Senate Judiciary Committee
Testimony Of Michael A. Carvin
Jones Day
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Mr. Chairman and distinguished members, I appreciate this opportunity to testify concerning "The *Citizens United* Court and the continuing importance of the Voting Rights Act."

I. *Citizens United*

Notwithstanding the hyperbolic and misleading criticism it has engendered, *Citizens United* is nothing more than a straightforward, faithful application of fundamental First Amendment principles. The speech involved in *Citizens United* was pure political speech regarding elections and the democratic process, the kind of speech at the very core of the First Amendment. Therefore, any restrictions on that speech must satisfy the most daunting constitutional standards. *Citizens United* fairly applied those standards to protect the rights of individuals to participate in independent political speech regardless of whether they choose to join their political voices together in a corporate form.

The predominant criticism of *Citizens Untied* is the simplistic and meaningless slogan that "corporations are not people." As a factual matter, this slogan completely misstates the entities actually protected by *Citizens United* and, as a legal matter, is wholly irrelevant. The "corporations" predominantly silenced by the restrictions were not large, for-profit corporations but were non-profit "corporations," like Citizens United, comprised of citizens who had united to express their collective views on policy issues and public elections. These "corporations" included the likes of the Center for American Progress, the Natural Resources Defense Council, and the Progressive Donor Network. The Government has no more power to ban these united citizens' collective, shared viewpoint than it does to ban the speech of the individuals comprising this united front. Indeed, *Citizens United enhanced* the voice of those groups relative to wealthy

corporations. As the Court noted, these small non-profit corporations can be particularly hard-hit by a ban on independent advocacy because, when legal corporate lobbying and a corporate independent-expenditure ban are coupled, the result may be "that smaller or non-profit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government." *Citizens United v. FEC*, 130 S. Ct. 876, 907 (2010).

In all events, it is quite irrational to suggest that corporations—profit or non-profit—have no First Amendment rights or that a ban on corporate expenditures to convey election-related speech is any different than a direct ban on political speech. No rational person would argue that a law restricting the speech of the New York Times or MSNBC, such as one requiring them to endorse Barack Obama (or Mitt Romney), would be constitutional, even though the speakers are nothing more than for-profit corporations. That basic principle is true regardless of whether the corporate speech is banned directly, or in the form of a prohibition on spending money—on printing presses or broadcast facilities—to disseminate that speech, since all public speech necessarily requires the expenditure of money. Accordingly, advocates of the mindless bromide that corporations have no First Amendment rights must explain why such restrictions on media corporations—those with the greatest access to the political marketplace and thus best positioned to "drown out" contrary voices—would be unconstitutional, but identical restrictions on non-media corporations are somehow permissible. There is no rational support for such an illogical argument, which is one of the many reasons why the Supreme Court has always consistently held that for-profit corporations have First Amendment rights, including the right to speak on election-related issues. *See First National Bank v. Bellotti*, 435 U.S. 765 (1978).

This basic principle is also mandated by the text and purpose of the First Amendment. First, the notion that the Free Speech Clause of the First Amendment protects only "people" or "individuals" is belied by the plain language of that Amendment. The First Amendment states that Congress "shall make no law . . . abridging the freedom of speech," without limiting this protection to "individuals" or "persons." It thus prohibits any restriction on speech, regardless of the source. Again, this reflects the Framers' understanding that the right to free speech is not limited to certain speakers and is certainly not unprotected because it emanates from a group of individuals who have banned together in order to enhance their collective voice. While "unions" are not people, their speech is protected by the First Amendment because they are a united group of people, even though, unlike non-profit corporations, they are not united for political or public advocacy purposes.

Nevertheless, some argue that for-profit corporations (and unions) can be singled out for discriminatory treatment because their speech will be heard by too many people. But speaker-based discrimination for the avowed purpose of limiting certain speakers' access to the marketplace of ideas is obviously at war with the fundamental tenets of the First Amendment. That Amendment guarantees access to the marketplace of ideas free from government control because such speech is an inalienable right that cannot be limited by government fiat and certainly not in order to advance the inherently paternalistic notion that government can apportion the people's access to diverse viewpoints. In a unanimous opinion joined by Justices Brennan and Marshall, the Supreme Court in *Buckley v. Valeo*, 421 U.S. 1 (1976) succinctly stated this basic truism: "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49.

The conclusion that our democracy functions best with more speech rather than less speech is correct not only as a matter of law, but also as a matter of experience. Notwithstanding recent uniformed and irresponsible speculation, corporate expenditures and speech in the wake of *Citizens United* have not overtaken the political marketplace or drowned out speech by individuals acting alone. To the contrary, recent election cycles have seen an explosion of political participation and contributions by individual voters, and no cognizable uptick in corporate political activity.

I am not aware of any major, for-profit corporation running a single political advertisement in its own name. And the data from the 2012 Republican Presidential primary elections completely refutes the overheated rhetoric that corporations are taking over the political world. Each of the eight leading Republican Presidential candidates was supported by an independent expenditure-only committee—the so-called Super PACs. Notwithstanding the fears of some that wealthy for-profit corporations would dominate politics, we now know from the disclosures filed with the FEC that *not a single one* of the Fortune 100 companies contributed a single cent to any of these eight Super PACs. *See* Br. *Amicus Curiae* of Senator Mitch McConnell at 7, *American Traditional Partnership, Inc. v. Bullock*, No. 11-1179 (filed Apr. 26, 2012). The data reflects that the Super PACs supporting three of the eight candidates received no corporate donations at all and six of the eight received none from public companies. So the much-predicted tsunami of corporate expenditures never came. *See id.* at 10.

As Bradley Smith, a former chair of the FEC, has correctly noted, "[t]his is our second election under *Citizens United* . . . In 2010, turnout was up from 2006, we had more competitive races than at almost any time in recent memory." Interview by Lee Pacchia of Bloomberg Law

with Bradley Smith, Former Chair, Federal Election Commission (Jan. 5, 2012) (available at http://www.youtube.com/watch?v=_BvYWdM6n44).

This outcome was entirely predictable. For years, states have been acting as laboratories experimenting with various levels of restrictions or no restrictions at all on corporate independent political expenditures. At the time *Citizens United* was decided, 26 states imposed no limits at all on the amount of independent expenditures by for-profit corporations. *Citizens United*, 130 S. Ct. at 908. Yet there was and is no basis to conclude that corporate spending in those states—which included states rarely associated with scandals, such as Virginia, Washington, and Utah—had overwhelmed other political voices or corrupted the political process. The same is true today in the world where *Citizens United* protects the right to independent political speech by individuals who decide to unify their voices in a corporation.

II. Voting Rights Act

When Congress reauthorized Section 5 of the Voting Rights Act in 2006, it made no serious attempt to establish that the burdens imposed by Section 5's "extraordinary burden-shifting procedure[]," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000) continue to be justified. Yet three years later, the Supreme Court *unanimously* gave Congress clear notice that, because the 2006 reauthorization "imposes current burdens," it "must be justified by current needs." *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *accord id.* at 226 (opinion of Thomas, J.). Eight Justices strongly warned that, given "current political conditions," "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance," *id.* at 203 (opinion of the Court), and Justice Thomas would have invalidated Section 5 on that ground, *id.* at 226-29.

Indeed, whereas the original preclearance regime enacted in 1965 justifiably targeted jurisdictions where intentional discrimination was so entrenched and evasive that normal

antidiscrimination litigation would be inadequate, *see id.* at 197-99, Congress in 2006 failed to provide any basis for concluding that ordinary litigation under Section 2 of the Voting Rights Act continues to be ineffective. Neither the statutory findings nor the House or Senate Reports contain any such conclusions regarding covered jurisdictions' conduct when Section 2 cases are being litigated or enforced. Instead, the record shows that "[b]latantly discriminatory evasions of federal decrees are rare." *Id.* at 202.

The absence of findings concerning Section 2's inadequacies shows that there is no cognizable need—and therefore no adequate constitutional justification—for extending Section 5. If Section 2 broadly and effectively precludes all actions with a discriminatory "result"—as it does—there is simply no need to supplement this effective antidiscrimination law with the burdensome preclearance requirement, just as it would be unconstitutional to supplement Title VII's "effects test" with a law requiring employers to preclear all hiring decisions with the Justice Department by proving the absence of such effect.

Worse still, Congress *selectively* imposed this gratuitous burden on certain jurisdictions solely because of electoral practices that occurred over 40 years ago, rather than on those jurisdictions (if any exist) that are *currently* engaging in pervasive discrimination allegedly not remediable under Section 2. Indeed, Congress consciously *avoided* examining whether there was a "current need" for Section 5 by refusing to tailor the preclearance burden to those jurisdictions which had the worst voting discrimination in 2006. Instead, Congress continued to rely on election data that was 34 to 42 years old to determine which jurisdictions would be covered. *See id.* at 199-200; *see also* 42 U.S.C. §§ 1973b(b), 1973c(a). Such reliance on outdated election data does not make sense, just as it would not have made sense for the

Congress in 1965 to rely on data from the election of Calvin Coolidge to determine which states should be covered by Section 5.

In fact, the legislative record clearly demonstrates that Section 5 no longer targets the states where discrimination is most pervasive. As the Supreme Court emphasized in *Northwest Austin*, even "supporters of extending § 5" acknowledged that "the evidence in the record" fails to identify "systematic differences between the covered and the non-covered areas" and "in fact … suggests that there is more similarity than difference." 557 U.S. at 204 (quoting Professor Richard Pildes).

Worse yet, not only did Congress reauthorize Section 5 and apply it to jurisdictions based on stale election data, Congress for the first time *expanded* the substantive grounds for denying preclearance. *First*, Congress absolutely prohibited "diminishing" a minority group's "ability . . . to elect their preferred candidates of choice," *see* 42 U.S.C. § 1973c(b),(d), thereby imposing a quota floor under minority electoral opportunities until 2032. *See Shelby County v. Holder*, 679 F.3d 848, 886-87 (D.C. Cir. 2012) (Williams, Senior Circuit J., dissenting). Congress did so to overturn *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which granted jurisdictions far more flexibility in arranging their electoral districts, *id.* at 480-82, precisely in order to avoid the serious constitutional questions created by the inflexible regime imposed by the 2006 amendments, *see id.* at 491 (Kennedy, J. concurring); *Nw. Austin*, 557 U.S. at 203 (quoting Justice Kennedy's concurrence in *Ashcroft* when describing the "constitutional concerns" created by the "tension" between Section 5's preclearance standard and the nondiscrimination mandate of the Constitution and Section 2).

Second, Congress required covered jurisdictions affirmatively to prove the *absence* of "any discriminatory purpose," 42 U.S.C. § 1973c(c), notwithstanding the difficult burden of

proving that negative. *See Shelby County*, 679 F.3d at 887-88. Such an expansion is clearly unwarranted—it could not possibly be the case that intentional discrimination that evades ordinary antidiscrimination litigation is more pervasive in the South now than it was in 1965.

The recent preclearance litigation involving Texas' redistricting plans and voter identification law highlights the fundamental flaws in Section 5 and why it is no longer justified.

Texas Redistricting Litigation

As noted, the 2006 Congress' decision to invalidate plans that in any way diminish minorities' ability to elect imposed a quota floor under the existing number of districts where minorities possessed such an ability. As the recent decision in *Texas v. United States*, No. 11–1303, 2012 WL 3671924 (D.D.C. Aug. 28, 2012) illustrates, this preferential guarantee for minority voters does not apply only to districts where minorities control the electoral outcomes or can elect their own preferred candidates. Rather, covered jurisdictions are also legally forbidden from diminishing the electoral fortunes of *white* Democrats solely because they receive the support of most minority voters in general elections, even though there is no indication that the district could elect a *minority* Democratic candidate, *id.* at *38-43; *see also id.* at 33-34; even though there is no evidence that the white Democratic incumbent would be the minority candidate of choice in a primary election against a minority candidate, *id.*; even though minorities do not "lead" the biracial coalition that supports the white Democrat, *id.* at *39 n.5; and even though it is stipulated that the white electorate is "colorblind" in its voting patterns, *id.* at 44.

Thus, Section 5 has been converted from a prohibition against disadvantaging the equal-electoral opportunities of *minority voters* "on account of *race*" into a guarantee of continued success for the political party disproportionately favored by minority voters (*i.e.* the Democratic

party outside of Dade County, Florida). This guarantee obtains even in colorblind districts where there are no race-based headwinds to minority success and even if the judicially-required preservation of that district will afford no opportunity for minorities to control the electoral outcomes or elect a minority Democratic candidate. Thus, as the Supreme Court has explicitly warned, this interpretation raises the most "serious constitutional questions" because it "infuses race into virtually every redistricting," *LULAC v. Perry*, 548 U.S. 399, 446 (2006) (Kennedy, J.), even in those districts where the white electorate had not previously considered race and where minorities constitute only a small proportion of the winning Democratic coalition. Needless to say, such a preferences for one political party has nothing to do with protecting minorities against race-based discrimination and therefore has nothing to do with enforcing the Fourteenth and Fifteenth Amendments' guarantees of racial equality in voting. Rather it is a *partisan* preference which guarantees Democratic Party success wherever there is a cognizable minority population. Ironically, this preference merely perpetuates the electoral conditions that existed in the South when the Voting Rights Act was enacted—*i.e.* consistent election of white Democrats receiving overwhelming support of black and Hispanic voters in general elections.

Prior to the 2006 reauthorization, the Voting Rights Act clearly did not protect such districts. In *LULAC v. Perry*, plaintiffs argued that the Voting Rights Act protected the district of white Texas Democrat Rep. Martin Frost, whose Congressional district was 49.8% white, 25.7% black, and 20.8% Hispanic, as measured by citizen voting-age population ("CVAP"). 548 U.S. at 443 (Kennedy, J.). Plaintiffs claimed that because blacks support Rep. Frost in the general election, he was the candidate of choice of blacks. *Id.* But the Court flatly rejected this notion. As the Court explained, while "African–Americans preferred Martin Frost to the Republicans who opposed him" in the general election, that does not "make him their candidate of choice,"

especially since "African-Americans could not elect their candidate of choice in the primary." *Id.* at 444, 445-46. Similarly, the Department of Justice precleared Texas' redistricting plan, even though it did not protect Rep. Frost's district—and the Court did not accept Justice Stevens' dissenting opinion that found that this violated Section 5. *Id.* at 447.

However, under the new "ability to elect" standard, Section 5 now protects the re-election of white Democrats like Rep. Frost solely because minorities overwhelmingly support him (like all Democrats) in general elections. The majority of the *Texas* court concluded that Section 5 protected the district of white Democratic Congressman Lloyd Doggett—a district that provides minorities even *less* opportunity to elect their own candidate of choice than what they enjoyed in Rep. Frost's district. Indeed, unlike Rep. Frost's district, whites constituted the *vast* majority of the CVAP in Rep. Doggett's district: the white CVAP was 63.1%, Hispanic CVAP was 25.3%, and the black CVAP was 9.1%. *Id.* at *39. And like Rep. Frost's district, there was no evidence indicating that blacks and Hispanics voted cohesively with whites in Democratic primaries, but the Court concluded that there was a bi-racial coalition even if the alleged members of the coalition voted *differently* in *primary* elections. *See id.* at *33-34 ("[I]t does not hold that evidence of cohesion in a primary is necessary to identify a candidate of choice. . . . We refuse to penalize minority voters for acting like other groups in a political party who do not coalesce around a candidate until the race is on for the general election."); *id.* at *40 n.7 ("groups comprising a voting coalition need not vote cohesively at the primary level"). Under this logic, there was a protected coalition between blacks and whites in the South in the 1960's and 1970's, since they both voted Democratic in *general* elections. Thus, as this opinion demonstrates, Section 5 now protects *any* district where minorities support the Democratic incumbent in the

general election—a result that can hardly be justified as aimed toward racial discrimination or its effects.

Moreover, under the revised Section 5, covered jurisdictions violate the "discriminatory purpose" prong even if the challenged action does not in any way "deny[] or abridge[e] the *right to vote*," 28 U.S.C. § 1973c(a) (emphasis added), but simply inconveniences minority incumbents. The *Texas* court found discriminatory purpose in the drawing of Congressional Districts 9, 18, and 30 because the enacted plan removed some of the "economic engines" from the districts and the new plan did not encompass the current district offices of these districts. *Id.* at *19. They did so even though it was undisputed that the districts continued to allow minority voters to easily elect their preferred candidate and the alleged deficiencies concerning district offices and "economic guts" did not even arguably affect this unimpaired voting power. Indeed, I am not aware of any court—prior to this Court—finding a violation of Section 2 or Section 5 of the Voting Rights Act based on circumstances similar to these. Therefore, this change to Section 5 dramatically alters the requirements covered jurisdictions must comply with to obtain preclearance—a burden that hardly can be justified as protecting minority voting strength.

Texas Voter Identification Litigation

The U.S. District Court for the District of Columbia's recent decision denying preclearance of Texas' voter identification law similarly illustrates the fundamental flaws in Section 5 and why it is no longer needed. *See Texas v. Holder*, No. 12–cv–128, 2012 WL 3743676 (D.D.C. Aug. 30, 2012). It imposes a dual regime where voter identification laws are impermissible in covered jurisdictions because they impose an impossible burden of proof on those jurisdictions, but are upheld or unchallenged in all non-covered jurisdictions. Attorney General Eric Holder has claimed that the burden of procuring identification functions as a "poll

tax" falling disproportionately on minority voters. *See* Joe Holley, *Holder calls Texas voter ID law a 'poll tax,'* Houston Chron., July 11, 2012, at B1. If Attorney General Holder actually believed his own rhetoric, he would obviously be bringing Section 2 suits against non-covered jurisdictions with significant minority populations that have enacted voter identification laws, such as Pennsylvania, Indiana, Kansas, and Tennessee. *See* http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (list of states with voter identification laws).

But the Attorney General has never done so because he knows that the Justice Department cannot satisfy its burden of proving that these laws have a discriminatory "result." Indeed, in evaluating Indiana's similar voter identification law, Justice Stevens, writing for the Court, held that "we cannot conclude that [Indiana's] statute imposes excessively burdensome requirements on *any class* of voters." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 202 (2008) (internal quotation marks omitted and emphasis added). Indeed, "For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198.

Yet the Department of Justice is able to impose the Attorney General's policy views under Section 5 precisely because the jurisdiction, not the Department of Justice, has the burden of proof, and therefore preclearance is denied purely based on groundless speculation. In Texas, for example, there was no objective proof that minorities would be disproportionately harmed or affected by the voter identification law. Among other things,

- Minority turnout *increased* after voter ID laws were enacted in Georgia and Indiana. *See* Proposed Findings of Fact & Conclusions of Law ¶ 25 (DE 202);

- It was undisputed that after Indiana and Georgia enacted a voter identification law, "virtually no Georgia or Indiana voters reported being turned away from the polls because of a lack of photo ID." *Texas*, 2012 WL 3743676, at *15;

- It was undisputed that "this finding remained constant across racial lines." *Id.*;

- There was no "reliable evidence" showing that minorities disproportionately lacked photo identification in Texas. *Id.* at *26.

Despite the lack of evidence of any *disparate impact* on minority voters, the court denied preclearance based on rank speculation that it will be more difficult for blacks and Hispanics who currently lack voter identification to obtain voter identification because minorities are disproportionately less wealthy. *Id.* at *27-29. But this speculation is misguided because the relevant comparison is between minorities and whites who *lacked voter identification*—and no evidence supports the counter-intuitive notion that, within the relatively poor group lacking ID, minorities are disproportionately unable to pay the modest fee to obtain such ID.

Finally, even though Section 5 protects "the right to vote" of "*citizen[s]* of the United States," 42 U.S.C. § 1973b(c) (emphasis added), the Department of Justice is now using Section 5 to protect *non*-citizens. Recently, the State of Florida has suffered widespread illegal voting by non-citizens, and has determined that removing non-citizens from the voter rolls will strengthen the voting power of both minority and non-minority citizens because it will remedy the dilution in their votes caused by ineligible non-citizens' illegal voting. Florida therefore sought and received access to the Department of Homeland Security's comprehensive Systematic Alien Verification for Entitlements database (SAVE), which federal, state, and local authorities across the country rely on every day for its accurate, up-to-the-minute data on citizenship status. But even though federal law clearly entitles Florida to access SAVE, the Department of Justice has taken the incredible position that Section 5 prohibits Florida from using SAVE to confirm registered individuals' citizenship without first obtaining preclearance. This position turns

Section 5 on its head because, instead of *protecting* citizens' votes, the Department of Justice is using Section 5 to *harm* citizens and to protect non-citizens' illegal voting. And the Department's reading of Section 5 would deter local authorities in covered jurisdictions from using more reliable sources of information to confirm citizenship status because that would subject them to the burdensome preclearance process. In contrast, local officials in non-covered jurisdictions have the flexibility to implement more accurate sources of information such as SAVE free of the strictures of federal superintendence.

Thank you, Mr. Chairman. I would be happy to take any questions from the Committee.