interests in the sense that free speech values and the government's competing justifications must be isolated and weighed in each case." L. Tribe, American Constitutional Law, §12-2, p. 792 (2d ed. 1988). After American Tradition's summary reversal of the Montana State Supreme Court's decision, there can be no doubt that Citizens United is of the former class, not the latter. As Professor Tribe has observed:

> The "absolutists" may very well have been right ... that their approach was better calculated to protect freedoms of expression.... If the judicial branch is to protect dissenters from a majority's tyranny, it cannot be

> satisfied with a process of review that requires a court to assess after each incident a myriad of facts, to guess at the risks created by expressive conduct, and assign a specific value to the hard-to-measure worth of particular instances of free expression. [*Id.* at 793.]

Although Professor Tribe seems to favor both interpretive approaches, he recognizes that the "absolutists" offer a surer foundation for First Amendment freedoms:

> [C]ategorical rules, by drawing clear lines, are usually less open to manipulation because they leave less room for the prejudices of the factfinder.... Categorical rules thus tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties. The balancing approach is contrastingly a slippery slope; once an issue is seen as a matter of degree, first amendment protections become especially reliant on the sympathetic administration of the law. [*Id.* at 793-94.]

What Professor Tribe says about First Amendment freedoms applies across the board. In the infamous Japanese-American internment case, Korematsu v. United States, 323 U.S. 214 (1944), the Court, applying "the most rigid scrutiny," concluded that a "pressing public necessity" of World War II overrode the due process guarantee of the Fifth Amendment.

After Korematsu, the Court extended its balancing test to other "race" cases, ruling that race as a legal classification bore "a heavy burden of justification ... and will be upheld only if necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *See* McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

From race,[8] to sex,[9] to illegitimacy,[10] to alienage,[11] to various additional classifications,[12] the Court extended and modified the equal protection guarantee of the Fourteenth Amendment, invoking a variety of standards, ranging from strict scrutiny, to intermediate scrutiny, to rational basis, and overriding, or sustaining, those classifications depending upon how "suspect" the class and how "strong" the governmental interests. These balancing tests also invaded First Amendment litigation respecting the free exercise of religion,[13] and the

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[8] *See, e.g.,* Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[9] *See, e.g.,* Craig v. Boren, 429 U.S. 190 (1976).

[10] *See, e.g.,* Pickett v. Brown, 462 U.S. 1 (1983).

[11] *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971).

[12] *See, e.g.,* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

[13] *See, e.g.,* Sherbert v. Verner, 374 U.S. 398 (1963). (The compelling interest test, as applied to the free exercise guarantee standing alone, was rejected in Employment Division v. Smith, 494 U.S. 872 (1990).)

freedom of speech.[14] By the beginning of the 21th century, this Court's constitutional jurisprudence was steeped in balancing formulas, sociological studies and economic models, and other nonconstitutional sources. *See, e.g.,* McConnell v. FEC, 540 U.S. 93 (2003); *see also* Citizens United, 130 S.Ct. 894 ("[The] inquiry into the facial validity [of section 441(b)] was facilitated by the extensive record, which was over 100,000 pages long....").

Then, on March 18, 2008, at oral argument in the Second Amendment case of District of Columbia v. Heller, 554 U.S. 570 (2008), as the Solicitor General was contending that "intermediate scrutiny," rather than "strict scrutiny," should be the standard by which the constitutionality of gun control laws should be measured, Chief Justice Roberts laid down the gauntlet:

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution.... Isn't it enough to determine the scope of the existing right that the amendment refers to ... and determine ... how this restriction and the scope of this right looks in relation to [it].... I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed

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[14] *See, e.g.,* Buckley v. Valeo, 424 U.S. 1 (1976).

> over the years as sort of baggage that the First Amendment picked up. [Transcript of Oral Argument, p. 44, Dist. Of Columbia v. Heller, 554 U.S. 570 (2008)].

Later, in the Heller opinion itself, the Court refused to formulate an "interest-balancing answer" to issues arising under the Second Amendment. *See* Heller, 554 U.S. at 634-35. Not only did the Court reject the Solicitor General's plea to apply "intermediate scrutiny," but it also jettisoned the entire notion that the task of judicial review, under any constitutional right, could be lawfully discharged by employment of "a free-standing 'interest balancing' approach":

> The very enumeration of the right takes out of the hands of the government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the **people** adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [*Id.* (italics original) (bold added).]

In the exercise of their sovereignty, the people of the United States have laid down the principled rule that "Congress shall make no law ... abridging the freedom of speech, or of the press...." U.S. Const.,

Amendment I. In the exercise of their respective powers, it is not for Congress or the courts to make exceptions based upon countervailing government interests, compelling, substantial, or otherwise. Indeed, if a governmental interest is so compelling, then those who support it are required by Article V of the U.S. Constitution to follow an amendment process by which such interests are established by the will of the people — by a two-thirds vote in both houses of Congress and ratification by three-fourths of the state legislatures. If this super-majoritarian process may be bypassed by the judicial fiat of five justices of the United States Supreme Court, then the "written constitution [is an] absurd attempt[], on the part of the people, to limit a power, in its own nature illimitable." Marbury, 5 U.S. at 177.

By rejecting the federal Government's appeal to the Court to subordinate the freedoms of speech and press to supposedly overriding governmental interests, including the interest of preventing corruption or the appearance thereof, the Citizens United Court took a giant step towards restoring the sovereignty of the people "to make informed choices among candidates for office" through free "[s]peech, [the] essential mechanism of democracy .... to hold officials accountable to the people." *See id.*, 130 S.Ct. at 898. The flawed notion that the government might, by demonstrating an important, or even a compelling, governmental interest, override the will of the people enshrined in a written constitution, is reason enough to repudiate the balancing tests that have undermined the freedoms of speech and of the press for too long.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Attorney for U.S. Justice Foundation

MARK B. WEINBERG
WEINBERG, JACOBS & TOLANI, LLP
10411 Motor City Dr.
Ste. 500
Bethesda, MD 20817
(301) 468-5500
Attorney for FSC and FSDEF

**Counsel of Record*
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