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## NOTES

### CITIZENS UNITED AT WORK: HOW THE LANDMARK DECISION LEGALIZED POLITICAL COERCION IN THE WORKPLACE

Imagine that you are a construction worker for a large, nonunion corporation. One day, your boss tells you that for two months leading up to the next national election, you and several other employees will work full time for the Koch brothers' Super PAC, helping to get out the vote for its preferred candidates. Furthermore, until that time, you are required to spend several hours each weekend participating in that group's phone banking and door-to-door canvassing efforts. And next week, you will attend a rally the group is hosting to demonstrate working-class support for its candidates. Aghast, you tell your boss that you do not support the Koch brothers or their preferred candidates, and do not wish to participate in any of this. He replies that he understands your view, but that these activities are now requirements of your job, and any employee who refuses to participate will be fired.

Most Americans would likely be appalled to find themselves in this situation. Intuitively, the employer's actions might strike us as falling well outside the bounds of what may legitimately be required of employees; as an outrageous violation of our individual autonomy and right to control our own speech; and, perhaps, as an extreme and dangerous extension of corporate power in a democracy. Among our first thoughts might be: "This can't be legal." Until 2010, that instinct was correct. But after the Supreme Court's decision in *Citizens United v. FEC*,<sup>1</sup> federal law does not protect the employee in the scenario above, nor do the laws of most states. This Note will explain why that is the case, and why Congress can and should act to protect employees from being coerced to participate in their employers' political activities.

#### INTRODUCTION

The Supreme Court's decision in *Citizens United*, which held that corporations have a First Amendment right to make independent political expenditures,<sup>2</sup> has profoundly impacted campaign finance law and reverberated throughout the political world. The implications of *Citizens United*'s reasoning for other campaign finance statutes have already been the subject of much scholarly commentary,<sup>3</sup> and some judi-

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<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> *Id.* at 913; see also 11 C.F.R. § 100.16 (2014) (defining independent expenditures).

<sup>3</sup> See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 603–17 (2011) (arguing that the logic of *Citizens United* could threaten legal limits on

cial opinions.<sup>4</sup> At least one scholar has also noted that the decision freed corporations and unions to communicate political messages not only to the public, but also to their employees.<sup>5</sup> Yet so far, little attention has been paid to what might be an even more substantial implication for the employer-employee relationship: in the wake of *Citizens United*, the statutory framework intended to prevent employers from coercing their employees into participating in their political expression no longer effectively serves that purpose.

This Note will explore the impact of *Citizens United* on political activity in the employment context and will argue that Congress should restore statutory protections. Part I explains how *Citizens United* has effectively allowed employers to require their employees to participate in their political activities. Part II illustrates some of the ways that employers have begun to use this power, and describes recent Federal Election Commission (FEC) proceedings involving such employers. Part III argues that Congress should address this issue, and offers some considerations to guide the drafting of a potential statute. Part IV explains why such a statute would be consistent with First Amendment doctrine, taking into account the impact of *Citizens United*.

Before undertaking this analysis, one point of clarification is in order: in discussing “political” activities, this Note refers to electioneering communications and speech that expressly advocates the election or defeat of a candidate.<sup>6</sup> Corporations and unions have long been allowed to engage in certain activities related to the political arena. For example, they may seek to influence elected officials regarding public policy issues.<sup>7</sup> They may also make expenditures to influence the outcome of ballot initiatives.<sup>8</sup> But until *Citizens United*, 2 U.S.C. § 441b(a) — part of the Federal Election Campaign Act of 1971<sup>9</sup> (FECA) — barred corporations and unions from making “a contribu-

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foreign spending in U.S. elections, spending on judicial elections, and direct contribution amounts).

<sup>4</sup> See, e.g., *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (en banc) (noting that *Citizens United*'s reasoning left the precedential value of prior campaign finance jurisprudence “on shaky ground”).

<sup>5</sup> See Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, 120 YALE L.J. ONLINE 17 (2010), <http://www.yalelawjournal.org/forum/addressing-political-captive-audience-workplace-meetings-in-the-post-citizens-united-environment> [<http://perma.cc/YYL4-4PCM>].

<sup>6</sup> “Electioneering communications” clearly refer to a federal candidate and are distributed shortly before an election. For the full statutory definition, see 2 U.S.C. § 434(f)(3) (2012).

<sup>7</sup> Federal law requires organizations to register in-house lobbying activities if related expenses exceed a de minimis threshold. *Id.* § 1603(a).

<sup>8</sup> See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784, 795 (1978).

<sup>9</sup> Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.) (current version at 52 U.S.C.A. §§ 30101–30146 (West 2014)).

tion or expenditure in connection with any election to any political office.”<sup>10</sup> In *Citizens United*, the Supreme Court struck down the statute’s ban on independent political expenditures,<sup>11</sup> though it did not explicitly address the ban on direct contributions by corporations to political candidates or parties.<sup>12</sup>

## I. THE IMPACT OF *CITIZENS UNITED* ON EMPLOYER-EMPLOYEE RELATIONS

Before *Citizens United*, Congress had established a comprehensive statutory framework regulating corporations’ and unions’ political engagement. One explicit goal of this framework was to protect employees against undue pressure from employers who might seek to coerce them into participating in certain political activities. Yet in ruling that corporations and unions have the right to make independent expenditures, the Supreme Court created a hole in that statutory scheme through which employers may legally require employee participation in their political activities.

### A. *The Pre-Citizens United Framework*

Corporations and unions could not require employees to participate in political activities before *Citizens United* because those entities were barred from such activities by § 441b(a). The statutory restriction was written broadly to encompass not only financial gifts but also “anything of value.”<sup>13</sup> Compensated employee time contributed to campaign activities was considered an in-kind direct contribution by the employer, and therefore prohibited.<sup>14</sup> If an employee participated in

<sup>10</sup> 2 U.S.C. § 441b(a).

<sup>11</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). Although *Citizens United* did not present the issue of unions’ independent expenditures, historically campaign finance regulations have treated corporations and unions as equivalent. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 802 (2012). The FEC has interpreted *Citizens United* as applying to unions as well, noting that the statute and associated regulations maintain this equivalence and that the Court’s decision suggested no reason to treat unions differently. FEC Advisory Op. 2010-11, at 3 n.3 (July 22, 2010), <http://saos.fec.gov/aodocs/AO%202010-11.pdf> [<http://perma.cc/UX92-4T5C>].

<sup>12</sup> See *Citizens United*, 130 S. Ct. at 909. The Court upheld the direct-contribution ban in *FEC v. Beaumont*, 539 U.S. 146, 149 (2003), and recently declined to grant certiorari in a Fourth Circuit case maintaining the ban, see *United States v. Danielczyk*, 683 F.3d 611, 615 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 1459 (2013).

<sup>13</sup> 2 U.S.C. § 441b(b)(2).

<sup>14</sup> 11 C.F.R. § 100.54 (2014); see also FEC MUR 5664 (Int’l Union of Painters & Allied Trades Dist. Council 53), General Counsel’s Report #2, at 5 (Apr. 4, 2008), <http://eqs.fec.gov/eqsdocsMUR/29044222596.pdf> [<http://perma.cc/QA59-N6K3>] (stating that an in-kind contribution would be established if employees were directed to participate in rallies supporting then-Senator John Kerry’s presidential campaign on paid time); FEC MUR 5268 (Ky. State Dist. Council of Carpenters et al.), General Counsel’s Report #3, at 4–8 (May 18, 2004), <http://eqs.fec.gov/eqsdocsMUR>

other political messaging by the corporation or union, or by an independent third-party group, such activity would be considered a prohibited independent expenditure if compensated by the employer.<sup>15</sup> Even if *not* compensated, these activities were attributed to the employer if employees were directed by managers to participate.<sup>16</sup>

Indeed, FECA not only prohibited corporations and unions from dragooning their employees into participation in their political activities, it also restricted their election-related *communications* with employees. These entities were allowed to communicate with employees regarding policy issues and pending legislation, but were not permitted to “expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party,”<sup>17</sup> either to their employees specifically or to the general public.<sup>18</sup> Thus, by significantly restricting employers’ ability to participate in politics, the statute broadly protected employees from political coercion.

FECA did allow corporations and unions to participate in politics by sponsoring separate segregated funds (SSFs), a type of political action committee (PAC). Through these connected organizations, corporations and unions could (and still can) solicit funds and spend them on campaign contributions and/or independent political expenditures.<sup>19</sup> But importantly, the statute included extensive protections designed to prevent corporations from coercing employee contributions. Under § 441b(b)(3)(A), SSFs are broadly prohibited from making a contribution or expenditure “by utilizing money or anything of value secured by . . . job discrimination, financial reprisals,” the threat of the same, or by “moneys required as a condition of membership in a labor organization or as a condition of employment.”<sup>20</sup> Moreover, anyone soliciting SSF contributions from an employee must inform her of the fund’s political purposes,<sup>21</sup> and of her right to refuse to contribute without

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/000023EF.pdf [http://perma.cc/868N-KN96] (finding that a union made in-kind contributions by coercing employees to perform work for various campaigns).

<sup>15</sup> See FEC MUR 5612 (SEIU), Factual & Legal Analysis at 3–6, 8–9 (Mar. 7, 2007), <http://eqs.fec.gov/eqsdocsMUR/00005E81.pdf> [http://perma.cc/5PWE-CQYH] (discussing in-kind labor contributions but finding no violation because the employee volunteers were compensated by a separate segregated fund).

<sup>16</sup> See FEC MUR 5664, General Counsel’s Report #2, *supra* note 14, at 5 (considering whether prohibited in-kind contributions were made “as a result of managers directing employees to engage in political activities”).

<sup>17</sup> 11 C.F.R. § 114.2(b)(2)(ii); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

<sup>18</sup> See *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 45 (D.D.C. 2012) (noting that “the general public necessarily would include rank-and-file employees”), *aff’d*, 761 F.3d 10 (D.C. Cir. 2014).

<sup>19</sup> See 2 U.S.C. § 441b(b)(2) (2012).

<sup>20</sup> *Id.* § 441b(b)(3)(A).

<sup>21</sup> *Id.* § 441b(b)(3)(B).

reprisal.<sup>22</sup> Acting in accordance with these restrictions, a corporation may solicit from its stockholders, executive and administrative personnel, and their families, and a union may solicit from its members and their families (the “restricted class”).<sup>23</sup> But if a corporation or union wants to solicit SSF contributions *beyond* the restricted class, from rank-and-file employees and/or their families, further restrictions apply: such solicitations must be made in writing, are limited to two times per calendar year, must be mailed to the employee’s residence, and must be designed such that the soliciting entity does not know who does or does not make a contribution of fifty dollars or less.<sup>24</sup> These statutory features confirm what legislative history lays bare: protecting employees from corporations’ and unions’ attempts to coerce their political activity has long been a specific goal of Congress’s campaign finance legislation.<sup>25</sup>

In sum, prior to *Citizens United*, employees were protected from coerced political activity. Corporations and unions could not pressure their employees to participate in making campaign contributions or independent expenditures, since the organizations themselves were barred from those activities. They could not expressly advocate that their employees vote a certain way. Nor could they coerce employee contributions to SSFs; such coercion was explicitly barred by statute, and extensive regulations ensured that any solicitation of employees would be infrequent, at arm’s length, and ensure dissenters’ anonymity.

### B. *The Post–Citizens United World*

The legal framework described above, with extensive employee protections built into SSFs as the only vehicle through which corporations and unions could participate in politics, no longer serves its function if those employers can participate directly. And because Congress did not anticipate a world in which corporations and unions could make independent political expenditures, there are no statutory provisions governing the solicitation of employees for such expenditures. Under current law, neither the Constitution nor federal statutes nor the

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<sup>22</sup> *Id.* § 441b(b)(3)(C).

<sup>23</sup> *Id.* § 441b(b)(4)(A); *see also id.* § 441b(b)(7) (defining “executive or administrative personnel” (internal quotation marks omitted)).

<sup>24</sup> *Id.* § 441b(b)(4)(B).

<sup>25</sup> *See, e.g.,* H.R. REP. NO. 94-1057, at 63 (1976) (Conf. Rep.) (emphasizing the conferees’ intent “to assure the anonymity [sic] of those who do not wish to respond or who wish to respond with a small contribution”); 122 CONG. REC. 6959 (1976) (statement of Sen. Bumpers) (“Everybody is concerned about the possibilities of a gentle, nevertheless overt, pressure when employees are solicited by their employer.”); 117 CONG. REC. 43,381 (1971) (statement of Rep. Hansen) (explaining that the “essential prerequisite for the validity of [SSF] funds” is that they be obtained “in a truly voluntary manner,” free from abuse of “organizational authority”).

laws of most states prevent employers from requiring their employees to participate in their political activities.

Absent statutory protection, federal law provides no redress for employees who suffer termination or other adverse action as a consequence of their unwillingness to participate in their employers' political activities. The Constitution itself provides no such protection, as employer-directed terms and conditions of private employment do not constitute state action.<sup>26</sup> And in U.S. employment law, employment-at-will remains the default rule.<sup>27</sup>

Before *Citizens United*, Congress never had to consider how to protect employees from being coerced to participate in corporate or union political activities that were themselves illegal. But by allowing these entities to make independent political expenditures, the Supreme Court has rendered SSFs (with their considerable restrictions and reporting obligations<sup>28</sup>) an easily bypassed "statutory artifact,"<sup>29</sup> thereby opening a large hole in the legal framework meant to protect employees from coercion. Under current federal law, corporations and unions may compel rank-and-file employees to carry out the entity's political advocacy just as they may compel employees to carry out other activities for the organization.<sup>30</sup> Such political advocacy may include participation in campaign activities for a particular candidate so long as the corporation or union does not coordinate with the campaign,<sup>31</sup> a limitation that means relatively little in practice.<sup>32</sup> Federal election law does not even bar requiring an employee to participate in *uncompensated* political activity outside work hours,<sup>33</sup> though the employee could seek due compensation under the Fair Labor Standards Act of 1938.<sup>34</sup>

Furthermore, the laws of most states do not offer the protection that federal law no longer provides. Professor Eugene Volokh has found that approximately half of all Americans live in jurisdictions that provide some level of protection from employer retaliation for

<sup>26</sup> See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); Sachs, *supra* note 11, at 849–50.

<sup>27</sup> See Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 5 n.9 (2010) (noting that "employment at will is the established law in every state except Montana, which has modified the default rule by statute").

<sup>28</sup> See 2 U.S.C. §§ 432–434.

<sup>29</sup> *Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 11 (D.C. Cir. 2014).

<sup>30</sup> See FEC MUR 6344 (United Pub. Workers, AFSCME Local 646, AFL-CIO), First General Counsel's Report at 7 (Jan. 31, 2011), <http://eqs.fec.gov/eqsdocsMUR/12044314606.pdf> [<http://perma.cc/VQP3-KZ4M>] (noting that after *Citizens United*, an employer "may use its own resources, including paid work-hour time of its employees, for independent expenditures").

<sup>31</sup> See *id.* at 13–14.

<sup>32</sup> See Mike McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. TIMES, Feb. 26, 2012, at A1 (discussing the "fluidity and ineffectual enforcement" of the coordination rules).

<sup>33</sup> See *infra* pp. 678–79.

<sup>34</sup> 29 U.S.C. §§ 201–219 (2012).

private-employee speech or political activity.<sup>35</sup> Yet while most or all of the relevant statutes protect an employee's self-directed, off-work political activity, fewer protect against employer coercion. For example, one common state-level approach prohibits taking action against employees for engaging in political activities.<sup>36</sup> Other state employment law statutes prohibit retaliation against employees for engaging in off-duty lawful activities;<sup>37</sup> for engaging in "recreational activities";<sup>38</sup> for belonging to, endorsing, or affiliating with a political party;<sup>39</sup> or for engaging in electoral activities.<sup>40</sup> These and similar statutes prohibit an employer from firing an employee for activities in which she decides to participate, but appear not to protect an employee who *declines* to participate in political activities directed by her employer. Even the few statutes that are written more broadly may not provide such protection (pending judicial interpretation),<sup>41</sup> and may have limited scope even where applicable.<sup>42</sup>

In declaring that corporations and unions must be allowed to make independent political expenditures, *Citizens United* has enabled these employers to bypass the SSF framework that had purposefully and effectively barred political coercion in the workplace. As a result, corporations and unions may now require employees to participate in a wide range of political activities, unhindered by the Constitution or by federal or state statutes. Of course, most employers are unlikely to utilize their workforces in this way. But some will and indeed already have, particularly unions and those corporations that are significantly impacted by government regulation. After *Citizens United*, their employees are no longer protected.

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<sup>35</sup> Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012).

<sup>36</sup> See, e.g., NEV. REV. STAT. § 613.040 (2013); W. VA. CODE ANN. § 3-8-11(b) (LexisNexis 2013). The wording and interpretation of these statutes varies somewhat by jurisdiction. See Volokh, *supra* note 35, at 313-19.

<sup>37</sup> Volokh, *supra* note 35, at 309-10.

<sup>38</sup> *Id.* at 311-12 (internal quotation marks omitted).

<sup>39</sup> *Id.* at 324-26.

<sup>40</sup> *Id.* at 326-27.

<sup>41</sup> States with ambiguous statutory language include Montana, which requires "reasonable job-related grounds for dismissal." MONT. CODE ANN. § 39-2-903(5) (2013). Louisiana and Massachusetts prohibit employment discrimination based on an employee's giving or withholding of a political "contribution." LA. REV. STAT. ANN. § 18:1461.1(A)(2) (2012); MASS. GEN. LAWS ch. 56, § 33 (2012). Oregon has a similar statute that is more clearly limited to the direct contributions from which corporations and unions are still prohibited. See OR. REV. STAT. § 260.665(2) (2013) (referring to contributions "to any candidate, political party or party committee").

<sup>42</sup> For example, Connecticut's statute, which may have the broadest language, bars disciplining or discharging an employee for exercising "rights guaranteed by the first amendment to the United States Constitution." CONN. GEN. STAT. § 31-51q (2013). Yet courts have found the statute limited in scope, with no bearing on decisions denying promotion or tenure, or on decisions not to hire. Volokh, *supra* note 35, at 311.

## II. A GLIMPSE OF WHAT'S AHEAD? WORKPLACE COERCION IN RECENT ELECTIONS

Some corporations and unions have already begun to take advantage of their newfound right to communicate political messages to their employees and, through those employees, to the general public. In some cases employees have been required to attend political events or participate in campaign activities without pay. These examples, and the inability of the FEC to sanction the employers responsible, illustrate just how flimsy employee protections have become in the post-*Citizens United* legal regime.

Political advocacy within the employment relationship has taken a variety of forms. At some companies, executives have sent letters to employees urging them to support certain political candidates, and even warning that their jobs will be in jeopardy if those candidates do not prevail.<sup>43</sup> Some employers have held captive audience workplace meetings to compel employees to listen to their political views, a tactic that Professor Paul Secunda argues may now be legal after *Citizens United*.<sup>44</sup> During the 2012 campaign, on a conference call hosted by a conservative small business group, Mitt Romney urged participating business owners to “make it very clear to your employees what you believe is in the best interest of your enterprise and therefore their job and their future in the upcoming elections,” noting specifically that there was “[n]othing illegal” about sharing such opinions.<sup>45</sup> The U.S. Chamber of Commerce encouraged businesses to include political advertisements in their employees’ payroll envelopes.<sup>46</sup> A national PAC with ties to more than one hundred prominent American employers now specializes in helping companies communicate political messages to their employees.<sup>47</sup>

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<sup>43</sup> Steven Greenhouse, *Here’s a Memo from the Boss: Vote This Way*, N.Y. TIMES, Oct. 27, 2012, at A1. These practices harken back to the Gilded Age, when the head of the Steinway & Sons piano company reportedly told employees before the 1896 presidential election, “Men, vote as you please, but if [William Jennings] Bryan is elected tomorrow, the whistles will not blow Wednesday morning.” Bruce Ackerman & Ian Ayres, *Election Bosses: How to Stop Employers from Telling Workers Whom to Vote For*, SLATE (Nov. 2, 2012, 6:31 PM) (internal quotation marks omitted), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/11/how\\_congress\\_can\\_stop\\_employers\\_from\\_telling\\_workers\\_how\\_to\\_vote.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/how_congress_can_stop_employers_from_telling_workers_how_to_vote.html) [<http://perma.cc/DA7N-L5LS>].

<sup>44</sup> See Secunda, *supra* note 5, at 20.

<sup>45</sup> Mollie Reilly, *Mitt Romney Encouraged Business Owners to Advise Employees How to Vote*, HUFFINGTON POST (Oct. 18, 2012, 11:25 AM) (internal quotation marks omitted), [http://www.huffingtonpost.com/2012/10/17/mitt-romney-employees-voting\\_n\\_1975636.html](http://www.huffingtonpost.com/2012/10/17/mitt-romney-employees-voting_n_1975636.html) [<http://perma.cc/M2KB-CWTE>].

<sup>46</sup> Gordon Lafer, *Very Unwise for Employers to Tell Employees How to Vote*, THE HILL: CONGRESS BLOG (Oct. 25, 2012, 5:00 PM), <http://thehill.com/blogs/congress-blog/economy-a-budget/264067-very-unwise-for-employers-to-tell-employees-how-to-vote> [<http://perma.cc/9LRP-5N7Y>].

<sup>47</sup> Spencer Woodman, *Office Politics: Inside the PAC Teaching Corporate America How to Make Its Employees Vote for the Right Candidates and Causes*, SLATE (Oct. 15, 2014, 11:49 PM),

Some employers have gone beyond merely expressing their own views and have sought to compel their employees to participate actively in political activities in support of their preferred candidates. One widely reported example involved Murray Energy, a coal mining firm whose CEO has also been accused of coercing employees to give money to Republican candidates.<sup>48</sup> In August 2012, Mitt Romney spoke at an Ohio campaign rally in front of one of Murray Energy's mines. Rows of miners were featured behind him on stage, with many more present in the audience; footage from the rally was later used in Romney campaign commercials.<sup>49</sup> Several Murray Energy employees alleged that the company, which shut down the mine for the day citing safety concerns, had forced them to attend the rally.<sup>50</sup> While the company acknowledged that workers were forced to give up a day's pay due to the event,<sup>51</sup> its CFO confusingly claimed that "attendance at the Romney event was mandatory, but no one was forced to attend."<sup>52</sup> Local advocacy group ProgressOhio filed a complaint with the FEC, alleging that the miners' required attendance constituted a prohibited corporate contribution from Murray Energy to the Romney campaign and that it violated Commission regulations.<sup>53</sup> The FEC has not yet ruled on the matter, but took no action in a similar case that involved the same regulation.<sup>54</sup>

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[http://www.slate.com/articles/news\\_and\\_politics/politics/2014/10/bpac\\_how\\_the\\_business\\_industry\\_political\\_action\\_committee\\_teaches\\_corporate.html](http://www.slate.com/articles/news_and_politics/politics/2014/10/bpac_how_the_business_industry_political_action_committee_teaches_corporate.html) [<http://perma.cc/ZC3P-99SA>].

<sup>48</sup> See Alec MacGillis, *Coal Miner's Donor*, NEW REPUBLIC, Oct. 25, 2012, <http://www.newrepublic.com/article/politics/108140/coal-miners-donor-mitt-romney-benefactor> [<http://perma.cc/HSC3-J6FR>]. A nonprofit group filed an FEC complaint against Murray Energy over the allegations in this report. Complaint, Citizens for Responsibility & Ethics in Wash. v. Murray (FEC Oct. 5, 2012), [http://crew.3cdn.net/1d82f57fa18eb104d8\\_17m6i6thu.pdf](http://crew.3cdn.net/1d82f57fa18eb104d8_17m6i6thu.pdf) [<http://perma.cc/TV9J-C9YD>]. The FEC has yet to rule on the matter.

<sup>49</sup> Neela Banerjee, *Romney Ad Features Miners Allegedly Forced to Attend Rally*, L.A. TIMES, Sept. 19, 2012, <http://articles.latimes.com/2012/sep/19/news/la-pn-romney-ad-miners-rally-20120919> [<http://perma.cc/MMU5-JEFJ>].

<sup>50</sup> *Id.*

<sup>51</sup> Harry Bradford, *Murray Energy Miners Allege They Had to Give Up Pay to Attend 'Mandatory' Romney Rally*, HUFFINGTON POST (Aug. 29, 2012, 1:39 PM), [http://www.huffingtonpost.com/2012/08/28/century-mine-romney-ohio-mandatory\\_n\\_1836674.html](http://www.huffingtonpost.com/2012/08/28/century-mine-romney-ohio-mandatory_n_1836674.html) [<http://perma.cc/X2HK-YRJA>] (interview with Murray Energy CFO Rob Moore). While some news sources have noted that the company may have committed a Fair Labor Standards Act violation, see, e.g., David McCann, *CEOs Twist Employees' Arms over Politics*, CFO, <http://www2.cfo.com/leadership/2012/10/ceos-twist-employees-arms-over-politics> [<http://perma.cc/Q6PN-F98Q>], it does not appear that a complaint was ever filed.

<sup>52</sup> Bradford, *supra* note 51 (internal quotation mark omitted). The CFO acknowledged that managers told employees that attendance was mandatory, but stated that no action was ultimately taken against employees who did not attend. *Id.*

<sup>53</sup> Omar Faruk, *ProgressOhio Files FEC Complaint Against Romney, Mining Company*, PROGRESSOHIO (Sept. 24, 2012), [http://www.progressohio.org/progressohio\\_files\\_fec\\_complaint\\_against\\_romney\\_mining\\_company](http://www.progressohio.org/progressohio_files_fec_complaint_against_romney_mining_company) [<http://perma.cc/JR55-AJP8>].

<sup>54</sup> See *infra* p. 679.

One week after the rally at the Murray Energy mine, the FEC ruled on a complaint filed against the United Public Workers, AFSCME Local 646, AFL-CIO (UPW). According to undisputed facts established in the enforcement proceedings, UPW held a mandatory employee meeting in April 2010 at which managers told UPW employees they were “expected” to participate in the union’s activities in support of Democratic congressional candidate Colleen Hanabusa.<sup>55</sup> These activities included sign waving, phone banking, and canvassing, all conducted outside work hours; employees were not paid for participating, nor did the union argue that these activities were part of any employee’s normal duties.<sup>56</sup> Georgette Yaindl, a former UPW employee, alleged that she and a colleague were terminated without justification after they declined to participate in some of these activities.<sup>57</sup> While UPW denied that employee participation in campaign activities was “a condition of continued employment,” it did not deny any of Yaindl’s factual allegations or provide any other reason for terminating the two employees.<sup>58</sup> The union instead argued that its actions did not constitute coercion and that, in any case, after *Citizens United* it was not prohibited from compelling employee participation in its independent political activity.<sup>59</sup>

The FEC ruled unanimously that UPW had failed to report independent expenditures in support of a federal candidate, but the Commissioners split 3–3 on the question of whether UPW’s actions violated § 441b(a).<sup>60</sup> The three Republican Commissioners accepted that the union’s actions amounted to coercion, but found that “UPW’s independent use of its paid workforce to campaign for a federal candidate post–*Citizen’s* [sic] *United* was not contemplated by Congress and, consequently, is not prohibited by either the Act or Commission regulations.”<sup>61</sup> Because UPW had not coordinated its activities through an SSF, regulations pertaining to such funds were inapposite.<sup>62</sup> The

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<sup>55</sup> FEC MUR 6344 (UPW), Statement of Reasons of Vice Chair Ellen L. Weintraub & Comm’rs Cynthia L. Bauerly & Steven T. Walther at 1 (Aug. 7, 2012) [hereinafter Democratic Comm’rs Statement of Reasons] (internal quotation marks omitted), <http://eqs.fec.gov/eqsdocsMUR/12044314776.pdf> [<http://perma.cc/S8WM-XKCP>].

<sup>56</sup> *Id.* at 2.

<sup>57</sup> FEC MUR 6344 (UPW), Factual & Legal Analysis at 1 (Apr. 18, 2011), <http://eqs.fec.gov/eqsdocsMUR/12044314629.pdf> [<http://perma.cc/E2ZX-XHNM>].

<sup>58</sup> Democratic Comm’rs Statement of Reasons, *supra* note 55, at 2–3 (internal quotation mark omitted).

<sup>59</sup> FEC MUR 6344, Factual & Legal Analysis, *supra* note 57, at 1.

<sup>60</sup> The split vote meant that UPW had no liability on the § 441b(a) issue. UPW agreed to pay a \$5500 civil fine for violating the disclosure requirements of 2 U.S.C. § 434(g) (2012). FEC MUR 6344 (UPW), Conciliation Agreement at 4 (July 9, 2012), <http://eqs.fec.gov/eqsdocsMUR/12044314733.pdf> [<http://perma.cc/4TT6-JXX4>].

<sup>61</sup> FEC MUR 6344 (UPW), Statement of Reasons Chair Caroline C. Hunter & Comm’rs Donald F. McGahn II & Matthew S. Petersen at 2 (Aug. 21, 2012) (footnote omitted), <http://eqs.fec.gov/eqsdocsMUR/12044320562.pdf> [<http://perma.cc/UJ27-3DDU>].

<sup>62</sup> *Id.*

Commissioners found the FEC's remaining anticoercion regulation inapplicable as well, because its language bars coercion only "to urge any individual to *make a contribution or engage in fundraising activities on behalf of a candidate or political committee*,"<sup>63</sup> and the FEC unanimously found no evidence that UPW had coerced employees to make *financial* contributions in this case.<sup>64</sup>

The three Democratic Commissioners found that UPW had violated § 441b(a).<sup>65</sup> Although the Commissioners conceded that "UPW appears to have engaged in independent speech," they read the language of the regulation on coerced contributions sufficiently broadly to encompass the union's conduct.<sup>66</sup> Citing "the congressional objective to ensure that contributions from corporate and union employees, who wish to aid their employers' political activities, are truly voluntary,"<sup>67</sup> the Commissioners argued that the *Citizens United* Court did not intend to diminish employees' rights to be free from the workplace coercion that Congress had repeatedly sought to prohibit.<sup>68</sup>

While popular commentary regarding the split FEC decision tended toward outrage at the Republican Commissioners who blocked the FEC from acting against UPW,<sup>69</sup> the most troubling aspect of the case may be the weak legal basis for the Democratic Commissioners' arguments. While it is certainly correct that Congress intended to protect employees from workplace coercion, that congressional intent is embodied in the regulations governing SSFs. Where a corporation or union itself makes an independent expenditure, those regulations are inapposite, and no applicable statutory provision bars workplace coercion.<sup>70</sup> Thus, in overturning the ban on independent political expenditures by corporations and unions, *Citizens United* in effect decimated the protections from coerced political speech that employees once enjoyed.

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<sup>63</sup> *Id.* (quoting 11 C.F.R. § 114.2(f)(2)(iv) (2014) (emphasis added)) (internal quotation mark omitted).

<sup>64</sup> FEC MUR 6344 (UPW), Certification at 2 (Apr. 5, 2011), <http://eqs.fec.gov/eqsdocsMUR/12044314625.pdf> [<http://perma.cc/CT8C-E4SW>].

<sup>65</sup> Democratic Comm'rs Statement of Reasons, *supra* note 55, at 1.

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3–4.

<sup>69</sup> See, e.g., Mark Schmitt, *Who's the Boss? The Worst Post–Citizen's United Ruling Yet*, NEW REPUBLIC (Sept. 11, 2012), <http://www.newrepublic.com/article/107079/whos-boss-worst-post-citizens-united-ruling-yet> [<http://perma.cc/U35C-QWP8>].

<sup>70</sup> In support of their approach, the Democratic Commissioners cited a regulation regarding coordination with candidates and two prior enforcement proceedings involving in-kind campaign contributions, all of which remains illegal but does not pertain to the independent-expenditure question impacted by *Citizens United* and relevant to the UPW case. See Democratic Comm'rs Statement of Reasons, *supra* note 55, at 3 n.13.

### III. CONGRESS SHOULD ACT TO PROTECT EMPLOYEES FROM POLITICAL COERCION

Having acted consistently for decades to protect employees from being coerced to participate in employers' political activity, Congress must act again to restore such protection after *Citizens United*. A federal statute with this objective would safeguard important public and employee interests, and could be designed simultaneously to protect employers' legitimate interest in participating in robust public discourse.

#### A. *The Case for Statutory Protection*

Guarding against political coercion of employees serves important societal interests in both individual autonomy and robust public discourse. Moreover, this form of workplace protection is particularly justified because employees have an especially strong interest in avoiding coerced participation, whereas an employer's legitimate associational interest in such coercion is limited.

Perhaps the most obvious interest served by such protection is the employee's interest in being an autonomous political actor, able to engage in (or choose not to engage in) the public sphere without fear of jeopardizing her livelihood. The specter of a job loss or other adverse employment consequence presents an incredibly potent threat to an individual's free expression,<sup>71</sup> as the Supreme Court has recognized.<sup>72</sup> Indeed, the Framers recognized the enormous power held by one who controls the livelihood of another; as Alexander Hamilton wrote, "[I]n the main it will be found that a power over a man's support is a power over his will."<sup>73</sup>

Of course, the argument for employee autonomy has its limits, as discussed in section III.B, but many of those concerns do not apply to restrictions on what political activity employers may *require*. For example, in some cases employers may have a legitimate interest in terminating workers who speak out directly against the employers' business interests,<sup>74</sup> or whose expression is alienating to coworkers or customers.<sup>75</sup> These concerns are especially legitimate with regard to

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<sup>71</sup> See Lewis Maltby, *Office Politics: Civic Speech Shouldn't Get Employees Fired*, LEGAL TIMES (Aug. 29, 2005), <http://workrights.us/wp-content/uploads/2011/02/ldlegaltimes.pdf> [<http://perma.cc/QEX4-FH4B>] ("People need their jobs, and many will sacrifice their rights as citizens to continue to provide for themselves and their families.").

<sup>72</sup> See NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (noting that any balancing of employees' and employers' rights must consider "the economic dependence of the employees on their employers").

<sup>73</sup> THE FEDERALIST NO. 73, at 440 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>74</sup> See, e.g., *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 736, 741 (Idaho 2003) (rejecting a wrongful discharge claim brought by an employee who participated in public activism against a land-development project supported by, and favorable to, his employer).

<sup>75</sup> Volokh, *supra* note 35, at 301.

high-ranking officers whose views are likely to be seen as reflecting those of the employer, though in some cases expression by lower-level employees may create similar pressure.<sup>76</sup> These are complicated associational-rights questions with which states seeking to protect employee speech have wrestled.<sup>77</sup> But protecting employees against directives to engage actively in certain political activity is a more modest project, with fewer risks to legitimate employer interests.

The government also has an interest in ensuring the basic health of American democracy, and “that competition among actors in the political arena is truly competition among ideas.”<sup>78</sup> Thus, for example, using the power of the economic marketplace to coerce someone to vote a certain way is already prohibited.<sup>79</sup> And ironically, the United States regularly condemns workplace political coercion as antidemocratic when it occurs abroad. For example, the Bush Administration criticized Armenian elections after observers found that “factory workers . . . were instructed to attend the incumbent’s rallies,”<sup>80</sup> which is not unlike what Murray Energy employees were required to do. As a D.C. District Court judge observed recently in upholding SSF solicitation restrictions post-*Citizens United*, safeguarding the speech rights of employees as well as employers is “vitally important to the health of American democracy,” which Congress may act to protect.<sup>81</sup>

Indeed, the Supreme Court has consistently emphasized the importance of “uninhibited, robust, and wide-open” debate on public issues.<sup>82</sup> Allowing corporations and unions to conscript their employees into participation in their speech would not only warp that debate via the leveraging of tremendous coercive power, it would have several other harmful effects as well. For one, this distortion could be especially pernicious because, as in the Murray Energy example, those subject to the messaging might not know who is really behind the

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<sup>76</sup> In one recent example of customer alienation, a movie theater chain and several other stores were boycotted after their *or their employees'* contributions to California's Proposition 8 campaign were publicized. See *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 921 (E.D. Cal. 2011), *aff'd in part and dismissed in part*, 752 F.3d 827 (9th Cir. 2014).

<sup>77</sup> Some states specifically do not protect employee speech and political activity that sufficiently undermines employer interests. Volokh, *supra* note 35, at 304–08.

<sup>78</sup> *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986).

<sup>79</sup> See 18 U.S.C. § 594 (2012).

<sup>80</sup> Lafer, *supra* note 46 (alteration in original) (internal quotation marks omitted). The Bush Administration also refused to accept the legitimacy of Ukrainian elections in part because international observers reported that managers of state-owned enterprises had “instructed their subordinates to vote for [the ruling party].” *Id.* (alteration in original) (internal quotation marks omitted).

<sup>81</sup> *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 47 (D.D.C. 2012), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014).

<sup>82</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

speech.<sup>83</sup> Employer pressure to participate in such activities would likely also lead workers to suppress their own political views.<sup>84</sup> Not only would such self-censorship further distort the political discourse, but losing workers' views would also deprive the marketplace of ideas of an important voice, which is itself a harm, especially (though not exclusively) when an employee's workplace experience is relevant to an area of policy.<sup>85</sup>

### B. *Defining the Proper Scope of Statutory Protection*

Any federal statute addressing these concerns must be broad enough to protect employees but not so broad as to infringe upon employers' legitimate and constitutionally protected interests. For example, a per se rule against corporations or unions conducting political activities through employees could effectively prevent those entities from speaking at all, which would be unconstitutional under *Citizens United*. But a well-designed statute can properly protect employees while still ensuring that corporations and unions have an effective opportunity to exercise their rights and pursue their interests.

One way for Congress to reestablish employee protections would be simply to extend the solicitation restrictions of § 441b(b)(3), which currently apply to SSFs, to corporations and unions. Removing or editing the statute's references to a "fund" yields the following language:

(3) It shall be unlawful —

(A) for [a union or corporation] to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment . . . ;

(B) for any person soliciting an employee for a contribution [or expenditure] . . . to fail to inform such employee of [its] political purposes . . . at the time of such solicitation; and

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<sup>83</sup> In weighing the First Amendment interests implicated by compelled speech, the Court has considered the likelihood of voter confusion a significant factor. See, e.g., *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15–16, 21 (1986) (plurality opinion) (holding, partly on this basis, that a state agency could not require a utility company to include a third-party newsletter in its billing envelope); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980).

<sup>84</sup> See David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 9–13 (1998) (discussing the pressure employees face to censor themselves in the workplace); Greenhouse, *supra* note 43 (quoting an employee who "won't even wear [his] Obama pin to work because of [his employer's] mailer" endorsing Mitt Romney and other candidates (internal quotation mark omitted)).

<sup>85</sup> See Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 111–12 (1995); Clyde W. Summers, Lecture, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 692.

(C) for any person soliciting an employee for a contribution [or expenditure] . . . to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.<sup>86</sup>

This simple statutory change would effectively protect workers, because “contribution or expenditure” is defined to include not only financial contributions but also “services” and “anything of value.”<sup>87</sup> Although § 441b is a criminal statute, the protections envisioned here would be enforceable by a civil cause of action,<sup>88</sup> similar to other employment discrimination protections, and would likely be evaluated under a familiar burden-shifting framework.<sup>89</sup>

To ensure that corporations’ and unions’ protected rights are not infringed, some employees and some employers would likely need to be exempted. Most importantly, Congress should exempt those employees for whom employer-directed political activity is a bona fide occupational qualification (BFOQ). Such an exemption would allow employers to direct the political activity of lobbyists and other employees hired to facilitate the entity’s political activity.<sup>90</sup> Additionally, executives should be exempted (as they are from SSF solicitation rules as part of the “restricted class”), since they may frequently be called upon to speak for the entity on a range of public issues. These reasonable exemptions would ensure corporations and unions an effective opportunity to exercise the speech rights recognized in *Citizens United*, without allowing them to direct every employee’s political activity.

Some categories of employers should also be exempted. Small employers are already exempt from many employment discrimination statutes<sup>91</sup> and the same should apply here, given their stronger associational interests and the fact that they may not be able to hire someone specifically to carry out their political advocacy. Additionally, non-profit advocacy corporations that are designed to amplify an ideologi-

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<sup>86</sup> 2 U.S.C. § 441b(b)(3) (2012) (edited to remove reference to “moneys obtained in any commercial transaction,” which may be used post-*Citizens United*, and to add references to expenditures).

<sup>87</sup> *Id.* § 441b(b)(2).

<sup>88</sup> California’s statute protecting employee political rights provides for a criminal penalty (a fine no greater than \$5,000) as well as a civil cause of action. CAL. LAB. CODE § 1103 (West 2011). Unsurprisingly, the availability of the criminal penalty does little to protect employee interests in practice, as employees have little incentive to pursue charges, and district attorneys may be unwilling or too burdened to prosecute. See Sionag M. Henner, Note, *California’s Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1054 (1970).

<sup>89</sup> See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (describing the burden-shifting framework for cases involving public employees).

<sup>90</sup> For advocacy of a broader employee-protection statute with a BFOQ exemption, see Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 258–59 (2013).

<sup>91</sup> See, e.g., 42 U.S.C. § 2000e(b) (2012) (limiting coverage of the Civil Rights Act of 1964 to employers with fifteen or more employees).

cal viewpoint should be exempt, given their particularly strong organizational speech interests.<sup>92</sup>

With these statutory protections in place, employees' interest in political autonomy and the public interest in robust democratic discourse would be appropriately protected without unduly burdening employers' right to participate in that discourse. This Note now turns to evaluating the constitutionality of such a statute under the First Amendment.

#### IV. THESE STATUTORY PROTECTIONS WOULD LIKELY SURVIVE A CONSTITUTIONAL CHALLENGE

The proposed statutory protections do not violate employers' rights. Under current doctrine, courts would likely evaluate the statute as a regulation of conduct not subject to any special First Amendment scrutiny. However, even if a court were to construe the statute as a content-neutral speech restriction and impose intermediate scrutiny, the Supreme Court's compelled-speech jurisprudence shows that the state's interest in protecting employees from political coercion would be entitled to significant weight. While *Citizens United* has expanded employers' political speech rights, neither its holding nor its rationale would place the constitutionality of the proposed statute in jeopardy.

##### A. Regulation of Conduct, Not Speech

The proposed statutory protections would constitute a restriction on employers' *conduct*, not a speech restriction subject to special First Amendment scrutiny.<sup>93</sup> Employers would still be free to communicate political messages to their employees and even to encourage them to participate in political activities; employers would be barred, however, from coercing employees to do so or taking adverse employment action against employees who refused. Thus, the statute does not regulate any "inherently expressive" conduct protected by the First Amendment;<sup>94</sup> rather, it regulates only "potentially expressive activities" which, when they "produce special harms distinct from their communicative impact, . . . are entitled to no constitutional protection."<sup>95</sup>

Of course, any restriction on the ability to hire and fire could theoretically impinge on an employer's First Amendment rights, yet Congress's authority to set minimum employment standards is nonetheless

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<sup>92</sup> The Supreme Court has noted that such corporations have particularly strong arguments against restrictions on their political expenditures. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986).

<sup>93</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616–17 (1969) (distinguishing employer speech from "conduct easily avoided, such as discharge," *id.* at 616).

<sup>94</sup> *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

<sup>95</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (holding that Jaycees' freedom of expressive association was not violated by a requirement that the organization accept women as members).

well established.<sup>96</sup> Indeed, the Supreme Court has consistently evaluated and upheld employment law protections as conduct regulations, including some that are arguably more speech-restrictive than the statute proposed here. For example, the Court has repeatedly declared that Title VII of the Civil Rights Act of 1964<sup>97</sup> constitutes a permissible regulation of conduct<sup>98</sup> in spite of some scholars' arguments that it restricts too much workplace speech.<sup>99</sup> The National Labor Relations Act<sup>100</sup> (NLRA) provides an even more apt example: the NLRA directly restricts employer-to-employee communications regarding unionization insofar as they may not contain a "threat of reprisal or force or promise of benefit."<sup>101</sup> The Court has consistently upheld these restrictions on employers' workplace speech without imposing heightened scrutiny.<sup>102</sup>

Even if the Court were to depart from this approach, the fact that the statute is content neutral means that, at most, it would be subject to intermediate scrutiny.<sup>103</sup> The proposed statute easily meets that standard; indeed, in a post-*Citizens United* case challenging SSF solicitation restrictions, the D.C. District Court declared that even strict scrutiny would be satisfied if it applied.<sup>104</sup> To understand why, it is important to consider how the Supreme Court's compelled-speech jurisprudence is relevant to this context.

### B. Constitutional Support in Compelled-Speech Jurisprudence

The Supreme Court has long recognized that the scope of speakers' First Amendment rights may be limited, in some circumstances, by others' right to decide *not* to participate in their speech.<sup>105</sup> In early

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<sup>96</sup> See, e.g., *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985).

<sup>97</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2012).

<sup>98</sup> See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting a First Amendment challenge to Title VII).

<sup>99</sup> See generally, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991).

<sup>100</sup> 29 U.S.C. §§ 151-169 (2012).

<sup>101</sup> *Id.* § 158(c).

<sup>102</sup> See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (upholding the statute and admonishing an employer for threats to shut down a plant); see also *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010) (noting that implicit employer threats are not protected by the First Amendment).

<sup>103</sup> See *McConnell v. FEC*, 540 U.S. 93, 138-40 (2003) (declining to apply strict scrutiny because the restriction at issue "in no way alter[ed] or impair[ed] the political message 'intertwined' with the solicitation," *id.* at 140); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 649 (1994).

<sup>104</sup> *Stop This Insanity, Inc. Emp. Leadership Fund v. FEC*, 902 F. Supp. 2d 23, 46 (D.D.C. 2012), *aff'd*, 761 F.3d 10 (D.C. Cir. 2014).

<sup>105</sup> See, e.g., *Turner*, 512 U.S. at 641 ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (declaring that, for First Amendment purposes, there is no difference between compelled speech and compelled silence); *W.*

compelled-speech cases involving the NLRA, the Court declared that employers have a constitutional right to attempt to *persuade* employees, but that “the limit of the right has been passed” when an element of coercion is present.<sup>106</sup> Indeed, the scope of a speaker’s First Amendment rights falls far short of the ability to coerce others to participate. Speakers also are not constitutionally protected in communicating an objectionable message to a captive audience,<sup>107</sup> nor in communicating any message to an unwilling recipient.<sup>108</sup>

Within the employment context, the Court has developed an extensive compelled-speech doctrine regarding the collection and use of union member dues. Where the law conditions employment on payment of dues, the use of such dues for political purposes raises constitutional questions “of the utmost gravity.”<sup>109</sup> Even where dues are required pursuant to a private contractual relationship between union and employer, the Court has held that the same analysis applies.<sup>110</sup> Thus, the Court has interpreted labor statutes to require payment of dues to support only the union’s collective bargaining activities,<sup>111</sup> and has required unions to return to dissenting members any portion of their dues used for political activities.<sup>112</sup> The Court recently went a step further in *Knox v. SEIU, Local 1000*,<sup>113</sup> holding that at least in some circumstances, these opt-out arrangements are insufficient to protect employees’ rights, and an affirmative opt-in is required.<sup>114</sup>

Furthermore, case law suggests that compelled participation in political speech — for example, compelling workers to attend a campaign rally — raises *greater* constitutional concerns than does compulsion to provide funds. Specifically, the Court has distinguished between com-

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Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (stating that the First Amendment was designed to prohibit coercion of speech as well as restriction of speech).

<sup>106</sup> Thomas v. Collins, 323 U.S. 516, 537–38 (1945); see also NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941) (rejecting an employer’s First Amendment argument and holding that employees are entitled to the NLRA’s protection if “the total activities of an employer restrain or coerce his employees in their free choice”).

<sup>107</sup> See *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

<sup>108</sup> See *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970).

<sup>109</sup> *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749 (1961).

<sup>110</sup> See *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988). In *Communications Workers of America v. Beck*, the Court explicitly declined to reach the question of state action, but effectively imported into the NLRA a prior statutory interpretation that had been justified on constitutional-avoidance grounds. See *id.* at 761–62. Thus, the decision has been described as driven by “constitutional values.” George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 234 (1994) (internal quotation marks omitted).

<sup>111</sup> See *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963) (holding that union membership that may be required must be “whittled down to its financial core”).

<sup>112</sup> See *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 443–44 (1984).

<sup>113</sup> 132 S. Ct. 2277 (2012).

<sup>114</sup> *Id.* at 2296.

pelled speech and compelled subsidization of speech,<sup>115</sup> in line with its longstanding view that financial contributions implicate First Amendment values but may be a step removed from speech itself.<sup>116</sup> Compelled participation in acts of speech therefore not only constitutes a greater First Amendment burden,<sup>117</sup> but also creates a greater risk of the employer's speech being mistaken for the speech of the person subject to compulsion.<sup>118</sup>

The constitutional values that have informed judicial construction of labor statutes in the Court's compelled-speech cases would likely also inform judicial review of a statute protecting employees against political coercion. While the employer/employee relationship differs from the union/member relationship in many respects, it does *not* differ here with respect to the crucial question of coercion: when an employee is required to contribute to political activity as a condition of employment, she is certainly no less coerced when the requirement is imposed by her employer and not her union representative.

This background makes apparent how unlikely it is that the Court, having upheld all manner of content-neutral regulations of conduct in the employment context, would find the proposed statute to be an impermissible regulation of employers' speech. Precedent establishes that First Amendment interests are implicated by coerced participation in political activities, and the Court has taken into account employees' economic dependence in assessing the scope of employers' expression rights.<sup>119</sup> Moreover, the union-dues decisions emphasize that dissenters should not be required to change jobs in order to avoid being compelled to fund political speech to which they object.<sup>120</sup> As the Sixth Circuit has recognized, "a state has a compelling interest in insuring that corporate employees and union members are aware of their right to refrain from contributing to political causes they do not support."<sup>121</sup> The Supreme Court's compelled-speech cases show that the state also

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<sup>115</sup> See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005); see also *Sachs*, *supra* note 11, at 857–58.

<sup>116</sup> See *Buckley v. Valeo*, 424 U.S. 1, 21–22 (1976) (per curiam) ("[T]he transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21.).

<sup>117</sup> See, e.g., *Johanns*, 544 U.S. at 565 n.8. Professors Catherine Fisk and Erwin Chemerinsky argue that corporations should be able to spend corporate (that is, shareholder) funds in exercising their associational speech rights, but that it would be impermissible compelled speech to require that employees campaign or display bumper stickers for a preferred candidate. See Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU*, Local 1000, 98 CORNELL L. REV. 1023, 1087 (2013).

<sup>118</sup> As discussed above, see *supra* note 83, the Supreme Court has recognized the potential for such confusion as independently relevant to the First Amendment analysis.

<sup>119</sup> See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

<sup>120</sup> See Jeremy G. Mallory, *Still Other People's Money: Reconciling Citizens United with Abood and Beck*, 47 CAL. W. L. REV. 1, 32 (2010).

<sup>121</sup> *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 315 (6th Cir. 1998).

has a compelling interest in ensuring that employees *have* such a right to refrain.

*C. Revisiting the Question After Citizens United*

The analysis thus far has endeavored to show that, under current Supreme Court doctrine, the proposed statutory employee protections do not violate the First Amendment. Because this precise issue has not yet been litigated, however, it is worthwhile also to consider in greater depth the *Citizens United* decision that set the issue in motion. Upon examination, neither the holding nor the reasoning in *Citizens United* suggests that the Court would be likely to strike down the statutory protections this Note proposes.

Most importantly, the Court's holding in *Citizens United* does not cast doubt on the constitutionality of employee protections, nor did any opinion in the case address that question. *Citizens United* involved independent political expenditures by a nonprofit advocacy corporation,<sup>122</sup> a type of entity unlikely to have employees who refuse to commit to its political mission (and which would be exempted from the proposed statute, in any event). While the Court's decision opened the door to employee coercion, there is no indication that any of the Justices anticipated this impact. We are left, therefore, to speculate as to the impact its reasoning may have on the relevant doctrines.

The aspect of *Citizens United* most relevant to employee statutory protections is the Court's rejection of the argument that the ban on corporations' independent political expenditures was justified by the interest in protecting dissenting shareholders. The Court, which had previously upheld other campaign finance laws partly on this basis,<sup>123</sup> found the interest insufficient to justify such a ban.<sup>124</sup> In theory, a Court that has become less concerned about protecting dissenting shareholders might also be less concerned about protecting dissenting employees, even if *Knox* strongly suggests otherwise.

The reasoning underlying the Court's rejection of the shareholder-protection rationale in *Citizens United*, however, does not apply to compelled employee speech. The Court recognized three justifications for rejecting that rationale, none of which would apply to the statute proposed here. First, the Court found that "[t]his asserted interest . . . would allow the Government to ban the political speech even of media corporations."<sup>125</sup> By contrast, the proposed statute does not ban anyone's speech, and employees of media corporations may quali-

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<sup>122</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 886, 888 (2010).

<sup>123</sup> See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 154 (2003); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982).

<sup>124</sup> *Citizens United*, 130 S. Ct. at 911.

<sup>125</sup> *Id.*

fy for a BFOQ exemption on the same terms as those of other corporations.<sup>126</sup> Second, the Court suggested that statutory protection was unnecessary because shareholders could correct any abuses “through the procedures of corporate democracy.”<sup>127</sup> But American employees have access to none of those potentially abuse-curbing procedures.<sup>128</sup> Third, the Court found that the statute was both underinclusive (because it banned corporate speech only in certain media and at certain times) and overinclusive (because it covered “all corporations, including nonprofit corporations and for-profit corporations with only single shareholders”).<sup>129</sup> Again, the proposed statute suffers from neither of these purported defects. It would likely qualify, therefore, as one of the “other regulatory mechanisms” that the Court suggested might permissibly remedy the concern about dissenters.<sup>130</sup>

More broadly, *Citizens United* relied on a conception of the nature and value of corporate speech rights that would not likely support coercion of employee speech. The *Citizens United* majority viewed corporations as essentially “associations of citizens”<sup>131</sup> who, like “[a]ll speakers, . . . use money amassed from the economic marketplace to fund their speech.”<sup>132</sup> Therefore, restricting their speech on the basis of their corporate identity constituted suspect discrimination against a disfavored category of speakers.<sup>133</sup> This notion of corporations as indistinguishable from other speakers sits at best uneasily with the prospect of management having full authority to deploy employees’ time toward whatever activities it sees fit.<sup>134</sup> Indeed, if corporations may use not only resources gained in the economic marketplace (as all speakers may do) but also the full force of their employment power, they would arguably be *privileged* as speakers.<sup>135</sup> Ultimately, then,

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<sup>126</sup> For example, presumably an employee assigned to write a newspaper editorial board’s endorsement in an upcoming election would be covered by the BFOQ exemption.

<sup>127</sup> *Citizens United*, 130 S. Ct. at 911 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)) (internal quotation marks omitted). These “procedures” included intracorporate remedies such as “elect[ing] the board of directors or insist[ing] upon protective provisions in the corporation’s charter,” as well as “the judicial remedy of a derivative suit.” *Bellotti*, 435 U.S. at 794–95.

<sup>128</sup> Indeed, Justice Kennedy’s dissent in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), overruled by *Citizens United*, 130 S. Ct. 876, emphasized that shareholders were differently situated from union employees at risk of losing their jobs, noting that dissenting shareholders “can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own.” *Id.* at 710 (Kennedy, J., dissenting).

<sup>129</sup> *Citizens United*, 130 S. Ct. at 911.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 908.

<sup>132</sup> *Id.* at 905.

<sup>133</sup> *See id.* at 898–99, 908.

<sup>134</sup> *See* Schmitt, *supra* note 69.

<sup>135</sup> Such an absolutist view of associational rights would truly “promote corporate power at the cost of the individual and collective self-expression the [First] Amendment was meant to serve.” *Citizens United*, 130 S. Ct. at 977 (Stevens, J., concurring in part and dissenting in part).

*Citizens United* appears to stand for the proposition that the government may not place special burdens on corporations (or, presumably, unions) that it does not place on similarly situated speakers. But where the government regulates the speech of employers *as employers*, the same concern does not apply.

Beyond this argument against speaker-based discrimination, the *Citizens United* Court emphasized the value of corporate speech in contributing to the public's access to information and enriching the public discourse.<sup>136</sup> This marketplace-of-ideas justification for corporate speech, long a feature of Supreme Court jurisprudence,<sup>137</sup> surely requires that corporations have an effective opportunity to exercise their speech rights. But it cannot justify broad coercion of employees, which may actually harm this societal interest by obscuring the identity of speakers and effectively suppressing employees' own speech.<sup>138</sup>

Thus, in light of the Court's historic jurisprudence on employment regulation and compelled speech, a well-drafted statute prohibiting political coercion by employers should survive First Amendment review. While *Citizens United* has broadened the scope of corporations' ability to participate in politics, neither its holding nor its rationale would threaten the constitutionality of such statutory protections.

#### CONCLUSION

The Supreme Court's decision in *Citizens United* has significantly altered not only the nation's political landscape but also, at least for now, the level of political autonomy that employees have a right to expect in their workplace. In allowing corporations and unions to engage in independent political expenditures, the Court has effectively permitted them to bypass the regulatory regime that Congress created to protect employees from workplace political coercion. Congress should renew such protections, while still ensuring employers an effective opportunity to exercise the rights guaranteed by *Citizens United*. Such a statute would likely pass First Amendment review as a content-neutral regulation of conduct, particularly in light of the Court's compelled-speech jurisprudence. Before more employers engage in such coercion, before more employees are forced to face a choice between losing their jobs or participating in political speech with which they disagree, Congress can and should act now.

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<sup>136</sup> See *id.* at 808 (majority opinion).

<sup>137</sup> See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 782-83 (1978) (discussing the First Amendment's role in "affording the public access to discussion, debate, and the dissemination of information and ideas," *id.* at 783, and rejecting a narrower conception of corporate speech rights that could prohibit "educational and socially constructive" activities, *id.* at 782 n.18).

<sup>138</sup> See *supra* p. 681-82.