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PRESS RELEASE

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**Former FEC Chairmen and Commissioners Call for Reversal of  
Two Supreme Court Cases Restricting Citizen Speech**

Late yesterday, eight former commissioners (seven served as chairmen) of the Federal Election Commission filed a friend-of-the-court brief in *Citizens United v. FEC* calling for the overruling of two Supreme Court decisions that have chilled public speech by imposing complex and burdensome layers of regulations.

As the former commissioners' brief noted: "[T]he field is so complex that citizens cannot understand it and experts find it difficult. The pristine simplicity of the First Amendment's proscription of any law . . . is replaced by a flood of complex regulations. The complexity requires citizens to hire specialists to speak. Specialists cost money. Errors risk penalties. Core political activity is chilled."

The case involves a challenge to a federal law prohibiting the broadcast of a documentary, *Hillary: The Movie*. In an unusual move, the U.S. Supreme Court ordered supplemental briefing on whether two of its decisions should be overruled. One is *McConnell v. FEC*, which facially upheld the prohibition in McCain-Feingold (the Bipartisan Campaign Reform Act) on corporate "electioneering communications" (broadcast ads mentioning federal candidates near elections). The other is *Austin v. Michigan State Chamber of Commerce*, which held that corporations could be prohibited from political activity.

The former commissioners speak from long years of experience in interpreting federal election laws, implementing regulations, devising enforcement policy, and investigating violations. They submitted the brief to advise the Court of the complexities and difficulties in the practical application of federal campaign-finance laws and the First Amendment to political speech and activity. And they highlighted how complex and confusing the federal regulatory scheme has become for citizens, and even specialists, and what a burden that fact imposes on participation in American political debate and elections, which are at the heart of the Republic.

Former Commissioner Hans A. von Spakovsky comments: "It is high time for the Supreme Court to overturn two bad decisions that fundamentally violate our First Amendment rights -- pornographers have greater freedom than those engaging in political speech. Giving government bureaucrats at the FEC the power to decide what can be said in political campaigns

is one of the most constitutionally questionable enactments since Congress passed the Alien and Sedition Acts in 1798.”

Although the First Amendment mandates that “Congress shall make no law . . . abridging the freedom of speech,” the *Austin* case (based on a level-the-playing-field principle expressly rejected in two other decisions) spawned complex multi-factor tests for restricting different types of entities and speech. The brief noted that there are now unique and complex rules imposed by the Federal Election Campaign Act (“FECA”) on 71 distinct entities, much of it justified by *Austin*. FECA also uniquely regulates 33 different forms of speech. Furthermore, while corporations are prohibited from political activity, there are exemptions for media corporations, MCFL-corporations, and membership organization, each with complex sets of rules.

However, whenever a corporation is allowed to speak it must take special care not to fall into “political committee” (“PAC”) status, which imposes additional layers of complex rules and carries with it onerous burdens of compliance. In fact, PAC status is so difficult and onerous that, while there are 5.8 million active corporations, there are fewer than 2000 corporate PACs. And the burdens of PAC status fall disproportionately on small corporations because large corporations can more readily bear the cost and burden. So the ban on corporate political activity has had the perverse result of silencing small corporations, not the behemoths usually cited as the source of concern. And some groups, such as the ACLU, cannot even have a PAC, so they are silenced altogether.

Former Commissioner and Chairman David Mason states the problem as follows: “For ten years I wrestled with a law that became ever more complex, more laden with exceptions, more difficult to apply, and less fair. Rather than crafting yet another exception, the Court should simply recognize the equal First Amendment rights of all speakers.”

The brief notes that the FECA is 244 pages, and the FEC regulations interpreting FECA add an additional 568 pages. There have been 17 “major” and 366 other cases challenging FECA and FEC regulations, with 17 yet unresolved. The FEC has filled 1,278 pages of the *Federal Register* with explanations and justifications for its regulations, along with 10 policy statements, 1 interpretive rule, and 1,771 advisory opinions since 1975, with 9 more pending. The FEC has published 17 reporting forms, each with instructions, 6 campaign guides, 24 brochures, and 163 monthly issues of *The Record*, beginning in 1996. The FEC has numerous audit reports for review, and over 6,000 Matters Under Review, which involve resolved FEC complaints.

Former Commissioner and Chairman Bradley Smith says: “We think it is important that the Court grasp the complexity of the law and the enormous practical burden it places on those who would speak about politics. As a result, many don’t speak at all, and our society is poorer for it. We hope that as former commissioners, we can assist the Court to understand the scope of the law and the difficulty, if not impossibility, of administering it in a manner consistent with a robust First Amendment.”

The former commissioners explained that decisions built on *Austin*, namely, *McConnell v. FEC*, and *FEC v. Wisconsin Right to Life*, had proven unworkable. As to the “appeal to vote”

test in *Wisconsin Right to Life*, intended to narrow the scope of regulable “electioneering communications,” the former commissioners noted that current commissioners disagree over its application, that the FEC has been unable to quickly determine whether the test applies or not, and that the FEC and a federal court have even disagreed over whether an ad is prohibited. The former commissioners concluded that, given the complexity and unworkability of the current regime, that political speech was being chilled and the decisions causing these problems must be overruled.

James Bopp, Jr., counsel of record for the commissioners, added: “The First Amendment mandated that ‘Congress . . . make no law . . . abridging freedom of speech.’ There was profound wisdom in that pristine statement that America must return to. While a few exceptions to ‘no law’ were made initially for exigent circumstances, the flood of regulation which these exceptions have spawned has made current federal campaign finance law the antithesis of ‘Congress shall make no law.’ *Austin* and *McConnell* must yield to the need of the American people for wide-open, robust debate about our government.”

The amici curiae (with FEC years and current affiliation indicated) are **Joan Aikens** (1975-1998, retired); **Lee Ann Elliott** (1982-2000, retired); **Thomas Josefiak** (1985-1991, Partner, Holtzman Vogel); **David Mason** (1998-2008, Visiting Senior Fellow, Heritage Foundation); **Bradley Smith** (2000-2005, Blackmore/Nault Designated Professor of Law, Capital University); **Michael Toner** (2002-2007, head of Election Law and Government Ethics Practice Group, Bryan Cave); **Hans von Spakovsky** (2006-2007, Visiting Legal Scholar, Heritage Foundation); and **Darryl Wold** (1998-2002, private law practice emphasizing election and political law). All chaired the FEC during their tenure except for Commissioner von Spakovsky.

The brief is available at [www.jamesmadisoncenter.org](http://www.jamesmadisoncenter.org), the James Madison Center’s website .

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