WRITTEN TESTIMONY OF DAVID N. BOSSIE, PRESIDENT OF CITIZENS UNITED

My name is David Bossie and I am the President of Citizens United. Citizens United is an IRC 501(c)(4) organization with 500,000 members and supporters. Our related organizations are Citizens United Foundation, a IRC Section 501(c)(3) organization, Citizens United Political Victory Fund, a separate segregated political fund under the Federal Elections Campaign Act, and The Presidential Coalition, an IRS Section 527 organization that works to elect conservative candidates to state and local offices.

Citizens United and its related organizations are dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.

Citizens United also serves as a media entity having produced and marketed award winning, popular and timely documentaries including *Celsius 41.11*, *Broken Promises*, *Border War*, *ACLU at War with America*, *Rediscovering God in America*, *Hillary The Movie*, *Hype: The Obama Effect*, *Blocking "The Path to 9/11"*, *Ronald Reagan: Rendezvous with Destiny*, *We Have the Power*, *Perfect Valor*, *Rediscovering God in America II: Our Heritage*, *Nine Days that Changed the World*, and *Generation Zero*. Citizens United distributes its films through a variety of channels including limited theatrical releases, broadcast on television, broadcast via video-on-demand, retail sale in DVD format, direct mail, and through wholesale bulk orders of DVDs to other organizations and retail businesses. We routinely run television and broadcast advertisements to promote the sale of our

films, and sometimes these advertisements refer to elected officials and candidates for public office.

Our 2008 film *Hillary The Movie* led to the recent Supreme Court decision in *Citizens United v. FEC*. The decision, the impetus for this hearing and proposed legislation today, reaffirmed the First Amendment protection of political speech. The Court specifically recognized the importance of political speech as a hallmark of our representative democracy.

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley*, *supra*, at 14–15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)); see *Buckley*, *supra*, at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution").
>
> For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.

The idea that citizens are free to question their government is a central tenet of both the freedom of speech and the freedom of the press. As Thomas Jefferson explained to George Washington:

> No government ought to be without censors, and where the press is free, no one ever will. If virtuous, it need not fear the fair operation of attack and defence. Nature has given to man no other means of sifting out the truth whether in religion, law or politics. I think it as honorable to the government neither to know nor notice its sycophants or censors, as it would be undignified and criminal to pamper the former and persecute the latter.

The Supreme Court Justices correctly recognized that if Congress could criminalize political speech in film and advertising they were heading down a dangerous path where politicians could control citizens and all forms of speech. At oral argument the Deputy Solicitor General went so far as to advocate for the government's ability to ban books. Restrictions on the exercise of the First Amendment as found in the Federal Election Campaign Act and the Bipartisan Campaign Reform Act set very dangerous precedents. The DISCLOSE Act is yet another attempt to control political speech.

In striking down the ban on corporate expenditures in federal elections, the Supreme Court has allowed organizations like Citizens United to better represent our membership. However, this restoration of the First Amendment has been met with harsh rhetoric from the Left, whether in editorial boards, Congress, or the Executive Branch.

During the State of the Union address, President Barack Obama unfortunately took the unprecedented action of falsely accusing the Supreme Court Justices who were present of "revers[ing] a century of law to open the floodgates for special interests -- including foreign companies --to spend without limit in our elections."

Of course the decision did no such thing. As former FEC Chairman Brad Smith has noted “the Court held that 2 U.S.C. Section 441a, which prohibits all corporate political spending, is unconstitutional. Foreign nationals, specifically defined to include foreign corporations, are prohibited from making ‘a contribution or donation of money or another thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State or local election’ under 2 U.S.C. Section 441e, which was not at issue in the case. Foreign corporations are also prohibited, under 2 U.S.C. 441e, from making any contribution or donation to any committee of any political party, and they are prohibited from making any ‘expenditure, independent expenditure, or disbursement for an electioneering communication.’”

The DISCLOSE Act is a solution in search of a problem. Democratic legislators have been proclaiming that the decision in *Citizens United* will allow corporations to spend unlimited sums of money to “hijack” elections. Yet in the three months following the decision we have only seen one advertisement run. This advertisement was not run by ExxonMobil, AstraZeneca, or Citigroup, but rather a small business in Texas. The ad ran in local newspapers and its costs were modest.

The rhetoric does not match the reality. There is no documented need for the proposed legislation. Though the Supreme Court has only recently restored the First Amendment right to political speech of corporations including incorporated associations of individuals, 26 states have long standing laws that have permitted such activity. In those 26 states there is not a record of widespread corruption of the electoral process. As the Supreme Court observed:

> The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for profit corporations. The Government does not

claim that these expenditures have corrupted the political process in those States.

The list of 26 states includes both Illinois and Maryland; two states which also permit corporations to make financial contributions to candidates for office. Financial disclosure reports indicate that Representative Van Hollen accepted corporate contributions during his tenure in the Maryland legislature. Reports similarly reveal that President Obama received nearly two-thirds of his Illinois State Senate contributions from corporations, unions, and PACs. President Obama received contributions from large corporations including Citigroup and AstraZeneca. Neither Representative Van Hollen nor President Obama appears to have been corrupted by receipt of these corporate contributions.

If the perceived problem is the undue influence of large corporations a bill should be drafted narrowly to address that concern, not place additional burdens and barriers to entry on small businesses, non-profit advocacy groups, and documentary film makers such as Citizens United

Representative Van Hollen has argued that the Citizens United decision "will allow the biggest corporations of the United States to engage in the buying and selling of elections. If you look at the staggering figures of the Fortune 100 companies and the revenues they have and the profits that they can now unleash directly in these elections has the potential to totally upend our system and corrupt the process in a way that I think should alarm every American citizen." If this is the perceived problem that the DISCLOSE Act is meant to remedy, it may be done in a narrower and more effective fashion. Unfortunately many of the burdens of the legislation will be shouldered by non-profit organizations and small businesses that lack the resources for compliance.

The legislation before us today was crafted by Representative Chris Van Hollen and Senator Charles Schumer. As Chairman of the Democratic Congressional Campaign Committee and the former Chairman of the Democratic Senatorial Campaign Committee, they are responsible for ensuring the re-election of incumbent Democrats and preserving Democratic majorities in both Houses of Congress. Despite populist rhetoric regarding transparency and accountability, this bill is nothing more than an incumbent protection measure. By Senator Schumer's own admission it will chill speech and result in less political advertising and less participation in our electoral process.

Schumer and Van Hollen allege that this legislation is necessary "to ensure that the American public has all the information necessary to exercise its free speech and voting rights." This bill will however stifle the speech of millions of Americans who choose to speak through non-profit advocacy groups like mine on both the left and the right. These groups will be required to hire a battery of attorneys and accountants before expressing their opinion regarding incumbent politicians and candidates for office.

My testimony will focus on three areas of concern: (1) the impact of the onerous proposed disclosure provisions on non-profit organizations; (2) the practical impact of the increased disclaimer provisions; and (3) the potential impact of the increased disclosure provisions on donors to non-profit organizations.

THE PROPOSED DISCLOSURE REGIME IS INCONSISTENT WITH THE HOLDING IN *CITIZENS UNITED V. FEC*

While striking down prohibitions on corporate speech, the Supreme Court let stand disclaimer and disclosure provisions. In upholding disclosure provisions as they pertained to Citizens United, the Court also addressed the impact and constitutionality of overly burdensome regulation on political speech.

The Court specifically addressed whether the ability to establish and operate a political action committee (PAC) was a sufficient substitute for the exercise of First Amendment rights by corporations – the Court held that it was not.

In finding PACs to be an insufficient alternative to allowing corporate speech, the Court addressed the burdensome process of establishing a PAC and the reporting requirements that are imposed on PACs.

> Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. See *McConnell*, 540 U. S., at 330–333 (opinion of KENNEDY, J.). A PAC is a separate association from the corporation. So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. 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. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. See *id.*, at 330–332 (quoting *MCFL*, 479 U. S., at 253– 254).
>
> And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur.

* * *

> PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. See Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11 (citing FEC, Summary of PAC Activity1990–2006, online at http://www.fec.gov/press/press2007/20071009pac/sumhistory.pdf); IRS, Statistics of Income: 2006, Corporation Income Tax Returns 2 (2009) (hereinafter Statistics of Income) (5.8 million for-profit corporations filed 2006 tax returns). 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.

In denouncing the PAC alternative, the Court specifically noted the burdensome nature of filing "detailed monthly reports with the FEC."

The disclosure regime proposed in the DISCLOSE Act goes far beyond filing monthly disclosure statements. The Act provides two choices of reporting regime depending on whether an organization utilizes its general treasury funds or establishes a "campaign related activity" account.

In *Citizens United*, the Supreme Court held that an organization may utilize its general treasury funds to make independent expenditures and electioneering communications. It rejected the burden of creating an independent entity and soliciting independent funds as a sufficient substitute for exercising an entity's First Amendment rights.

The proposed legislation however disregards the Supreme Court's guidance. The bill goes so far as to penalize organizations that do not set up dedicated

“campaign related activity” accounts. It does so by forcing organizations that use general treasury funds for political communications to provide greater disclosure than organizations that go through the procedural hurdles of creating, soliciting funds for, and maintaining a “campaign related activity” account.

Organizations that utilize their general treasury funds must report all contributors over the reporting threshold, whereas an organization that utilizes a “campaign related activity” account need only report funds raised for that account. In addition to requiring a broader class of contributions to be reported, the draft legislation also places a lower reporting threshold on the use of general treasury funds than it does on the use of “campaign related activity” funds. For example, contributions used to further independent expenditures are subject to a $600 reporting threshold if spent from general treasury funds, and a $6000 reporting threshold if sent from a “campaign related activity” fund.

Regardless of the choice of form and reporting regime chosen, the DISCLOSE Act will expand current reporting obligations to an absurd degree. The expansion of reporting requirements is achieved by significantly broadening the definition of “electioneering communication” and requiring the reporting of donor information on independent expenditure reports.

For independent expenditures of as little as $1,000 reports will be due to the FEC within 24 hours. The DISCLOSE Act would significantly expand the content of those reports in a manner that will unduly burden non-profit organizations.

Unlike the current reporting regime, the proposed reports will require the inclusion of information pertaining to our donors. Specifically, should Citizens United utilize general treasury funds to make the expenditure, it must report all donors who have made contributions totaling or exceeding $600 or more from

the beginning of the calendar year through the date on which a regulated communication is publicly distributed.

As anyone who has had to file reports with the FEC or IRS can verify, having to gather a complete and accurate snapshot of contributions received by an organization over the course of the previous year is an extremely burdensome task to accomplish within 24 hours. For an organization like Citizens United, this would require hiring additional compliance staff which would incur additional costs and would impose an undue burden on the organization.

These burdensome reporting provisions of the DISCLOSE Act appear to apply to many of our films and promotional materials. This is due to the overbroad definition of electioneering communication. In order to bring informative and relevant commentary to the public, our films often feature interviews with policy commentators as well as policy makers. For example, in 2006, Citizens United released the film *Border War*. *Border War* examined the impact of illegal immigration by documenting the lives of individuals personally impacted by this continuing national problem.

Arizona Congressman J.D. Hayworth had previously released a book on the challenges of illegal immigration and the urgent need for immigration reform. Because of his expertise and study of the subject, Congressman Hayworth was invited to participate in the film *Border War*. Currently, J.D. Hayworth is seeking election to the United States Senate. Should Citizens United seek to broadcast our film *Border War*, we would be subject to reporting requirements under the DISCLOSE Act. The regulation of such films and promotional materials because they include individuals that have subsequently sought elected office is clearly beyond the scope of the alleged problems the legislative drafters seek to cure.

THE PROPOSED DISCLAIMER PROVISIONS WILL

REDUCE POLITICAL SPEECH AND PARTICIPATION

In seeking to promote the film *Hillary The Movie*, Citizens United sought to air one 30 second ad and two 10 second ads. At the time, as we maintain today, we believed that requiring a 4.5 second "stand by your ad" disclaimer provided little information or value to the viewing public while causing a significant detriment to a non-profit organization like ours by increasing the costs of airing an independent expenditure advertisement.

The proposed legislation could expand these disclaimers to a cost prohibitive length. The legislation could require a group like Citizens United to include an organizational "stand by your ad" disclaimer, a disclaimer from a "significant funder", and display the organizations top five funders on screen for a 6 second period. This will at least double, if not triple, the length of required disclaimers on an advertisement and will significantly impact an organization's ability to convey its message.

Non-profit organizations like Citizens United rely on the generosity of their donors. Funds raised must be appropriately and judiciously spent. Citizens United routinely produces industry standard length commercials in 30 second and 10 second lengths. By requiring an organization like ours to air at least 9 seconds of disclaimers this legislation will drastically reduce the content of our advertisements. This may force many speakers out of the public debate.

The extended disclaimer provisions will increase the cost of non-profit advocacy while providing little additional information to viewers. For example under the proposed legislation I would have to record a disclaimer stating: "I am David Bossie, the President, of Citizens United, and Citizens United approves this message."

The message required to be recorded by a "significant funder" may be even more redundant, requiring the representative of an organizational funder to repeat the name of his or her organization three times: "I am _________, the _________, of _________. __________ helped to pay for this message, and __________ approves it."

THE DISCLOSE ACT IMPOSES SIGNIFICANT BURDENS
ON DONORS TO NON-PROFIT ORGANIZATIONS

The *Citizens United* decision permitted small businesses, corporations, and labor unions to engage in political speech. It allowed a broad spectrum of organizations to make independent expenditures and electioneering communications.

The DISCLOSE Act seeks to limit this speech by placing additional burdens on organizational donors. Organizational donors will now be required to file independent expenditure reports if they make a transfer to or are deemed to have made a transfer to an organization for the purposes of making a public independent expenditure.

The draft categories in the DISCLOSE Act for determining whether an organization has been deemed to have made a public independent expenditure are far too broad. For example, an organization may be deemed to have made a public independent expenditure if "the person or the person to whom the amounts were transferred knew or should have known of the covered organization's intent to make public independent expenditures." In practice this standard will lead to absurd results.

It is also important to note that the independent expenditure reports are required to be filed with the FEC within 24 hours of making or contracting to make the expenditure. The DISCLOSE Act will also require organizations to post the

information on their website within 24 hours of reporting to the FEC. To expand the reporting requirements and the definition of public independent expenditure in this fashion will leave many organizational donors unaware of their duty to file reports with the FEC.

This expansion is in addition to the creation of new reporting requirements for organization donors that produce regular, periodic reports to shareholders, members, and donors. Such organizations will be required to include itemized information regarding the date, cost, and information regarding the candidate supported or opposed for any independent expenditure or electioneering communication in their periodic reports.

Organizational donors to non-profit groups may curtail donations as a result of the DISCLOSE Act. To the extent that organizations are aware that a new reporting regime exists, they may halt donations due to the increased costs of compliance. To the extent they are unaware that they are subject to a reporting duty, they will face significant penalties which will chill any future donations.