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TAKING BACK OUR DEMOCRACY: RESPONDING TO CITIZENS UNITED AND THE RISE OF SUPER PACS

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSTITUTION,
CIVIL RIGHTS AND HUMAN RIGHTS

OF THE

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UNITED STATES SENATE

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TAKING BACK OUR DEMOCRACY: RESPONDING TO *CITIZENS UNITED* AND THE RISE OF SUPER PACS

TUESDAY, JULY 24, 2012

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND HUMAN RIGHTS,
Committee on the Judiciary,
WASHINGTON, DC.

The Subcommittee met, pursuant to notice, at 2:34 p.m., in Room SH–216, Hart Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin, Leahy, Whitehouse, Klobuchar, Coons, and Blumenthal.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chairman DURBIN. This hearing of the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights will come to order. It is entitled, "Taking Back our Democracy: Responding to *Citizens United* and the Rise of Super PACs." I welcome those who have joined us in the hearing room, those watching live online, and those following the hearing on social media using the hashtag Citizens United. Someday I will understand what I just said.

[Laughter.]

Chairman DURBIN. This is the second hearing that this Committee has held on the impact of *Citizens United*, and after my opening statement, I am going to recognize Senator Graham, the Ranking Member, and Senator Leahy, Chairman of the Full Committee.

Today we will examine the dramatic rise in spending by Super PACs that are largely funded by corporations and wealthy individuals. We will also consider proposed legislation and constitutional amendments to stem this tide.

Since the Supreme Court's decisions in *Citizens United* and *SpeechNow*, a later decision by the D.C. Court of Appeals, we have witnessed the rapid rise of Super PACs and the unprecedented influence by corporations and wealthy individuals seeking to advance their political agenda.

In 2006, outside groups spent $70 million to influence the Federal midterm election. Four years later, it was up to $294 million, more than four times the amount. That is four times the amount

since 2006, and by all accounts they are going to break all records this Presidential election year.

Ordinary Americans often have no idea who is bankrolling the omnipresent political advertising. In 2006, secret donors made up one percent of all outside spending—one percent. Four years later, after *Citizens United* and the rise of Super PACs, secret donors rocketed to 44 percent of outside spending. Studies show that as the amount of money floating campaigns increases, disclosure and transparency decline. In a democracy that values openness and voter participation, the voters ought to know who is paying for the ads. We should call them not "Super PACs" but "Super Secret PACs" because the reality is the public has shockingly little information about them.

The little that we have been able to learn has identified some major donors. Half of all Super PAC money being spent in the Presidential election is coming from 22 people: millionaires and billionaires who are buying their way in.

To be clear, I do not begrudge them any business success. They have a right to be heard. However, they do not have a right to be the only voice heard. Just because wealthy donors that are behind the Super PACs have achieved economic success does not mean they have earned the right to buy or control our political agenda. Sadly, it appears that is happening.

According to a recent report on campaign elections, Super PACs threatened to purchase every last minute of available television advertising space for the fall election, exponentially driving up the cost of these ads, especially in battleground States. As a result, a voter may never hear directly from State and local candidates. I thought *Citizens United* was about giving the voters more information. These candidates can be kept off the air entirely due to the rising cost and fact that they are not entitled to reasonable access to the air waves like Federal candidates.

There are 314 million people in this country whose lives, jobs, safety, and health are impacted by decisions made by elected officials. Can we still proclaim to be the world's model for free elections with open debate when we allow 22 wealthy people to control the terms of that debate and silence the voices of others? The public may not know the agendas of those who are buying these ads, but I can assure you that the politicians they have supported will once they begin calling after the election.

There is a series of legislative proposals that would stem this dangerous tide of secret special interest money that is flowing into our elections. I have introduced Fair Elections Now. It would create a public financing system that will free candidates from the dangerous reliance on Super PACs once and for all. Under Fair Elections, viable candidates who qualify for the program would raise a maximum of $100 from any single donor. The candidates would then receive matching funds and grants sufficient to run a competitive campaign. It is a totally different approach. It really means that we would have campaigns more substantive, maybe shorter, maybe some real debates. Sound interesting?

Fair Elections would fundamentally reform our broken system and put the average citizen back in control. Last week, the Senate voted on the *DISCLOSE Act*, a simple proposition. Who is paying

for these ads? A majority of the Senate, including every Democratic Member of this Committee, voted to support the measure. I want to thank Senator Whitehouse, who is a Member of the Committee, for his leadership. The bill is simple. It requires Super PACs and other big spenders to disclose all donors who give $10,000 or more. In other words, it would write into law the same basic concept of disclosure that the Supreme Court says it endorsed in *Citizens United*.

Congress could pass these two bills right now and make a world of difference. But with a Supreme Court that has not been shy about overturning precedent and disregarding congressional intent, passing these pieces of legislation may not be enough. After much deliberation, I have, with some hesitation, reached the conclusion that a constitutional amendment is necessary to clean up our campaign finance system once and for all. I have been reluctant to sponsor constitutional amendments. Some of my colleagues sponsor a lot of them. I think you ought to be careful not to take a roller to a Rembrandt, and I have tried to wait for those moments in history where I thought it was necessary. I think this is one of those moments.

Slavery and the denial of basic freedom of Americans was the law of the land before and after *Dred Scott*, but many fought, bled, and died so that the 14th, 15th, and 16th Amendments would ensure that America lived up to its promise of equality. Those who fought for women's suffrage for decades were discouraged by the Supreme Court's ruling in *Minor* v. *Happersett*, but years of activism were rewarded when the 19th Amendment was passed.

The Supreme Court's decision in *Breedlove* v. *Suttles* affirmed the imposition of poll taxes that prevented many African Americans and poor from voting. Those fighting for equal ballot access rallied to pass the 24th Amendment, and their victory was completed when State poll taxes were invalidated by *Harper* v. *Board of Elections*.

So it is an uphill battle, and it may take years, but the passage of these five amendments remind us that grassroots movement can put our country back on the right course after a Supreme Court decision like *Citizens United* gets it dead wrong. That grassroots movement is well underway. Stacked over there in the corner are 1,959,063 petition signatures from Americans across the Nation representing every State in the Union in support of a constitutional amendment to stop the negative influence of secret money from special interest groups and individuals.

Today we are going to hear testimony from some of my colleagues who have responded to this call by coming up with their own approaches, constitutional amendments. I am looking forward to their testimony. I am going to yield the floor when Senator Graham arrives so that he can speak, and the same for Senator Leahy.

The first panel is seated. There have been 13 constitutional amendments introduced in the House and Senate, and my colleagues have taken many different approaches, but are all united in the belief that *Citizens United* and its progeny are bad for America. I am pleased to be joined today by some of the Members who have taken a leadership role.

First, Senator Max Baucus, senior Senator from the State of Montana, Chairman of the Senate Finance Committee. In January of this year, Senator Baucus introduced his constitutional amendment, Senate Joint Resolution 35. His presence here today is particularly timely since just a few weeks ago, the Supreme Court struck down Montana's century-old ban on corporate political contributions in State elections.

Senator Baucus, the floor is yours.

STATEMENT OF THE HONORABLE MAX BAUCUS, A UNITED STATES SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Mr. Chairman.

President Franklin Delano Roosevelt once said, "The ultimate rulers of our democracy are not a President and Senators and Congressmen and government officials, but the voters of this country."

People in charge, we are just hired hands. We have got lots of great players back in our home States. We are the employees, and it is the people in our States that decide who they are going to elect, unelect, and give us direction as to what they think we should do.

I sit before you today on behalf of those voters—in my State, nearly one million Montanans, those are the folks that I work for, as well as over 1.7 million Americans we all serve who have signed those petitions over there that you referred to. They have signed that petition calling for a constitutional amendment, some kind of amendment that this Committee is now considering at this moment.

That is 1.7 million signatures. Those are mothers, fathers, employers, veterans, school teachers. They are Americans that we were sent here to serve.

I must say, as a Montanan, this issue is deeply personal to me, and let me tell you why.

At the top of our State Capitol building in Helena, Montana, sits a beautiful copper dome. Nearly a century ago, this copper dome was not just for decoration. It was a symbol of what we call in Montana and other parts of the country, the symbol of the "copper barons." Now, who are they? They are the three major folks, extremely wealthy, who fought for and controlled the production of copper in Butte, Montana. Butte, Montana, is known as the richest hill on earth. One of them was a fellow named William Clark. William Clark is the largest benefactor to the Corcoran Gallery here in Washington, D.C. In today's dollars, he would rival Warren Buffett or Bill Gates. He was that wealthy.

While miners were working underground, what was William Clark doing? William Clark was buying elections with his money. In fact, it was common for corporations in our State, and probably other States, to buy elections with their money.

Remember, back then we were elected by State legislatures, not by the people. Legislatures decided who was going to serve in the U.S. Senate.

In 1899, William Clark bribed the Montana State Legislature into appointing him to serve here in the U.S. Senate. Well, the Rules Committee had the goods on him because he actually threw—or his people did—bundles of dollars over the transom in

hotels where the State legislators were staying, passing laws in the State of Montana. In fact, he is quoted as saying, "I never bought a man who was not for sale."

The Rules Committee sat down and met. What would they do with this guy, William Clark, who had clearly bribed his way to the U.S. Senate?

Well, William Clark was no dummy. While the Rules Committee was meeting, and they had the goods on him—this is back around 1900—what did he do? He used his money to do something pretty clever. He arranged to have the Governor of the State of Montana leave Montana and go to San Francisco. He bought him off. And then he, William Clark, resigned. He resigned his position in the U.S. Senate and arranged to have the Lieutenant Governor, then Acting Governor, appoint him to the U.S. Senate, and that is how William Clark became a Senator. He bought his way into the U.S. Senate.

That led to the 17th Amendment. That incident and the scandal in Montana led to the passage of the 17th Amendment. And Montana also responded by passing laws prohibiting corporations from contributing to elections. We were so outraged with what William Clark and his people did in the State of Montana. And as you said, *Citizens United* overturned that and made it impossible for Montana to enforce this law that was deeply embedded in our culture, and the recent decision by the Court in the aftermath of *Citizens United* made that very clear. We in Montana cannot proceed.

So I believe, as you believe, that the solution here is a constitutional amendment. That is about the only way we can solve this, to restore power and put power back in the hands of the people, not in the hands of the corporations like William Clark exercised back then.

There was a 2012 poll which says that 63 percent of Americans believe that corporations and unions should not be able to spend unlimited amounts of dollars in elections. And the people we work for, at least in my State, and I think across the country, agree.

Again, the surest way to get at the heart of the matter, I think, is a constitutional amendment.

In the Federalist Papers, James Madison noted that there would be circumstances when "useful alterations [to the Constitution] will be suggested by experience."

Still this is a process that requires significant deliberation. It should. As you have said, Mr. Chairman, you do not just amend the constitution lightly. And I do not take a proposal to amend the Constitution lightly at all. And I agree with James Madison that we should amend the Constitution only on "great and extraordinary occasions."

This is one of those occasions, as you said just a few minutes ago. And Congress, I think, owes it to the American people to fully study, discuss, and debate the merits of an amendment.

My proposal—and there are many here—would right the wrong of *Citizens United*, simply overturn it. It would restore Congress' and States' ability to regulate political spending by corporations and labor in elections and then give people in States like Montana and other States the power to once again say, "We are not for sale."

It is clear to me that action is needed to restore Americans' faith in our political and electoral process, and I urge my colleagues to join me in supporting this amendment.

[The prepared statement of Senator Baucus appears as a submission for the record.]

Chairman DURBIN. Thanks a lot, Senator Baucus. I appreciate your testimony, and we would love to have you stay, but if you have other things calling you in the Senate Finance Committee and other places, you are welcome to leave.

Senator BAUCUS. Thank you.

Chairman DURBIN. Ordinarily I would then recognize Senator Sanders, but it turns out the senior Senator from Vermont showed up, and he is Chairman of the Committee, and I hope, Senator Sanders, that you will give us a chance here for Senator Leahy to say a word or two in opening, and then I will recognize you next.

Senator Leahy.

STATEMENT OF THE HONORABLE PATRICK J. LEAHY, A UNITED STATES SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Thank you, Chairman Durbin.

Listening to our friend Senator Baucus and watching what has happened on television or watching elections the last two and a half years, we have seen the corrosive effects of the Supreme Court's decision in *Citizens United*. It is really hard to think of any Supreme Court decision that has had such a negative impact on our political process.

Nobody who has heard the barrage of negative ads from always undisclosed and, even worse, unaccountable sources can deny the impact of *Citizens United*. Nobody who has strained to hear the voices of the voters lost among the noise from Super PACs can deny that by extending First Amendment "rights" in the political process to corporations, five Justices put at risk the rights of individual Americans to speak to each other and, crucially, to be heard. The idea that a corporation is a person is as crazy as saying, "We elected General Eisenhower President, then why can't we elect General Motors President?" It makes no sense.

But those same five Justices doubled down, as Senator Baucus would agree, when they summarily struck down the 100-year-old Montana law.

These Supreme Court decisions go against all kinds of long-standing laws and legal precedents, but also against common sense and against the people. Corporations are not people. Corporations do not have the same rights, the same morals, or the same interests. Corporations cannot vote in our democracy. They are artificial legal constructs meant to facilitate business. Now, the Founders of this country knew that. Vermonters and Americans across our country have long understood this. Five members of the Supreme Court apparently do not.

Like most Vermonters, I believe that this is a harmful decision that needs to be fixed. I have sought legislative remedies, of course, because that would be quicker, although I believe constitutional remedies have to be considered. That is why I held the very first congressional hearing on that terrible decision after it was issued. I worked with Senator Whitehouse, Senator Schumer, and others

to amend the *DISCLOSE Act*, bring forth the *DISCLOSE Act* that could at least cut out some of the worst parts of *Citizens United*.

I have worked with Senator Durbin, the Chairman of this Subcommittee, to schedule today's hearing. And, Senator Durbin, I do thank you for holding this hearing. It is extremely important. He has been not only a leader on this, but he has been a leader in shedding light on the effort in so many States to deny millions of Americans access to the ballot box through voter purges and voter ID laws. It is amazing to find people trying to cut out the right to vote for individual Americans. They are saying we are going to cut out the right for individual Americans to vote, but we are going to give unlimited power for corporations to involve themselves in secret spending to change the outcome of our elections. We have to work to restore the right balance in our democracy to protect the form of government Americans have fought and died for, what President Lincoln called our government of, by, and for the people.

The last 236 years have been one toward greater inclusion and participation by all Americans. That is not what is happening here.

I will put my full statement, Mr. Chairman, in the record, but I look at a little State like mine, a tiny fraction of the corporate money being spent could overwhelm us in our State. That is why more than 60 Vermont towns passed resolutions on Town Meeting Day calling for action to address *Citizens United*.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman LEAHY. Also, Mr. Chairman, I would ask consent that a statement by a Vermonter, Rick Hubbard of South Burlington, be included in the record.

Chairman DURBIN. Without objection.

[The prepared statement of Mr. Hubbard appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Senator Leahy.

Let me now recognize Senator Sanders, the junior Senator from Vermont. He has introduced Senate Joint Resolution 33 in an effort to respond to *Citizens United* and related cases. Senator Sanders enjoys a larger grassroots following than probably any other Senator, and we know that he is frequently in touch with people who are following this issue very carefully.

Senator Sanders, please proceed.

STATEMENT OF THE HONORABLE BERNARD SANDERS, A UNITED STATES SENATOR FROM THE STATE OF VERMONT

Senator SANDERS. Thank you very much for convening this enormously important hearing, and thank you for your very strong opening remarks. And I thank Senator Leahy as well for his strong statement.

Mr. Chairman, as you have indicated a moment ago, the history of our country has been to drive toward a more and more inclusive democracy—a democracy which would fulfill Abraham Lincoln's beautiful phraseology at Gettysburg when he talked about "a Nation of the people, by the people, and for the people."

We all know that American democracy has not always lived up to this ideal. When this country was founded, only white male

property owners over age 21 could vote, but people fought to change that, and we became a more inclusive democracy.

After the Civil War, we amended the Constitution to allow non-white men to vote. We became a more inclusive democracy.

In 1920, after years of struggle and against enormous opposition, we finally ratified the 19th Amendment guaranteeing women the right to vote. We became a more inclusive democracy.

In 1965, under the leadership of Martin Luther King, Jr., and other great heroes, the civil rights movement finally succeeded in outlawing racism at the ballot box, and LBJ signed the Voting Rights Act. We became a more inclusive democracy.

One year after that, the Supreme Court ruled that the poll tax was unconstitutional, that people could not be denied the right to vote because they were low income. We became a more inclusive democracy.

In 1971, young people throughout the country were saying, "We are being drafted to go to Vietnam and get killed, but we are 18 and we do not have the right to vote." We passed a constitutional amendment. The voting age was lowered to 18. We became a more inclusive democracy.

Mr. Chairman, the democratic foundations of our country and this movement toward a more inclusive democracy are now facing the most severe attacks, both economically and politically, that we have seen in the modern history of the United States. Tragically—and I say these words advisedly—we are well on our way to seeing our great country move toward an oligarchic form of government where virtually all economic and political power rests with a handful of very wealthy families. *Citizens United* is a part of that process, and that is a trend we must reverse.

Economically, the United States today has by far the most unequal distribution of wealth and income of any major country on earth, and that inequality is worse today than it was at any time since the late 1920s. One family, the Walton family of Wal-Mart fame, owns more wealth than the bottom 40 percent of the American people. The bottom 60 percent own less than two percent of the wealth. The top one percent owns 40 percent of the wealth.

Now, that is what is going on economically in this country. A handful of billionaires own a significant part of the wealth of America and have enormous control over our economy.

What the Supreme Court did in *Citizens United* is say to these same billionaires, "You own and control the economy. You own Wall Street, you own the coal companies, you own the oil companies. Now for a very small percentage of your wealth, we are going to give you the opportunity to own the U.S. Government." That is the essence of what *Citizens United* is all about, and that is why it must be overturned.

Let us be clear. Why should we be surprised that one family worth $50 billion is prepared to spend $400 million in this election to protect their interests? That is a small investment for them and a good investment. But it is not just the Koch brothers.

Mr. Chairman, there are at least 23 billionaire families who have contributed a minimum of $250,000 each into the political process up to now during this campaign, and my guess is that number is really much greater because many of these contributions are made

in secret. In other words, not content to own our economy, the one percent want to own our government as well.

The constitutional amendment that Congressman Ted Deutch and I have introduced states the following: "For-profit corporations are not people and are not entitled to any rights under the Constitution. For-profit corporations are entities of the States and are subject to regulation by the legislatures of the States so long as the regulations do not limit the freedom of the press. For-profit corporations are prohibited from making contributions or expenditures into political campaigns. Congress and the States have the right to regulate and limit all political expenditures and contributions, including those made by a candidate."

I am proud to say that the American people are making their voices heard on this issue. You have close to two million signatures right there on a petition. In my State of Vermont, we have seen dozens and dozens of towns go on record as saying they support a constitutional amendment, and we have six States having done the same.

You have some very good amendments here with Senator Baucus, Senator Udall, and Congresswoman Edwards. I hope we move on this issue because the future of American democracy is at stake.

Thank you very much.

[The prepared statement of Senator Sanders appears as a submission for the record.]

Chairman DURBIN. Thanks, Senator Sanders.

Senator Tom Udall is the junior Senator from New Mexico and offered one of the first amendments in the Senate on this subject. We are glad you are here today, and the floor is yours.

STATEMENT OF THE HONORABLE TOM UDALL, A UNITED STATES SENATOR FROM THE STATE OF NEW MEXICO

Senator UDALL. Thank you, and good afternoon, Chairman Durbin, Chairman Leahy, and Senator Coons.

In January 2010, the Supreme Court issued its opinion in *Citizens United* v. *FEC*. Two months later, the D.C. Circuit Court of Appeals decided *SpeechNow* v. *FEC*. These two cases opened the door to Super PACs. Millions of dollars now pour into negative and misleading campaign ads. This is poisoning our democracy, and often we do not even know who is doing the poisoning.

Our campaign finance system was in trouble before these opinions. We have been on this dangerous path for a long time. The *Citizens United* and *SpeechNow* decisions just picked up the pace, but the Court laid the groundwork many years ago.

We can go all the way back to 1976. That year, the Court held in *Buckley* v. *Valeo* that restricting independent campaign expenditures violates the First Amendment right to free speech. In effect, money and speech are the same thing.

This is tortured logic. It is divorced from the reality of political campaigns, and it is the basis for the Court's ruling in *Citizens United*. The outcome is hardly surprising. Americans' right to free speech is now determined by their net worth. For average Americans, they get one vote. They go to the polls and cast their ballot with millions of others. But for the wealthy and the super wealthy, *Buckley* says they get so much more, says that they can spend un-

limited amounts of money to influence our elections. And now with *Citizens United* that right has been extended to corporations and other special interests.

The damage is clear. Elections become more about the quantity of cash and less about the quality of ideas; more about special interests, and less about public service.

We have a broken system based on a deeply flawed premise. There are only two ways to change this: the Court could overturn *Buckley* and *Citizens United*, which is unlikely with its current ideological makeup; or we amend the Constitution, we overturn the previous bad Court decisions and prevent future ones. Until then, we will fall short of real reform. Until then, the flood of special interest cash will continue.

That is why I, along with several Members of this Subcommittee, introduced S.J. Res. 29 last November. We are up now to 23 cosponsors, with several other Senators expressing support for a constitutional amendment in floor speeches and press interviews.

This amendment is similar to bipartisan proposals in previous Congresses. It would restore the authority of Congress—stripped by the Court—to regulate the raising and spending of money for Federal political campaigns. This would include independent expenditures, and it would allow States to do so at their level. It would not dictate any specific policies or regulations. But it would allow Congress to pass sensible campaign finance reform legislation that withstands constitutional challenges.

In Federalist No. 49, James Madison argued that the U.S. Constitution should be amended only on "great and extraordinary occasions." I believe we have reached one of those occasions. Free and fair elections are a founding principle of our democracy. They should not be for sale to the highest bidder.

I know amending the Constitution is difficult. And it should be. Last week, during the debate on the *DISCLOSE Act*, Chairman Leahy said that we must pass that bill now because of the "years and years that a constitutional amendment might take." The Chairman makes a fair point.

But those "years and years" started decades ago. There is a long—and, I might add, bipartisan—history here. Many of our predecessors from both parties understood the corrosive effect money has on our political system. They spent years championing the cause.

In 1983—the 98th Congress—Senator Ted Stevens introduced an amendment to overturn *Buckley*. And in every Congress from the 99th to the 108th, Senator Fritz Hollings introduced bipartisan constitutional amendments similar to the one I have introduced. After he retired, Senators Schumer and Cochran continued the effort in the 109th Congress.

And that was before *Citizens United*, before things went from bad to worse. The out-of-control spending since that decision has further poisoned our elections. But it has also ignited a broad movement to amend the Constitution.

Across the country, more than 275 local resolutions have passed calling for a constitutional amendment to overturn *Citizens United*. Legislatures in six States—California, Maryland, Hawaii, Vermont, Rhode Island, and my home State of New Mexico—have called on

Congress to send an amendment to the States for ratification. Many more States have similar resolutions pending. And as has been mentioned here, 1.9 million citizens have signed petitions in support of an amendment. More than a hundred organizations, under the banner of United for the People, are calling for constitutional remedies.

But an amendment can only succeed if Republicans join us in this effort. They have in the past. I know the political climate of an election year makes things even more difficult, but I am hopeful that we can work together and that we can reach consensus on a bipartisan constitutional amendment that can be introduced early in the next Congress.

We must do something. The voice of the people is clear, and so is their disgust.

And with that, Senator Durbin, thank you for your courtesies on going a little bit over time. I would ask that I put my full statement into the record and once again thank you for this very important and timely hearing.

[The prepared statement of Senator Udall appears as a submission for the record.]

Chairman DURBIN. Thank you, Senator Udall. Of course, your statement will be in the record.

It is my pleasure now to introduce Congresswoman Donna F. Edwards, representing Maryland's Fourth Congressional District, 15 years of experience on campaign finance reform, voting rights, and government ethics issues. She was the first Member of the House to introduce a constitutional amendment responding to *Citizens United*. She has been actively engaged in educating the public about this effort, and we are glad to have you on this side of the Rotunda. Please proceed.

STATEMENT OF THE HONORABLE DONNA EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Ms. EDWARDS. Thank you, Mr. Chairman, and to all the Members of the Committee and the Ranking Member, I really do appreciate the opportunity to be here today to testify. I think this is an important hearing to examine the pending responses to the Supreme Court's decision in *Citizens United* and related cases.

We do not have any doubt that we have entered into an unprecedented era in our political system and one in which Super PACs seem to rule. "One person, one vote" seems more appropriate for a history lesson than a description of our current elections process.

The danger of *Citizens United* was heralded by Justice Stevens in his dissenting opinion. He could not have been more prescient when he warned that it would "undermine the integrity of elected institutions around the Nation." Justice Stevens' warning materialized initially during the 2010 election cycle, but that was just the opening salvo. We have seen at the start of the 2012 Republican Presidential primaries the true scope and danger of *Citizens United*.

Restore Our Future, a Super PAC supporting former Governor Mitt Romney and run by his former staffers, poured nearly $8 million into Florida.

Winning Our Future, a Super PAC supporting former Speaker Newt Gingrich, made a $6 million ad buy there.

After being targeted by Restore Our Future, Speaker Gingrich concluded, "I think it debilitates politics. I think it strengthens millionaires and it weakens middle-class candidates." I could not agree more.

This is an equal opportunity corrosion. Democratic-leaning groups are preparing to play, too, even while doing a little catch-up with Republican-leaning groups. Sadly, the landscape continues to darken as we march toward the 2012 general election.

According to the Center for Responsive Politics, 678 groups who organized as Super PACs reported receipts of over $280 million and independent expenditures of more than $145 million already in this election cycle.

Putting an end to the influence of secret money on our elections I think requires a three-legged stool approach:

First, require increased disclosure of money in political campaigns;

Second, allow public financing of candidates for Congress. If we do not own our elections, who will?

Then, third, amend the Constitution to give Congress the authority that it needs to regulate political expenditures.

I am an original cosponsor of measures that do just that, and, Mr. Chairman, I want to thank you for your sponsorship and leadership on the Fair Elections Now Act. And I particularly want to applaud Senator Whitehouse for his leadership on the *DISCLOSE Act*. While these interim reforms should be enacted into law to mitigate the influx of unregulated money in our elections, the *Citizens United* decision leaves Congress, I think, with really only one true option, and that is, to amend the Constitution.

As a lawyer and someone who has dedicated nearly 15 years to working on campaign finance reform, I do not take amending our Nation's guiding document lightly either. Indeed, as an advocate and a donor, I spent the better part of my career shunning attempts by reform groups to support constitutional amendments.

That all changed with *Citizens United*. I believe firmly that such bold action is warranted as we face the threat that *Citizens United* poses to the health of the democracy. In its majority opinion, the Court was clear: Congress does not have the authority to regulate these expenditures. I do not agree, but the Court did double down in its conclusion in *SpeechNow* and in *Bullock*. Only an amendment to the Constitution can provide Congress with the authority it needs.

Fewer than two weeks after *Citizens United* was released, I joined with House Judiciary Chairman John Conyers to introduce the first constitutional amendment to reverse the decision. Our amendment would have given specific authority to Congress and the States to regulate corporate expenditures on political activity by imposing content-neutral regulations and restrictions on expenditures of funds for political activity by any corporate entity excluding the media. It is very similar to Senator Baucus' approach. Ranking Member Conyers and I reintroduced our amendment in this Congress.

But we are not alone in the fight. You have already indicated that 14 amendments—three in the Senate and 11 in the House—have been introduced during the current Congress. We all agree that corporate money and individual wealth cannot dominate our politics any longer. But as usual, the public is way ahead of us. We can see that. Two hundred and seventy-five cities and towns from Albany to Pittsburgh to Kansas City to Missoula have passed anti-*Citizens United* resolutions, including my home State of Maryland.

The sponsors of a constitutional amendment all came together, and we agreed to what is called a "Declaration for Democracy," to declare our support for amending the Constitution. And today 1,854 public officials, including 92 Members of the House and 28 Senators, over 2,000 business leaders, and thousands of ordinary citizens have signed their name to this declaration. And now some are questioning the need for an amendment, but the Supreme Court has answered that question pretty unequivocally when it overturned Montana's century old limits on corporate spending.

The Supreme Court closed the door on reasonable laws to regulate campaign finance, and except for disclosure, the constitutional door is the only one that really remains open. And we owe it to the American people—and, Mr. Chairman, I know that you agree—to find the consensus that we need and to walk through the door.

And so I want to thank you for this opportunity and thank you for your work, and I appreciate the chance to be here today.

Chairman DURBIN. Congresswoman Edwards, thank you for coming. Senator Udall and Senator Sanders, thank you as well.

Unless my colleagues have a comment or question, I will thank you once again and invite the second panel to come forward.

Chairman DURBIN. Before you take your seats, I will administer the oath, which is the custom of this Subcommittee. If you will please raise your right hand. Do you affirm the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ROEMER. I do.

Mr. SHAPIRO. I do.

Mr. LESSIG. I do.

Chairman DURBIN. Thank you. Let the record reflect that all three witnesses have answered in the affirmative.

Charles (Buddy) Elson Roemer III, former Governor of Louisiana. Prior to becoming Governor of Louisiana in 1988, Roemer served four terms in the U.S. Congress from 1981 to 1988. I was honored to serve with him. As Governor, Buddy Roemer worked with the State legislature to enact sweeping campaign finance reform. Most recently, Governor Roemer was a candidate in the 2012 Republican Presidential primary. During his Presidential campaign, Governor Roemer limited all campaign contributions to $100, practiced full and immediate disclosure, and refused to accept contributions from PACs, Super PACs, and corporations.

Governor Roemer, thank you for joining us today. The floor is yours.

STATEMENT OF THE HONORABLE CHARLES "BUDDY" ROEMER, FORMER CONGRESSMAN AND FORMER GOVERNOR, STATE OF LOUISIANA, BATON ROUGE, LOUISIANA

Mr. ROEMER. Thank you, Mr. Chairman. Thanks for inviting me.

Washington, D.C., appears to be broken, with gridlock, an unreadable tax code that exports American jobs; dumb trade rather than smart, non-existent budget discipline; too big to fail in perpetuity. Broken? Yes. But it is bought first. And it will not be repaired by those who profit from its impairment.

Political campaigns have always required funding, but citizens do not now fund campaigns. The special interests do, because they gain a disproportionate say-so in public policy as a result. This dependence between special interest funding and political advancement is a form of institutional corruption in a representative democracy. It is corrupt when the size of your contribution determines your place in line. It is institutional when everyone does it, when the invitees to your fundraisers are from the industries you regulate.

The public's perception is not only that Congress is a do-nothing, gridlocked institution, more interested in themselves than in us, but that in order to fund that priority, they go to where the money is, the special interests, who have never profited more than now while America hurts.

Four years ago, it became obvious when the two Presidential nominees received more PAC and other special interest funding from Washington, DC, and its environs than they did from the individual contributions of 32 States combined. That is four years ago. It is now worse. With less than one percent giving more than 99 percent of all campaign funding, it cannot be called a Republic for long.

Being on the campaign trail for the past 20 months with a $100 limit, full disclosure, and refusal of all PAC money, I saw the skewing of the current system toward the power of the unlimited givers. I saw multiple candidates pretend non-coordination with their Super PACs while personally addressing their Super PAC fundraisers. Uncoordinated? Are we stupid?

I saw qualified candidates excluded from the national televised debates because they had not raised $500,000 in the prior 90-day period. How do you do that without taking special interest money? Raise it from the people, you say. Well, how do you do that if excluded from the debates?

Free to lead is the qualification of every great President, yet our institutional corruption places our futures in the hands of the mega contributors. Who elects them?

When I came to Congress 31 years ago, the debate was between full disclosure on the part of the conservatives and caps on giving by liberals. Now we have neither. A constitutional amendment might be required to address this imbalance, but it will and should require careful debate. Statutory solutions can rectify much now. Consider seven quick points.

One, full disclosure of all contributions and expenditures used politically. Full disclosure does not solve all our problems, but sunlight is a powerful disinfectant.

Two, 48-hour reporting for all transactions in the political marketplace. Actionable, timely disclosure yields the greatest, most valuable information for the voting public.

Three, no financial contributions or assistance should be allowed from registered lobbyists.

Four, the limits on PAC contributions should be the same as exist on individual contributions, whatever they are.

Five, independent, non-coordinated efforts should be defined by Congress with boundaries set at relatively low levels of connections to candidate or campaign, disqualifying an entity.

Six, lobbying of Congress by retiring members should be disallowed for a period of at least five years post-retirement.

Seven, Congress should enact criminal penalties for the willful violation of these six points.

Finally, I have come to support the use of public funds for candidates for Federal office who meet reasonable fundraising thresholds of small contributions from within their district. The cost is minimal. The benefits to the anticorruption effort are powerful. "We, the people" is the phrase that guides us, not "we, the strongest," not "we, the best and brightest," not "we, the biggest." "We, the people."

The system is not broken, Mr. Chairman. It is bought. Action is necessary for a nation at risk. We need a speed limit on the highway to prevent and protect against corruption and the appearance of corruption. Just a speed limit, not a ban. Broad limits, bright sunshine—a Republic.

[The prepared statement of Mr. Roemer appears as a submission for the record.]

Chairman DURBIN. Thank you, Governor Roemer.

Next is Ilya Shapiro. He is a senior fellow in constitutional studies at the Cato Institute. Mr. Shapiro is an editor in chief of the Cato Supreme Court Review. He frequently provides commentary on political and legal issues for major news outlets. Mr. Shapiro lectures regularly on behalf of the Federalist Society. He was an Inaugural Washington Fellow at the National Review Institute. He has worked as an adjunct professor at George Washington University Law School. Prior to joining Cato, Mr. Shapiro was a litigator in private practice, earned his law degree from the highly regarded University of Chicago and, after graduating, clerked for Judge Grady Jolly on the U.S. Court of Appeals for the Fifth Circuit.

Mr. Shapiro, please proceed.

STATEMENT OF ILYA SHAPIRO, SENIOR FELLOW IN CONSTITUTIONAL STUDIES, CATO INSTITUTE, WASHINGTON, DC

Mr. SHAPIRO. Mr. Chairman and distinguished Members of the Subcommittee, thank you for this opportunity to discuss campaign finance law.

Let me first note that *Citizens United* is one of the most misunderstood, high-profile cases ever, so I will review what the case actually said before discussing possible responses.

Citizens United is both more important than you might think—because it revealed the instability of our system—and less important, because it does not stand for what many people say it does. Take, for example, President Obama's famous statement that the

decision "reversed a century of law that I believe will open the floodgates of special interests—including foreign corporations—to spend without limit in our elections." In one sentence, the former law professor made four errors of law.

First, *Citizens United* did not reverse a century of law. The President was referring to the Tillman Act of 1907, which prohibited corporate donations to candidates and parties. *Citizens United* did not touch that. Instead, the overturned precedent was a 1990 case that, for the first and only time, allowed a restriction on political speech based on something other than corruption or the appearance thereof.

Second, the "floodgates" point depends on how you define those terms. As you may have just read in the *New York Times* magazine, there is no significant change in corporate spending this election cycle. There are certainly people running Super PACs who would otherwise be supporting candidates directly, but *Citizens United* did not cause Super PACs, as I will get to shortly. And the rules affecting the wealthy individuals who are spending more—be they Sheldon Adelson or George Soros or the Waltons—have not changed at all. It is unclear that any floodgates have been opened or which special interests did not exist before.

Third, the rights of foreigners—corporate or otherwise—is another issue about which *Citizens United* said nothing. Indeed, just this year the Supreme Court summarily upheld the restrictions on foreign spending in political campaigns.

Fourth and finally, while independent spending on elections now has few limits, candidates and parties are not so lucky, and neither are their donors. Again, *Citizens United* did not affect laws regarding individual or corporate contributions to candidates.

More important than *Citizens United* was *SpeechNow.org*, decided two months later in the D.C. Circuit. That case removed the limits on donations from political action committees, thus making these PACs "super" and freeing people to pool money the same way one rich person can alone.

And so if you are concerned about the money spent on elections—though Americans spend more on chewing gum and Easter candy—the problem is not with the big corporate players. This is another misapprehension: Exxon, Halliburton, and all these "evil" companies—or even the "good" ones—are not suddenly dominating the political conversation. They spend little money on political advertising, partly because it is more effective to lobby, but even more, why would they want to alienate half of their customers? As Michael Jordan famously said, "Republicans buy sneakers too."

On the other hand, groups composed of individuals and smaller players now get to speak: your National Federations of Independent Business and Sierra Clubs, your ACLUs and Planned Parenthoods. So even if we accept "leveling the playing field" as a proper basis for regulation, the freeing up of associational speech levels that field.

Moreover, people do not lose rights when they get together, be it in unions, advocacy groups, clubs, for-profit companies, or any other way.

Now, I have reviewed the various proposals introduced to remedy some of *Citizens United's* perceived ills. The gist is that if only we can eliminate private money, elections will be cleaner.

The underlying problem, however, is not the underregulation of independent spending, but the attempt to manage political speech in the first place. Political money, is like water: It will flow somewhere, because what the government does matters, and people want to speak about their concerns. To the extent that "money in politics" is a problem, the solution is to reduce the political scope that the money can influence. Shrink government and you will shrink the amount people spend trying to get their piece of the pie.

While we await that shrinkage—and my Cato colleagues have suggestions if you are interested—we do have to address the core flaw in campaign finance. That original sin was committed by the Supreme Court, not in *Citizens United* but in the 1976 case of *Buckley* v. *Valeo*. By rewriting the Federal Election Campaign Act to remove spending limits but not contribution caps, *Buckley* upset Congress' balanced reform. That is why politicians spend all their time fundraising. Moreover, the regulations pushed money away from candidates and toward advocacy groups—undermining the worthy goal of government accountability.

The solution is obvious: Liberalize rather than restrict the system. Get rid of limits on individual contributions and then have disclosures for those who donate amounts big enough for the interest in preventing corruption to outweigh the potential for harassment. Then the big boys will have to put their reputations on the line, but not the average person. Let the voters weigh what a donation source means to them rather than—with all due respect—allowing politicians to write rules benefiting themselves.

In sum, we now have a system that is unbalanced and unworkable. At some point, enough incumbents will feel that they are losing message control so that they will allow fairer political markets. Earlier this month, for example, the Democratic Governor of Illinois signed a law allowing unlimited contributions where there was significant independent spending. This is political self-preservation, but that is fine. Once more politicians realize that they cannot prevent communities from organizing, they will want to capture more of their dollars. Stephen Colbert would then have to focus on other laws to lampoon, but I am confident that he can do that, and we will be better off.

Ultimately—and I will conclude with this, Mr. Chairman—the way to "take back our democracy"—to invoke this hearing's name—is not to give government more power to decide who should speak and how much.

Thank you again for having me. I welcome your questions.

[The prepared statement of Mr. Shapiro appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Mr. Shapiro.

Lawrence Lessig is a professor of law at Harvard Law School and director of the Edmond J. Safra Center for Ethics at Harvard University, a nationally recognized scholar, author, speaker. Professor Lessig is one of our Nation's leading authorities on constitutional law and campaign finance reform. Prior to teaching at Harvard, Professor Lessig clerked for Judge Richard Posner on the Seventh

Circuit Court of Appeals in Chicago and subsequently for Justice Antonin Scalia on the U.S. Supreme Court. In addition to serving on the boards of other nonprofit organizations, Professor Lessig is on the Advisory Board of the Sunlight Foundation, an organization dedicated to using the Internet and technology to foster a more open and transparent government. Many of our witnesses make many sacrifices to appear before us, but none makes a greater sacrifice than your son, who interrupted his family vacation to accompany his father to this hearing, so we thank him for joining us.

[Laughter.]

Chairman DURBIN. Professor Lessig, the floor is yours.

STATEMENT OF LAWRENCE LESSIG, ROY L. FURMAN PROFESSOR OF LAW AND LEADERSHIP, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. LESSIG. Thank you, Mr. Chairman, and I commend this Committee for holding this hearing, which is really a celebration of the extraordinary grassroots movement led by new organizations, such as Free Speech for People and Move to Amend, and more established organizations, such as People for the American Way and Common Cause, that has developed to demand the reversal of *Citizens United* and an end to the system for funding elections that leads most Americans to believe that this government is corrupt.

Yet this hearing could only be the beginning of the serious work that will be required to address the problem in America's democracy that *Citizens United* has come to represent, and that problem can be stated quite simply: The people have lost faith in their government. They have lost the faith that their government is responsive to them because they have become convinced that their government is more responsive to those who fund your campaigns. As all of you—Democrats, Republicans, and Independents alike—find yourselves forced into a cycle of perpetual fundraising, you become, or at least most Americans believe you become, responsive to the will of the funders. Yet the funders are not the people; 0.26 percent of Americans give more than $200 in a congressional campaign, 0.05 percent give the maximum amount to any congressional candidate, 0.01 percent, the one percent of the one percent, give more than $10,000 in an election cycle. And in the current Presidential election cycle, 0.000063 percent—that is 196 citizens—have funded 80 percent of the indivdual Super PAC contributions so far.

There are two elections in America today—not the primary and general election, but the money election and the voting election. And to win the voting election, you must first compete in the money election. But unlike the voting election, not every citizen can participate equally in the money election. Instead, it is only the very few who can compete at all. And it is because of this money election that we have evolved a system in which the elected are dependent upon the tiniest slice of America. Yet that tiny slice is in no way representative of the rest of America.

This, Senators, is corruption. It is not corruption in the criminal sense. I am not talking about bribery or quid pro quo influence peddling. It is instead corruption in a sense that our Framers would certainly and easily have recognized. They architected a government that in this branch, at least, as Federalist 52 puts it,

would be "dependent upon the people alone," but you have evolved a government that is dependent upon the people and dependent upon the funders. And that different and conflicting dependence is a corruption of our Framers' design, now made radically worse by the errors of *Citizens United*.

But in responding to those errors, please, do not lose sight of one critical fact: On January 20, 2010, the day before *Citizens United* was decided, our democracy was already broken. *Citizens United* may have shot the body, but the body was already cold. And any response to *Citizens United* must also respond to that more fundamental corruption.

Now, how you do that—how you do that—will be as important as what you do. For America's cynicism about this government, whether fair or not, is too profound to imagine that this Congress alone can craft a response that would earn the confidence of the American people. Instead, this Congress needs to find a process that could discover the right reforms that itself could earn the trust of the American people. That process should not be dominated by politicians or law professors, indeed, by any of the professional institutions of American Government. It should be dominated instead by the people.

I have submitted today to this Committee the outline of one such plan, what I called a series of "citizen conventions," constituted as a kind of civic jury and convened to advice Congress about the best means for reform. But whether it is this process or another, your challenge is to find a process that could convince America that a corrupted institution can fix itself.

The confidence of the American people in this government, in you, is at a historic low. That is not because of the number of Democrats sitting in Congress. It is not because of the number of Republicans. And it will not change simply by changing the number of Democrats or Republicans sitting in Congress. Instead, confidence is at a historic low because of the dependence that all of you and all of us have allowed to evolve in this government that draws you away from a dependence upon the people alone.

I thank you for the beginning this hearing represents, and more importantly, I thank the extraordinary citizens who have united to get you to focus upon this issue. But I urge you now to act in a way that has a real chance to restore that confidence of the people in their government.

Thank you very much.

[The prepared statement of Mr. Lessig appears as a submission for the record.]

Chairman DURBIN. Thank you, Professor Lessig.

Let me just note for the record here that at 3:40, in just a few moments here, we are going to suspend the hearing for a moment of silence. It is the 14th-year anniversary of the death of two of our Capitol Hill policemen, and across Capitol Hill that moment of silence will be acknowledged. So I will let you know when that arrives. But until then, we will continue to pursue the questioning here.

Professor Lessig, one of the things I found interesting in your testimony—you did not mention it, but as written—is this notion of a citizens convention. Most of the constitutional amendments

that are being proposed talk about actually changing the Constitution. You have taken it a step beyond that, have you not, in terms of opening it up to a much different process to bring in a lot of new voices.

How do you guarantee that a citizens convention is not overwhelmed by these same oligarchs?

Mr. LESSIG. So the process that I have described of the citizen conventions would be conducted in the way that, for example, Professor Fishkin of Stanford has conducted, what he calls "deliberative polls." So in this procedure, we take a random selection of, let us say, 300 citizens. Imagine we run four of these conventions around the country, one in each region, four regions in the country. And these 300 citizens would act as a jury—as a jury that would listen to the submissions of people about what these issues are and what the solutions are and they would deliberate. And they would deliberate—in my view, they should be sequestered, they should be compensated, they should be protected so that they can do their work like any jury can do its work with the confidence and protection necessary. But in that process, we would involve a cross-section, a representative random cross-section of the American public. And my view is this process is necessary because, as Americans look to this institution and, frankly, to people like me, law professors or lawyers who talk about this issue, their eyes glaze over because they cannot believe that the institution has the capacity to change itself to deal with what is the core problem.

So that is the way that bringing in another voice into this process could aid this Congress, I believe, in thinking about what response might actually earn the trust of the American people.

Chairman DURBIN. Governor Roemer, when you served in the House of Representatives, I do not know if you raised money in the same fashion as you did during your Presidential campaign. But you certainly got to see a contrast to your approach in the Republican Presidential primary when one Las Vegas casino magnate, as he is generally referred to, decided to bankroll one of your opponents, Newt Gingrich, and put $20 or $30 million in and promised more if needed.

Tell me how the dynamics of the campaign were affected by that decision.

Mr. ROEMER. To your first point, when I was a Member of the House of Representatives, I chose not to accept PAC money. I think I was the only Member who made that choice. I came from a State that had a culture, a history of tolerance of political corruption, if I could say that gently. I love Louisiana. Let me say that clearly. I ran for Governor in that State as the only candidate not to take PAC money. I had no chance. I was sixth in a five-man race. But I won in the end with less money but making money the issue. So I know this can be done.

When I ran for President this time, after being out of politics for 20 years—and very happy, Senator, let me just say the best 20 years of my life. Building community banks is what I do. No Federal bailout money, just lean and clean and profitable.

When I ran for President thinking that maybe we could connect with the American people on the issue of money, I found a couple interesting dynamics that surprised me. One is the whole public

out there depends on the debates as to their impressions of people, and every Republican in that race kind of had their moment in the sun. They would rise and fall with those debates.

Well, interestingly enough, I was the only candidate running who had been elected Governor and a Congressman and was a successful businessman, and I was not invited to a single debate—not one of the 23 nationally televised debates. And you have known me for a long time. I love the debates. I mean, that is where I am alive. And I think I made a mistake, Mr. Chairman. I gave a speech in Iowa early in February 2011, and it was Romney, Santorum, and several others were there, Newt Gingrich. And I got the only standing ovation, and I had talked about eliminating the ethanol subsidy and the oil subsidy.

I mean, the 1,200 people in that room were like stunned about the sacrifices that we have to make to get this government strong again. And I talked about their sacrifice and mine, and I got a standing ovation. I was not invited to another debate after that. I just could not raise the money.

So I have found, much to my surprise, after 20 years gone, that politics had changed. And it is like Larry Lessig, a friend—I trust Larry completely. It is like Larry Lessig just said. There are two races that you run: the race for money and then the race for votes. And what I tried to do running for President was to run the race for money so that I would be free after elected to do the right thing. And I would not have to call Wall Street for bank reform. I would not have to. I would listen to them, but I would not have to call them. I would not have to have a fundraiser there. I would not have to go to the top of the money pile to get my answers. And I found that it affected everything I do.

I raised about three-quarters of a million dollars, the average gift $45. I was the only candidate that got Federal matching funds at the end. I qualified. I had it from all 50 States. I paid my bills, and I returned a substantial amount of money back to the Federal match. It can be done. But you have got to get on the debate, and it is all about the money.

Chairman DURBIN. Thank you.

Mr. Shapiro, if this were a trial and you were a witness, the first question I would ask you is the following: Is it true that you are here representing the Cato Institute, which is, in fact, financed largely by the Koch brothers, whom you are defending in terms of their contributions to Super PACs? Should you have recused yourself under those circumstances?

Mr. SHAPIRO. No.

Chairman DURBIN. Do you want to turn your microphone on, please?

Mr. SHAPIRO. The answer to that question as a whole and the various subparts is no. I am here representing myself. Whenever we speak as Cato scholars, we use our institutional affiliation for identification purposes. Some of my colleagues might disagree with something that I said today. I do not know. And I guess if they disagree too much, or at least if the management does, I might get fired. I do not know. But the Koch brothers have not financed Cato in the last several years. As you may know, they sued Cato recently. Thankfully, it seems that that lawsuit is working toward a

settlement now. The Kochs represented less than two percent of Cato's donations in the last decade.

I have received funding through Koch sources over the course of my career and when I was a student to attend seminars and things like this. I do not generally have a problem with the sorts of things that the Kochs are doing, but I am certainly not bought or paid for by any more than I am bought or paid for any other number of Cato donors. We are hired because we believe in libertarian ideas, and some people want to fund those ideas, and I am grateful for that, because if they did not, then I guess I would have to go and be a litigator again.

So there you go.

Chairman DURBIN. Thank you. My time is up.

Senator WHITEHOUSE. And I remind you that at 3:40 we will take a moment.

Senator WHITEHOUSE. Go ahead.

Chairman DURBIN. Senator Coons, would you like to go first?

Senator COONS. I want to thank Senator Durbin for chairing and convening this hearing, and I would like to particularly thank Senator Udall for his testimony before and for his leadership in sponsoring a constitutional amendment, which I was pleased to join. And I do think this amendment, although it does not include express limits on campaign spending, makes an important step forward in restoring the power of this body to regulate campaign finance as well as the States. So I wanted to, if I could, address a series of questions to you while being mindful of the impending moment of silence.

First, if you would, Mr. Shapiro, I was struck at your passion at advocacy for disclosure, something that was long shared by a broad range of Members of this body, Republican and Democrat. How do you account for the complete abandonment of disclosure as a principle by Members of the other party? We recently took a floor vote on the *DISCLOSE Act*, which I thought would have been an important step forward toward dealing with some of the challenges of our current campaign financing system. How do you account for the complete absence of any support for broader disclosure in the current campaign financing environment?

Mr. SHAPIRO. Well, I do not speak for the Republican Party, of course. I can tell you what I think about the *DISCLOSE Act*, which may or may not parallel the thinking of some of your colleagues on the other side of the aisle, and that is that the *DISCLOSE Act* is more about deterring speech than about disclosure, and it is certainly different from the type of regime that I would have in mind that I was passionately advocating, as you say.

I think the George Soroses and Sheldon Adelsons and Kochs of the world should have to disclose if they are making major multimillion donations, but under the current regime, you know, the maximum donation is $2,500. I think that is too low. I do not think any politician—I think more highly of you, Senator Coons, than to think that you can be bought by a $2,500 donation, for example. And so I am for certain types of disclosure, but there are a lot of problems with the *DISCLOSE Act*, both in the numbers and exemptions for unions and other things like that.

So with another type of disclosure regime, I think you might see other types of votes.

Senator COONS. Professor Lessig, your colleague to your left there suggested that *Citizens United* did not really overturn settled law. Any difference of opinion on that point?

Mr. LESSIG. Very strong difference of opinion. In particular, I guess I take some—well, I would not say "offense," but I want to say it is a little bit harsh to say that the President, a former constitutional law professor from your law school, was in error in his characterization of *Citizens United*. I do not think he was in error at all. What he said was that it overturned a century's law, and what he was referring to was the very clear indication in the Supreme Court, explicitly articulated by Justice Scalia, that they would not treat the First Amendment as making any distinction based on speaker. And the assumption that you could regulate on the basis of the difference of speaker was fundamental from the *Tillman Act* on. So that is why the *Tillman Act* has a very specific regulation of corporations, and there was in *Taft-Hartley* a different set of regulations around unions than around corporations. And, quite frankly, that principle the Supreme Court itself has now abandoned, as Justice Stevens recently commented in a speech when the Supreme Court upheld limitations on legal immigrants participating in the political process while striking down limitations on corporations participating in the political process.

So, quite frankly, it is the Supreme Court that I would criticize as confused in this particular area, not the President.

Senator COONS. Thank you, Professor. If I might, I will note we have reached the moment.

Chairman DURBIN. Excuse me, Professor Lessig and Senator Coons.

I might note for those who were not aware that, 14 years ago, Capitol Hill Police Officer Jacob Chestnut and Detective John Gibson of the U.S. Capitol Police were killed in the line of duty defending the Capitol, the people who work here, and its visitors against an armed intruder. And for those who are physically able, I would ask you to please rise for a moment of silence.

[Moment of silence.]

Chairman DURBIN. Thank you very much.

Senator Coons, please proceed.

Senator COONS. Thank you, Mr. Chairman.

I will, just in closing, remark on our gratitude for the men and women of the Capitol Police who protect us each and every day and protect the many folks who work here and the many citizens who come here to offer their testimony and their witness.

Professor Lessig, if I might just in closing, you offered a tantalizing vision of how we might mobilize broadly the citizens of this country to become, in effect, real *Citizens United* to galvanize action by the Senate. If you could just explain in a little more detail how you think an effective citizen convention might move us toward effective action in campaign finance reform.

Mr. LESSIG. Well, I think the most difficult problem here is that this is a difficult problem to solve. Unlike the 17th Amendment, which when it changed the Senate from being appointed by State legislatures to be elected by the people, that solution was a simple

one to craft. Everybody understood how to do it. The words were not in contest.

What we have seen in the range of proposals here is that it is a really complicated question, and it should be carefully deliberated upon in a way that could bring people into the conversation much more effectively than, frankly, any hearing process could inside of the U.S. Congress.

So my suggestion is if we had a process that was open and observed by people, where ordinary people participated—and I have run mock conventions of ordinary people talking about constitutional matters—I think to the surprise of many people, you would see that ordinary people deliberating about what the Constitution needs and how the reforms should go forward would far surpass 98 percent of what is commonly discussed in this particular context. And that is because, frankly, politics is the one sport where the amateur is better for the Nation than the professional, because the professional is very good at figuring out what the particular interests that he or she represents needs, but the amateur can be brought to a point where he or she thinks about what the Nation needs. And I think we need at least that part in this process.

So if this Congress convened a series of citizen conventions that could advise Congress—it would have no legal authority, of course, but if run in the right way, it could advise Congress in a way that could make people look at it and say, OK, if four of these conventions have said the following amendments make sense and Congress then proposes those amendments, we have a reason to have some confidence that this might actually be a way to solve the problem.

Senator COONS. Professor Lessig—I see I am out of time—that is a very, I think, compelling proposal. It is sort of harkening to what is at the heart of our jury system, our grand jury system, and how average citizens are empowered in our system, or should be, to make fundamental decisions both about the substance and the process of governing.

Governor Roemer, I just want to say thank you for your very strong example.

Mr. ROEMER. Thanks.

Senator COONS. It is a striking example that you were not engaged in the debate so that your voice was really not a part of the Presidential campaign.

Mr. ROEMER. Well, as the only non-lawyer around these parts—you know, and I never admit to going to Harvard undergraduate and the Harvard Business School when I am in Louisiana, but I think I am far enough away now to go ahead and admit that.

[Laughter.]

Mr. ROEMER. But as a former Senator would always say when he fought civil rights legislation, talking about the distinction that Larry made between the professional politician—us—and the average citizen, as Russell of Georgia would say, "It is not about the poll tax. It is about States' rights." Of course, we knew what it was about. And citizens meeting to focus on what is needed to make our Constitution real would be powerful. I think it is a great idea.

Chairman DURBIN. Senator Whitehouse.

Senator WHITEHOUSE. Governor Roemer, you will be pleased to know that States' rights has declined a bit in its stature around here once it became a potential place for credit card customers to get out from under the rules that are set in South Dakota or people were trying to avoid the gay marriage licenses of other States. I think that was a doctrine of convenience then, and interesting that you should bring it up.

Professor Lessig, the Supreme Court in *Citizens United* said, and I quote: "Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

What was it doing when it said that? Is that a judicial determination? Is that a conclusion of law? Is that an act of taking judicial notice? What were they doing?

Mr. LESSIG. I think they were blundering when they said that.

Senator WHITEHOUSE. We know that, because we know that they were wrong.

[Laughter.]

Mr. LESSIG. And as I have written, I think they were blundering in a way that harkens back to the mistake of the Supreme Court in the *Lochner* era, where in a similar way, the Court, sitting high above the legislative process, looked down and reviewed what the legislature had said about whether health legislation was actually affecting the health of workers, and said, "We do not buy it. We do not think it affects the health of workers. We think it is really about taking money from the capitalist and giving it to the workers, so we are going to strike it down."

A judicial finding of fact based not upon evidence—there was no submission to suggest this——

Senator WHITEHOUSE. In fact, they went well out of their way to make sure that there was no record that might give contrary evidence to the finding of fact that they made.

Mr. LESSIG. Absolutely. And, actually, in the Montana case, the most striking thing, I think, about the Montana case was the Court's decision to summarily reverse the Montana case when the Montana Supreme Court's appeal was chock full with all the arguments necessary to see why this is a kind of corruption, this current system is a kind of corruption. But the current Court is dominated by Justices who believe the only corruption that is relevant is quid pro quo corruption.

Senator WHITEHOUSE. Criminal corruption was your testimony.

Mr. LESSIG. That is right. But from the Framers' perspective, that is outrageous. The Framers of our Constitution were more concerned with the systemic, what Buddy called the "institutional corruption," than they were worrying about whether there would be the Randy Duke Cunninghams or William Jeffersons inside of Government. They were worried about setting up a system that would create the right incentives, the right dependencies. And what we have seen now is a corruption of that——

Senator WHITEHOUSE. They talked about that in the debates that led to the Constitution, and they used the very word "corruption" in those discussions, and it was sort of the opposite side of the coin of integrity of government.

Mr. LESSIG. Absolutely. That is exactly right.

Senator WHITEHOUSE. Now, you used to clerk for Judge Posner, did you not?

Mr. LESSIG. I did.

Senator WHITEHOUSE. Recently, Judge Posner critiqued the *Citizens United* decision. He is a very conservative judge, so it was interesting coming from him. He said, and I quote, "Our political system is pervasively corrupt due to our Supreme Court taking away campaign contribution restrictions on the basis of the First Amendment."

Do you have a sense of what he meant using the phrase "pervasively corrupt"?

Mr. LESSIG. I think that he is referring to the kind of corruption that I am talking about, and in this sense, this is the way in which—I want to take more distance from Mr. Shapiro's testimony. When Mr. Shapiro and libertarian organizations say the solution to this problem is just to remove all limits so that we do not have any caps on the amount that people can give directly to campaigns or indirectly to campaigns, let us just have disclosure but no limits, that does not in any way respond to the kind of corruption that I am talking about, because what we have seen—and Montana, again, submitted evidence about this—is that when you remove limits, overwhelmingly the pattern is for campaign contributions to go up dramatically so that we concentrate even more fundraising in the tiniest slice of the one percent in a world where there is no limits. So we would go to a world where maybe 1,000 families would be funding all the campaigns in a world where there are no limits on campaigns, and that would be more corruption relative to the current system in the framework that I think the Framers gave us for thinking about how to keep this institution non-corrupt.

Senator WHITEHOUSE. And if you go behind the—I agree with you. It is a judicial finding of fact. You are an expert in appellate law as well. Let me start with: What is the role of ab initio judicial findings of fact at the Supreme Court level?

Mr. LESSIG. Well, the Supreme Court has learned again and again the high costs that it suffers when it engages in exactly that kind of behavior. It is striking that it forgets it again and again, but it learns it again and again after——

Senator WHITEHOUSE. Because it seemed a little convenient in this case, but I will——

Mr. LESSIG. That is right. And I think that the Court's opinion, to the extent that it says that the people cannot perceive this as corruption, just cannot stand, because, of course, the people are pretty good at perceiving this as corruption. And there is all the reason in the world for them to perceive it as corruption, not necessarily the corruption that says that anybody is being bought—so, again, it is not the question of whether $2,500 buys a Senator or not—but from the perspective that what it does is guarantee that you are constantly focused on what the 0.05 percent of America cares about so that you can win in the money race so that you have a shot in the voter election.

Senator WHITEHOUSE. And as a matter of traditional appellate practice, judicial findings of fact are supposed to be made at the trial court level or by a jury.

Mr. LESSIG. That is true.

Senator WHITEHOUSE. And not by either intermediate or ultimate appellate courts, correct?

Mr. LESSIG. That is right, although in constitutional context, the Court has a significant role in making what is thought of as constitutional findings of fact like this. But what is so striking about——

Senator WHITEHOUSE. This is not constitutional finding of fact. This has to do with the behavior of human beings in a political environment.

Mr. LESSIG. It does.

Senator WHITEHOUSE. And whether or not somebody will be corrupted by, say, a secret, multimillion-dollar expenditure made on their behalf by a special interest. The notion that that cannot happen seems to me to be absurd.

Mr. LESSIG. OK. You can—you should say that. As a law professor, I should avoid that word because my students will have less respect for what I say. But it is something that I think is deeply troubling in that decision. It is one of the core mistakes of that decision—a decision, though, that—let me say that the kernel of that decision, the idea that Congress should not be able to silence or effectively silence anybody, you could agree with, without agreeing with the implication that the Court made from that decision, that basically Congress has no power to intervene to try to limit the corrupting influence on this democracy.

Senator WHITEHOUSE. And I would conclude by asking you, I hope, a very short question. What we I think both agree is an inaccurate finding of fact that they made stood on two subordinate findings that they also made. One is that—or presumptions that they made. One is that these expenditures would, in fact, be independent, and the second is that they would be disclosed. Are either of those legs borne out by the facts in *Citizens United*?

Mr. LESSIG. They are certainly not disclosed. The Court was mistaken in its understanding of the extent of disclosure obligations. But even if we assume that they are independent in the sense that nobody is behind the doors agreeing on ways to coordinate, what we have understood from antitrust law since the beginning of antitrust law is that there are ways to coordinate without explicit agreement. And when you are looking at the same polling data, the Super PAC and the campaign, and you understand the same data supports the same response, you do not have to actually pick up the telephone and make any agreement——

Senator WHITEHOUSE. Well, throw in former staffers, family members running it, the same consultants on both sides of the equation, the Super PACs using actual footage from the candidates' campaigns, and, frankly, I think your competitor, Mr. Santorum, actually won in Minnesota only through his Super PAC. So it does not seem to be holding up very well.

I should yield. I have gone over my time.

Mr. ROEMER. And the lead benefactor, Senator, was standing behind Rick when he gave his victory speech in the central part of America—I think it was Missouri that night—and there was no coordination. He just was four feet away from him.

[Laughter.]

Senator WHITEHOUSE. Thank you, Governor Roemer. I yield.

Chairman DURBIN. Senator Klobuchar.

Senator KLOBUCHAR. Well, thank you very much, Mr. Chairman. Thank you for holding this hearing. Since we are mentioning the Midwest, it is a good time for me to talk.

I am someone who is up for office now and have seen firsthand what is going on here, and I truly believe that unless we fix this, we are going to literally undermine our elections and our democracy. And my first question is really just about how this has rolled out, and I guess for you, Governor Roemer, having been in the middle of it, I think most people anticipated that corporations would give a lot of money, and I think that they are, through 501(c)(4)s, which is really hard to track down, which is part of the *DISCLOSE Act*. But I am not sure anyone anticipated that individuals would give to this extent, that one billionaire would write a $10 million or a $15 million check, and how the influence that that one person can wield over an individual, I think, was something that was not at first anticipated when this came out. And I wondered if you could comment on that, Governor Roemer?

Mr. ROEMER. I think you are absolutely correct, Senator. I read nor spoke with anyone—I read anything that anybody wrote or spoke to anyone who a year and a half ago predicted this onslaught of individual wealth and large checks. But the pattern has been coming for a number of years, and one of the interesting things to me, as kind of a populist at heart, you know, being from that cotton farm in north Louisiana and I cannot get away from it, the lessons learned, is how distant the average person has become from the process, which includes the money. And it is not healthy. And they are angry about it. If you get the meeting room to express their fear and their anxiety, it is like it will bring the room to a stop.

So I am here to—I am not a constitutional lawyer. I get my advice from Larry. I apologize, and I admit that. The first person I went to see when I decided in December 2010 to run for President, the first person I went to see the first week in January 2011 was Larry Lessig. We had never met. We had a mutual friend, a guy named Mark McKinnon, who is a political strategist who helped me run my campaign for Governor. And Mark and I were close, and I gave Mark the speech at my family meeting—Mark is like part of my family—that I was running for President, $100 limit, no PACs, no Super PACs, full disclosure, and let us get it on. I remember the speech. I will not go through it now.

Senator KLOBUCHAR. Thank you. I only have seven minutes.

Mr. ROEMER. I know. Mark says, "Well, you have got to call Larry Lessig," and he gave me the number. And that is when Larry and I met, and we have worked together. We do not always agree but work together. But one of the surprising things to, I think, both of us is the lack of credibility and feasibility of a candidacy if you do not embrace the big checks, because you cannot win. Wow.

Senator KLOBUCHAR. Yes. You know, one of the things that I think is just so ironic here is anyone that is running, if you are a candidate, you disclose everything that is over $200, and it is out there, everyone can see it. And that is one of the beauties of our laws right now. And you can disagree with people who are giving, but at least you know who it is. And this has completely decimated that.

And I also was wondering, Professor Lessig, if you could talk a little bit about what effect you think this could have legally on some of the down-ballot races, not just the congressional races but State and local and what could happen there. I know in my State we have campaign finance laws that allow for matching funds, which has evened the playing field somewhere, where there is public funding for half the money basically for legislative races, and what you could see happening here.

Mr. LESSIG. Well, it is certainly the case that this business model of the Super PAC, which because of changes in the last has become an extremely effective vehicle for large donors to channel their influence, is spreading not just at the Federal level but at the State level, even the local level. In my testimony, I pointed out a Denver school board race which is in the hundreds of thousands of dollars in contributions and expenditures for a school board position that was facilitated by exactly this kind of dynamic.

And so you are going to see this happen across the board because, as campaign managers begin to think about what is the most effective device for channeling money into a political election, these Super PACs will serve it.

There have been three very important counter examples to this—Arizona, Maine, and Connecticut most recently—which have tried to facilitate small-dollar-funded elections. I do not like to call it "public funding" because it evokes a different idea—small-dollar-funded elections where people need to raise a certain amount of money in small-dollar contributions and those then get to be matched—this was the model, of course, the Fair Elections Now Act proposed—has dramatically changed the way those State legislature elections work.

In Connecticut, in the very first year of that system, 78 percent of the elected representatives ran with this small-dollar-funded system on both the Republican and Democratic sides of the aisle, 78 percent of the elected representatives used that. So this convinces me that if we just get the numbers right and have a kind of small-dollar system inside of Congress, you just change the business model. This is just incentives. Change the business——

Senator KLOBUCHAR. Especially with the Internet, I mean, this was the hope, that you are able to reach out, as Governor Roemer knows, to more people on the Internet. But it completely gets overwhelmed by these $10, $15 million checks.

My last question would be, obviously—I am a cosponsor of the *DISCLOSE Act*. I think it is important to disclose, but we all know that is not going to fix it. When you talk about your idea of citizens gathering for these basically constitutional conventions on the local level, how do you see this working with actually getting the amendment passed that it appears that we are going to have to pass to fix this?

Mr. LESSIG. I think that these conventions should come up with their view of what the right answer looks like, and that should come back to this Congress, and this Congress should be required to then answer the view of these conventions: Here is what we think is should be, here is how Congress responds to that. And then hopefully the process comes to some convergence on what the

right answer looks like, which Congress could then introduce as an amendment that gets sent down to the States.

This is a short circuit around the way the Framers thought we would bring the States and the people into this process, which is a constitutional convention or an Article V convention that the States call up on. A lot of people have problems with that. I have more faith in that system than most. But I think this system would at least bring citizens into the process at a time when the technology enables people to participate in a way that would be quite effective, but could product something valuable and useful for Congress to use in figuring out what the right answer looks like.

Senator KLOBUCHAR. Thank you very much.

Chairman DURBIN. Senator Blumenthal of Connecticut.

Senator BLUMENTHAL. Thank you. Thank you, Senator Durbin. Thank you for convening this hearing, which I think is profoundly important for all the reasons that you have stated very eloquently as members of this panel and also the panel before. And the Congress has sought to wrestle with these issues, most recently in the *DISCLOSE Act*, which I have been proud to cosponsor. Obviously it would not impose any restrictions on the size of funding, only require that there be some greater measure of transparency and literally disclosure, which seems like a fairly modest and limited, very simple and straightforward way of remedying some—in a very limited way—some of the issues that have been raised. And, you know, your reference to the Connecticut system of public financing—which has been upheld by the courts—it was challenged while I was still Attorney General, and it has been upheld now. But I think that the combination of the 501(c)(4)s and the Super PACs threatens to make a mockery, literally to make a mockery, of any similar systems because the amounts of potential so-called independent financing will overwhelm the amounts available to candidates, and the test will really be not so much in this cycle as the next one, when there will be statewide campaigns for all the statewide offices, and we will see whether, in fact, these systems can survive that onslaught and deluge of money anonymously and in magnitudes that have not been seen in campaigns before.

And so I think that, you know, the first question I would have, Professor Lessig, is whether, in fact, you can think of ways to change a Connecticut-type system to constrain or to overcome that threatened deluge.

Mr. LESSIG. Well, I agree with Congresswoman Edwards' comment earlier that this is a solution that requires—this is a problem that requires a three-legged solution. So disclosure is important and critical. That is leg one.

I have been, every chance I can, saying a critical second leg has got to be the kind of citizen-funded elections that the Fair Elections Now Act would represent, or we have been talking about a voucher system. Congressman Sarbanes is considering introducing legislation that would start a pilot for a voucher system where individuals would have a democracy voucher that they could use to contribute.

But a third thing has got to be a response to this constitutional problem the Supreme Court has created. So I do not think that there is a way, given the Supreme Court's authority right now, to use the citizen-funded component to directly limit the opportunity

for independent expenditures But I do think if there is enough money in the citizen-funded component, you could overwhelm them.

In the democracy voucher program that I have described, $50 a voter is $7 billion just for congressional elections. That is three times the total amount raised and spent in 2010. So that would be real money, and the critical thing is it would be coming from voters across the income spectrum, it would not be coming just from the tiniest slice of the one percent, which would be a significant way to make the funders the same as the people and so, therefore, eliminate the kind of corruption that I have been talking about.

Senator BLUMENTHAL. And, you know, the problem is not so much raising the money that candidates need to qualify for the public support. It is what happens when the anonymous groups come forward and raise the ante and thereby overwhelm them. And what I hear you saying is, given the current constitutional jurisprudence from this Supreme Court, it would be very difficult to counter it.

Mr. LESSIG. That is right, although there have been clever—or at least one very clever strategic response. So Congressman Sarbanes, again, finding himself drawn, because it is natural and more efficient, to only raise large-dollar contributions, did what I think has never happened in the history of the U.S. Congress where he bound himself through a legal document. He raised three-quarters of a million dollars and then said that he could not touch the three-quarters of a million dollars until he raised 1,000 small contributions. And then on June 30th, he achieved his 1,000 small contributions. And the reason he did that was that if a Super PAC came in and attacked him, he would have 1,000 small contributors to turn to to say, "We need your help to respond to the Super PAC."

So that is a dynamic, to use small-dollar contributions, just many of them, to create a large army of potential supporters who could respond to that big money. But there is no way legally to restrict that big money so long as the Supreme Court's doctrine remains.

Senator BLUMENTHAL. I want to, in the time I have remaining, turn to a related issue, which is the damage done not only to democracy by *Citizens United* and some would say the only tangentially related social welfare organizations, because *Citizens United* itself is not the sole cause of the problems we face, but also the damage done to the Court itself by these decisions. And I worry about the credibility and even legitimacy of the Court. I know you have been a scholar, you have been a law clerk. I wonder if you could talk a little bit about that area and about possibly also the related area of a code of ethics that would be applied to the Supreme Court. We have talked about it here. Senator Durbin and others have raised it, and I have as well. So let me ask you that very general question.

Mr. LESSIG. I frankly have been surprised in the last five to eight years with the carelessness the Court has displayed about the need to nurture and preserve the public's confidence in that institution as being above the political fray. I think there is a willfulness that historically, not just in this Court but across other courts across the world, has led to the weakening of that kind of institution within a political system. So, you know, I think in the recent

Obamacare decision, it was an extraordinary act of political statesmanship, I think, that the Chief Justice did what the Chief Justice did, and I think it mirrors what Chief Justice John Marshall did in the decision of *Marbury* v. *Madison*, in a way to decide the case, actually, I think scholars will say, in a way that really helped the cause of limiting the scope of the Government's power, but in a way that did not open up the institution to the charge that it was just behaving politically, deciding a case favoring Republicans at a time when Republicans controlled the Court. And the same thing, of course, has happened the other way around.

So I am concerned that not all Justices are demonstrating that kind of, I think, sensitivity and awareness, and I hope that this decision begins to remind other Justices on the Court of how important it is not just to decide the cases rightly, but to decide the cases in a way that continues to earn the respect and confidence of the American people in that extraordinarily important institution.

Senator BLUMENTHAL. And speaking extra—when Justices speak outside the courtroom, outside their opinions, or take positions or decline to conform to certain rules, all of it can affect the public perception of the Court.

Mr. LESSIG. That is right. And, you know, one of the great—one of the things I agree with Justice Scalia about is his desire not to have cameras inside the courtroom, and one of the reasons I think that is a great thing is that it minimizes the extent to which people want to play to the public. And I think they should not want to play to the public. There should be people who are happy, like Justice Souter was, to be completely unrecognized and to be able to walk around Washington without anybody coming up and saying, "Justice, let me shake your hand." They should be focused on the job of deciding the cases in a way that is conforming to the law. And I worry that as they spend their whole lives on these courts and they live in this city where being well recognized and popular is so important, that some of that corrupts the way that institution begins to function as well.

Senator BLUMENTHAL. Well, I thank you and all the members of this panel very much for your answers and your very helpful testimony today. I might just respectfully suggest that having cameras in the courtroom would not necessarily make them instantly recognizable as they walk around the streets of Washington, which is a good thing.

Mr. SHAPIRO. I have no problem with cameras in the courtroom. [Laughter.]

Senator BLUMENTHAL. Thank you.

Chairman DURBIN. Thanks, Senator Blumenthal. This panel has been very accommodating, and we will probably have a very brief second round here, not as long as the first. I thank you for waiting.

Mr. Shapiro, I am trying to put this in the perspective of my life as a public official, representing a State of close to 13 million people, about 500 miles long and an hour-and-a-half- to two-hour plane ride to head back to it, spending three or four days a week in Washington, going home to try to serve 102 counties in the State, and considering the next political campaign, which may in a State my size run in the neighborhood of $20 million. So at the time you would announce for re-election, you are faced with raising

$1 million a month, basically, to be competitive under the old rules, before the arrival of the Super PACs.

Most Americans, I think, would be maybe a little embarrassed but certainly surprised at how much time Members of Congress spend talking about raising money and actually raising money. It is an enormous commitment of time—time away from Washington, time away from your State, time away from your family, generally spent with very nice people who, by and large, are not looking for much but generally are in higher-income categories, trying to raise enough money to be sure that at the end of the day your message gets out in the campaign.

Now, air-drop in Super PACs, and you do not know what is going to happen in the closing days. So far a couple of our colleagues have faced $10 and $12 million of Super PAC negative advertising unanswered in their election campaigns. That is the new world that we live in.

And so when you make the suggestion, as you have, that removing all limitations on the amount of money that can be donated to a campaign will lead to more people getting involved in the process and more donations, I have to look at the record that was presented to the Supreme Court by Montana. The Montana Supreme Court found that "the percentage of campaign contributions from individual voters drops sharply from 48 percent in States with restrictions on corporate spending to 23 percent in States without [restrictions]."

Why? I think because unlimited contributions drive the fundraising business model away from small contributors to large contributions. And, second, small donors know their contributions will have a substantially diminished impact when there are no limits.

So how do you respond, Mr. Shapiro, to others who say that the opposite true when the facts say that it does not help to increase voter participation and voter contributions?

Mr. SHAPIRO. Mr. Chairman, I sympathize with your plight, and I offer you a solution. Remove contribution caps, and you will spend less time fundraising, as will all your colleagues.

Chairman DURBIN. If I get to know Sheldon Adelson.

Mr. SHAPIRO. There are plenty of billionaires on both sides.

Chairman DURBIN. Is that really——

Mr. SHAPIRO. George Clooney and——

Chairman DURBIN. Is that our goal, to find the richest people in America and cozy up to them to finance our campaigns? That makes us a better democracy?

Mr. SHAPIRO. Let voters decide based on knowing who is contributing. In 1968, the reason Gene McCarthy was able to stage his challenge to LBJ was because he had three donors who gave seven figures each. Without that, there would not be anything like that, or third-party——

Chairman DURBIN. I am not going to condone that, but when we have Sheldon Whitehouse's *DISCLOSE* bill up so that the voters can decide based on who gives the money, we cannot get a single vote—well, I guess we got a few, a handful of votes from the other side of the aisle, but not enough.

Senator WHITEHOUSE. Not one.

Chairman DURBIN. Not one? All right.

Mr. SHAPIRO. Make the disclosure for really significant amounts and not small businesses that donate and then have the IRS sicced on them.

Chairman DURBIN. Well, I certainly do not think that is the case. I think when you look at the statements made by leaders of the other party, consistently made, that disclosure is the best disinfectant and so forth, sunlight is the best disinfectant, clearly we have a very infected model right now because there is not much sunlight nor much disclosure, and we cannot get any bipartisan cooperation to move us in that direction. So if ultimately the decision is to be made by the voters, should they not at least have the information about who is playing in this game?

Mr. SHAPIRO. I agree. That is why I propose raising or eliminating contribution limits along with setting the proper disclosure, and you can negotiate what that amount should be.

Senator WHITEHOUSE. What should it be? What should it be?

Mr. SHAPIRO. That would take a very difficult econometric analysis to perform. I am a simple constitutional lawyer . . . but on the order of half a million or something like that. It is not $10,000, it is not $2,500. It is where the interest in preventing the appearance of corruption overwhelms the interest in preventing harassment of various kinds.

Senator WHITEHOUSE. Do you know how much, say, a general treasurer's race in the State of Rhode Island costs to run?

Mr. SHAPIRO. I do not.

Senator WHITEHOUSE. But you are willing to say that $500,000——

Mr. SHAPIRO. It would depend on the race. I was talking about a——

Senator WHITEHOUSE. Presidential race?

Mr. SHAPIRO. No, not a Presidential for that amount. I do not know. Like I said, I can pick numbers off the top of my head and I can pick on the fly right now, but——

Senator WHITEHOUSE. A congressional race, most congressional races come in for well less than $1 million. You are saying that you should not have to disclose a $499,000 contribution to a Member of Congress?

Mr. SHAPIRO. I am saying you set the amount for—maybe it differs on the State, maybe it differs on the race. I have not come here with a set of—with a roster, with a schedule of what that would be. It would have to be tailored——

Senator WHITEHOUSE. You have come here with a criticism of the *DISCLOSE Act* that it sets the number in the wrong place. How do you know that it sets it in the wrong place if you do not know where that place is?

Mr. SHAPIRO. Just like the Supreme Court often says when it rules in various directions, we do not know where the line is, but this is clearly past it——

Senator WHITEHOUSE. And $10,000 is clearly an amount that would not influence an election?

Mr. SHAPIRO. Correct. When you are talking—when you are comparing it to the Sheldon Adelsons and the George Soroses of the world, or the Koch brothers or whoever else, that is not a——

Senator WHITEHOUSE. Even a congressional election, because it applies to congressional races.

Mr. SHAPIRO. Maybe for city dog catcher. Maybe $10,000 should be disclosable for a city dog catcher. But, again, you have to balance the interests, and that is—that is not a bright line you can draw. It is something that you have to measure and that has to be debated about where that interest in knowing where that potential appearance of corruption is strong enough to overwhelm otherwise private individuals' rights to speak their mind without fearing harassment from their neighbors.

Senator WHITEHOUSE. Well, we have——

Mr. SHAPIRO. Let alone from the Government.

Senator WHITEHOUSE. We have had a country where—let me just tell you that when I went into the *DISCLOSE Act* vote, as I came out of the basement lobby, I passed a young man, a marine from Pennsylvania, who was sitting in the lobby in a wheelchair with a number of escorts around him to greet the Senators who were going by. We had asked that young man to go to Afghanistan, and we had sent him down a road that had an improvised explosive device under it that blew both of his legs off. If we can ask that young man to do that, we can darn well ask the Koch brothers to put up with some impolite blogging.

Mr. SHAPIRO. I agree. The Koch brothers, yes.

[Applause.]

Mr. SHAPIRO. And George Clooney and George Soros and anybody that, as I said, is far above any line that I would draw.

Senator WHITEHOUSE. One other thing you said earlier, I want to correct the record here. You said there was—I believe I wrote it down accurately. You said there was an "exemption for unions" in the bill. I want to make sure that the record is clear there was no exemption for unions in the bill. Unions, corporations, 501(c)s, billionaires, everybody is treated exactly the same in the bill. I know that canard has kind of crept its way into the public debate, but every time I have asked a colleague of mine to say where is it, they cannot find it. And the reason they cannot find it is because in a 19-page-long bill written in very big letters, it just is not there to be found. And I want to make sure that that is clear for the record. We did not put an exemption for unions into the bill. Every organization is treated absolutely identically.

Chairman DURBIN. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. I just have a couple of follow-up questions, and I passed the same marine on my way to vote, and certainly if you compare the sacrifices that are made by the men and women who are fighting to uphold democracy and serving and sacrificing for our freedoms, I would compare them not only to the relatively minor inconvenience of disclosure, but also to the choice they have as to whether to contribute in the first place. And part of the reason why we are such a great democracy is that we do shine that light of disclosure in a lot of areas, not just in this one but in many corporate areas as well. When a company is a public company and making these contributions to a public process and a public institution I think well merits this kind of disclosure.

But the question that I have for all the members of the panel is: Put aside the laws that have been proposed to improve the system. I am not satisfied that existing laws are being enforced sufficiently, aggressively, and faithfully, whether the provisions of the Tax Code, for example, or the current provisions that draw distinctions between political activities and non-political activities are being sufficiently well enforced. What is your view on that, Mr. Shapiro?

Mr. SHAPIRO. I have not studied the enforcement mechanisms. If they are not being enforced, they should be. I am all for the rule of law.

I will say that you cannot just brush aside the threat of harassment and vigilante action and the Government going after people who have disclosed. Frank VanderSloot, for example, an Ohio businessman, was disclosed as having contributed against President Obama, and all of a sudden has a raft of regulatory agencies going after him, even though he has never had any trouble, never committed a business crime. And that is not the only example of that. Whether you are talking about the $100 donor to a campaign for Prop. 8 in California—I happen to be against Prop. 8, but I do not think that someone who donates $100 should lose their job for it.

Again, there are competing interests but we should be for maximizing speech rather than having government control. And do not mistake this. What all of these programs are saying is that the government should control independent political speech and people getting together at some point is too much speech.

Senator BLUMENTHAL. But disclosure is not control, is it?

Mr. SHAPIRO. Disclosure is not control. That is a different problem. You are right.

Senator BLUMENTHAL. So if you cannot draw the line at a particular amount, why not just require disclosure of everything?

Mr. SHAPIRO. Because there is no right, absolute right, to know what all your neighbors are donating. It is a prudential concern rather than a constitutional one at that point. It is possible to draw a line. I am just saying I have not analyzed all of the different possible races and seen where that line should be drawn. But, you know, after a study of this—and that can be negotiated and should be negotiated politically—that line should be drawn where indeed it only is the big boys that are putting their reputation on the line rather than people donating $100 or $2,500.

Senator BLUMENTHAL. Thank you.

Chairman DURBIN. Thank you very much, Senator Blumenthal.

I thank the witnesses on this panel. For the record, the way the witness panels are constructed, there are witnesses that are suggested by the majority side and by the minority side, and so there is some balance in the testimony here. Mr. Shapiro, thank you for being here at the invitation of Senator Graham. I thank Professor Lessig and Governor Roemer for being here to give us their input on this important topic.

I want to note that there are over 400 people who have been attending this hearing, both in this room and in the overflow room, as an indication of the level of interest.

There is also another indication. We have had a number of organizations and individuals submitting statements for the record, including Americans for Campaign Reform, Common Cause, Demos,

Free Speech for People, Move to Amend, People for the American Way, Public Campaign, Public Citizen, Ben & Jerry's, American Sustainable Business Council, Center for Media and Democracy, Washington Public Campaigns, Professor Jamie Raskin, Professor Sierra Torres Bellisi, former North Carolina State Representative Chris Haggerty, and Attorney Rick Hubbard of South Burlington, Vermont. Without objection, I will add their statements to the record, thanking the individuals and organizations for their important work.

[The information appears as a submission for the record.]

Chairman DURBIN. There may be some follow-up questions to the witnesses—it happens—and I hope if you receive them that you can, even on vacation, respond in a timely fashion. I want to especially thank your son for being a dutiful observer of this constitutional process. And if there are no further comments from my panel or colleagues, I thank all the witnesses for participating and everyone in attendance on this important issue.

This hearing stands adjourned.

[Whereupon, at 4:30 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

WITNESS LIST

Hearing before the
Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

On

"Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs"

Tuesday, July 24, 2012
Hart Senate Office Building, Room 216
2:30 p.m.

Panel I

The Honorable Max Baucus
United States Senator
State of Montana

The Honorable Bernard Sanders
United States Senator
State of Vermont

The Honorable Thomas Udall
United States Senator
State of New Mexico

The Honorable Donna Edwards
United States Congresswoman
State of Maryland

Panel II

The Honorable Charles "Buddy" Roemer
Former Governor of Louisiana
Baton Rouge, LA

Lawrence Lessig
Roy L. Furman Professor of Law and Leadership
Harvard Law School
Cambridge, MA

Ilya Shapiro
Senior Fellow
Cato Institute
Washington, DC

PREPARED STATEMENTS OF HON. RICHARD J. DURBIN AND HON. PATRICK LEAHY

United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights
Senator Richard J. Durbin, Chairman

"Taking Back Our Democracy:
Responding to Citizens United and the Rise of Super PACs"

Tuesday, July 24, 2012

Opening Statement

Today we will examine the dramatic rise of spending by Super PACs that are largely funded by corporations and wealthy individuals with special interests. We will also consider proposed legislation and constitutional amendments designed to stem this dangerous tide.

Since the Supreme Court's decision in *Citizens United* and *Speech Now*, a later decision by the DC Court of Appeals, we have witnessed the rapid rise of Super PACs and unprecedented influence buying by corporations and wealthy individuals seeking to advance their agendas.

The Rise of Super PACs and Wealthy Donor Spending

In 2006, outside groups spent $70 million to influence federal midterm elections. Four years later, outside groups spent $294 million to influence the federal midterm elections. That's four times the amount they spent in 2006. By all accounts, these outside groups are prepared to break that record during this presidential election year.

Secret Money

Ordinary Americans often have no idea who is secretly bankrolling the omnipresent political advertisements designed to influence their vote. In 2006, secret donors made up 1% of all outside spending. Four years later, after *Citizens United* and the rise of Super PACS, secret donors rocketed to 44% of outside spending. And studies show that as the amount of money flooding into campaigns increases, disclosure and transparency dramatically decreases.

In a democracy that values open debate and participation, voters should know who has paid for the political ads designed to persuade them. We should call them "Super Secret PACs" because the reality is that the public has shockingly little information about where they get their resources.

American Oligarchs

The little that we have been able to learn about the major donors to these Super PACs is very disturbing. Half of all Super PAC money being spent in this presidential election is coming from just 22 millionaires and billionaires. To be clear, I don't begrudge their business success. And their voices and opinions should be heard. Theirs, however, are not the only voices and opinions that should be heard.

Just because the wealthy donors behind Super PACs have achieved economic success doesn't mean they have earned the right to buy control of the political agenda by drowning out all opposing voices. Unfortunately, that is exactly what's happening.

According to a recent report in the journal of Campaigns & Elections, Super PACs threaten to purchase every last minute of available television advertising space for the fall election, exponentially driving up the cost of these ads, especially in battleground states. As a result, voters may never hear directly from some state and local candidates, who could be kept off the air entirely due to rising costs and the fact that they are not entitled to "reasonable access" to the airwaves like federal candidates.

There are 314 million people in this country whose lives, jobs, safety, and health are impacted by the decisions of the people they elect. Can we still proclaim to be the world's model for free elections with open debate when we allow 22 wealthy people to control the terms of that debate and silence the voices of millions of others?

The public may not know the agendas of the secret, wealthy donors behind these Super PACs, but I can assure you that the politicians they've supported will – once they begin calling after the election. Imagine hearing the following phrase from a Las Vegas casino magnate [Sheldon Adelson], billionaire brothers and oil tycoons [Charles and David Koch], or the multimillionaire head of a southern retail empire [Art Pope]:

> "I spent millions to get you elected and there's plenty more where that came from... But, if you don't vote my way, I'll spend it against you the next time."

At that point, an elected official might very well just decide to forget about facts and figures, constituent letters, and town hall meetings.

Reform Is Urgently Needed: Fair Elections Now Act and DISCLOSE

There are a series of legislative proposals that would stem this dangerous tide of secret, special interest money that's flowing into our elections.

The Fair Elections Now Act

I introduced the Fair Elections Now Act, which would create a public financing system that will free candidates from the dangerous reliance on Super PACs once and for all. Under Fair Elections, viable candidates who qualify for the Fair Elections program would raise a maximum of $100 from any donor. These candidates would then receive matching funds and grants sufficient to run a competitive campaign. Fair Elections would fundamentally reform our broken system and put average citizens back in control of their elections and their country.

The DISCLOSE Act

Last week, the Senate voted on the DISCLOSE Act. A majority of the Senate, including every member of this committee, voted to support the measure. I want to thank Senator Whitehouse for his leadership on this legislation.

The bill is simple. It would require Super PACs and other big spenders in elections to disclose all donors who give $10,000 or more in any two year campaign period. In other words, it would write into law the same basic concept of disclosure that the Supreme Court actually endorsed in *Citizens United.*

Congress could pass these two bills right now and make a world of difference.

Need for Constitutional Amendments

But with a Supreme Court that has not been shy about overturning precedent and disregarding Congressional intent, passing these very good pieces of legislation may not be enough. After much deliberation, I have reached the conclusion that a constitutional amendment is necessary to clean up our campaign finance system once for all. I know there are some who say it will be next to impossible to pass a constitutional amendment on this issue. But I also know the history of our country.

Slavery and the denial of basic freedoms for African Americans was the law of the land before and after the Supreme Court's decision in *Dred Scott.* But many fought, bled, and died so that the 14th, 15th, and 16th Amendments would insure that America lived up to its promise of equality for all.

Those fighting for women's suffrage were discouraged by the Supreme Court's ruling in *Minor v. Happersett,* but years of activism were rewarded when the 19th Amendment was ratified. The Supreme Court's decision in *Breedlove v. Suttles* affirmed the imposition of poll taxes that prevented many African Americans and other poor citizens from voting in federal elections. Those fighting for equal ballot access rallied to pass the 24th Amendment and their victory was completed when state poll taxes were invalidated by *Harper v. Board of Elections.*

It may be an uphill battle. It may take years of organizing and advocacy. But the passage of the these five Amendments remind us that grassroots movements can put our country back on the right course after a Supreme Court decision -- like *Citizens United* -- gets it dead wrong.

That grassroots movement is well underway. This Subcommittee has received 1,959,063 petition signatures from Americans representing every state in the Union in support of a constitutional amendment to stop the pernicious influence of secret money from corporations and wealthy special interests.

STATEMENT OF SENATOR PATRICK LEAHY (D-VT.)
HEARING ON "TAKING BACK OUR DEMOCRACY: RESPONDING TO CITIZENS UNITED AND THE RISE OF SUPER PACS"
JULY 24, 2012

Every American who has watched our elections or even tried to watch television over the last two and half years has seen the corrosive effects of the Supreme Court's decision in *Citizens United.* Few Supreme Court decisions in American history have had such a negative impact on our political process. That decision by five justices in *Citizens United* to overturn a century of law designed to protect our elections from the corruption of corporate spending turned on its head the idea of government of, by and for the people.

Nobody who has heard the barrage of negative advertisements from undisclosed and unaccountable sources can deny the impact of *Citizens United.* Nobody who has strained to hear the voices of the voters lost among the noise from SuperPACs can deny that by extending First Amendment "rights" in the political process to corporations, five justices put at risk the rights of individual Americans to speak to each other and, crucially, to be heard.

Last month, those same five justices doubled down on *Citizens United* when they summarily struck down a 100-year-old Montana state law barring corporate contributions. In doing so, they broke down the last public safeguards preventing corporate megaphones from drowning out the voices of American voters.

These Supreme Court decisions not only go against longstanding laws and legal precedents, but also against common sense. Corporations, quite simply, are not people. Corporations do not have the same rights, the same morals or the same interests. Corporations cannot vote in our democracy. They are artificial legal constructs meant to facilitate business. The Founders understood this. Vermonters and Americans across the country have long understood this. A narrow majority on the Supreme Court apparently does not.

Like most Vermonters, I strongly believe that this was a harmful decision that needs to be fixed. I have pressed to make fixing it a high priority of this Congress, and I will continue to work for remedies. I have sought legislative remedies, and the harm of this decision is so threatening to our system that I also believe constitutional remedies should be evaluated. That is why I held the first congressional hearing on that terrible decision after it was issued. That is why I have worked with Senator Whitehouse, Senator Schumer and others to craft legislation like the DISCLOSE Act that could immediately address some of the worst effects of *Citizens United.* And that is why I have worked with Senator Durbin, the Chairman of this subcommittee, to schedule today's hearing to look at proposals for fixing the damage done by *Citizens United.*

I thank Senator Durbin for holding this important hearing. He has been a leader not only on this issue, but also in shedding light on the renewed effort in many states to deny millions of Americans access to the ballot box through voter purges and voter ID laws. It is astonishing and troubling for our democracy to see efforts underway to restrict the right to vote for individuals Americans, while corporations are empowered through secret spending to control the outcome of our elections. We need to work to restore the right balance in our democracy to protect the form

of government Americans have fought and died for, what President Lincoln called our government of, by and for the people.

The path of American democracy over the last 236 years has been one toward greater inclusion and participation by all Americans. Yet a report released last week by the non-partisan Brennan center concluded that newly-enacted voter ID laws alone will burden up to 10 millions voters. Pennsylvania's voter ID law, for example, could disenfranchise over 750,000 voters even though the state has told a court they have no evidence of in person voter fraud or even evidence it is likely to occur without their voter ID law. This Committee has received expert testimony that voter ID laws will disenfranchise African-Americans, Hispanics, military veterans, college students, the poor, and senior citizens. Many Americans associate barriers to voting with a dark time in our nation's history, when courageous and disenfranchised, yet resilient, citizens attacked by dogs, blasted with water hoses, and beaten by mobs simply for attempting to register to vote. I am not alone in noting the disturbing irony of the contrast between the concerted partisan push for voter ID in many states, and a fact which is in focus in this hearing: It is becoming increasingly difficult for ordinary, hardworking Americans to cast their votes, while billionaires suddenly are able to contribute at will to shape election results, without having to 'show any ID' at all.

We cannot return to a time when discriminatory devices were used to exclude American citizens from their democracy.

We also cannot back down from our efforts to ensure that the ability of Vermonters and all Americans to participate in our elections is not undercut by wealthy corporations dominating all mediums of advertising. The interests of the voters should control the outcomes in our elections, not the race for secret money and who can collect the largest amount of unaccountable, secret donations.

Addressing the effects of *Citizens United* should not be a partisan issue. It should be an issue for anybody who cares about our democracy. Regrettably that has not been the case and our efforts have been stymied so far. Just last week, Republicans denied the American people an open, public, and meaningful debate on the DISCLOSE Act, legislation that would restore transparency and accountability to campaign finance laws by ensuring that all Americans know who is paying for campaign ads. Despite a majority of support for this common sense legislation, Republicans continued their years-long filibuster of the DISCLOSE Act, refusing to even proceed to debate the bill in the Senate.

There is no reason a clear-cut reform like the DISCLOSE Act should not draw overwhelming bipartisan support. From the depths of the Watergate scandal forward, until only recently, the principle of disclosure was a bipartisan value. Despite the clear impact of unaccountable corporate campaign spending, a minority in the Senate consisting exclusively of Republicans continues to prevent passage of this important law.

Why have they worked so hard against this bill? Why, when so many Senators of both parties used to champion disclosure laws and supported knowing who is paying for campaign ads have they continued to prevent us from considering this remedial legislation – legislation that the conservative justices on the Supreme Court themselves endorsed and thought would follow after their disastrous opinion on *Citizens United*? Why, when the conservative Supreme Court justices

made clear even in their *Citizens United* decision that disclosure laws are constitutional does the Senate Republican leadership insist on blocking this reform? Disclosure of who is paying for election ads should not be kept secret from the public. In a democracy, our ballots should be secret – not massive corporate campaign contributions.

When an individual donates money directly to a political candidate, our donation is not hidden. It is publicly disclosed. Yet those who oppose the DISCLOSE Act are supporting special rights for corporations and wealthy donors to use SuperPACs to funnel secret, massive, non-disclosed donations to political campaigns. They are creating a special right to launder money through the use of loopholes opened up by *Citizens United.* Nobody has answered why those funding these SuperPAC's should not be bound by the same disclosure rules for giving directly to campaigns. Public disclosure of donations to candidates has never chilled campaign funding, and has never prevented millions of Americans from participating freely and openly in our elections.

Vermont is a small state. It would not take more than a tiny fraction of the corporate money being spent in other states to outspend all of our local candidates combined. I know that the people of Vermont, like all Americans, take seriously their civic duty to choose wisely on Election Day. That is why more than 60 Vermont towns passed resolutions on Town Meeting Day calling for action to address *Citizens United.* Like all Vermonters, I cherish the voters' role in the democratic process and am a staunch believer in the First Amendment. The rights of Vermonters and all Americans to speak to each other and to be heard should not be undercut by massive anonymous and corporate spending.

I look forward to hearing testimony from our witnesses today looking at how we can undo the damage caused by the *Citizens United* decision. I remain open to any remedy – including constitutional remedies – that can help us restore the right balance to our democracy and protect the right of every American to participate meaningfully in free and fair elections.

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July 24, 2012
Contact: Jennifer_Donohue@baucus.senate.gov

Testimony of U.S. Senator Max Baucus, Montana

Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights

Hearing on Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs

President Franklin Delano Roosevelt once said, "The ultimate rulers of our democracy are not a President and Senators and Congressmen and government officials, but the voters of this country."

I sit before you today on behalf of those voters – the nearly 1 million Montanans I work for, and over 1.7 million Americans we all serve who have signed a petition calling for a constitutional amendment this committee is considering today.

That's right, 1.7 million signatures. And each one is a mother, a father, an employer, a veteran, a school teacher, an American we were sent here to serve.

As a Montanan, this issue is deeply personal to me.

At the top of our state capital building in Helena sits a beautiful copper dome. Nearly a century ago, that copper dome wasn't just for decoration. It was a symbol of the copper barons and their ultimate power to decide who represented the people of Montana.

While miners risked their lives working thousands of feet below the earth, the copper kings lived high on the hog.

Corporations were literally buying elections.

In 1899 Copper Baron William Andrews Clark, bribed the state legislature into appointing him to serve here in the U.S Senate. The scandal led to the passage of the 17th Amendment to our constitution – the amendment that gave each one of us the honor of being elected to serve by the popular vote of the people of our states.

In his own defense, Clark is famously purported to have said, "I never bought a man who wasn't for sale."

So, the people of Montana responded with one voice loud and clear: 'we are not for sale.'

Montanans took democracy into their own hands and passed laws to keep their elections off the market and in the hands of the people.

But today, in the latest aftermath of *Citizens United*, the Supreme Court has stuck down those very laws.

Once again, the essence of our democracy is being threatened. And once again a constitutional amendment is needed to restore balance and put the ultimate power back in the hands of the people.

In a 2012 poll, sixty-three percent of Americans said corporations and unions should not be able to spend unlimited amounts of money in elections. The people we work for believe that state and local governments should be able to respond to corruptive behavior.

The surest way to get at the heart of the Supreme Court ruling is a constitutional amendment.

In the Federalist Papers, James Madison noted that there would be circumstances when "useful alterations [to the Constitution] will be suggested by experience."

Still this is a process that requires significant deliberation. It should. I do not take a proposal to amend the constitution lightly. I agree with James Madison that amending the Constitution should be done only on "great and extraordinary occasions."

But I believe this is one of those occasions. And Congress owes it to the American people to fully study, discuss and debate the merits of a constitutional amendment.

My proposal for a Constitutional amendment will right the wrong of *Citizens United.* My amendment will restore Congress' and States' ability to regulate political spending by corporations and labor in elections. It will give states like Montana the power to once again say: 'we are not for sale.'

It's clear that action is needed to restore Americans' faith in our political and electoral process. I urge my colleagues to join me in supporting this amendment.

Testimony of Senator Bernard Sanders
Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
Hearing on "Taking Back Our Democracy:
Responding to Citizens United and the Rise of Super PACs"
July 24, 2012

Mr. Chairman, thank you for convening a hearing on the enormously important issue of "Taking Back Our Democracy." Unfortunately, that title exactly describes the challenge facing us today.

The history of this country has been the drive towards a more and more inclusive democracy—a democracy which would fulfill Abraham Lincoln's beautiful phraseology at Gettysburg in which he described America as a nation "of the people by the people for the people." Lincoln's vision has endured throughout the ages, and many courageous Americans put their lives on the line defending that vision: "Of the people, by the people, for the people."

We all know American democracy has not always lived up to this ideal. When this country was founded, only white male property owners over age 21 could vote. But people fought to change that and we became a more inclusive democracy. After the Civil War, we amended the Constitution to allow non-white men to vote. We became a more inclusive democracy. In 1920, after years of struggle and against enormous opposition, we finally ratified the Nineteenth Amendment, guaranteeing women the right to vote. We became a more inclusive democracy.

In 1965, under the leadership of Martin Luther King, Jr. and others, the great civil rights movement finally succeeded in outlawing racism at the ballot box and LBJ signed the Voting Rights Act. Black people in our country could not be denied the right to vote. We became a more inclusive democracy. One year after that, the Supreme Court ruled that the poll tax was unconstitutional, that people could not be denied the right to vote because they were low-income. We became a more inclusive democracy. In 1971, young people throughout the country said; "we are being drafted to go to Vietnam and get killed, but we don't even have the right to vote." The voting age was lowered to 18. We became a more inclusive democracy.

Mr. Chairman, the democratic foundations of our country are now facing the most severe attack, both economically and politically, that we have seen in the modern history of our country. Tragically, we are well on our way where America is moving toward an oligarchic form of government – where virtually all economic and political power rest with a handful of very wealthy families. This is a trend we must reverse.

Economically, the United States today has, by far, the most unequal distribution of wealth and income of any major country on earth and that inequality is worse today in America than at any time since the late 1920s.

Today, the wealthiest 400 individuals own more wealth than the bottom half of America - 150 million people.

Today, one family, the Walton family of Wal-Mart fame, with $89 billion, own more wealth than the bottom 40 percent of America. One family owns more wealth than the bottom 40 percent.

Today, the top one percent own 40 percent of all wealth, while the bottom sixty percent owns less than 2 percent. Incredibly, the bottom 40 percent of all Americans own just 3/10 of one percent of the wealth of the country.

Between 1980 and 2005, 80 percent of all new income created in this country went to the top 1 percent. In 2010 alone, 93 percent of all new income went to the top 1 percent. This is not American democracy. This is American oligarchy.

That is what is going on economically in this country. A handful of billionaires own a significant part of the wealth of America and have enormous control over our economy. What the Supreme Court did in Citizens United said to these very same billionaires: "You own and control the economy, you own Wall Street, you own the coal companies, you own the oil companies. Now, for a very small percentage of your wealth, we're going to give you the opportunity to own the United States government." That is the essence of what Citizens United is all about.

Let's be clear. Why should we be surprised that one family, worth $50 billion, is prepared to spend $400 million in this election to protect their interests? That's a small investment for them and a good investment. But it is not only the Koch brothers.

Mr. Chairman, there are at least twenty-three billionaire families who have contributed at least $250,000 each into the political process up to now;[1] my guess is that number is really much greater because many of these contributions are made in secret.

The constitutional amendment that Congressman Deutch and I have introduced, S. J. Res. 33, states the following:

- For-profit corporations are not people, and are not entitled to any rights under the Constitution.
- For-profit corporations are entities of the states, and are subject to regulation by the legislatures of the states, so long as the regulations do not limit the freedom of the press.
- For-profit corporations are prohibited from making contributions or expenditures in political campaigns.
- Congress and the states have the right to regulate and limit all political expenditures and contributions, including those made by a candidate.

[1] *See* Appendix I.

I'm proud to say the American people are making their voices heard on this issue—they are telling us loud and clear it is time to reverse the trend. Six states, including my home state of Vermont, have passed resolutions asking us to pass a constitutional amendment to overturn Citizens United. More than 200 local governments have done the same, including many in Vermont. I'm proud to sponsor one such amendment. My colleagues here, Sen. Baucus, Sen. Udall, and Congresswoman Edwards, all have good amendments, and I thank them for their hard work on this issue.

APPENDIX I

America for Sale:
A Report on Billionaires Buying the 2012 Election

U.S. Senator Bernie Sanders (I-Vt.)
Washington, DC

Billionaires buying the 2012 elections have a combined $146 billion in wealth, more than the bottom 42.5% of American households – nearly 50 million families.

- So far this year, 26 billionaires have donated more than $61 million to super PACs, according to the Center for Responsive Politics. And, that's only what has been publically disclosed.

- This $61 million does not include about $100 million that Sheldon Adelson has said that he is willing to spend to defeat President Obama; or the $400 million that the Koch brothers have pledged to spend during the 2012 election season.

- These 26 billionaires have a combined net worth of $146 billion, which is more than the bottom 42.5 percent of American households (equal to nearly 50 million families in the United States).

(Sources: Federal Reserve's Survey of Consumer Finances published in June 2012; and the Forbes billionaire list of April 2012. Sylvia A. Allegretto, an economist at the University of California, Berkeley helped us gather the data from the Federal Reserve study to come up with these statistics.)

Here is a list of the billionaires:

1. Sheldon Adelson, owner of the Las Vegas Sands Casino, is worth nearly $25 billion, making him the 14th wealthiest person in the world and the 7th richest person in America.

   While median family income plummeted by nearly 40% from 2007-2010, Mr. Adelson has experienced a nearly eightfold increase in his wealth over the past three years (from $3.4 billion to $24.9 billion).

   Forbes recently reported that Adelson is willing to spend a "limitless" amount of money or more than $100 million to help defeat President Obama in November.

   While $100 million sounds like a lot, it equals the same percentage of Adelson's wealth that $300 to $400 does for the typical middle class family (with a net worth of about $77,000).

   Sheldon Adelson owns more wealth than the bottom 40.2% of American households or 47.2 million American families.

2. The Kochs (David, Charles, and William) are worth a combined $54 billion, according to Forbes. They have pledged to spend about $400 million during the 2012 election season.

3. Jim Walton is worth $23.7 billion. He has donated $300,000 to super PACs in 2012.

4. Harold Simmons is worth $9 billion. He has donated $15.2 million to super PACs this year.

5. Peter Thiel is worth $1.5 billion. He has donated $6.7 million to Super PACs this year.

6. Jerrold Perenchio is worth $2.3 billion. He has donated $2.6 million to super PACs this year.

7. Kenneth Griffin is worth $3 billion and he has given $2.08 million to super PACs in 2012.

8. James Simons is worth $10.7 billion and he has given $1.5 million to super Pacs this year.

9. Julian Robertson is worth $2.5 billion and he has given $1.25 million to super PACs this year.

10. Robert Rowling is worth $4.8 billion and he has given $1.1 million to super PACs.

11. John Paulson, the hedge fund manager who made his fortune betting that the sub-prime mortgage market would collapse, is worth $12.5 billion. He has donated $1 million to super PACs.

12. Richard and J.W. Marriott are worth a combined $3.1 billion and they have donated $2 million to super PACs this year.

13. James Davis is worth $1.9 billion and he has given $1 million to super PACs this year.

14. Harold Hamm is worth $11 billion and he has given $985,000 to super PACs this year.

15. Kenny Trout is worth more than $1.2 billion and he has given $900,000 to super PACs this year.

16. Louis Bacon is worth $1.4 billion and he has given $500,000 to super PACs this year.

17. Bruce Kovner is worth $4.5 billion and he has given $500,000 to super PACs this year.

18. Warren Stephens is worth $2.7 billion and he has given $500,000 to super PACs this year.

19. David Tepper is worth $5.1 billion and he has given $375,000 to super PACs this year.

20. Samuel Zell is worth $4.9 billion and he has given $270,000 to super PACs this year.

21. Leslie Wexner is worth $4.3 billion and he has given $250,000 to super PACs this year.

22. Charles Schwab is worth $3.5 billion and he has given $250,000 to super PACs this year.

23. Kelcy Warren is worth $2.3 billion and he has given $250,000 to super PACs this year.

Testimony of Senator Tom Udall
Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights
Hearing on "Taking Back Our Democracy:
Responding to Citizens United and the Rise of Super PACs"
July 24, 2012

Good afternoon Chairman Durbin, Ranking Member Graham, and members of the Subcommittee.

Thank you for holding this important hearing.

Today's hearing comes at an ideal time, as the 2012 election cycle provides a perfect example of just how broken our national campaign finance system really is. The integrity of our elections, and ultimately our governance, depends on a vigorous debate in which American citizens truly have a voice. Unfortunately, our elections no longer focus on the needs and interests of individual voters, but are instead shaped by multi-million dollar ad campaigns funded by special interest groups with seemingly limitless resources.

In January 2010, the Supreme Court issued its opinion in *Citizens United v. FEC*. Two months later, the DC Circuit Court of Appeals decided the *SpeechNow v. FEC* case. These two cases opened the door to Super PACs. Millions of dollars now pour into negative and misleading campaign ads, often without disclosing the true source of the donations.

But our campaign finance system was hardly a model of democracy before these opinions. We have been on this dangerous path for a long time. The *Citizens United* and *SpeechNow* decisions may have picked up the pace, but the Court laid the groundwork many years ago.

We can go all the way back to 1976. That year, the Court held in *Buckley v. Valeo* that restricting campaign spending, as well as limiting independent expenditures, violates the First Amendment right to free speech. In effect, the Court said that money and speech are the same thing.

This is a flawed premise, but the Court has continued to rely on it to issue more disastrous opinions, such as *Citizens United* and *Speech Now*. Unfortunately, the outcome is hardly surprising – Americans' right to free speech is now determined by their net worth.

But the founding principle of this nation is that all Americans deserve the same constitutionally guaranteed rights. We don't tell the wealthy they can choose any religion, but the poor can only pick from a few. But that's exactly what the Court said about the freedom of speech. For average Americans, they get one vote. They go to the polls and cast their ballot with millions of others. But for the wealthy, and the super wealthy, *Buckley* says that they can spend unlimited amounts of money to influence the outcome of our elections. And now, with *Citizens United*, that right has been extended to corporations and other special interests.

The damage is clear. Elections become more about the quantity of cash, and less about the quality of ideas. More about special interests, and less about public service.

We cannot truly fix this broken system until we undo the flawed, inherently undemocratic premise that spending money on elections is the same thing as exercising free speech. That can only be achieved in two ways. The Court could overturn *Buckley* and the subsequent decisions based on it – which seems highly unlikely given its current ideological makeup. Or we amend the Constitution. To not only overturn the previous bad Court decisions, but to also prevent future ones. Until then, we will fall short of the real reform that is needed.

That is why Senator Bennet and I, along with several members of this subcommittee, introduced S.J. Res. 29 last November. We're up to 23 cosponsors, with several other senators expressing support for a constitutional amendment in floor speeches and press interviews.

This amendment is similar to bipartisan proposals in previous Congresses. It would restore the authority of Congress – stripped by the Court – to regulate the raising and spending of money for federal political campaigns, including independent expenditures, and it would allow states to do so at their level. It would not dictate any specific policies or regulations. But, it would allow Congress to pass sensible campaign finance reform legislation that withstands constitutional challenges.

In *The Federalist* No. 49, James Madison argued that the Constitution should be amended only on "great and extraordinary occasions." I believe we have reached one of those occasions. In today's political campaigns, our free and fair elections – a founding principle of our great democracy – are for sale to the highest bidder.

I know amending the Constitution is difficult. And it should be. Last week during the debate on the DISCLOSE Act, Chairman Leahy commented that we must pass that bill now because of the "years and years that a constitutional amendment might take."

But those "years and years" started decades ago. There is a long – and bipartisan – history here. Many of our predecessors from both parties understood the corrosive effect money has on our political system. They spent years championing the cause.

In 1983 – the 98th Congress – Senator Ted Stevens introduced an amendment aimed at overturning *Buckley*. And in every Congress from the 99th to the 108th, Senator Fritz Hollings introduced bipartisan constitutional amendments similar to mine. After he retired, Senators Schumer and Cochran continued the effort in the 109th Congress.

And that was before the *Citizens United* decision. Before things went from bad to worse. The out of control spending since that decision has further poisoned our elections. Fortunately, it has also ignited a broad movement to amend the Constitution.

I participated in a panel discussion in January with several activists in this movement. One of the panelists, Maryland State Senator Jamie Raskin, was asked about overcoming the difficulty of amending the Constitution. Jamie said that "a constitutional amendment always seems impossible until it becomes inevitable." I think we are finally reaching the point of inevitability.

Across the country, more than 275 local resolutions have passed calling for a constitutional amendment to overturn *Citizens United.* Legislatures in six states – California, Maryland, Hawaii, Vermont, Rhode Island, and my home state of New Mexico – have called on Congress to send an amendment to the states for ratification. Many more states have similar resolutions pending.

Over 1.9 million citizens have signed petitions in support of an amendment. More than a hundred organizations, under the banner of United For the People, are advocating for constitutional remedies.

This grassroots movement is yielding progress. In addition to our Senate amendments, several other campaign finance related amendments have been introduced in the House.

But an amendment can only succeed if Republicans join us in this effort, as they have in the past. I know the political climate of an election year makes things even more difficult, but I'm hopeful that we can work together and reach consensus on a bipartisan constitutional amendment that can be introduced early in the next Congress.

We must do something. The voice of the people is clear, and so is their disgust. A recent Washington Post–ABC News poll found that nearly 70% of registered voters would like Super PACs to be illegal. Among independent voters, that figure rose to 78%.

Since his retirement, Senator Hollings has continued to call for passage of an amendment. After the Citizens United decision, he wrote on The Huffington Post that, "Like a dog chasing its tail, Congress has tried for thirty-five years to control spending in federal elections, only to be thwarted by the Supreme Court intent on equating speech with money. To return to Madison's freedom of speech, Congress needs to pass a Joint Resolution amending the Constitution to authorize Congress to limit or control spending in federal elections."

Senator Hollings also recognized the deterioration of our legislative branch due to the increasing influence of money on our elections. In another Huffington Post piece, Senator Hollings wrote:

> "Money has not only destroyed bi-partisanship but corrupted the Senate. Not the senators, but the system. In 1966 when I came to the Senate, Mike Mansfield, the Leader, had a roll call every Monday morning at 9:00 o'clock in order to be assured of a quorum to do business. And he kept us in until 5:00 o'clock Friday so that we got a week's work in . . . Today, there's no real work on Mondays and Fridays, but we fly out to California early Friday morning for a luncheon fundraiser, a Friday evening fundraiser, making individual money appointments on Saturday and a fundraising breakfast on Monday morning, flying back for perhaps a roll call Monday evening."

I agree with his assessment, and also remember when fundraising wasn't the priority it is today. My father was elected to Congress in 1954. I was in first grade. And the legislative branch was a Citizens' Congress. Members were in Washington for six

months, and then they went home for six months and worked at their profession. But during those six months in session, Congress focused on legislating.

And unlike today, where it's a weekly race to get out of town every Thursday, everyone socialized. I remember there were Saturday night potlucks with many members of Congress and their families. My mom told me she didn't even know who was a Republican and who was a Democrat. When you socialize like this on the weekend, it makes it much harder to attack each other the following week on the House or Senate floor. Unlike the political climate we're in today, there was a willingness to put partisanship aside for the common good.

Unfortunately, our current campaign finance system has locked members of Congress into an endless campaign cycle. Elected officials spend far too much time raising money for campaigns, and not enough time carefully considering legislation or listening to constituents. The drive to raise money is constant, and allowing vast new amounts of special interest money into the system will only increase the pressure. This causes a deterioration of Congress's ability to function, including its ability to adequately represent and respond to its constituents.
As the money raised and spent on campaigns by special interests continues to climb, members of Congress will have to devote more time trying to keep up in the fundraising race. It is no wonder that, as the pursuit of campaign money has come to dominate politics, the American people have become increasingly dissatisfied with Congress' performance.

The pressure to raise money also discourages many qualified Americans from running for office. After the 2010 elections, former U.S. Senators Warren Rudman (R-NH) and Tim Wirth (D-CO) published a joint op-ed in which they state:

> "If there's one reason for leaving [the Senate] that both Senators [George] Voinovich [R-OH] and [Evan] Bayh [D-IN] – and ourselves in our time – share in common, it's money. [They] are just the latest in a stream of moderate Senators who are too fed up to seek another term. Congress is stuck in the mud of strident partisanship, excessive ideology, never-ending campaigns, and – at the heart of it all – a corrosive system of private campaign funding and the constant fundraising it demands."

Money has poisoned our political system. And the Supreme Court has incorrectly equated that money with speech, leaving us with one option for real reform. We must work towards a constitutional amendment that will restore integrity to our elections and legislative process. We, as Americans, believe in government "of the people, by the people, for the people." Generations of Americans before us have spoken out, worked tirelessly, and even given up their lives so that we might have the chance to have such a government. We cannot sit by as that ideal is lost.

Thank you again for holding this hearing.

TESTIMONY OF
CHARLES "BUDDY" ROEMER
FORMER CONGRESSMAN AND GOVERNOR OF LOUISIANA
AND PRESIDENTIAL CANDIDATE

SENATE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS

HEARING

"TAKING BACK OUR DEMOCRACY:
RESPONDING TO CITIZENS UNITED AND THERISE OF SUPER PACS."

JULY 24, 2012

During this primary season in which I was a candidate for the Republican nomination for President and, failing that, a candidate for the Americans Elect nomination, much was made by the want-to-be presidents about how Washington DC was broken.

Broken? An unreadable tax code apparently written by and for special interests; the exporting of American manufacturing jobs overseas and subsidizing corporations to facilitate that outsourcing; an inability to exhibit budget discipline or prioritization over the next ten years in the Administration's own pro forma budget proposals with a growth of debt faster than economic growth of the nation; the downgrading of the national credit rating; bank "reform" that failed to rein in the so-called "too big to fail" that allowed the top banks to have a larger percentage of deposits after "reform" than before; a supposed bank reform that failed to restore the protections of the Glass-Steagall Act and refused to require capital ratios to rise with asset growth; health care reform that retained pharmaceutical and insurance monopolies entrenched in law; addiction to oil from the Middle East with no apparent energy strategy; 42 consecutive years of a trade imbalance as we monetized our debt; and devaluing our currency. I could go on.

Broken? Of course.

A nation in trouble? Of course.

A cry for leadership? Of course.

A time for unity and cooperation? Of course.

But I take a different approach to this "it's broken, let's fix it" path. There is a bigger, tougher, more pervasive issue than being broken: institutional corruption, or put another way, "being bought" by someone other than "the people". When the special interests have never done better and are in command of funding those who would repair the system, how much repair will get done? As the only person running for President who was elected both as Congressman and as Governor, it is my belief that Washington DC is not just broken. It is bought, rented, leased, owned by the money givers. Special interests, the bundlers, PACs, Super PACs, lobbyists, the Wall Street bankers, the pharmaceuticals, the corporate giants, the insurance companies, organized labor, the GSE's like Fannie and Freddie, energy companies, on and on and on and on. And this is not about one party versus the other, or about one person or another. It is about systemic and institutional corruption where the size of your check rather than the strength of your need or idea determine your place in line.

Corruption becomes institutional when those involved can pretend that it doesn't exist or that it doesn't affect them or that it has always been this way, or even that it yields a good outcome for the nation. Has it? Institutional corruption is when a committee membership means that your fundraisers cater to a select list of invitees – all regulated by your committee. Institutional corruption means that one of your prime options for life after public service is to represent as a lobbyist in Congress the very companies, organizations, and interests you regulated as an elected official and to do so when your contacts and relationships are fresh and strong. It is institutional corruption when those who raise questions are shunned or ignored by the body.

Outside these walls, the public's perception is that not only is Congress a do-nothing institution, but that it is bought and paid for as well. And, in politics, perception is reality, and the perception is that it is getting worse, not better. The numbers are not yet in for the 2012 election cycle, but let's look at 4 years ago where we do have at least partial numbers.

When Senator McCain opposed then Senator Obama, both candidates received more campaign contributions from PACs and lobbyists from Washington DC and its environs than from the contributions of all sources in 32 states combined. The largest corporate giver to candidates including the Presidential candidates four years ago was General Electric. How did that work for their shareholders? $5.2 Billion of domestic profit before taxes year before last and General Electric paid not one penny in Federal Income tax. And the largest contributor among banks and financial institutions? A little firm called Goldman Sachs. Maybe that's how you get "bank reform" that fails to eliminate "too big to fail", that bails out the biggest banks in America, refuses to re-instate Glass-Steagall, and allows the Department of Justice to spend more time on Barry Bonds and Roger Clemens than on the veracity of the testimony of major bank CEOs.

With the advent of Super PACs and tax-exempt organizations of "independent" status, the amount and percentage of big corporate, special interest money fueling the debate has increased exponentially. The Supreme Court has ruled that these third-party, independent-expenditures, if not coordinated with a candidate, cannot be regulated as they give no appearance of corruption as

direct contributions can and do. Is it coordination when Mitt Romney addresses the fundraiser for his own Super PACs? What bout when Rick Santorum wins a Midwest primary and has the largest contributor of his Super PACc appear on the victory stage election night directly behind the speaking candidate? When the President allows his team members helping him run his administration's programs to solicit funds for his Super PAC? Cooperation, utilizing the same playbook, managing content and timing either directly or indirectly are all components of coordination it seems to me.

I've managed more than forty campaigns for others in my younger life – Congress, Governor, US Senate races, and I've personally run for office successfully in seven, separate elections. For more than 40 years, I have been involved in the debate about money and politics. I have never tried to get money out of politics and am not trying to do so now. Money is a commodity that can be used to foster debate and the enlightenment that comes there from. I have promoted and voted for and practiced full disclosure as the essential, most important step in revealing the power of money in the political debate. I still believe that. Others with a less conservative persuasion in this matter have promoted broad limits in the amount and source of political financial contributions.

The bad news is that now, we have neither limits nor disclosure nor truly independent expenditures. This dependence on the special interest money has helped paralyze our nation. We need action for the benefit of our neighbors, yet we have become a Republic representing only those with big checks, maintaining a status-quo, a gridlock if you will, that rewards the victors and turns a deaf ear to the victims.

The people know what's happening and it is why they don't give any more. They feel that their small checks aren't needed and won't make a difference. Being out of office for 20 years and happily and successfully engaged in community banking far away from Washington, I too began to see the corruption of special interest money grow and its negative impact on meaningful reform: banking, tax, budget, housing, medical, trade.

It's why I ran for president. We wanted to get campaign reform as the first priority for a new Administration. Without reform, gridlock and status quo win, and we lose. So we deliberately adopted a financial platform of both full disclosure and tight limits on giving, hoping to attract the average person. We had a $100 maximum on any individual's contribution. We accepted no PAC contributions, just as I had done as Congressman and as Governor. We fully disclosed all contributions regardless of size. We accepted no corporate contributions. We hoped to attract the small, clean contributions of plain and average Americans, maybe 3 million at $100 each for a total of $300 million which would beat the candidates of either Party, we believed. Weak President, weak opposition is the way we saw it in December of 2010. And there was no one fighting for campaign reform.

The internet phenomenon would get us started, and the debates would put wind into our sails, we planned. As it turned out, we didn't get invited to a single one of the 23 nationally televised debates. We did achieve matching funds, raised $800,000 with contributors from all 50-states averaging nearly $50 per contribution and had 7% in a national poll the week before the failure of Americans Elect when we had to drop out.

During the campaign, I said that my first bill before Congress would be Campaign Reform; that the necessary actions required to start this economic engine (Tax, Budget, Medical, Banking, Trade, Energy, and Regulatory Reform) would not be possible with the special interests owning the Congress or the White House, so we had to lead with reform. The list of content for this Reform Bill would include (1) full disclosure, (2) 48-hour reporting, (3) no financial contributions or financial assistance from registered lobbyists, (4) PAC contributions be limited to that of individuals, (5) Establish a low threshold definition for "coordination" of third Party expenditures and have the same full disclosure and reporting requirements as those for direct contributions, (6) disallow lobbying by former members for a period of 5-years after retirement, and (7) criminal penalties for the willful violations of these conditions.

Additionally, I have grown to like the use of public funds for candidates for Federal office who meet a standard of fundraising of $100 contributions. These seven measures put meat on the bones of reform and give an opportunity for "we the people" to fund campaigns.

I recommend that we work simultaneously on statutory and constitutional efforts to increase the public discourse while revealing the special interests without limiting the right to free speech.

An appropriate Constitutional Amendment could be required as we work through this complex problem, but much can be done without a Constitutional Amendment. The time required for a constitutional approach is uncertain and appropriate content needs full scrutiny so I see the need to follow a two-initiative approach at the same time: statutorily and constitutionally. We cannot wait as a nation, so we must have a two-pronged effort from the beginning: an immediate correction maximizing the chance for real people to get re-involved and re-move the gridlock addiction fostered by the special interests who dominate fundraising (my seven point plan for example), while constitutional efforts are coordinated.

We have not picked on events or parties or personalities who are corrupt or who have been bought by the special interest checks. That's not the problem. The problem is a system that is corrupt and the corruption of an honored institution of which you are a member. It will not stand. More and more of us are leaving our day jobs and our homes and fighting for the restoration of our Republic. A group of us have started The Reform Project, a not for profit organization designed to be engaged in the debate, to foster action and reform, and to stand with those attacked by the special interest, status quo gridlockers.

Neither party has embraced needed reform. Both major parties are addicted to the special interest money. President Truman, a Democrat, and Teddy Roosevelt, a Republican, would have

surveyed this landscape of special interest money and hidden contributions and gridlock within America in trouble and wondered what has happened to our nation.

Let me answer their question. Nothing is wrong with America that we cannot correct, strengthen and re-build. We must do it together. We constitutionally must allow money to fuel debate and discourse – it is a part of our precious liberty --, but the funds must come from the people, not solely or primarily from the special interests if we are to call ourselves a "Republic". At a minimum, we must reveal the pervasive presence of special interest money, because it falls in love with itself, requires attention and feeding and, as a result, negatively impacts our neighbors in times of real need.

We can do this. Let us begin.

Testimony before the U.S. Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights

Ilya Shapiro
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July 24, 2012

Chairmen Durbin and Leahy, Ranking Member Graham, and distinguished members of the Subcommittee, thank you for this opportunity to discuss the regulation of political campaigns.

By way of overview, let me note that *Citizens United* is one of the most misunderstood high-profile cases ever, and so my testimony will review what the case actually said, briefly opine on the constitutional amendments and legislation proposed in response, and outline a better solution to our unworkable campaign finance regime.

Now, *Citizens United* is both more and less important than you might think. It's more important because, beyond whatever effect it has on the amount of corporate or union money in politics, it has revealed the instability of our current system. It's less important because it doesn't stand for half of what many people say it does.

Take for example President Obama's famous statement that the decision "reversed a century of law that I believe will open the floodgates of special interests—including foreign corporations—to spend without limit in our elections."[1] In that sentence, the former constitutional law professor stated four errors of constitutional law.

First, *Citizens United* didn't reverse a century of law, but 20 years at most. The president was referring to the Tillman Act of 1907, which prohibited corporate donations to candidates and parties. *Citizens United* didn't touch that issue. Instead, the overturned precedent was a 1990 case that, for the first and only time, allowed a restriction on political speech based on something other than corruption or the appearance thereof.[2]

Second, as far as opening the floodgates to special interests goes, it depends on how you define those terms. As you may have read in the *New York Times* magazine this weekend, there's no indication that there's a significant change in corporate spending this election cycle.[3] There are certainly people running Super PACs who would otherwise be supporting candidates in other ways—as bundlers or directors of regular PACs—but Super PACs aren't a function of *Citizens United* (as I'll get to shortly). And the rules affecting the wealthy individuals who do seem to be spending more—be they Sheldon Adelson on the Republican side or George Soros on the Democratic side—haven't changed at all. It's just unclear that any "floodgates" have been opened or what these special interests are that didn't exist before.

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[1] State of the Union 2010 (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

[2] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990). For a further critique of such assertions, see Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Can Courts Overturn Precedent*, 16 NEXUS: CHAPMAN'S JOURNAL OF LAW & POLICY 121, 125-26 (2011).

[3] Matt Bai, *How Much Has* Citizens United *Changed the Political Game?*, N.Y. TIMES MAGAZINE, July 22, 2012, *available at* http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html.

Third, the rights of foreigners—corporate or natural persons—is another issue about which *Citizens United* said nothing. Indeed, just this year the Supreme Court summarily upheld the restrictions on foreign spending in U.S. political campaigns.[4]

Fourth and finally, there's the charge that spending on elections now has no limits. That's close to the truth in the context of independent political speech, but it's certainly not for candidates and parties, nor for their donors. Again, *Citizens United* did not rule on either individual or corporate contributions to candidates. All *Citizens United* did was remove the limits on independent associational expenditures.

More important than *Citizens United* was *SpeechNow.org v. FEC*, decided two months later in the D.C. Circuit.[5] That decision removed the limits on individual donations to independent expenditure groups, which led to the creation of the so-called Super PACs. Previously, we had plain-old PACs—political action committees—defined as any group receiving or spending $1,000 or more for influencing elections, to which individuals could only donate $5,000 per year. Now you still have to register these groups but there's no limit on how much people can donate to them. *Citizens United* merely allowed the use of general treasury funds for speech, while *SpeechNow.org* freed people to pool their money to speak in the same way one very rich person could already.

And so, if you're concerned about the amount of money spent on elections—though Americans spend more annually on chewing gum and Easter candy[6]—the problem is not with the big corporate players. This is another misapprehension of those who criticize *Citizens United*: Exxon, Halliburton, and all these "evil" companies (or even so-called good ones, like Apple and Google) aren't suddenly dominating the political conversation. They actually spend very little money on political advertising, partly because it's more effective to spend money on lobbying but more importantly, why would they want to alienate half of their customers? As Michael Jordan famously said when he was criticized for not speaking about politics, "Republicans buy sneakers too."[7]

Fortune 500 companies are very cautious; they won't risk the kind of consumer reaction that Target faced after supporting a candidate who opposed gay marriage. All they want is a legal regime their phalanx of lawyers and accountants can manage, gladly accepting regulations that are disproportionately onerous to their more entrepreneurial competitors. Many corporations liked the pre-*Citizens United* restrictions because then they didn't have to decide whether to spend money on political ads!

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[4] *Bluman v. FEC*, 132 S. Ct. 1087 (2012).

[5] *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

[6] George Will, *How States Are Restricting Political Speech*, WASH. POST, Feb. 3, 2012 (presidential campaigns spend roughly the same as what Americans do on Easter candy), http://www.washingtonpost.com/opinions/states-are-cracking-down-on-political-speech-with-burdensome-laws/2012/01/31/gIQAPe6ziQ_story.html; George Will, *A Campaign-Finance Bill That Doesn't Pass Muster*, WASHINGTON POST, Apr. 27, 2011, (Obama may raise $1 billion in private contributions for the 2012 race, half of what Americans spend on Easter candy), http://www.washingtonpost.com/opinions/a-campaign-finance-bill-that-doesnt-pass-muster/2011/04/26/AFXpSq0E_story.html; George Will, *The Democratic Vision of Big Brother*, WASH. POST, Oct. 17, 2010 (election spending for every U.S. office during two-year cycle is less than Americans spend on candy in two Halloween seasons) http://www.washingtonpost.com/wp-dyn/content/article/2010/10/15/AR2010101504201.html.

[7] Jordan made the statement in response to questions about why he wouldn't endorse the black Democratic candidate, Harvey Gantt, in the 1990 North Carolina Senate race against Republican Jesse Helms. *See, e.g.*, Kurt Badenhausen, *The Business of Michael Jordan Is Booming*, FORBES, Sept. 22, 2011, http://www.forbes.com/sites/kurtbadenhausen/2011/09/22/the-business-of-michael-jordan-is-booming/.

On the other hand, groups composed of individuals and smaller players now get to speak: your National Federations of Independent Business and Sierra Clubs, your NRAs and Planned Parenthoods. They can't lobby as much as the big boys on K Street, but they definitely enrich the public discourse and keep government honest. So even if we accept "leveling the playing field" as a proper basis for campaign regulation, *Citizens United*'s freeing up of associational speech levels that playing field in many ways. As Ira Glasser, the ACLU's former executive director, put it, "if regulating unevenness of speech by regulating the unevenness of wealth is the goal, then why include small business corporations . . . but not Warren Buffett?"[8]

Moreover, it's a good thing that the First Amendment protects political speech regardless of the nature of the speaker: People don't lose their rights when they get together and associate, whether it be in unions, non-profit advocacy groups, private clubs, for-profit corporations, or any other form.[9] But the ruling does create the odd situation whereby independent political speech is mostly unbridled while candidates and parties are heavily regulated.[10] That's not necessarily a bad thing—parties aren't privileged under the Constitution—but it does create a weird dynamic.

Now, I've reviewed the various proposals introduced in this Congress to remedy this scenario, as well as some of *Citizen United*'s other perceived ills. They're too numerous to detail here, but they have certain commonalities: limiting spending or donations, prohibiting political speech through the corporate form, removing First Amendment protections from all but natural American persons, expanding public financing of campaigns, etc. The idea is that if we could only get private money out of politics, elections will be cleaner and the government more accountable to the people.

The underlying problem, however, is not the under-regulation of independent speech but the attempt to manage political speech in the first place. Political money is a moving target that, like water, will flow somewhere. If it's not to candidates, it's to parties, and if not there, then to independent groups or unincorporated individuals acting together. Because what the government does matters and people want to speak about the issues that concern them. To the extent that "money in politics" is a problem, the solution isn't to try to reduce the money—that's a utopian goal—but to reduce the scope of political activity the money tries to influence. Shrink the size of government and its intrusions in people's lives and you'll shrink the amount people will spend trying to get their piece of the pie or, more likely, trying to avert ruinous public policies.

While we await that shrinkage—my Cato colleagues have some suggestions if you're interested—we do have to address the core flaw in our modern campaign finance regime. That flaw is not a stubborn First Amendment that grants more protection to political speech here than anywhere in the world. Instead, the original sin, if you will, was committed by the Supreme Court, not in *Citizens United* but in the 1976 case of *Buckley v. Valeo*.[11] By rewriting the Watergate-era Federal Election Campaign Act[12] to

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[8] Ira Glasser, *Understanding the* Citizens United *Ruling*, HUFFINGTON POST, Feb. 3, 2010, http://www.huffingtonpost.com/ira-glasser/understanding-the-emcitiz_b_447342.html.

[9] *See, e.g.*, Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701, 707-08 (2011).

[10] *See* discussion of Comedy Central's satire of the present system in Ilya Shapiro, *Stephen Colbert Is Right to Lampoon Our Campaign Finance System (And So Can You!)*, 6 ST. THOMAS J.L. & PUB. POL'Y __, __ (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102747.

[11] *Buckley v. Valeo*, 424 U.S. 1 (1976).

eliminate limits on campaign spending while keeping caps on contributions to candidates, *Buckley* upset Congress's finely balanced global reform.

By refusing to strike down FECA altogether, just excising its expenditure limits, the Court produced a system where candidates face an unlimited demand for campaign funds but a tapered supply. That's why legislators spend all their time fundraising. Some would say that's a feature not a bug—because, of course, the government that governs least, governs best—but nevertheless these rules have inflated the priority of fundraising efforts. Moreover, the regulations have pushed money away from candidates and toward advocacy groups—undermining the worthy goal of accountable government.

The solution is rather obvious: Liberalize rather than further restrict the campaign finance regime. Get rid of limits on contributions to candidates—by individuals, not corporations—and then have disclosures for those who donate some amount big enough for the interest in preventing the appearance of quid pro quo corruption to outweigh the potential for harassment. Then the big boys who want to be real players in the political market will have to put their reputations on the line, but not the average person donating a few hundred bucks—or even the lawyer donating $2,500—and being exposed to boycotts and vigilantes. Let the voters weigh what a donation from this or that plutocrat means to them, rather than—and I say this with all due respect—allowing incumbent politicians to write the rules to benefit themselves.

In sum, we now have a system that's unbalanced, unstable, and unworkable—and we haven't seen the last of campaign finance cases before the Supreme Court or attempts at legislative reforms. At some point, however, there will be enough incumbents who feel that they're losing message control to such an extent that they'll allow fairer political markets. It's already happening: Earlier this month, the Democratic governor of Illinois signed a law that allows state candidates to receive unlimited campaign contributions if their race includes significant independent spending.[13] This deregulation is a mere act of political self-preservation, but that's fine. Once more incumbents realize that they can't prevent communities of people from organizing to express their views, they'll want to capture more of those dollars. Stephen Colbert would then have to focus on other laws to lampoon, but I'm confident that he can do that and we'll be better off on all counts.

Ultimately, the way to "take back our democracy"—to invoke the name of this hearing—is not to further restrict political speech but to rethink the basic premise of existing regulations.

Thank you again for having me. I welcome your questions.[14]

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[12] As amended by the Federal Election Campaign Act Amendments of 1974, P.L. No. 93-443.

[13] *See, e.g., Free(er) Speech for Illinois*, WALL ST. J., July 12, 2012, available at http://professional.wsj.com/article/SB10001424052702303740704577522760702640068.html?mod=djemEditorialPage_h&mg=reno64-wsj.

[14] In addition to these prepared remarks, I've submitted to the hearing record the three law review articles I've written regarding post-*Citizens United* campaign finance, which were the basis for my presentation. Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701 (2011), *also available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873158; Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Can Courts Overturn Precedent*, 16 NEXUS: CHAPMAN'S JOURNAL OF LAW & POLICY 121 (2011), *also available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1760127; Ilya Shapiro, *Stephen Colbert Is Right to Lampoon Our Campaign Finance System (And So Can You!)*, 6 ST. THOMAS J.L. & PUB. POL'Y __ (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102747.

TESTIMONY OF
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SENATE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS AND HUMAN
RIGHTS

HEARING ON
"TAKING BACK OUR DEMOCRACY:
RESPONDING TO *CITIZENS UNITED*
AND THE
RISE OF SUPER PACS."

JULY 24, 2012

INTRODUCTION

Mr. Chairman, and Members of the Committee, my name is Lawrence Lessig, and I am the Roy L. Furman Professor of Law and Leadership at Harvard Law School. I also direct the University's Edmond J. Safra Center for Ethics. I have been a professor at Stanford and the University of Chicago. Before teaching, I clerked for Judge Richard Posner of the Seventh Circuit Court of Appeals, and Justice Antonin Scalia.

I commend this Committee, and its Chairman, for holding this hearing, a celebration of the extraordinary grassroots movement that has developed to demand the reversal of *Citizens United*, and an end to a system for funding elections that leads most Americans to believe that this government is corrupt. Hundreds of thousands of citizens have gotten hundreds of cities, and now a half a dozen states, to pass resolutions calling on Congress to correct the Supreme Court's mistake. It has been a century since we have seen such anti-corruption activism, and it is a testament to the leadership of the many new grassroots organizations, such as *Free Speech*

for People, and *Move to Amend*, that in just two years, they have achieved so much.

Yet this hearing is just the beginning of the serious work that will be required to address the problem in America's democracy that *Citizens United* has come to represent. That problem can be simply stated:

The People have lost faith in their government.

They have lost the faith that their government is responsive to them, because they have become convinced that their government is more responsive to those who fund your campaigns. As all of you, Democrats, Republicans, and Independents alike, find yourselves forced into a cycle of perpetual fundraising — spending, according to the estimates in the academic literature, anywhere between 30% and 70% of your time raising money to get back into office or to get your party back into power — you become, or at least most Americans believe you become, responsive to the will of "the Funders." But "the Funders" are not "the People": .26% of Americans give more than $200 in a congressional campaign; .05% give the maximum amount to any congressional candidate; and .01% — the 1% of the 1% — give more than $10,000 in an election cycle.[1] We have *up-sourced* the funding of your campaigns to the tiniest fraction of the 1%; America has grown cynical in response.

Citizens United has only made this problem worse, as it has further and predictably concentrated funding in an even smaller slice of America. In the current presidential election cycle, .000063% of America — that's 196 citizens — have funded 80% of Super PAC spending.[2] 22 Americans — that's 7 one-millionths of 1% — account for 50% of that funding. *Citizens United* has thus further shifted the sources of campaign funding toward an ever shrinking few.

This, Senators, is corruption. Not "corruption" in the criminal sense. I am not talking about bribery or quid pro quo influence

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[1] See Lee Drutman, *The Political One Percent of the One Percent*, Sunlight Foundation Blog, http://bit.ly/LHoAfr.

[2] Ari Berman, The .000063% Election, The Nation, http://bit.ly/LHoOmE.

peddling. It is instead "corruption" in a sense that our Framers would certainly and easily have recognized: They architected a government that in this branch at least was to be, as Federalist 52 puts it, "dependent upon the People alone." You have evolved a government that is not dependent upon the People *alone*, but that is also dependent upon the Funders. That different and conflicting dependence is a corruption of our Framers' design, now made radically worse by the errors of *Citizens United*.

As the Supreme Court has now doubled down on its deeply flawed decision, it is both appropriate and necessary for this Congress to consider how best to respond.

But in considering that response, you should not lose sight of this one critical fact: On January 20, 2010, the day before *Citizens United* was decided, our democracy was already broken. *Citizens United* may have shot the body, but the body was already cold. And any response to *Citizens United* must also respond to that more fundamental corruption. We must find a way to restore a government "dependent upon the People alone," so that we give "the People" a reason again to have confidence in their government.

How you do that will be as important as *what* you do. America's cynicism about this government — whether fair or not — is too profound to imagine that this Congress alone could craft a response that would earn the confidence of the People. The eyes of Americans glaze over when they hear you speak of "campaign finance reform," because they don't believe you would ever do anything that would truly end the institutional corruption that too many within this beltway depend upon.

Instead, this Congress needs to find a process to discover the right reforms that could itself earn the trust of the American people. That process should not be dominated by politicians, or law professors, or indeed any of the professional institutions of American government. It should be dominated instead by the People.

I have today submitted to this committee the outline of one such plan — a series of "citizen conventions," constituted as a kind of citizen jury, and convened to advise Congress about the best means of reform. But whether it is this process or another, your challenge is to find a process that could convince America that a

corrupted institution can fix itself. That is not an easy task, though it is crucial if you are to stop the spiraling cynicism that marks America's attitude towards its government.

The confidence of the American people in this government — in you — is at an historic low. That is not because of the number of Democrats sitting in Congress. It is not because of the number of Republicans. It is because of a dependence that all of you, and all of us, have allowed to evolve in this government, that we all see draws you away from a dependence upon "the People alone." I commend you for the beginning this hearing represents, but I urge you to act now in a way that has a real chance to restore that confidence.

CITIZENS UNITED AND ITS EFFECT

There have been but few decisions in the history of the Supreme Court that have excited as much outrage and sustained fury from citizens across the political spectrum as has *Citizens United.* Whether or not the decision is the "worst ... this century," as Senator McCain has described it, it is, in my view, one of the most clumsy. One could easily agree with the principle at the core of the Court's reasoning — that Congress hasn't the power to effectively ban for any sustained period of time the speech of any entity engaging in political activity — without accepting the principle that the case has come to stand for: that Congress has no power to limit the corrupting influence of unlimited independent expenditures. That second principle does not follow from the first: One could easily insist that the government does not have the power to effectively silence the political speech of any one or any group — whether immigrants, corporations, the French or dolphins for that matter — without concluding that the government has no power to limit the corruption of its democracy.

Yet it is this broader principle that has led courts and the Federal Election Commission to truly revolutionize the actual practice of campaign funding, and not just at the federal level. Courts have taken the hint from the Supreme Court's recent cases, and remade the nature of campaign fundraising.

This is not to say that before *Citizens United*, large contributions or expenditures did not matter. Of course they did. But *Citi-*

zens United and its progeny have changed the way that large expenditures can matter. And that change in turn has inspired an explosion in the level — both the amount and the size — of such contributions.[3]

Before *Citizens United*, individuals could make large contributions to *qualified nonprofit corporations* ("c(4)s"). But c(4)s were not permitted by the IRS to make "political influence" their primary purpose. Thus c(4)s had to spend 50% or more of their funds on activities other than "political influence." In this way, the influence of c(4) contributions was effectively taxed at a 50% rate.

Likewise, before *Citizens United*, individuals and corporations could contribute to independent political committees organized under section 527 of the Internal Revenue Code ("527s"). All 527s can spend 100% of their money for purposes of "political influence." If they acted independently of any political campaign, 527s could also accept unlimited contributions — but only so long as they avoided express advocacy for or against any candidate. Thus, money contributed to these 527s wasn't taxed with the burdens of a c(4). But it was burdened by the risk that its indirect advocacy would be deemed express advocacy, and thus subject to penalties from the F.E.C.

Citizens United and its progeny have radically changed these two limits. Relying upon *Citizens United,* the D.C. Circuit lifted the contribution limits on independent 527s that engage in express advocacy. The F.E.C. then formalized the rules governing these committees, creating what has been dubbed, by Eliza Newlin Carney, the "Super PAC."

Super PACs are thus a classic story of American innovation: deliver more bang for the buck, and radically change the market. Because Super PACs aggregate contributions, they spend their money more efficiently than contributors could on their own. Because they are freed of the effective 50% tax on c(4)s, the aggre-

[3] Throughout this testimony, by "contributions" I mean both direct contributions to a campaign, and indirect contributions to "independent" political action committees. This aggregation is not meant to deny that the independent committees act independently. Whether they do or not, the beneficiary (the candidate) certainly can recognize what he or she must do in order to induce more such contributions.

gated contributions will have more effect. And because they are freed of the rule against express advocacy, the contributions can be more effective. As the iPhone taught the cellphone, or the Internet taught the mainframe, or the PC taught the calculator: do more more efficiently, and demand will take off.

And so has the demand for Super PAC spending soared: As the Sunlight Foundation reports, in the 2011-12 cycle so far, more than a quarter of a billion dollars has been raised by Super PACs. Of the $142 million spent so far, negative spending has outstripped positive spending 2 to 1.[4] OpenSecrets.org reports that through April, "outside spending in all its forms has doubled since 2008, but independent expenditures have more than tripled."[5] And while there are questions about whether that growth was truly caused by *Citizens United*,[6] there can be no question that changes in the concentration of funding have been driven by changes caused by *Citizens United*. Whether there was a comparable amount of money in 2008 or not, the number of large funders has grown. In my view, it is this concentration that defines the corruption, for it is this concentration that creates the corrupting dependence.[7]

The full effect of *Citizens United*, however, is not captured in numbers. Indeed, there are three points beyond the numbers that this committee should keep in view.

1. *Citizens United has radically changed the business model of political fundraising.*

The most important effect of *Citizens United* is a change in the business model of campaign funding. When contributions (either directly to a campaign or indirectly to an "independent" commit-

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[4] See *Follow the Unlimited Money*, http://bit.ly/LIJ77Y.

[5] See Bob Biersack, Outside Spending: The Big Picture (So Far), OpenSecrets-Blog, http://bit.ly/I Ub7R

[6] See, e.g., Matt Bai, How Much Has Citizens United Changed the Political Game?, New York Times, July 17, 2012. See also Rick Hasen's succinct response to Bai's piece. *Election Law Blog*, http://bit.ly/LIJe3w.

[7] It is for this reason that proposals to "remedy" the problem caused by *Citizens United* by simply lifting all contribution limits simply misses the point: If the corruption is caused by the gap between "the Funders" and "the People," lifting contribution limits will simply increase that corruption, by increasing that gap.

tee) are limited, candidates must appeal to a large number of potential contributors to fund their campaigns. But when such contributions are unlimited, the most efficient way to fund a campaign is to appeal to large contributors alone. Candidates' time is short. It makes much more sense to spend that time trying to secure large contributions rather than small. And this fact in turn radically expands the influence of large contributors over others within the electoral system.[8]

This is precisely the point that the Montana Supreme Court made when upholding its regulation of corporate speech in political elections, but which the United States Supreme Court reversed (without even granting Montana the courtesy of a fully briefed opinion). As the Montana Court wrote, "allowing unlimited independent expenditures of corporate money into the Montana political process would drastically change campaigning by shifting the emphasis to raising funds."[9] Instead, by limiting contributions and the source of those contributions, campaigns in Montana are "marked by person-to-person contact and a low cost of advertising compared to other states."[10]

By structuring an election system in which candidates must rely upon small contributions from citizens only, the system assures that candidates pay attention to the needs of those contributors — and hence the needs of these citizens. But when contributions are concentrated in the very few, those few have a corrupting influence,

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[8] Congressman John Sarbanes (D-MD) has reacted to this dynamic by creating a formal structure to create pressure on him, and his campaign, to raise small contributions to support his election. Through a legal trust, his campaign raised funds that could only be accessed once 1,000 small contributors had been secured. See Paul Blumenthal, *John Sarbanes Experiments With His Own Campaign To Promote Public Financing*, http://huff.to/PzpkVm. To my knowledge, this is only time such a device has been used in the history of the Naiton, and it reflects the strong pressure on a congressional campaign that would otherwise exist to raise funds in large contributions only. On June 30, Sarbanes met his initial target of 1,000 contributors.

[9] *Western Tradition Partnership, Inc. v. Montana*, 2011 MT 238, p18 (2011).

[10] The Montana Court also credited the work by Edwin Bender of the National Institute on Money in State Politics, who found that the "percentage of campaign contributions from individual voters drops sharply from 48% in states with restrictions on corporate spending to 23% in states without." Id. This finding is consistent with the theory that unlimited contributions drive the business model of fundraising away from small contributions to large. *Id.*

because the government's dependence upon them conflicts with a dependence upon the people "alone."

Yet concentrated influence is exactly what the current system of campaign funding induces. As many have recognized, it is as if America runs two elections each election cycle — one a money election, and one a voting election. To succeed in the latter, you must succeed in the former first. But while in the voting election, all citizens can participate, in the money election — at least when contributions are unlimited — only a tiny slice of America can participate meaningfully. Those tiny few have extraordinary influence relative to the rest of us. And so long as effective contributions are unlimited, candidates will continue to be dependent upon those tiny few, and hence not "dependent upon the People alone."

2. Citizens United has affected local as well as national elections.

The principles that the Court announced in *Citizens United* derive from the First Amendment. Yet because of incorporation, they apply to every political entity subordinate to the federal government as well. Thus the rules of unlimited expenditures that are changing the nature of presidential and congressional elections are changing the nature of state and local elections too — including judicial elections.[11] Norms favoring campaigns funded primarily by large contributions are displacing the practice of small, citizen funded elections. David Sirota, for example, writes in Salon about the extraordinary story of a school board race in Denver dominated by $25,000 contributions.[12] Total contributions in that race approached $1 million. Sirota's story is an increasing norm.[13]

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[11] Perhaps strangely, when it comes to judicial elections, the Supreme Court is quite sensitive to the corrupting influence of unlimited independent expenditures. In *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), for example, the Court crafted a new constitutional rule to force a judge to recuse himself in the face of large independent campaign expenditures, for fear that the taint of corruption would taint the judicial process. Why independent expenditures could taint judicial elections but not legislative or presidential election was not explained well by the Court.

[12] See http://bit.ly/LIJiAa.

[13] See Ben Tribbett, *Citizens United Goes Local*, Huffington Post, http://huff.to/LHeU4E.

No doubt real differences are at the core of these races, and drive these contributions. And in a democracy, in my view, we need more, not less, attention to political and policy differences. That attention, in turn, will cost more real money.

But the problem with the post-*Citizens United* campaigns is not the amount of money. It is the source. Again, to qualify as a viable candidate in elections from school board to president, you increasingly need the effective approval of the tiniest slice of the 1%. Without that approval — expressed in contributions, not votes — the vast majority of candidates have no chance in the voting election. For most, winning the (tiny fraction of the) 1% election is thus a necessary condition for winning in the 99% election.

We ridiculed Soviet "democracy" when it effectively did the same thing, by requiring every candidate be cleared by the Politburo before being allowed on the ballot. Yet most in America today don't even recognize the parallel that we have produced here.

3. More effective disclosure alone could not reveal the influence that Citizens United has effected.

There are some who believe that any problem that *Citizens United* created could be remedied simply by more effective disclosure. It is critical that this Committee recognize that however important disclosure is, disclosure alone *could not* reveal the actual influence of unlimited independent expenditures.

This point is clear from both academic work and practical political experience.

Marcos Chamon and Ethan Kaplan, for example, in their work describing the "Iceberg Theory of Campaign Contributions," point out that the incentive produced by a $10,000 contribution to a candidate is the same as the incentive produced by a $2,000 contribution to that candidate, *plus* a credible threat of an $8,000 contribution to that candidate's credible opponent.[14] Given that equivalence, it's not surprising the contributor would opt for the smaller contribution. But obviously, the influence of that $8,000 would be completely missed even by the most effective disclosure statute. No

[14] See http://bit.ly/LHojZN. The $10,000 assumes PAC contributions ($5,000 per cycle).

rule requires that implicit threats be disclosed. Nor could any such rule be enforced.

The same point has been recognized by at least former Members of this body, relying less on formal modeling and more on the practical reality of post-*Citizens United* politics. I had the privilege, for example, of participating on a panel with Senator Evan Bayh, conducted by Senator Arlen Specter, discussing *Citizens United.* Senator Bayh explained quite clearly the dynamic that *Citizens United* has produced: As he put it, the biggest fear an incumbent has now is that 30 days before an election, some Super PAC will drop a $1 million in attack ads on the other side. If that happens, the incumbent can't simply turn to his or her largest contributors, for by definition, they have already maxed out in the campaign. So instead, the incumbent must, in effect, buy (what we could call) "Super PAC insurance": the assurance that if a Super PAC attacks, there will be another Super PAC on the incumbent's side to defend. But as with any insurance, premiums must be paid in advance — which in this case means the incumbent must behave in a way that gives Super PACs on his or her side a reason to defend the incumbent. ("We'd like to support you Senator, but we have a rule that forbids us from supporting anyone with less than a 90% grade on our report card..."). The Senator thus has a target. And long before even a dollar is spent by anyone, that threat has the potential to change the incumbent's behavior.

This is the economy of a protection racket. And once again, the influence of that protection racket *could not be* captured by any disclosure scheme. Thus disclosure may be essential, but disclosure is not enough.

Let me emphasize this point to be clear: I serve proudly on the advisory board of the Sunlight Foundation, and I am a strong supporter of disclosure legislation. Effective disclosure makes it possible for the public to identify the influences that might influence their candidates. It makes it harder for illicit influence to find its effect within a political system.

But as valuable and as necessary as disclosure is, we must recognize that it *could not be* a sufficient response to the corruption that now defines this government. Only a system of "citizen funded elections" — where dependence upon "the Funders" is the same as

dependence upon "the People" — could reform that corruption. I don't need to explain this point to this Chairman, who has championed one version of "citizen funded elections" in the form of the Fair Elections Now Act. But I do find that in the frenzy to reverse *Citizens United*, too many have forgotten that even if we succeeded, a more fundamental problem would remain. That problem too requires your attention.

THE POLITICAL RESPONSE TO *CITIZENS UNITED*

On the day that *Citizens United* was decided, the political response to the Supreme Court's mistake was born. But interestingly, and importantly, that response came not just from traditional, existing, inside the beltway organizations. It came as well from a slew of new organizations, formed by outraged citizens from across the country. Groups such as *FreeSpeechForPeople.org* and *MoveToAmend.org*, launched almost simultaneously and joined many other more established organizations, such as *Common Cause, Public Citizen, MoveOn.org*, and *People for the American Way*, to push for a constitutional response to the Supreme Court's ruling.

These grassroots movements have in turn inspired scores of local city councils to adopt resolutions calling on Congress to initiate an amendment to overturn *Citizens United*.[15] Half a dozen state legislatures have now passed similar resolutions.[16] And literally thousands of citizens have been joining meet-ups and public fora

[15] Using the compilation provided by *People for the American Way*, Harvard Law student Alan Rozenshtein has calculated that more than 270 cities and towns have now passed resolutions. Of these, 38% call for an amendment declaring that "corporations are not people"; 10.2% that "money is not speech"; and 8.5% that corporations be denied full First Amendment rights. These cities and towns come from more than half the states (27).

[16] California, Hawaii, Maryland, New Mexico, Rhode Island, Vermont.

to discuss what should be done to respond to the corruption of this system.[17]

I have had the privilege of witnessing this extraordinary energy first hand. Since January, 2010, I have given more than a hundred talks across the country to literally tens of thousands of citizens. These events, organized by a wide range of groups, have been packed with frustrated and angry citizens — and packed not just because of my stunning good looks. Instead, ordinary citizens on both the Right and the Left have come to see that something fundamental is rotten on this Hill, and that *they* have a crucial role in fixing it.

The cities and states that have passed these resolutions are not aliens within our culture. Indeed, as my colleague Paul Jorgensen has calculated, they look very much like the rest of America. If we created a Nation comprised of the states that have passed resolutions against *Citizens United*, it would have the same basic demographics as the rest of America: the same percentage of women (50.5% vs 50.8%), fewer African Americans (8.6% vs. 12.6%), more Latinos (32.6% vs. 16.3%). And if we created a Nation comprised of the cities and townships that have passed resolutions against *Citizens United*, it would look even more like the rest of America: women, 50.7% vs. 50.8%; African Americans, 12.9% vs. 12.6%; Latinos, 26.8% vs. 16.3%. The only significant difference between these two "anti-*Citizen United* nations" and the rest of America is the per capita political contributions: Anti-*Citizen United* America gives, per capita, *much more* in political contributions than the rest of America: $12.10 (States) vs. $8.80 (Nation); $18.90 (Cities/Towns) vs. $8.80 (Nation).

Many in Congress have now responded in turn to this energy, and taken the lead to propose amendments to overturn *Citizens United*. While these amendments are different, they are all born of

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[17] *People for the American Way* has the most complete list of passed and pending resolutions, which I have attached as an Appendix to this testimony. *MoveToAmend.org* has a similar list of resolutions opposing corporate personhood, as well as others that the organization believes "don't fully address corporate constitutional rights" (http://bit.ly/LHou7z). Finally, *United4ThePeople.org*, a site maintained by *People for the American Way*, has a list of public officials endorsing constitutional remedies, as well as a collection of the amendments that have been introduced so far.

the common view that our democracy has been corrupted. Some believe the best way to attack that corruption is to deny the status of "personhood" to corporations. Some believe that the First Amendment should be amended to reverse *Buckley v. Valeo*, and declare that "money is not speech." And some believe the best way to respond is simply to affirm that Congress has the power to enact content-neutral laws regulating campaign contributions and expenditures.

While we all have our own convictions about which of these various solutions would work best, what has been most striking to me in this process has been the open willingness of even proponents of various amendments to recognize that they are not yet certain about which response is best. In this way at least, this period is unlike the Progressive Era of a hundred years ago, when a primary source of federal corruption was thought to be, whether rightly or not, the structure of the United States Senate. In that context, the task of crafting a constitutional response was simple, and the 17th Amendment achieved it.

But today, as everyone with even an ounce of humility recognizes, the challenge of crafting an appropriate constitutional response to *Citizens United* is incredibly difficult. The First Amendment has become the heart of America's democracy. As with open heart surgery, one must be extraordinarily careful before tinkering with the freedoms that amendment secures, even if the cause is as significant as the struggle to restore faith in this democracy.

Yet in one way, the challenge facing this Congress is simpler than at other times in our history when constitutional reform has been needed.

When the Radical Republicans proposed the Civil War Amendments, no one doubted that they were proposing to change critical principles of the original constitution. No one today questions the wisdom of that change. But change it was.

Likewise with the 17th Amendment: Everyone recognized that the decision to displace the power of state legislatures to appoint United States Senators was a decision to modify the constitutional commitment to federalism.

And likewise with the 19th Amendment: Everyone, women especially, understood that amendment to be a change in the Constitution's responsibility to guarantee equality to women.

Almost everyone today agrees with each of these changes. But I appreciate how difficult each of them must have been, at least for constitutionalists of the day. The temptation to conservatism is strong. And against the genius of the Framers' (flawed but) brilliant design, it is always difficult to muster the courage or confidence to commit to changing it.

But the reform that this Congress needs to effect is not any *change* of the Framers' design. It is a *restoration* of that design. We don't need to decide whether to add a new principle to their constitution. We need simply to figure out how best to respect the principles that already guided them.

The Framers gave us a "Republic." But by a Republic, they meant a "representative democracy." And by a "representative democracy," they meant a government with a branch that would be "dependent upon the people alone."

This Congress, however, is plainly not "dependent upon the people alone." It is dependent as well upon "the Funders." And in my view, the simplest and most important objective of any amendment must be to restore that critical constitutional principle, by removing a dependence on anything save "the People alone."

For the reasons that I sketched in my introduction, simply reversing *Citizens United* would not achieve this end. Indeed, returning America to the democracy that existed before *Citizens United* would still leave us with a democracy in which Congress was dependent upon the tiniest slice of the 1% to fund its elections. That dependency is corrupting — by drawing your attention away from the attention the Framers intended — in exactly the way that *Citizens United* is corrupting. And any constitutional reform must consider that corruption alongside the immediate and pressing need to reverse *Citizens United.*

The ideals of the Framers' Republic could, and should, guide your reform. For in my view, here at least, the Framers were clearly right: We need a Republic, a representative democracy, with a leg-

islature "dependent upon the People alone." Reversing *Citizens United* alone won't get us that Republic. It may be an essential step. But it is not the last.

NEXT STEPS

The task this Congress faces is not just to determine the best amendment to restore trust in this government. It is also to do that in a way that itself earns the confidence of the people in that amendment. No constitutional reform can ever pass without broad and cross-partisan support. But in this political climate, no such support is possible unless the process you adopt for identifying the necessary reform itself convinces America of its own integrity.

This is a concern that the Framers themselves were focused upon. When the drafters of the constitution first architected Article V, the amending procedure, they vested in Congress exclusive control over the amendments that could be proposed. But an obvious question was then raised: What if Congress itself was the problem? That concern led the Framers to open a second path to amendment — securing to state legislatures the power to demand that Congress call an Article V convention, that itself could propose amendments. Those amendments must be ratified in the same way as amendments proposed by Congress. But by creating the possibility that they could be proposed by a body other than Congress, the Framers guaranteed a path to reform that was not controlled exclusively by the body that needed reform.

There are many who are skeptical about an Article V convention today. In my view, much of that concern is misguided. But independently of the power of the states to demand that Congress convene a convention, Congress plainly has the power to constitute its own independent procedure for advising it about the best means for reform.

In a separate submission, I have outlined one such procedure that in my view could both identify the correct reforms and do so in a way that would earn the confidence of the American people. Through a series of "citizen conventions," constituted by a random selection of 300 citizens within each, and conducted as deliberative polls, Congress could empower a body that could both deliberate carefully about the question of reform, and itself earn the confi-

dence of the American people in its work. That body would be removed from the influences thought to corrupt this Congress, but secured in its work through a series of protections that Congress would by law enact. Its product would represent a mature and considered judgment of a statistically fair snapshot of America. And if confirmed through a series of deliberations, could well earn the trust sufficient to support the broad movement for reform that this government needs.

I recognize that this sounds like a radical proposal — though how odd is it, that in a Republic, the idea of returning to the People for guidance sounds "radical." I know there are many who are skeptical about the ability of ordinary citizens to deliberate seriously and effectively about an issue as important as the Constitution.

But as a law professor who has taught in the most elite of America's law schools for more than 20 years, I am not at all skeptical of the work of ordinary citizens properly convened within a convention. Indeed, in the few examples that I've seen, I have only been inspired by that work.[18]

Yet to the skeptics I would say this: the worst that this proposal could produce is ideas that may fail to inspire Congress. By contrast, the best that would happen from a process controlled exclusively by this Congress is a series of proposals that will certainly fail to earn the confidence of a significant proportion of the American people.

Whether it is "citizen conventions" or some other procedure, however, my point is simply this: ordinary process will not work here. America won't trust the work of Congress alone. Neither will it trust the work of any "blue ribbon commission" comprised of experts with strong ties to this Congress. Instead, this Congress must

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[18] I was first convinced after a "mock" Constitutional Convention that I co-chaired with Mark McKinnon, conducted at a CoffeePartyUSA.com convention in Kentucky. See http://bit.ly/LHpusd. More than hundred attendees at that convention deliberated for just a day about the problems they had identified, and crafted a set of innovative and valuable responses. Those responses were not "liberal." They were not "conservative." To one who has studied the Constitution carefully, they were simply restorative.

find a process that gives America a reason to listen. America has grown bored with elites and insiders.

CONCLUSION

Every one here recognizes that the work of a Member of Congress is not easy. Nor is it often fun. As your families know, you spend endless hours serving this Republic. You have almost no time to focus on even the most fundamental questions.

In such a context, it is easy to lose perspective. And surrounded by those offering their support, and seeking your help, it is easier still to focus simply upon your good intentions.

There is no doubt that the intentions of Members from both sides of the aisle are good. This is not the Congress of the Gilded Age. Corruption in its criminal sense is almost extinct.

But good intentions are not enough. And with respect for this Committee, and love for this institution, I would urge you to step back and recognize something that is as clear to most Americans as anything could be: Our confidence in this institution is collapsing. This body, the crown jewel of the Framers' Republic, created in the first article of their Constitution, has lost our trust. Poll after poll finds confidence ratings at or below 10%. *Ten percent.* It is certainly the case that a higher proportion of Americans had faith in the British Crown at the time of the Revolution than have faith in this body today.

It is critically necessary that you act swiftly — not as Democrats or as Republicans, but as trustees to the most important democratic body crafted within our tradition — to give America a reason to trust you again. You will do that only if you make yourselves again "dependent upon the People alone" — through both the votes that elect you, and the funding that makes your elections possible.

Appendix:

People For the American Way
List of local and state resolutions
Updated 7/17/2012

This list is regularly updated at: http://www.pfaw.org/issues/government-the-people/citizens-united-v-fec-constitutional-remedies-list-of-local-state-and-f

Alaska

State Resolutions

- HJR 33, **introduced** by Representatives Gara, Tuck, Holmes, Miller, Gardner, Kawaski, Kerttula, and Petersen on February 2, 2012, proposes that Congress and the President work to pass a constitutional amendment that would limit the ability of corporations, unions and wealthy individuals from making limitless independent expenditures to influence the outcome of elections. Currently awaiting passage in Alaska's House of Representatives.
- SJR 13, introduced by Senator Dyson, **passed in the Senate** on March 21, 2012 in a 12-7-1 vote and is **currently awaiting passage in the House**. It proposes that Congress and the President work to pass a constitutional amendment that would limit the ability of corporations, unions and wealthy individuals from making limitless independent expenditures to influence the outcome of elections.

Local Resolutions

- On July 10, 2012 The City of Sitka passed a resolution supporting an amendment to the constitution to restore the peoples power to limit corporate influence in elections and policy making

Arizona

State Resolutions

- HCR 2049, **introduced** by State Representative McCune Davis on February 1, 2012, provides support for the introduction of a 2012 ballot initiative that would call upon Congress to pass a constitutional amendment to overturn the Citizens United decision and related cases.
- SCR 1040, **introduced** by State Senator Steve Gallardo on January 31, 2012, provides support for the introduction of a 2012 ballot initiative that would call upon Congress to pass a constitutional amendment to overturn the Citizens United decision and related cases.
- Local Resolutions Passed

  On May 4, 2012 the Flagstaff City Council passed a resolution calling for a constitutional amendment, organized by a new citizens' group called Flagstaff for Democracy planned. The resolution calls on Congress to approve a 28th amendment to the United States Constitution that would overturn Citizens United by stating that corporations are not natural persons entitled to constitutional protections of free speech that money is not speech for the purpose of influencing elections, and that local, state and federal government shall have the right to regulate, limit or prohibit contributions and expenditures, including a candidate's own contributions and expenditures for the purpose of influencing in any way the election of any candidate for public office or any ballot measure, and that any permissible contributions and expenditures be publicly disclosed.

- On June 12, 2012, The Tuscon City Council voted 7-0 in favor of abolishing corporate personhood and supporting a Constitutional amendment.

Arkansas

Local Resolutions Passed

On June 5, 2012, the Fayetteville City Council passed a resolution to defend democracy by ensuring only human beings, not corporations, have constitutionally protected free speech.

California

State Resolutions

- AJR 3, **introduced** on January 23, 2010 by Assemblyman Pedro Nava (D-35), expresses disagreement with the Citizens United ruling, and calls upon Congress to pass a constitutional amendment to address the issue.
- AJR 22, introduced on March 20, 2012 by Assemblyman Weikowski, **passed in the California State Assembly** and **passed in the California State Senate**. Thus, **California became the 6th state** to call upon Congress to propose an amendment. It proposes that Congress pass a constitutional amendment to overturn the Citizens United decision.
- Local Resolutions Passed

- On April 25th, 2000, the municipality of Point Arena passed a resolution rejecting corporate personhood, which declared, "Interference in the democratic process by corporations frequently usurps the rights of citizens to govern."
- On May 19, 2004, the city of Arcata passed Resolution No. 034-51, the Corporate Personhood Resolution, declaring corporate personhood illegitimate and undemocratic. It attempts to prevent corporations from challenging Arcata town laws that restrict corporations.
- On February 10, 2010, the Humboldt County Democratic Central Committee passed the Resolution to Legalize Democracy and Abolish Corporate Personhood in response to the Citizens United v. FEC ruling. The resolution calls for an amendment to the US Constitution to abolish corporate personhood.
- On March 1, 2010, Richmond City Council votes unanimously to support a resolution calling for a constitutional amendment to abolish corporate personhood.
- On April 1, 2010, the Berkeley City Council passed a resolution calling for "amending the United States and California Constitutions to declare that corporations are not entitled to the protections or "rights" of human beings and to declare that the expenditure of corporate money is not a form of constitutionally protected speech."
- On December 1, 2010, students at UC Santa Barbara passed a resolution against corporate personhood through their student government.
- On March 28, 2011, the Fort Bragg (CA) City Council passed a resolution calling for a constitutional amendment to ban corporate personhood. All of the council members present voted for it; one member was absent.
- On April 1, 2011, AFSCME Local 1684 in Eureka passed a resolution condemning the Supreme Court's ruling on Citizens United and proposing a constitutional amendment to reverse the decision.
- On April 12, 2011, the Central Labor Council of Humboldt and Del Norte adopted the Move to Amend Model Resolution.
- On April 22, 2011, the Associated Students of HSU passed a resolution supporting the Move to Amend campaign and calling for a constitutional amendment to abolish corporate personhood. The resolution was proposed by a group of students working with Democracy Unlimited.
- On July 21, 2011, the South Robertson Neighborhood Council (SORONC) passed a non-binding resolution to amend the Constitution to state clearly and unequivocally that human beings, not corporations, are entitled to constitutional rights and that money should not be equated with speech.
- On August 15, 2011, the Ojai Valley Democratic Club endorsed a resolution supporting a Constitutional amendment ending corporate personhood.
- On August 24, 2011, the Marin County Board Supervisors voted unanimously in favor of a resolution supporting a Constitutional amendment to overturn the Citizens United decision and limit corporate constitutional rights.

- On Tuesday October 18, 2011, the Marina City Council passed a resolution calling for a constitutional amendment in response to the Citizens United vs Federal Election Commission case.
- On December 1, 2011, the Wellstone Progressive Democrats of Sacramento passed a resolution that calls for a constitutional amendment that abolishes corporate personhood. They also agreed to send a letter with the endorsed resolution to the California State Democratic Central Committee asking the California Democratic Party to endorse the resolution.
- On December 6, 2011, Los Angeles City unanimously endorsed a resolution to end personhood rights of corporations and allows Federal, State, and Local governments to regulate campaign finance.
- On December 20th, 2011, the city council of Oakland, California unanimously passed a resolution in support of a constitutional amendment to reverse the Citizens United decision.
- On January 11th, 2012, the town council of Fairfax California approved a resolution in favor of abolishing corporate personhood with the intent of restoring the democratic process to the people.
- On January 17, 2012, West Hollywood passed a resolution condemning the Supreme Court's decision on Citizens United and supporting a constitutional amendment to overturn the ruling.
- On January 24, 2012, the city of Santa Cruz approved a resolution that calls for a constitutional amendment to overturn the Supreme Court's decision on Citizens United.
- On January 25, 2012, the city of Petaluma passed a resolution in a 6-1 decision that called for a reversal of the Citizens United decision.
- On January 31, 2012, the city of San Francisco passed a resolution condemning the Supreme Court's ruling on Citizens United and supporting a constitutional amendment to reverse the decision.
- On February 6, 2012, the Albany City Council has passed a municipal government resolution that calls for a constitutional amendment to overturn the Supreme Court's decision on Citizens United and clarifies that corporations are not people.
- On February 21, 2012, the city council of Davis voted unanimously on a resolution in support of Assembly Joint Resolution 22, a bill in the California legislature that calls on Congress to pass an amendment to overturn the Citizens United decision.
- On Feb. 21, 2012, the City of Sebastopol passed a resolution urging Congress to propose a constitutional amendment to remove corporate personhood and outlaw political spending by corporations.
- On March of 2012, the city of Point Arena unanimously passed a resolution supporting their previous resolution in 2000, which called for the abolition of corporate personhood.
- On March 1, 2012, the Democratic Central Committee of Marin passed a resolution calling for a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On March 6, 2012, the Berkeley City Council unanimously passed their second resolution calling upon Congress to amend the Constitution to overturn Citizens United in support of Assembly Bill AJR 22 and to 'stand with communities across the country' who are engaged in the movement.
- On March 13, 2012, the Ojai City Council passed a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On March 14, 2012, Nevada City's City Council passed a resolution supporting a constitutional amendment stating that corporations should not receive the same constitutional rights as natural persons and that money is not speech.
- On March 19, 2012, the Los Altos Hills City Council approved a resolution that condemns the Supreme Court's ruling on Citizens United and calls for a constitutional amendment to reverse the decision.
- On March 20th, 2012, the city council of Mountain View passed a resolution in favor of abolishing corporate personhood, and encouraging Congress to pass a constitutional amendment that would overturn the Citizens United decision.

- On March 23, 2012, the Sonoma County Board of Supervisors voted urging Congress to pass an amendment to the U.S. Constitution that would overturn the Citizens United decision.
- On April 9, 2012, the Malibu City Council, At the request of Councilmember Conley Ulich, adopted Resolution No. 12-10, supporting a Constitutional Amendment and legislative actions restricting corporate spending in the electoral process and ensuring that only human beings, not corporations, have constitutionally-protected free speech.
- On April 17th, 2012, the city council of Chico passed a resolution calling on Congress to pass a constitutional amendment to overturn the Citizens United decision. The resolution provides that corporations should not have the constitutional right to spend money in elections, and that money should not be equated to speech.
- On April 24, 2012, City Council of the City of Thousand Oaks passed a resolution declaring its support for an amendment to the United States Constitution to end Corporate Personhood.
- On May 5th, 2012, the Redlands City Council passed a resolution calling for a constitutional amendment based upon the principles that corporate rights should be limited and money is not speech.
- On May 15, 2012, the Plumas County Board of Supervisors in Quincy, California passed a resolution to call for a constitutional amendment to abolish corporate personhood.
- On June 12, 2012, the Ventura County Board of Supervisors passed a resolution that supports a Constitutional amendment ending corporate personhood and the doctrine that money is not free speech.
- On June 26, 2012, the Oxnard city council voted 4-0 to support a constitutional amendment ending corporate personhood, a concept that has generated controversy following a 2010 U.S. Supreme Court ruling that allowed corporations certain unlimited political spending under free speech rules.
- On July 12, 2012 the Claremont City Council voted to pass a resolution calling on Congress to overturn the Supreme Court's decision in Citizens United v. FEC by constitutional amendment.

Colorado

Local Resolutions Passed

- On April 5, 2011, the Arapahoe County Democratic Central committee approved a resolution in support of the Move to Amend constitutional amendment campaign.
- On April 13, 2011, the Boulder Democratic Party passed the Urging Support of a Constitutional Amendment Abolishing Corporate Personhood resolution supporting an anti-corporate personhood amendment.
- On September 12, 2011, the Jamestown Board of Trustees unanimously passed a resolution calling for an amendment to the U.S. Constitution to establish that only human beings, not corporations, are entitled to constitutional rights and that the First Amendment does not protect unlimited political spending as free speech.
- On November 1, 2011, voters in Boulder, CO passed a ballot measure calling for an amendment to the US Constitution that would state that corporations are not people and reject the legal status of money as free speech.
- On January 3, 2012, the Commissioners of Pueblo County, Colorado unanimously passed a resolution in favor of overturning the Citizens United decision, and calling for the end of corporate personhood.
- On Feb. 7, 2012 the Archuleta County Republican convention approved resolutions calling for a constitutional amendment overturning the Supreme Court's Citizens United decision.
- On March 17, 2012 the Archuleta County Democratic convention approved resolutions calling for a constitutional amendment overturning the Supreme Court's Citizens United decision.
- On March 23, 2012 both the Archuleta County Democratic convention and Republican Convention issued a joint resolution against the use of outside expenditures from corporations and unions in elections

- On April 17, 2012, Archuleta County Colorado Board of County Commissioners passed a resolution condemning corporation and union money in politics.
- On May 17, 2012 the Town Council of the town of Telluride passed a resolution declaring its support to ending corporate personhood.

Connecticut

Local Resolutions Passed

- On May 15th, 2012, the city council of Hartford unanimously passed a resolution in support of an amendment to the Constitution that would overturn Buckley v. Valeo and the Citizens United v. FEC. The public support for the amendment was strong, with standing-room-only at the public hearing and over 60 Hartford residents in support.
- On June 4, 2012, the City Council of New London approved a resolution in support of a constitutional amendment abolishing corporate personhood.
- On June 4, 2012, the Common Council of Middletown passed a resolution condemning the Citizens United decision and calling for electoral form.
- On June 4, 2012, the New Haven Board of Aldermen passed a resolution that calls for an amendment to the Constitution abolishing corporate personhood.
- On June 11, 2012 The Ashford Board of Selectmen passed a resolution calling for a constitutional amendment to overturn Citizens United v FEC.
- On June 11, 2012, the West Haven City Council passed a resolution calling for a constitutional amendment to overturn Citizens United.

Florida

State Resolutions

- SM 1576 – the People's Rights Amendment – **introduced** by Sen. Braynon on January 5th 2012, proposes that Congress pass a constitutional amendment that would overturn the Citizens United decision.
- HM 1275 – the People's Rights Amendment – **introduced** by Rep. Williams on January 5th 2012, proposes that Congress pass a constitutional amendment that would overturn the Citizens United decision.
- Local Resolutions Passed

- On September 15, 2011, the Sarasota Alliance for Fair Elections (SAFE) has passed a resolution stating that SAFE stands with the Move to Amend campaign and communities across the country to defend democracy from the corrupting effects of undue corporate power by amending the United States Constitution.
- On October 1, 2011, the Coalition of Concerned Patriots of Bradenton passed a resolution standing with the Move to Amend campaign, and calling for constitutional remedies to counter corporate influence.
- On October 4, 2011, the South Miami City Commission passed a resolution calling for a constitutional amendment to end corporate personhood.
- On October 14, 2011, the Fruitland Park chapter of Pax Christi passed a resolution in support of a constitutional amendment and the Move to Amend campaign.
- On October 20, 2011, the Social Justice Committee of the Universalist Unitarian Church in Venice approved a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment to reverse the ruling.
- On October 27, 2011, the Palm Beach County of Progressive Democrats passed a resolution calling for an amendment to end corporate personhood and reject the notion that money is speech.
- On November 14, 2011, citizens in Orlando passed a resolution calling for a constitutional amendment to overturn the decision in the Citizens United case. Furthermore, the resolution rejected the notion that 'money is speech.'
- In November of 2011, the Cutler Bay City Council passed a resolution calling for an amendment to the Constitution to overturn the Citizens United decision.

- On December 1, 2011, the Southwest Florida Coalition for Peace and Justice passed a resolution supporting a constitutional amendment to reverse the Supreme Court's decision on Citizen[illegible]
- On March 15, 2012, the Tampa Bay City council unanimously passed a resolution calling for Congress to amend the Constitution to rectify the Supreme Court's interpretation of corporate rights and corporate engagement in the electoral process.
- On March 19, 2012, the Key West City Commission passed a resolution condemning the Citizens United decision, stating that corporations should not have the same rights as people.
- On June 4, 2012, the City Commission of DeLand Florida passed a resolution instructing our State and Federal delegations to work to get money out of politics.

Georgia

State Resolutions

- HR 1377, introduced on February 15, 2012 by State Representative Stephanie Benfield, opposing the United States Supreme Court's ruling in Citizens United v. Federal Election Commission and requesting a constitutional amendment "to restore republican democracy to the people of the United States."

Hawaii

State Resolutions

- SCR225, **introduced** on March 10, 2010 by Senator Gary L. Hooser (D-7), expresses disagreement with the *Citizens United* ruling and calls on the US Congress to pass a constitutional amendment barring the use of "person" when defining "corporate entity."
- SR116, **introduced** on March 10, 2010 by Senator Gary L. Hooser (D-7), expresses disagreement with the *Citizens United* ruling and calls on the US Congress to pass a constitutional amendment barring the use of "person" when defining "corporate entity."
- HCR282 HD1, introduced on March 10, 2010 by Rep. Bob Herkes (D-5) – **passed both the House and Senate** and was adopted on April 28th, 2010, expresses disagreement with the *Citizens United* ruling and calls on the US Congress to propose an amendment to the Constitution of the United States to permit Congress and States to regulate expenditure of funds by corporations engaging in political speech.
- HR204, **introduced** on March 10, 2010, also by Rep. Bob Herkes (D-5), expresses disagreement with the *Citizens United* ruling and calls on the US Congress to pass a constitutional amendment barring the use of "person" when defining "corporate entity."
- HB36, **introduced** on January 20, 2011 by Rep. Karl Rhoads (D-28), proposes a state constitutional amendment to provide that freedom of speech applies only to natural persons.
- HCR 51 – a joint measure – was **introduced** on February 11, 2011 by Rep. Roy Takumi (D-36), proposing that the United States Congress pass a constitutional amendment that provides that corporations are not persons under the laws of the U.S. or any of its jurisdictional subdivisions.
- HR 44 – a house measure – **passed in the House** on April 14, 2011. The bill was introduced by Rep. Roy Takumi (D-36). Proposes that the United States Congress pass a constitutional amendment that provides that corporations are not persons under the laws of the U.S. or any of its jurisdictional subdivisions.

Idaho

State Resolutions

- HJM012, **introduced** on February 24, 2010 in the House State Affairs Committee, expresses disagreement with the *Citizens United* ruling and calls on the US Congress to take action through legislation or a constitutional amendment.

Illinois

Local Resolutions Passed

- On May 5, 2012, the town of Warren passed a resolution calling for an end to corporate personhood.
- On May 14, 2012, the Evanston City Council unanimously passed a resolution supporting a constitutional amendment to overturn the Citizens United ruling. The city's resolution explicitly states its support for all such constitutional amendments introduced in Congress, including the one co-sponsored by U.S. Senator Dick Durbin (D-Ill.).
- On June 4, 2012, Galesburg became the second city in Illinois to pass a City Council resolution calling for Congress to overturn the Supreme Court's decision in Citizen's United v. FEC by way of Constitutional Amendment.

Indiana

State Resolutions

- On June 20, 2012 the Bloomington City Council passed a resolution calling to overturn Citizens United.

Iowa

State Resolutions

- SR 113, introduced by State Senator Jeff Danielson, **passed in the Senate** by a 7-4 vote on March 12, 2012. The resolution expresses disagreement with the current interpretation of corporate rights and the Citizens United decision, and calls for Congress to enact appropriate legislation to regulate and restrict corporate spending in elections.

Kansas

State Resolutions

- SCR 1617, introduced on March 18, 2012 by State Senators Holland, Faust-Goudeau, Francisco, Haley, Hensley and Steineger, opposing the United States Supreme Court's ruling in Citizens United v. Federal Election Commission, and requesting a constitutional amendment to repeal corporate personhood.

Kentucky

State Resolutions

- HR 14, **introduced** by Representative Rollins on the January 4, 2011 General Assembly regular session, calls upon Congress to amend the Constitution to prevent corporate control of elections.

Maine

Local Resolutions Passed

- On June 14, 2010, the town of Monroe passed a resolution denouncing the Citizens United decision.
- On January 18, 2012, the city council of Portland, Maine, passed a resolution in support of a constitutional amendment that would provide that corporations are not people.
- On February 21, 2012, the city council of Waterville passed a resolution in support of a constitutional amendment that would overturn the Citizens United decision.
- On February 26, 2012, the town of Great Pond passed a resolution in support of a constitutional amendment that would overturn the Citizens United decision.
- On March 11, 2012, Selectmen of the town of Freedom unanimously agreed to allow citizens to vote on a resolution calling for a constitutional amendment to clarify that corporations are not people. The Town Meeting was held on March 11 and a majority of the 65 meeting participants were in favor of a non-binding vote to abolish corporate personhood
- On March 26, 2012, the Bangor City Council passed in a 5-3 vote a resolution calling for a constitutional amendment to overturn the Citizens United decision and stating that corporations are not entitled to the same rights of natural persons.
- On April 11, 2012, the Fairfield City Council unanimously passed a resolution calling for a constitutional amendment to overturn the Citizens United decision and stating that corporations are not entitled to the same rights of natural persons.

- On May 14, 2012, the city council of Winslow passed a resolution supporting an amendment to the U.S. Constitution that would clarify that money is not speech and corporations are not persons.
- On May 15, 2012, the Bar Harbor City Council unanimously passed a resolution calling for a constitutional amendment to overturn the Citizens United decision and stating that corporations are not entitled to the same rights of natural persons.
- On June 2, 2012, the attendees of the Town Meeting of Leeds passed a Town Warrant to call for a constitutional amendment to overturn Citizens United.
- On June 4, 2012 the town of Mount Desert, ME passed an article denouncing the Citizens United decision
- On June 13, 2012, the town Arrowsic approved an article denouncing the Citizens United decision.
- On June, 18, 2012 the Newcastle Board of Selectmen passed a resolution denouncing Citizens United and calling for an end to corporate personhood
- On June 26, 2012 Southwest Harbor Board of Selectmen passed a resolution denouncing the Citizens United ruling.
- In June of 2012, the city of Shapliegh has passed a resolution denouncing the Citizens United decision.
- In June of 2012 the Bethel Board of Selectmen passed a resolution denouncing the Citizens United decision.
- In June of 2012 the town of Liberty, ME has passed a resolution denouncing the Citizens United decision.
- In June of 2012, the town of Vassalboro, have passed a resolution denouncing the Citizens United decision.

Maryland

State Resolutions

- On January 19, 2012, State Senator Jamie Raskin introduced a letter to the Maryland General Assembly. It sharply disagrees with the Supreme Court's decision on *Citizens United* and calls for a constitutional amendment to be sent to each state for ratification to overturn the ruling. The **majority of members in the House of Delegates and State Senate have signed this letter in agreement.**

Local Resolutions Passed

- On January 23, 2012, the Greenbelt City Council passed a resolution that supported a Maryland General Assembly Letter to Congress calling for a constitutional amendment to overturn Citizens United.
- On January 24, 2012, the College Park City Council passed a resolution that supported a National General Assembly Letter to Congress calling for a constitutional amendment to overturn Citizens United and clarify that corporations are not people protected by the First Amendment.
- On February 21, 2012, the Prince George's County Council passed a resolution expressing support for a Maryland General Assembly Letter to Congress calling for a reversal of the Citizens United decision and to restore fair elections and democratic sovereignty to the people.
- On March 6, 2012, the Mt. Rainier City Council unanimously passed a resolution supporting a Maryland General Assembly Letter to Congress that calls for campaign financing and spending by corporations should be limited and not protected under the First Amendment. It seeks to create a constitutional amendment to overturn the Citizens United decision.
- On May 21, 2012, the city council of Baltimore passed a resolution in support of a constitutional amendment abolishing corporate personhood.

Massachusetts

State Resolutions

- SD 772, **introduced** by State Senator Jamie Eldridge on January 21, 2011, the Free Speech for People resolution calling for the United States Congress to pass and send the states for ratification a constitutional amendment to restore the First Amendment and

fair elections for the people. Currently being heard by the Joint Committee on the Judiciary.

- S.305 introduced by State Senator Eldridge, this legislation is relative to accountability for corporate political spending.
- H.1985 By State Representative Walz of Boston, a petition of Wolf and others for legislation to strengthen certain provisions of the campaign finance laws Joint Committee on Election Laws.

City/Local Resolutions

- In April of 2011, the town of Yarmouth passed a resolution in a town hall meeting demanding a constitutional amendment to dismantle corporate personhood.
- On April 4, 2011, Provincetown passed resolution calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people, and calling on the Massachusetts General Court to pass resolutions requesting those actions.
- On April 24, 2011, the town of Leverett passed Move to Amend's model resolution at a townhall meeting.
- On April 26, 2011, the town of Truro passed a resolution calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- On April 26, 2011, the town of Wellfleet passed a resolution calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- In May of 2011, Lanesborough citizens passed a resolution that supports the overturning of the Citizens United decision, stating that the Supreme Court's findings were wrong and clarifying that corporations are not people.
- On May 2, 2011, the town of Great Barrington passed a resolution calling upon the United States Congress to pass and send to the states for ratification a constitutional amendment that Congress and the states will regulate the use of funds for political speech by any corporate entity.
- On May 3, 2011, the town of Brewster passed a resolution calling for the Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- On May 3, 2011, the town of Dennis passed a resolution calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- On May 8, 2011, the town of Orleans passed a resolution calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- On May 9, 2011, the town of Chatham passed a resolution calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- On May 12, 2011, Williamstown passed a resolution calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- On October 13, 2011, the town of Somerville passed a resolution condemning the Supreme Court's decision on Citizens United and supports a constitutional amendment to overturn the ruling.
- On October 24, 2011, the Cambridge City Council passed a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On December 1, 2011, Psychologists for Social Responsibility in Brookline approved a resolution that condemns the Supreme Court's decision on Citizens United and calls for a constitutional amendment to reverse the ruling.
- January 5, 2012, the town of Westport passed a resolution condemning the Supreme Court's decision on Citizens United and supports a constitutional amendment to overturn the ruling.

- On January 30, 2012, Cambridge passed a second resolution that supports a constitutional amendment to overturn the Supreme Court's decision on Citizens United.
- On February 14, [illegible] passed a resolution that condemns the Supreme Court's ruling on Citizens United and supports a constitutional amendment to reverse the decision.
- On February 29, 2012, the city of Boston passed a resolution condemning the Supreme Court's ruling on Citizens United and calling for a constitutional amendment to overturn the decision.
- On March 20, 2012, the members of the Falmouth Town Meeting declared their support for abolishing corporate personhood, affirming their belief that the First Amendment only protects people.
- On March 24, 2012, a town hall meeting in Lincoln passed a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On March 27, 2012, the Newburyport Town Council passed a resolution that supports a constitutional amendment to overturn the Supreme Court's decision on Citizens United.
- On April 4, 2012, the town of Provincetown passed a resolution condemning the Supreme Court's ruling on Citizens United and supporting a constitutional amendment to overturn the decision.
- On April 5, 2012, the town of Falmouth passed a resolution condemning the Supreme Court's ruling on Citizens United and supporting a constitutional amendment to overturn the decision.
- On April 10, 2012, the town of Oak Bluffs passed a resolution that supports a constitutional amendment to overturn the Supreme Court's decision on Citizens United.
- On April 10, 2012, the town of Edgartown passed a resolution that condemns the Supreme Court's decision on Citizens United and calls for a constitutional amendment to overturn the ruling.
- On April 10, 2012, the town of West Tisbury passed a resolution supporting a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On April 10, 2012, the town of Tisbury passed a resolution condemning the Supreme Court's decision on Citizens United and supporting a constitutional amendment to overturn the ruling.
- On April 12, 2012, the town of Natick voted in favor of a resolution that calls for a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On April 19, 2012, the Northampton City Council unanimously passed a resolution calling for a Constitutional amendment that would reverse a Supreme Court decision giving corporations the same rights as people.
- On April 23, 2012, the town of Chilmark passed a local resolution condemning the Supreme Court's ruling on Citizens United and supporting a constitutional amendment to reverse the decision.
- On April 24, 2012, the town of Framingham passed a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On April 27, 2012, the town of Concord voted to pass a resolution that condemns the Supreme Court's decision on Citizens United and calls for a constitutional amendment to overturn the ruling.
- On April 28, 2012, the town of Leverett passed a second resolution condemning the Supreme Court's ruling on Citizens United and calling for a constitutional amendment to reverse the decision.
- On April 28, 2012, the town of Nahant voted to pass a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On April 30, 2012, the town of West Newbury voted to pass a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On May 1, 2012, the town of Reading passed a resolution condemning the Supreme Court's Citizens United decision and calling for a constitutional amendment to overturn the ruling.

- On May 1, 2012, the town of Shelburne passed a resolution condemning the Supreme Court's Citizens United decision and calling for a constitutional amendment to overturn the ruling.
- On May 1, 2012, the town of Deerfield passed a resolution condemning the Supreme Court's Citizens United decision and calling for a constitutional amendment to overturn the ruling.
- On May 1, 2012, the town of Shutesbury passed a resolution condemning the Supreme Court's Citizens United decision and calling for a constitutional amendment to overturn the ruling.
- On May 3, 2011, the town of Dennis, MA introduced, voted and passed article 51 calling on the United States Congress to pass and send to the states for ratification a constitutional amendment to restore the First Amendment and fair elections to the people.
- On May 5, 2012, the town of Cummington passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 5, 2012, the town of Pelham passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 5, 2012, the town of Warren passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 5, 2012, the town of Ashfield voted in favor (with only two dissenting votes out of 65) to support a resolution in favor of amending the Constitution to overturn the Citizens United decision.
- On May 7, 2012, the Amherst City Council unanimously passed a resolution calling for a constitutional amendment to overturn the Citizens United decision.
- On May 7, 2012, the town of Sheffield passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 7, 2012, the town of Warwick passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 7, 2012, the town of Swampscott passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 8, 2012, the town of Colrain passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 8, 2012, The town of Aquinnah passed a local resolution supporting S. 772 State resolution to overturn Citizens United and restore first amendment rights.
- On May 9, 2012, the town of Orleans passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 9, 2012, the town of West Tisbury passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 9, 2012, the town of Buckland passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 10, 2012, the city council of Salem passed a resolution that condemns the Supreme Court's ruling on Citizens United and supports a constitutional amendment to reverse the decision.
- On May 14, 2012, the town of Conway passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 14, 2012, the town of Needham passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 14, 2012, the town of Rowe passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 14, 2012, the town of Medway passed a resolution approving Article 49 and urged support for the Senate Bill 772: A Resolution Restoring Free Speech, sponsored by state Sen. Jamie Eldridge.
- On May 15, 2012, the town of Boxborough passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.

- On May 15, 2012, the town of Otis passed a resolution calling for an amendment to Constitution to overturn the Citizens United decision.
- On May 15, 2012, the city council of Worcester passed a resolution that condemns the Supreme Court's ruling on Citizens United and supports the People Rights amendment.
- On May 16, 2012, the town of Arlington passed a resolution condemning the Supreme Court's Citizens United decision and calling for a constitutional amendment to overturn the ruling.
- On May 21, 2012, the town of Somerset passed a resolution abolishing corporate personhood.
- On May 22, 2012 the town of Brookline passed a resolution calling for a constitutional amendment to overturn the Supreme Court's decision in Citizens United vs. FEC.
- On May 23, 2012, the town of Richmond passed a resolution to abolish corporate personhood.
- On May 25, 2012, the town of Stockbridge passed a resolution in opposition to the Citizens United decision.
- On May 25, 2012, the town of Charlemont passed a resolution in support of abolishing corporate personhood.
- On May 29, 2012, the town of Newbury passed a resolution in support of abolishing corporate personhood.
- On June 4, 2012, the City Council of Quincy passed a resolution calling for a constitutional amendment to overturn the Supreme Court's decision in Citizens United vs. FEC.
- On June 4, 2012, the Town of Wendell passed a resolution to show their support for an amendment to the US Constitution that would proclaim that the rights listed in the bill of rights are for people, rather than corporations.
- On June 7, 2012, the town of Bernardston passed a resolution advocating for the reversal of the Supreme Court's decision in Citizens United v. FEC by way of a constitutional amendment.
- On June 20, 2012 the Lenox Board of Selectmen passed a resolution calling to overturn the Citizens United decision.
- On July 9, 2012 The Newton Board of Alderman passed a resolution calling for a Constitutional amendment to overturn Citizens United last night by a near unanimous vote (23-1).

Michigan

Local Resolutions Passed

- On December 1, 2011, the Dickinson County Democratic Party passed a resolution that condemns the Supreme Court's ruling on Citizens United and calls for a constitutional amendment to overturn the decision.
- On February 2, 2012, the Emmet County Democratic Committee Executive Board declared support for the Move to Amend resolution, which calls upon Congress to propose an amendment to the Constitution that would abolish corporate personhood and the judicial interpretation that money is speech.
- On February 9, 2012, the 15th Congressional District Democratic Organization of Michigan passed a resolution that calls upon Congress to propose an amendment to the Constitution that would abolish corporate personhood and the judicial interpretation that money is speech.
- On March 28, 2012, Gogebic County Democratic Party passed a resolution, affirming its belief that corporate personhood must be abolished by amending the Constitution.

Minnesota

State Resolutions

- HF0914, **introduced** on March 7, 2011 to the Minnesota State Legislature, provides that corporations are not natural persons and proposes a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.

- SF683, **introduced** on March 9, 2011 to the Minnesota State Senate, condemns the Supreme Court's decision on Citizens United and calls for a constitutional amendment to reverse the ruling.

Local Resolutions Passed

- On March 1, 2011, the Minnesota Democrats passed a resolution calling for a constitutional amendment to define an individual as a "natural person" in hopes to abolish corporate personhood.
- On August 9, 2011, the Minnesota Coalition of Peacemakers passed a resolution seeking to abolish corporate personhood by an amendment to the U.S. Constitution.
- In October of 2011, the Minnesota Retiree Council of the AFL-CIO passed a resolution to support Move to Amend.
- On December 13th, 2011, the city council of Duluth, Minnesota passed a resolution in opposition to the Citizens United decision and the legal definition of corporate personhood.
- On June 11, 2012, the St. Paul City Council passed a resolution supporting an Amendment to the United States Constitution that only human beings, not corporations, are protected by democratic rights.
- On June 15, 2012, the Minneapolis City Council unanimously passed a resolution calling for the end to corporate personhood.

Mississippi

State Resolutions

- HC 108, introduced on April 5, 2012 by Representative James Evans, provides for a constitutional convention with the sole purpose of proposing an amendment to the United States Constitution that would abolish the concept of corporate personhood.

Local Resolutions Passed

- On December 13, 2011, citizens in Jackson passed a resolution supporting a constitutional amendment to overturn the Citizens United decision and clarifying that corporations are not people protected by the First Amendment.
- On June 2, 2012, the Mississippi Democratic Party declared its support for an Amendment to the Constitution to abolish corporate personhood and the doctrine that money is speech.

Missouri

State Resolutions

- HCR 38, introduced by Rep Tracy McCreery, calls for a constitutional amendment that clearly states that corporations are not human beings and do not have the same rights as the citizens of the United States.

- Local Resolutions Passed

- On June 14, 2012 Kansas City, MO Council unanimously approved a resolution Thursday supporting a constitutional amendment overturning the Supreme Court's "Citizens United" ruling of 2010.

Montana

State Resolutions

- HJ 10, **introduced** by Representative Hill on February 2, 2011, proposes that Congress pass a constitutional amendment to overturn the Citizens United decision.

Local Resolutions Passed

- On August 23, 2011, the Missoula City Council voted to place a referendum on the 2011 ballot that urges federal and state lawmakers to amend the U.S. Constitution to clearly state "that corporations are not human beings and do not have the same rights as citizens." On November 8, 2011, Missoula voters approved a local ballot referendum urging Congress to propose a constitutional amendment that clearly states that

corporations are not people and do not have the same rights as citizens by a three to one margin.

- On May 2, 2012, the city council of Hoboken unanimously passed a resolution in support of an amendment to overturn the Citizens United decision, and providing that corporations are not people.

New Hampshire

State Resolutions

- In May 2004, the Democratic Party of New Hampshire, **passed** a resolution declaring that "Corporations shall not be considered "persons" protected by the Constitution of the United States or by the Constitutions of the states that so declare; and the rights of individual, natural persons shall be privileged over any and all rights that have been extended to artificial entities."
- HCR 1, **introduced** by Rep. Weed and Rep. Car on January 5th, 2011, proposes that Congress pass a constitutional amendment that provides that constitutional rights such as free speech apply to living persons, and not to corporations, for the purpose of electioneering, among others.
- HR 8, **introduced** by Rep. Pierce and Rep. Richardson on January 6th, 2011, proposes that Congress pass a constitutional amendment that would limit corporate spending in elections, and thus overturn the Citizens United ruling.

Local Resolutions Passed

- On March 14, 2012, citizens in a Bradford Town Hall Meeting voted to pass a resolution condemning the Citizens United decision and calling for a constitutional amendment to overturn the Supreme Court's ruling.

New Jersey

State Resolutions

AR 64, introduced on March 4, 2010, by State Representative Herb Conway, calls on Congress to propose an amendment to the United States Constitution to provide that with regard to corporation campaign spending, a person means only a natural person for First Amendment protection of free speech.

- SR 47 **introduced on** Feb 16, 2012 by State Senator Jeff Van Drew, calls on Congress to propose an amendment to the United States Constitution to provide that with regard to corporation campaign spending, a person means only a natural person for First Amendment protection of free speech.
- Local Resolutions Passed

On April 10, 2012, the Franklin Township Council (Somerset County, NJ) passed a Resolution (#12-167) in support of a constitutional amendment to overturn the Citizens United decision.

New Mexico

State Resolutions

- Joint Memorial 36, **introduced** on February 11, 2011 by Rep. Mimi Stewart (D-21), failed by one vote on the House floor. It expresses strong opposition to the Supreme Court's decision in Citizens United v. Federal Election Commission and call upon the United States congress to propose and send to the states for ratification an amendment to the United States constitution to restore free speech and fair elections to the people of the United States.

- HM 4, introduced by Representative Stewart, **passed** in a 38-29 vote in the House on January 30, 2012. SM 3, introduced by Senator Fischmann, **passed** in a 20-9 vote in the Senate on February 7, 2012. On February 11, 2012, **the New Mexico joint legislature passed** a resolution calling for Congress to propose a constitutional amendment to overturn the Citizens United decision, becoming the second state in the union to do so.

Local Resolutions Passed

- On January 11, 2012, citizens in Santa Fe passed a resolution calling for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people.

- On February 25, 2012, the Taos City Council passed a resolution condemning the Supreme Court's decision on Citizens United and supporting a constitutional amendment to overturn the ruling.
- On April 17, 2012, the Taos County Commission unanimously approved a resolution requesting Congress to propose an amendment to the Constitution to counter the effects of the Citizens United ruling.

New York

State Resolutions

- K01016, introduced by Assemblyman James Brennan on March 7, 2012, **passed** the **New York State Assembly's Law Election Committee, awaiting a floor vote,** provides that the US Congress to send the states a constitutional amendment to overturn the Citizens United case, which would enable corporate spending in elections.

Local Resolutions Passed

- In February of 2011, the Essex County Democratic Committee voted to approve a constitutional amendment that would establish money is not speech and that people, not corporations, are people with constitutional rights.
- In March of 2011, the Progressive Coalition of Northern New York approved the Move to Amend resolution.
- On December 6, 2011, the Albany Common Council passed a resolution stating that "Corporations are not People".
- On December 28, 2011, the Brighton Town Council voted to pass a resolution in support of abolishing corporate personhood.
- On January 4th, 2012, the city council of New York City passed a resolution "supporting an amendment to the Constitution to provide that corporations are not entitled to the entirety of protections or 'rights' of natural persons."
- On January 11, 2012, citizens in Buffalo passed a local resolution calling for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not natural persons.
- On February 1, 2012, the Common Council of Ithaca, NY voted 8-1 in favor of a resolution calling on Congress to pass an amendment to end corporate personhood.
- On February 13, 2012, the town board of Danby voted unanimously for a resolution calling on Congress to pass an amendment to end corporate personhood.
- On March 1, 2012, the city of Troy passed a resolution calling for a constitutional amendment to overturn the Citizens United decision and clarifying that corporations are not people.
- On March 26, 2012, the Yonkers City Council passed a resolution calling for a constitutional amendment providing that corporations are not entitled to the entirety of protections or "rights" of natural persons, specifically so that the expenditure of corporate money to influence the electoral process is no longer a form of constitutionally protected speech.
- On May 2, 2012, the Allegheny County Council approved a resolution in support of an amendment that would overturn the Citizens United decision.
- On May 8, 2012, the Mt Kisco Village Board of Trustees unanimously passed a resolution calling for a constitutional amendment that declares corporations are not given the same legal status as people and that corporate spending for influencing elections is not deemed to be a form of speech.
- On June 6 and 19, 2012, the Tompkins County legislature passed three resolutions on 6/6 and 6/19 calling for campaign finance reform, abolition corporate personhood, and a constitutional amendment to overturn Citizens United.
- On June 13, the Mount Vernon City Council adopted a resolution calling for a constitutional amendment to overturn the Citizens United decision.

North Carolina

Local Resolutions Passed

- On April 1, 2011, The Alamance County Democrats passed a resolution at their democratic convention, calling for a Constitutional amendment to abolish corporate personhood.
- On December 10, 2011, the Progressive Democrats of North Carolina passed the Move to Amend model resolution.
- On January 9, 2012, the Chapel Hill Town Council passed the Move to Amend Resolution stating that corporations are not people and that money is not speech.
- On January 17, 2012, the Carrboro Board of Alderman unanimously passed a resolution in to clarify that "corporations are not people and money is not speech."
- On February 14, 2012, citizens in Asheville passed a local resolution calling for the reversal of the Citizens United decision, stating that corporations are not people protected by the First Amendment.
- On February 21, 2012, the board of commission of Orange County passed a resolution supporting an amendment to Constitution that would provide that corporations are not people.
- On April 2, 2012, the Franklin Board of Alderman passed a resolution calling upon the North Carolina General Assembly to petition Congress for a constitutional amendment that would overturn the Supreme Court's ruling on Citizens United.
- On April 4, 2012, the Board of Aldermen of Bryson City, NC passed a resolution to support a constitutional amendment to abolish the doctrine that money is speech and that human beings, rather than corporations, are protected by democratic rights.
- On April 17, 2012, the Highlands Town Council passed a resolution supporting an amendment to the Constitution that would provide that corporations are not people, and that money is not speech.
- On May 2, 2012, the Allegheny County Council approved a resolution in support of an amendment that would overturn the Citizens United decision.
- On May 24, 2012, the City Council of Durham supported a constitutional amendment that would "defend democracy from the corrupting effects of corporate power."
- On July 3rd 2012, Raleigh N.C passed a resolution condemning Citizens United and calling for a constitutional amendment to overturn the decision by a 6-3 vote.

Ohio

Local Resolutions Passed

- On February 6, 2012, the city council of Athens unanimously passed a resolution rejecting the Citizens United decision and calling for an amendment to redefine corporate constitutional rights.
- On February 23, 2012, the Oberlin City Council unanimously approved a resolution calling upon the US Congress and Ohio legislature to create a constitutional amendment that would reverse the Citizens United decision and reinstates that free speech is a right of persons, not corporations.
- On June 18, 2012, Cleveland Heights City Council passed a resolution calling to abolish corporate personhood and overturn the Supreme Court's decision in Citizens United.

Oklahoma

State Resolutions

- On May 17, 2003, the Oklahoma Democratic Party, at their state convention, **approved** a resolution opposing corporate personhood.

Oregon

State Resolutions

- HJM 9, **introduced** by Representative Phil Barnhart on January 10, 2011, provides that Congress to pass a constitutional amendment that would "restore the First Amendment and fair elections to the people."
- Local Resolutions Passed

- On June 23, 2011, the Democratic Party of Douglas County, Oregon voted to pass a resolution opposing Corporate Personhood and in support of the Move to Amend organization.
- On January, 12, 2012, the Portland City Council voted unanimously in favor of a resolution put for by Mayor Sam Adams, which declared that money is not speech and corporations are not people.
- On February 7, 2012, the Klamath County Democratic Central Committee passed a resolution that supports a constitutional amendment to overturn the Supreme Court's decision on Citizens United and clarifies that corporations are not people protected by the First Amendment.
- On February 15th, 2012, the city council of Eugene, Oregon passed a resolution encouraging Congress to pass an amendment to the Constitution that would overturn the Citizens United decision.
- On March 7, 2012 The Coos Bay City Council passed a local resolution calling for state and federal legislators to support and pursue a constitutional amendment to end corporate personhood.
- On April 12, 2012, the City Council of Yachats rejected the Citizens United ruling, passing a resolution in affirmation of the belief that money is not speech and that the Constitution protects the rights of human beings.
- On April 23, 2012, the City Council of the City of West Lin voted to pass a resolution in opposition to corporate personhood.
- On May 15, 2012, the City Council of Newport passed a resolution in support of a constitutional amendment abolishing corporate personhood and the doctrine that money is not speech.
- On June 19, 2012 Ashland City Council passed a resolution supporting U.S. Senator Merkley's effort to amend the Constitution to make clear Congress has authority to regulate campaign finances and expenditures.

Pennsylvania

State Resolutions

- HR 653 **introduced** on March 9, 2010 by Rep. Steve Santarsiero (D-31), expresses disagreement with the *Citizens United* ruling and calls on the US Congress to call a constitutional convention.

- Senate Resolution 264, **will be introduced** shortly by Senator Jim Ferlo, who announced his intention to do so on March 9, 2012. The bill calls to support the nationwide effort to amend the US Constitution to overturn the Citizens United ruling.

Local Resolutions Passed

- On January 1, 2010, the Lehman City Council passed a resolution condemning the Supreme Court's decision on Citizens United and supporting a constitutional amendment to reverse the ruling.
- On December 30, 2011, the Pittsburgh City Council passed a resolution calling for a constitutional amendment to abolish corporate personhood and return our elections back to the American people.
- On February 14, 2012, the town of Lancaster passed a resolution calling for a constitutional amendment to overturn the Citizens United decision.
- On May 2, 2012 Allegheny County, PA passed a resolution calling for a constitutional amendment to overturn the Citizens United decision.
- On May 24, 2012 the Wilkes-Barre City Council voted 4-1 in favor of calling for to overturn the Supreme Court's Citizens United ruling.
- On June 21, 2012 the Philadelphia City Council passed a resolution calling for a constitutional amendment to overturn the Supreme Court's *Citizens United* decision. (nothing on United4 map)
- On June 25, 2012 the Reading City Council approved a resolution urging lawmakers to amend the U.S. Constitution to abolish so-called corporate personhood.

Rhode Island

State Resolutions

- H 6156, **introduced** on May 18, 2010 by Rep. Thomas Winfield, proposes that Congress pass a constitutional amendment to overturn the Citizens United decision.

- H 8186, **introduced** on May 27, 2010 by Rep. David Segel (D-2), applies to the Congress of the United States to call a constitutional convention.

- H7899 was introduced by Speaker of the House Gordon Fox and **passed** on May 8th. S2656 was introduced by State Senate President Teresa Paiva-Weed and **passed** on April 25th, 2012. These companion resolutions call for Congress to pass an amendment to overturn the Citizens United decision and its subsequent, related cases.

- Local Resolutions Passed

- On June 7, 2012, the Providence City Council unanimously passed a resolution calling for a constitutional amendment to overturn the U.S. Supreme Court decision lifting the federal ban on corporate campaign spending.

South Dakota

State Resolutions

- HCR 1018 **introduced** on March 2010, by Rep. Ed Iron Cloud (D-27) and Sen. Jim Bradford (R-27), failed on a 24-43 vote on the day after it was introduced. The resolution urged the Congress and the States to propose a constitutional amendment that would reverse Citizen's United V. FEC decision.

Vermont

State Resolutions

- JRS11, introduced January 21, 2011 by Senator Virginia Lyons (D-Chittendon), and **passed in the Senate** on April 12, 2012 urges the United States Congress to propose an amendment to the United States Constitution, which provides that corporations are not persons under the laws of the United States or any of its jurisdictional subdivisions. The **bill passed the House** on April 19th, 2012, with a 92-40 vote, which made **Vermont the third state in the country** – following Hawaii then New Mexico – to ratify a *Citizens United*-related resolution.

Local Resolutions Passed

- On February 28, 2011, the town of Lincoln approved a resolution to end corporate personhood in their community.
- On March 6, 2012, in Albany, citizens voted in favor of a ballot that supports a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, at a town hall meeting in Barnet, citizens passed a resolution condemning the Supreme Court's ruling on Citizens United and called for a constitutional amendment to reverse the decision.
- On March 6, 2012, in Bolton, citizens nearly unanimously voted to pass a resolution calling for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, citizens at a town hall meeting in Brattleboro passed a resolution that condemns the Citizens United decision and supports a constitutional amendment to reverse the Supreme Court ruling.
- On March 6, 2012, in Brandon, citizens voted to pass a resolution calling for campaign finance reform and urging both the Vermont and US Congresses to support the same resolution. It supports a constitutional amendment to overturn the Citizens United decision.
- On March 6, 2012, a town hall meeting in Bristol voted to support a resolution that calls for a constitutional amendment to reverse the Supreme Court's decision on Citizens United and clarify that corporations are not people protected by the First Amendment.

- On March 6, 2012, citizens in Burlington passed a resolution that calls for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, in Calais, citizens at a town hall meeting voted to pass a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment to reverse the ruling.
- On March 6, 2012, a town hall meeting in Charlotte voted in favor of a resolution that calls for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, citizens in Chester passed a resolution that supports a constitutional amendment to reverse the Supreme Court's decision on Citizens United.
- On March 6, 2012, in Chittenden, citizens at a town hall meeting voted in favor of a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment to overturn the ruling.
- On March 6, 2012, a town hall meeting in Craftsbury voted to pass a resolution supporting a constitutional amendment that would overturn the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, citizens in a town hall meeting in East Montpelier passed a resolution that condemns the Supreme Court's rulings on Citizens United and calls for a constitutional amendment to reverse the ruling.
- On March 6, 2012, in Fayston, citizens passed a resolution that favors a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people protected by the First Amendment.
- On March 6, 2012, a town hall meeting in Fletcher voted in favor of a resolution that supports a constitutional amendment to reverse the Supreme Court's decision on Citizens United.
- On March 6, 2012, citizens at a town hall meeting in Granville voted to pass a resolution that condemns the Supreme Court's rulings on Citizens United and supports a constitutional amendment to reverse the decision.
- On March 6, 2012, in Greensboro, citizens passed a resolution calling for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people protected by the First Amendment.
- On March 6, 2012, citizens in Hardwick unanimously voted in favor of a resolution that calls for a constitutional amendment to reverse the Supreme Court's decision on Citizens United.
- On March 6, 2012, a town hall meeting in Hartford voted to pass a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment to reverse the ruling.
- On March 6, 2012, in Hartland, citizens passed a resolution calling for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, citizens at a town hall meeting in Hinesburg voted in favor of a resolution that condemns the Supreme Court's ruling on Citizens United and supports a constitutional amendment to overturn the decision.
- On March 6, 2012, a town hall meeting in Jericho voted to pass a resolution supporting a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people protected by the First Amendment.
- On March 6, 2012, citizens at a town hall meeting in Marlboro voted in favor of a resolution that supports a constitutional amendment to reverse the Citizens United decision and clarifies that corporations are not people.
- On March 6, 2012, in Marshfield, citizens passed a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment that reverses the ruling.
- On March 6, 2012, a town hall meeting in Middletown Springs voted in favor of a resolution that supports a constitutional amendment to reverse the Supreme Court's decision on Citizens United and clarifies that corporations are not people protected by the First Amendment.

- On March 6, 2012, citizens at a town hall meeting in Monkton voted to pass a resolution calling for a reversal of the Supreme Court's decision on Citizens United.
- On March 6, 2012, in Montgomery, a town hall meeting passed a resolution that condemns the Supreme Court's decision on Citizens United and favors a constitutional amendment to reverse the ruling.
- On March 6, 2012, a town hall meeting in Montpelier voted in favor of a resolution that supports a constitutional amendment to overturn the Citizens United decision and clarifies that corporations are not people.
- On March 6, 2012, citizens in Moretown voted to pass a resolution that favors a constitutional amendment to reverse the Supreme Court's ruling on Citizens United.
- On March 6, 2012, in Mt. Holly, citizens at a town hall meeting passed a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment to reverse the ruling.
- On March 6, 2012, a town hall meeting in Newbury voted in favor of a resolution that calls for a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people protected by the First Amendment.
- On March 6, 2012, citizens at a town hall meeting in Newfane voted to pass a resolution that condemns the Supreme Court's ruling on Citizens United and favors a constitutional amendment to reverse the decision.
- On March 6, 2012, in Norwich, citizens passed a resolution that supports a constitutional amendment to reverse the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, a town hall meeting in Peru voted to pass a resolution that condemns the Supreme Court's decision on Citizens United and favors a constitutional amendment that would overturn the ruling.
- On March 6, 2012, citizens in Plainfield voted in favor of a resolution that calls for a constitutional amendment to reverse the Supreme Court's ruling on Citizens United and clarifies that corporations are not people protected by the First Amendment.
- On March 6, 2012, at a town hall meeting in Putney, on two ballots, citizens unanimously passed a resolution that condemns the Supreme Court's decision on Citizens United and favors a constitutional amendment to overturn the ruling.
- On March 6, 2012, in Randolph, citizens at a town hall meeting voted to pass a resolution that supports a constitutional amendment to overturn the Citizens United decision.
- On March 6, 2012, a town hall meeting in Richmond voted in favor of a resolution that condemns the Citizens United decision and calls for a constitutional amendment to reverse the Supreme Court's ruling.
- On March 6, 2012, at a town hall meeting in Ripton, citizens unanimously passed a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United and clarifies that corporations are not people.
- On March 6, 2012, in Rochester, citizens voted to pass a resolution that condemns the Supreme Court's ruling on Citizens United and favors a constitutional amendment to reverse the decision.
- On March 6, 2012, citizens at a town hall meeting in Roxbury voted in favor of a resolution that supports a constitutional amendment to reverse the Supreme Court's decision on Citizens United.
- On March 6, 2012, a town hall meeting in Rutland City passed a resolution that favors a constitutional amendment to overturn the Citizens United decision and clarifies that corporations are not people protected by the First Amendment.
- On March 6, 2012, in Rutland Town, citizens voted to pass a resolution condemning the Supreme Court's ruling on Citizens United and support a constitutional amendment to reverse the decision.
- On March 6, 2012, citizens in Sharon voted in favor of a resolution that supports a constitutional amendment to reverse the Supreme Court's decision on Citizens United.

- On March 6, 2012, a town hall meeting in Shelburne passed a resolution that favors a constitutional amendment to overturn the Supreme Court's ruling on Citizens United and clarifies that corporations are not people
- On March 6, 2012, citizens at a town hall meeting in Shrewsbury voted to pass a resolution that condemns the Supreme Court's decision on Citizens United and favors a constitutional amendment to overturn the ruling.
- On March 6, 2012, in South Burlington, citizens voted in favor of a resolution that supports a constitutional amendment to reverse the Supreme Court's ruling on Citizens United.
- On March 6, 2012, a town hall meeting in Starksboro passed a resolution that favors a constitutional amendment to overturn the Citizens United decision and clarifies that corporations are not people protected by the First Amendment.
- On March 6, 2012, citizens in Sudbury unanimously voted in favor of a resolution that condemns the Supreme Court's ruling on Citizens United and supports a constitutional amendment to reverse the decision.
- On March 6, 2012, in Thetford Center, citizens at a town hall meeting voted to pass a resolution that favors a constitutional amendment to overturn the Citizens United decision and clarify that corporations are not people.
- On March 6, 2012, a town hall meeting in Tunbridge passed a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment to reverse the ruling.
- On March 6, 2012, citizens at a town hall meeting in Underhill voted in favor of a resolution that supports a constitutional amendment to overturn the Citizens United decision.
- On March 6, 2012, in Waitsfield, citizens passed a resolution that favors a constitutional amendment to reverse the Supreme Court's ruling on Citizens United and clarifies that corporations are not people protected by the First Amendment.
- On March 6, 2012, at a town hall meeting in Walden, citizens voted to pass a resolution that condemns the Supreme Court's decision on Citizens United and favors a constitutional amendment to overturn the ruling.
- On March 6, 2012, citizens in Waltham voted in favor of a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.
- On March 6, 2012, a town hall meeting in Warren passed a resolution that condemns the Supreme Court's ruling on Citizens united and favors a constitutional amendment to reverse the decision.
- On March 6, 2012, in West Haven, citizens voted to pass a resolution supporting a constitutional amendment to reverse the Citizens United decision and clarifying that corporations are not people.
- On March 6, 2012, at a town hall meeting in Williamstown, citizens voted in favor of a resolution that supports a constitutional amendment to overturn the Supreme Court's decision on Citizens United.
- On March 6, 2012, citizens in Williston passed a resolution that condemns the Supreme Court's ruling on Citizens United and favors a constitutional amendment to reverse the decision.
- On March 6, 2012, in Windsor, citizens at a town hall meeting voted to pass a resolution that supports a constitutional amendment to reverse the Citizens United decision and clarifies that corporations are not people protected by the First Amendment.
- On March 6, 2012, a town hall meeting in Winooski voted in favor of a resolution that supports a constitutional amendment to overturn the Supreme Court's decision on Citizens United.
- On March 6, 2012, citizens in Woodbury passed a resolution that condemns the Supreme Court's ruling on Citizens United and favors a constitutional amendment to reverse the decision.
- On March 6, 2012, at a town hall meeting in Woodstock, citizens supported a resolution that calls for a constitutional amendment to reverse the Supreme Court's decision on Citizens United and clarifies that corporations are not people.

- On March 6, 2012, in Worcester, citizens voted to pass a resolution that supports a constitutional amendment to overturn the Supreme Court's ruling on Citizens United.

Virginia

State Resolutions

- On December 11th, 2011, the Democratic Party of Virginia **ratified** a resolution against the Citizens United ruling, which provides "that corporations are not entitled to the same rights in our elections as people" and that "the Supreme Court's ruling in *Citizens United* was incorrectly decided."
- On June 2, 2012, the Democratic Party of Virginia State Convention declared support for a constitutional amendment to overturn the Citizens United decision.
- Local Resolutions
- On June 4, 2012, the City Council of Charlottesville passed a resolution in support of a constitutional amendment overturning the Citizens United ruling.

Washington

State Resolutions

- SJM 8027, **introduced** on February 4, 2010 by Senator Ken Jacobsen (D-46), expresses disagreement with the *Citizens United* ruling and calls on the US Congress to pass a constitutional amendment.
- SJM 8007, **introduced** on February 16, 2011 by State Senator Adam Kline, requests a constitutional amendment declaring that corporations are not persons under U.S. law.
- On April 30, 2011, the Washington State Democratic Party **passed** a resolution entitled "Amending the U.S. Constitution to Reserve Constitutional Rights for People, not Corporations." The resolution calls on the state legislature to pass a joint resolution urging Congress "to pass and send to the states for ratification a constitutional amendment to establish that a corporation shall not be considered a person eligible for rights accorded to human beings under the U.S. Constitution." The resolution goes on to say that the amendment should stipulate that "the use of money to influence elections or the acts of public officials shall not be considered a protected form of speech."

Local Resolutions Passed

- On December 1, 2011, the Jefferson County Democratic Party passed a resolution supporting a constitutional amendment to reverse the Supreme Court's ruling on Citizens United.
- On March 5, 2012, the Port Townsend City Council unanimously passed a Municipal Government resolution that condemns the Supreme Court's ruling on Citizens United and supports a constitutional amendment to overturn the ruling.
- On April 23, 2012, the Jefferson County Board of Commissioners passed a resolution in support of an amendment to the United State Constitution to abolish corporate personhood.
- On May 14, 2012, the Seattle City Council unanimously passed a resolution condemning the Citizens United decision and calling upon Congress to pass a constitutional amendment to overturn it.
- On June 4, 2012, the City Council of the City of Bellingham passed a resolution in support of amending the US Constitution to declare "that corporations are not entitled to the constitutional rights of natural persons, and further to ensure that the expenditure of corporate money to influence the electoral process is no longer a form on constitutionally protected speech."
- On June 4, 2012, the City Council of Langley, WA passed a resolution calling for Congress to adopt a Constitutional amendment that would overturn Citizens United. The amendment would declare that money is not speech and that corporations are not people.

West Virginia

Local Resolutions

- On January 12, 2012, the Martinsburg City Council adopted a resolution calling for a constitutional amendment to reverse the Supreme Court's ruling on Citizens United and clarifying that corporations are not people.
- On January 26, 2012, the Jefferson County Commission passed a resolution that condemns the Supreme Court's decision on Citizens United and supports a constitutional amendment to reverse the ruling.
- On March 5, 2012, Charles Town passed a resolution calling on the US Congress to amend the constitution to state that only living persons are endowed with constitutional rights and that money is not the same as free speech.
- On April 3, 2012, the Saint Albans City Council unanimously passed a resolution that condemns the Supreme Court's decision on Citizens United and presses for a constitutional amendment to overturn the ruling.

Wisconsin

State Resolutions

- On March 6, 2011, the Democratic Party of Wisconsin **adopted** a resolution in support of a constitutional amendment overturning the Citizens United V.FEC case.
- On February 9th, 2012, Representatives Mark Pocan and Chris Taylor **introduced** legislation (yet to be numbered) that provides that Congress amend the Constitution to overturn the Citizens United decision and related cases.

Local Resolutions Passed

- On March 28, 2011, the Milwaukee County Democrats passed a resolution that calls for amending the U.S. Constitution to make clear that corporations are not persons and that money is not speech.
- In April of 2011, 84% of voters in Madison, WI approved a resolution containing the following:

  "Shall the City of Madison adopt the following resolution: RESOLVED, the City of Madison, Wisconsin, calls for reclaiming democracy from the corrupting effects of undue corporate influence by amending the United States Constitution to establish that:

  1. Only human beings, not corporations, are entitled to constitutional rights, and
  2. Money is not speech, and therefore regulating political contributions and spending is not equivalent to limiting political speech."
  3. On April 1, 2011, American Federation of State, County, and Municipal Employees (AFSCME) 40 passed a resolution advocating for a constitutional amendment to oppose corporate personhood, and to declare that money is not speech.
- On April 3, 2012, voters in West Allis passed a ballot resolution that rejects the Supreme Court's decision on Citizens United and calls for a constitutional amendment to reverse the ruling.
- On April 5, 2011, Dane County voters approved the following resolution by 78%:

  "Should the US Constitution be amended to establish that regulating political contributions and spending is not equivalent to limiting freedom of speech, by stating that only human beings, not corporations, are entitled to constitutional rights?"

- On June 4, 2012, the common council of Wisconsin passed the Move to Amend model resolution, providing that corporations are not people and money is not speech.
- On June 4, 2012, the Monona City Council passed a resolution calling on Congress to pass a constitutional amendment to overturn the Citizens United decision.

Wyoming

Local Resolutions Passed

- On May 15, 2012, the Sheridan County Democrats passed a resolution providing that corporations are not people and money is not speech.

SOURCES:

- http://movetoamend.org/
- http://freespeechforpeople.org/
- http://democracyisforpeople.org/
- http://www.resolutionsweek.org/
- http://www.thealliancefordemocracy.org/
- http://www.duhc.org/

WASHINGTON
LEGISLATIVE OFFICE

July 24, 2012

The Honorable Richard Durbin,
Chairman
Subcommittee on the Constitution,
Civil Rights and Human Rights,
Committee on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Lindsey Graham,
Ranking Member
Subcommittee on the Constitution,
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TREASURER

Re: "Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs"

Dear Chairman Durbin and Ranking Member Graham:

On behalf of the ACLU, a non-partisan organization with over a half million members, countless additional supporters and activists, and 53 affiliates nationwide, we submit this statement for the record on today's hearing. We urge the subcommittee to exercise caution in responding to the Supreme Court's decision in *Citizens United v. Federal Election Commission*,[1] and we strongly urge the Senate to resist any effort to amend the Constitution to limit the First Amendment.

The ACLU has been involved in the public debate over campaign finance reform for decades, providing testimony to Congress on these issues regularly and challenging aspects of campaign finance laws in federal court.

We applaud the subcommittee in its efforts toward the laudable goal of fair and participatory federal elections. We support numerous campaign disclosure and fair election measures that promote and inform the electorate. These include public financing, tightening regulations governing independent expenditures to bar coordination with campaigns and candidates, disclosure that preserves issue-based anonymous speech rights and either free or discounted broadcast advertising rates for political advertisements. We address these non-controversial proposals below.

We have serious concerns on several other fronts. Perhaps most serious are the various proposals for constitutional amendments that would either limit corporate First Amendment protection or directly limit the First Amendment

[1] 558 U.S. 50 (2010).

itself. We also oppose the various iterations of the DISCLOSE Act,[2] which would require non-partisan "issue advocacy" groups like the ACLU, the National Rifle Association and the Sierra Club to disclose the identity of certain members. Finally, we note common misconceptions about the decision in *Citizens United*, a decision which has very little to do with the "problem" of independent expenditure-only committees (colloquially, and inaccurately, known as "Super PACs").

The election of public officials is an essential aspect of a free society, and campaigns for public office raise a wide range of competing civil liberties concerns. Any regulation of the electoral and campaign processes must be fair and evenhanded, understandable, and not unduly burdensome. It must assure integrity and inclusivity, encourage participation, and protect privacy and rights of association while allowing for robust, full and free discussion and debate by and about candidates and issues of the day. Measures intended to root out corruption should not interfere with freedom of expression by those wishing to make their voices heard, and disclosure requirements should not have a chilling effect on the exercise of rights of expression and association, especially in the case of controversial political groups.

Further to these core principles, we offer comments in four areas.

1. Do Not Amend the Constitution.

There are at least 14 separate constitutional amendments pending in Congress to address the decision in *Citizens United*.[3] Although they differ in the particulars, all take one of two general approaches. Several would limit constitutional rights to "natural persons." The rest provide for either Congressional regulation of contributions and expenditures, or directly limit contributions and expenditures by corporations, including for-profit and non-profit entities. Both approaches would effectively "amend" the First Amendment to limit speech rights, and would be the first time in history that the Constitution has been amended to *restrict*, rather than expand, individual, constitutionally guaranteed rights.[4]

The amendatory process for the Constitution is as burdensome as it is to prevent precisely these types of amendments. While the ACLU is concerned about the impact of aggregated wealth, including that of corporations and unions, on the political process, taking the radical step of amending the Constitution to restrict speech rights cannot be the answer.

Furthermore, we fear an amendment to "fix" *Citizens United* would serve as precedent for other restrictive constitutional amendments. The ACLU has long fought numerous constitutional amendment proposals designed to restrict constitutional rights and liberties, including

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[2] S. 3369, S. 2219, H.R. 4010, 112th Cong. (2012). S. 3369 is identical to S. 2219, the previously introduced version of the DISCLOSE Act, but removes the disclaimer requirements of 2219 and moves the effective date of the legislation beyond the 2012 elections. H.R. 4010 resembles in significant part S. 2219.

[3] *See* League of Women Voters, Review of Constitutional Amendments Proposed in Response to Citizens United, http://www.lwv.org/content/review-constitutional-amendments-proposed-response-citizens-united#_ftn1.

[4] Even Prohibition was not as extreme a restriction on individual liberties as these proposals. The right to consume alcohol is not constitutionally enumerated.

amendments prohibiting or permitting the prohibition of flag "desecration," the so-called Victims' Rights Amendment, and birthright citizenship amendments (that would repeal the 14th Amendment's guarantee of citizenship to individuals born in the United States). These *Citizens United* amendments are just as misguided (and unnecessary), and we urge all members of Congress to oppose them if they are ever formally considered.

Finally, those amendments targeting corporate personhood would have serious civil liberties implications in that they could inadvertently strip away, for example, Fourth and 14th Amendment rights that derivatively protect the "natural person" constitutional rights of shareholders and other stakeholders. Great care should be taken when legislating in this area. Any constitutional amendment restricting corporate speech would pose a danger that simply cannot be overstated for other rights and civil liberties.

2. Set the Record Straight on Citizens United

As recently reported by Matt Bai, chief political correspondent for the New York Times, assigning total blame for "money in politics" to *Citizens United* is, at best, "overly simplistic."[5] *Citizens United* is a relatively narrow decision. It held that unions and corporations (including non-profit corporations like the ACLU) can spend general treasury funds on communications that are not coordinated with a candidate or campaign. That is, they no longer need to form a political action committee, or PAC, in order to engage in direct political speech (direct *contributions* to candidates remain totally forbidden).

The simple fact is, unless corporations and/or unions are doing so through disclosure-exempt 501(c)(4) organizations,[6] they have not spent a sizeable amount of money on independent expenditure-only committees. To date, only about 13 percent of "Super PAC" donations have come from corporations, and less than one percent from publicly traded corporations.[7] It bears repeating: virtually all of the relatively small amount of corporate spending is coming from private and most likely closely held corporations, which are often affiliated with a particularly influential *individual*. For example, five donor companies share an address in The Villages, Florida, affiliated with developers H. Gary and Renee Morse.[8]

Additionally, all indications are that the current state of campaign finance is not a historical anomaly. There has been a consistent upward trend in campaign expenditures for decades as television advertising becomes more expensive (because a growing audience and more competitive races means more spots need to be purchased cycle after cycle). As Bai noted, the

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5 Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. Times, July 17, 2012.

6 In which case, there should be disclosure to shareholders or members.

7 Bai, *supra* note 5. And a Bloomberg Government study has an even lower number—7.6 percent—for the period of December 2011 and March 2012. Mark Silva, *Super-PACs: Little from Corporations*, Bloomberg, July 12, 2012, http://go.bloomberg.com/political-capital/2012-07-12/super-pacs-little-from-corporations/.

8 *Corporate Shells Ramp Up Super PAC Giving*, Wash. Times, July 21, 2012, http://www.washingtontimes.com/blog/inside-politics/2012/jul/21/corporate-shells-ramp-super-pac-giving/.

percentage increase in outside expenditures (i.e., not direct contributions) has remained relatively static even after *Citizens United* (rising 164% from 2004 through 2008 and 135% from 2008 through 2012).

Finally, despite the deserved media attention surrounding the significant expenditures by Super PACs favoring Republican candidates and policies, there is no indication thus far that the increase in political spending has disproportionately benefitted any one party or candidate. The Romney campaign is likely to "outspend" the Obama campaign in this year's presidential election. Further, for the first time in history, the GOP-affiliated Super PACs are spending at a level such that "outside" independent expenditures could outstrip direct contributions.

That said, President Obama was, in 2008, the first major-party candidate to decline public financing due to the remarkable number of relatively small direct contributions he received (which is testament, further, to the resiliency of popular democracy in America).[9] Additionally, even the Super PAC race is far from one-sided. Of the top individual contributors, three—including comedian Bill Maher, actor Morgan Freeman and CEO of Dreamworks, Jeffrey Katzenberg—are supporting Priorities USA, the "Obama" Super PAC. And, Priorities USA is aggressively running precisely the type of negative advertising against Mr. Romney that has been so derided in the current debate, which Professor Thomas Edsall at Columbia University suggests is a tactic to dissuade white men without college degrees—Obama's least favorable constituency—from going to the polls.[10]

For all the oxygen consumed on *Citizens United*, the decision in *SpeechNow.org v. Federal Election Commission* is of more salience for the Super PAC phenomenon.[11] That said, even before *SpeechNow,* individuals were free to spend significant amounts of money on political speech and sometimes anonymously. For instance, during the 2004 presidential election, groups like Moveon.org, America Coming Together, and Swift Boat Veterans for Truth spent significant amounts of money on political speech.

There should be a public discussion of the problems arising from the influence of aggregated wealth, be it corporate or individual. Nevertheless, the country must not act with undue haste in changing our elections laws—and especially should not do so based on faulty information. We urge the subcommittee and all members of Congress to act on facts, and not hyperbole.

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[9] *See* Shailagh Murray & Perry Bacon Jr., *Obama to Reject Public Funds for Election*, Wash. Post, June 20, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/06/19/AR2008061900914.html.

[10] Thomas B. Edsall, *The Politics of Anything Goes*, N.Y. Times, July 23, 2012, http://campaignstops.blogs.nytimes.com/2012/07/23/the-politics-of-anything-goes/.

[11] 599 F.3d 686 (D.C. Cir. 2010). There, the D.C. Circuit held that individual contribution limits to unincorporated "527" committees, named after the section of the tax code, were unconstitutional in light of the holding in *Citizens United* that uncoordinated expenditures do not give rise to the type of quid pro quo corruption or the appearance thereof that would justify limiting the First Amendment.

3. Disclosure and Protecting Anonymous Political Speech Not Mutually Exclusive

Transparency drives democracy. The American electorate has a legitimate interest in knowing the source of significant support for a candidate. Accordingly, relatively large contributions and/or expenditures are subject to legitimate disclosure (as they already are). What disclosure rules cannot do is act to chill constitutionally protected associational and expressive rights.[12] Unfortunately, the current disclosure legislation pending in Congress would do exactly that.[13]

First, all of the DISCLOSE Acts currently pending would dramatically expand the period of time during which issue advocates—those taking no position in support of or in opposition to a political candidate—must disclose their donors if they wish to publish issue ads.[14] The Act would expand the "electioneering communications" period—currently the 30 days before a primary and the 60 days before a general election—quite significantly. For communications that refer to a candidate for the House or Senate, the period would begin on January 1 of the election year and end on the election, and would encompass the entire period following the announcement of a special election up to the special election. For communications mentioning a presidential or vice presidential candidate, the period would extend from 120 days before the primary or caucus in an individual state, which would radically extend the heightened disclosure period in numerous jurisdictions.

Additionally, the legislation would expand the definition of independent expenditure, which is currently limited strictly to communications that expressly endorse or oppose a candidate, to those that are the "functional equivalent" of express advocacy. The functional equivalency test, such as it is, invariably drags in speech that is and should be protected from limitation under the First Amendment. This, in fact, was the case in *Citizens United*, where the communication at issue was an independent documentary critical of then-presidential candidate Senator Hillary Clinton. Similar communications (assuming they are outside the electioneering communications window) would trigger disclosure as independent expenditures. And, as the government conceded in the *Citizens United* oral arguments, the same logic would extend to a book or other non-broadcast medium like a pamphlet or sign that could be construed as critical of a candidate, which is an obvious First Amendment violation.[15]

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[12] The constitutional interest in anonymous speech was most obvious during the civil rights era, when segregationist state governments sought to chill associational activity in civil rights groups. *See, e.g., Nat'l Assoc. for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) (holding NAACP membership lists off limits to state government seeking to prevent organization's operation in-state).

[13] *See supra* note 2 for a list of the relevant legislation.

[14] S. 3369 § (2)(a)(2).

[15] Transcript of Oral Argument at 65:2-15, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 50 (2010) (No. 08-205). Then-Solicitor General Elena Kagan explained that to the extent that a book would be construed as express advocacy, 2 U.S.C. § 441b would cover that book, but further explained that there would be a good "as-applied" challenge to any enforcement. She further noted that there had never been an FEC action covering a book. Nevertheless, the government clearly admitted that a book would be covered by the ban in 441b. To the extent the definition of independent expenditure is amended to include the functional equivalency test, even a book that does not expressly say "vote for candidate X," but is highly critical of said candidate, would be covered.

Finally, and to be very clear, the DISCLOSE Act would require non-partisan issue advocates like the ACLU, Planned Parenthood or the National Rifle Association to disclose the identity of some donors. To the extent that donors contribute more than $10,000 that is spent on electioneering communications, independent expenditures or "covered transfers," their identities must be disclosed. While the legislation provides for disclosure only with regard to a segregated account, assuming these organizations take the time and trouble to set it up, this legislation will require membership disclosure for those issue advocates who must rely on larger donations to fund political communications simply because of the economics of their operations (some small organizations have, for instance, a limited base of larger donors).

Further, and even with a $10,000 trigger, the present exceptions in the DISCLOSE Act may still leave the door open to disclosure when a donor had no intention that a gift be used for political purposes.[16] It is both impractical and unfair to hold contributors responsible for every advertisement that an organization publishes, which would be required were the entity to spend more than $10,000 in a cycle on covered communications from general treasury funds, and even donors who give more than $10,000 may be small relative to the size of the covered organization's donor base as a whole.

The DISCLOSE Act is likely to do one of two things, particularly when an organization is engaged in advocacy on controversial issues with which typical donors or members might not want to be associated publicly. First, the organization might refrain from engaging in public communications that would subject its donors to disclosure, in which case the organization's speech will have been curtailed. Alternatively, donors sensitive to public disclosure may refrain from giving to the organization (or may cap disclosure just below the trigger threshold), in which case the organization's ability to engage in speech will also have been curtailed. In both cases, those whose names are disclosed would be subject to personal, political or commercial impacts, and the national political conversation will itself have been chilled.

4. There Are Numerous Productive Alternatives to Constitutional Amendments, Further Limitations on Speech and Onerous Disclosure Rules.

a. Tighten Coordination Rules to Prevent Sham Independent Expenditures

First, Congress and the Federal Election Commission ("FEC") should turn their attention to ensuring that independent expenditures are truly independent. As a matter of economics (not to mention common sense), truly independent expenditures cannot be corrupting or produce the appearance of corruption because there is no promise—tacit or explicit—that the candidate will provide something of value, including access, in exchange for the expenditure. The individual or group spending the money will have to hope that the candidate is listening and receptive. Additionally, truly independent expenditures are also frequently used to promote salutary policy debate (e.g., "support candidate X, a true friend of the Second Amendment").

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[16] S. 3369 § (2)(b)(1)(a)(3)(B). The donor would have to specifically prohibit, in writing, use of the funds for any covered payment, and the covered organization would have to agree and then segregate the funds.

During the recently concluded primary season, Super PACs spent millions supporting particular candidates or—more frequently—opposing rivals. That practice has now turned to the general election, with Super PACs for and against President Obama and former Governor Romney taking turns attempting to sway voters. Because these organizations carefully avoid the regulatory definition of coordinating' with a candidate, they are allowed to spend unlimited sums. In truth, connections between most of these organizations and the candidates they support run deep.[17]

When Newt Gingrich was still a viable candidate, he announced to the world how much he would benefit from an upcoming independent ad campaign.[18] His public comments clearly gave a clue to his benefactors that he approved. The Super PAC supporting Mitt Romney—Restore Our Future—is led by a group of people deeply involved in the 2008 Romney campaign. As noted, Priorities USA is President Obama's Super PAC and it was founded by a former key staffer to Rahm Emmanuel and a former campaign press secretary. [19] The candidates are allowed to help the Super PACs raise money and, despite rules to the contrary, the campaigns and the Super PACs share consultants and communicate routinely across the public airwaves and otherwise.

Regulations that define 'coordination' do not necessarily ensure complete separation between organizations making independent expenditures and the candidates they support. An ad is considered to be coordinated with a candidate—and thus restricted—if it meets certain 'content' and 'conduct' standards. Most ads do NOT avoid the content standard because they all advocate the election or defeat of a candidate. To avoid the conduct standard, a Super PAC must, among other things, avoid employing or contracting with someone who worked for the candidate in the past four months or must make sure the ads are based on publicly available information. In fact, most Super PACs supporting major candidates employ plenty of people closely aligned with the candidates—but they simply make sure they haven't worked for the candidates for over four months. Such a restriction is easy to overcome and it is naïve to think that a candidate staffer who has been intimately involved in the strategic thinking of a campaign will somehow be uninformed about the strategic and tactical needs of the campaign only four months after leaving.

Congress and the FEC should tighten the definitions so that independent expenditures are truly independent of the campaigns they are intended to benefit.

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[17] *See* Nicholas Confessore, *At 40, Steering a Vast Machine of GOP Money*, N.Y. Times, July 22, 2012, *available at* http://www.nytimes.com/2012/07/22/us/politics/steering-the-rights-vast-money-machine.html?_r=2&ref=politics; Mike McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. Times, Feb. 25, 2012, http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html?_pagewanted=all.

[18] *See* Quin Hillyer, *Did Gingrich Break the Law?*, The American Spectator, Spectator Blog, Jan. 9, 2012, http://spectator.org/blog/2012/01/09/did-gingrich-break-the-law.

[19] Dan Eggen & Chris Cillizza, *Romney Backers Launch 'Super PAC' to Raise and Spend Unlimited Amounts*, Wash. Post, June 23, 2011, http://www.washingtonpost.com/politics/romney-backers-launch-super-pac/2011/06/22/AGTkGchH_story.html.

b. Support Effective Public Financing

Contrary to the perceived wisdom, public financing of elections can be highly effective. As noted above, President Obama was the first to turn down the sizeable pool of public financing dollars for presidential elections, suggesting that the preceding presidential races benefitted greatly from the financing program. ***There is no constitutional reason not to enact similar policy for other federal elections***. We applaud Chairman Durbin for his efforts in this area, and the Fair Elections Now Act is a promising step in this direction. Much of it follows the key principles of an effective public financing system: funds are available to all-comers who meet certain local support criteria; it provides a floor for campaign expenditures sufficient to allow candidates to run a competitive campaign; and it would not be unduly burdensome.

Note, however, that the adjustment mechanism should not be allowed to unfairly disadvantage the non-cooperating candidate, nor interfere with the voluntary nature of the candidate's choice to participate in the public finance system.

c. Speed Tax-Exempt Status Determinations

A relatively easy improvement in campaign finance would be to ensure that the Internal Revenue Service has the resources and expertise to expeditiously approve or deny tax-exempt status proceedings. One complaint heard over and over is that organizations are able to shield donors under tax exemption laws without any oversight or enforcement until well after the relevant election period has ended.[20] At the very least, federal agencies with enforcement authority should be given the tools to prevent abuses of the system and not rely solely on punishing those intent on committing such abuses.

d. Mandate Lowest Cost Political Advertising

The ACLU supports cost reduction mechanisms, which may be the best option for limiting the influence of aggregations of money in politics. For instance, we support government-sponsored communications platforms that permit all candidates to state their views. Additionally, we support extending the franking privilege to challengers in federal campaigns, and we support providing for free or lowest-cost broadcast television airtime to candidates. Such measures must, of course, be administered in a nondiscriminatory manner and under circumstances that expand candidates' access to media. But they would, quite literally, end the problem in one fell swoop.

5. Conclusion

The current debate over campaign finance is a worthy one. We share the legitimate concerns of many Americans about the influence of "money in politics." Campaigns for federal office are expensive, and are becoming more so by the day and the cycle. Nevertheless, many of the recent calls for reform are unnecessary and counterproductive. In the case of proposed constitutional

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[20] Jonathan Weisman, *Democrats to Ask for Curbs on Donor-Shielding Groups*, N.Y. Times, July 8, 2012, http://www.nytimes.com/2012/07/09/us/politics/democrats-want-fec-to-restrict-donor-shielding-groups.html ("The F.E.C. is usually slow to respond to such complaints, and any action is unlikely to affect the 2012 election.").

amendments and legislation that would require actual social welfare organizations to disclose the identity of their members, these proposals present civil liberties perils of the highest order. Despite the influence of money in politics, evidence does not yet exist of a threat that large donors are monopolizing channels of communication to the exclusion of candidates, parties, or those organizations funded by aggregations of smaller donors. We strongly urge the subcommittee, and indeed the whole Congress, to tread lightly in any effort implicating the right to speak freely on issues of political and public moment.

Please do not hesitate to contact Legislative Counsel Gabe Rottman if you have any questions or comments at 202-675-2325 or grottman@dcaclu.org.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief of Staff/First Amendment Counsel

Gabriel Rottman
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cc: Members of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights

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July 23, 2012

The Honorable Dick Durbin
Chair, Subcommittee on the Constitution, Civil Rights and Human Rights
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The American Sustainable Business Council (ASBC) is pleased to offer this testimony in support of a Constitutional amendment to reverse the *Citizens United* decision which has had an adverse effect on many businesses, especially small- and medium-sized businesses. We would like to express our gratitude to you for holding this important hearing and your work to find solutions to the problem of unlimited and unaccountable money in our political system.

The American Sustainable Business Council (ASBC) is a growing national coalition of businesses and business organizations committed to advancing policies that support a vibrant and sustainable economy. ASBC, through its partner organizations, represents over 150,000 businesses including industry associations, local and state chambers of commerce, microenterprise, social enterprise, green and sustainable business, advocates for community-rooted business, women and minority business leaders, and investor networks and more than 300,000 business professionals.

In his dissenting opinion to the United States Supreme Court's *Citizens United* decision, now-retired Justice John Paul Stevens stated, "a democracy cannot function effectively when its constituent members believe laws are being bought and sold."

This simple statement cuts to the core of the corruption of the democratic process that has occurred following the unleashing of unrestricted, secretive and unaccountable spending to influence U.S. public policy. It is critical for Congress to act on legislation like the DISCLOSE Act and support a constitutional amendment to limit the influence of money in politics and restore the democratic system of governance to preserve a fair and free society for all.

By allowing for unrestricted political spending by corporations, Super-PACs and wealthy individuals, the free speech of the average person and most business owners is severely marginalized. This leads many to become either disenfranchised or disillusioned by the system.

The *Citizens United* decision substantially increases the influence of large corporations and the ultra-wealthy in politics—both in determining who gets elected and how they make decisions once in office. The ruling asserts that the legal construct of the corporation, created at the state level, should have the same Constitutional rights as people to "speak" through expenditures in elections.

Executives, owners, investors, and business professionals understand that money can influence political

decision making and is harmful to our businesses and to the economy. Business confidence in the fairness and equity of the policy making system is the lifeblood of our economy and the democratic process. As any economist will tell you, rules and institutions do matter, and the *Citizens United* decision severely distorts the public debate through which these rules operate and institutions function.

In recent independent polling released by the American Sustainable Business Council, 9 in 10 small business owners stated they had a negative view of the role money plays in politics. In addition, 66% polled voiced their opinion that the *Citizens United* decision was bad for small business with only 9% saying it was good.

The basis for their concern is that as small businesses, they would rather invest in their business and create jobs than invest in the electoral process. They are also firm believers in a level playing field that allows for fair competition. They know they cannot compete with the mountains of cash thrown at politicians by large corporations to influence policy. This fact greatly distorts the economic system for small businesses and alters the landscape of the efficiency and transparency of markets within which all businesses compete.

Companies ought to be competing in the marketplace, not in our elections. And citizens ought to be in charge of the government, not corporations. Every company in America should be willing to say that. That's what nearly 2000 business leaders endorsed when they signed the American Sustainable Business Council's Business for Democracy (www.businessfordemocracy.com) petitions calling for a constitutional amendment to reverse the *Citizens United* decision. ASBC's ally Free Speech For People (www.freespeechforpeople.org), joined in helping to enlist business leaders to sign this call.

Large established industries that spend heavily in campaigns are more likely to defend the interests of the past, rather than advocate for the industries innovating for the future. They are more likely to be committed to old energy sources rather than making America a leader in clean and renewable energy. They are more likely to be companies that are utilizing overseas tax havens and not contributing their fair share of taxes to the economy, while often receiving the largest government subsidies.

It is small- and mid-sized businesses, entrepreneurs and consumers that create the foundation that drives economic growth and job creation. The current campaign finance system puts such companies at a distinct disadvantage to big corporations. This does not lead to good economic policy

As elections become more expensive, the voices of those who can't make contributions or only make smaller contributions will be drowned out. These disadvantages are exacerbated by the emergence of Super-PACs in the aftermath of the *Citizens United* decision. Recent data from OpenSecrets.org, a campaign finance watchdog group, shows that the top 5 Super-PACs account for almost $144 million of the $282 million in 2012 election cycle independent expenditures to date.

How can individuals make informed decisions about elected officials and about policies to help create a sustainable economy of the future when such a disproportionate amount of the information easily accessible to the public comes from such a concentrated group of voices advocating for the maintenance of an unsustainable status quo.

Businesses should support a politics of transparency and fairness, where citizens are the players in our

democracy. Our businesses thrive because they are competitive and well managed — not because certain businesses favored the winning candidate in the last election.

ASBC and its members hold strong democratic values. We do not want a government in which elected officials must raise ever increasing funds from business. Nor where a few businesses define the debate on policy issues or where the majority of business people and citizens alike are silenced in the din of negative ads.

The core of democracy lies in the active participation of the constituent members of a society in voicing their views on how a society and economy should function. The idea of freedom and liberty envisioned by the framers of the constitution was not a concept for corporations and oligarchs. It is a concept for the people and citizens of this nation, and it is time for the people to once again have a fair and equal voice in their democracy.

Respectfully submitted,

David Levine
CEO and Co-Founder

AMERICANS FOR CAMPAIGN REFORM
Our future depends on it.

Statement For The Record
Submitted by Americans for Campaign Reform
July 18, 2012

Since the beginning of the current election cycle, extremely wealthy individuals, corporations and trade unions — all of them determined to influence who is in the White House next year — have spent more than $160 million, excluding party expenditures.

To put this in some historical context, at this point in 2008, about $36 million had been spent on independent expenditures (independent meaning independent of a candidate's campaign). In all of 2008, in fact, only $156 million was spent this way. In other words, we've already surpassed 2008, and it's July.

And so far in this election cycle, the top three contributors, via independent expenditures, have already spent about $42 million - more than was spent on independent expenditures by all donors at this point 2008. And at the extreme, one wealthy individual, Sheldon Adelson, has already spent $20 million in a brazen attempt to impact the outcome of this year's Presidential election.

As further evidence of the concentration of this spending among the very wealthy, the top donors to Super PACs represent only 3% of all Super PAC donors but have contributed almost 80% of the money.

No matter how you slice it, and from what perspective you look at the data, two things are very clear: There is a lot more money being spent to influence the Presidential election outcome than ever before. And the money is being spent by a very, very small percentage of the population.

It is also clear that the anonymity and detachment of these independent organizations--Super PACs, 501(c)3s and 527s--is facilitating a dramatic increase in the use of negative advertising. And, it appears that much of the negative advertising we've seen to date is unencumbered by the truth, making it much more difficult for voters to make informed, educated decisions about who should lead our country.

This massive influx of special interest money, the anonymity allowed by current law and the preponderance of negative messages is having a detrimental impact on our elections and may over time have a more profound and troubling impact on the long-term ability of our government to meet our most difficult challenges.

A close look at a recent race provides a compelling window into the situation.

Paul Hodes was a two-term Democratic Congressman representing the Second District of New Hampshire who decided, in 2010, to relinquish his seat and run for the open Senate being vacated by Judd Gregg. Hodes had adequate name recognition and a reputation as a left-of-center moderate willing to reach out to Republicans and compromise in the interest of his constituents.

In the general election, Hodes faced Republican Kelly Ayotte, a former NH Attorney General who had served under both a Republican and a Democratic governor. Although Ayotte had never run for public office, she was well known and well respected, particularly in conservative circles. While serving as Attorney General she had successfully prosecuted two high-profile murder cases, winning convictions in both and getting a death penalty sentence in one.

As Hodes said recently, "She had a lot going for her that made her an attractive candidate in New Hampshire. She had a tough-as-nails trial record, some bipartisan credibility, and her husband ran a snow plow business!"

From the beginning, Hodes knew this race was going to be different than his previous campaigns for Congress. While Hodes set a record for the amount of in-state contributions he raised, Ayotte was able to attract millions of dollars from out-of-state interests determined to keep the open seat in Republican hands. Ayotte also benefitted from major financial support from the Republican Party.

According to Hodes, when it was all said and done, Ayotte and her supporters had spent some $25 million. Hodes had spent about $5 million with no significant financial support from the Democratic Party and virtually no expenditures from any outside group. Despite Hodes own admission that he spent an astounding 80% of his time fundraising during the campaign, he was outspent five to one.

In November 2010, Ayotte won the election by about 20%.

Interestingly, Hodes doesn't blame his loss solely on the huge disparity of campaign spending. He credits Ayotte with running a good, tough campaign and acknowledges that there were a lot of factors that contributed to her victory.

But Hodes has a lot to say about how the massive amounts of money from outside New Hampshire changed the race in profound and troubling ways.

He is still frustrated by the anonymity of much of the forces opposing him. "I was subjected to a barrage of negative advertising in a small state by anonymous out-of-state interests. As best as I could tell, these were people who had no interest in New Hampshire. They were only interested in controlling a seat in the US Senate and the

US Senate itself. The game is on steroids now. Campaigns have become a playground for people with huge amounts of money."

He adds, "It is sobering to understand the extent to which the modern campaign depersonalizes politics. Your ideas don't count. Your record doesn't count. All of the decisions made are about money, and the decisions are made by people with no interest in New Hampshire."

When talking with Hodes about his experience, it is impossible not to sense his bitterness and concern.

We believe that this is a critically important and threatening outcome of the *Citizens United* and *Speech Now* decisions. We've already seen many of our most talented leaders and most capable statespersons leave the House and Senate because the partisanship and the tone of the debate has become stifling and toxic.

If Hodes' experience is shared by others seeking public office, and campaigning continues to be so heavily affected by anonymous out-of-district influences running negative advertising, we fear even more incumbents will decline to run for reelection and many of our most capable potential leaders will not consider running for elective office.

In America we elect only 536 people to lead our country: 435 House Members, 100 Senators and the President. It is vital that we elect the finest and most capable leaders we have. But, unfortunately, this is unlikely unless we enact sweeping campaign reform laws. Today, candidates must have access to incredible wealth to run for office and are then exposed to the increasing likelihood of an onslaught of largely anonymous negative advertising like that seen in the Hodes' Senate race.

If we are to overcome the daunting challenges that our country faces, we must do everything in our power to conduct political campaigns that elicit bold ideas in the most positive atmosphere possible. We must encourage, rather than discourage, talented people from seeking public office.

Full transparency of political spending, a Constitutional Amendment to overturn Citizens United, and, most importantly, voluntary public funding of federal elections should all be openly debated and embraced. However, given the length of time it would likely take to pass an Amendment, it is important to note that voluntary public funding--at appropriate levels--will still be effective even as Citizens United remains the law of the land.

We believe that, in the long term, there is nothing more important for our country.

30 community drive • south burlington, vt 05403 • tel: 802-846-1500 • www.benjerry.com

The Honorable Dick Durbin
Chair, Subcommittee on the Constitution, Civil Rights and Human Rights
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

July 11, 2012

On behalf of Ben & Jerry's Homemade, Inc., I write to express our Company's strong support for a Constitutional amendment that would overturn the *Citizens United v FEC* decision and create a more democratic system of campaign finance in the United States. I thank the Chairperson and the subcommittee for calling this hearing and receiving this testimony.

Ben & Jerry's is a Vermont corporation and a wholly-owned subsidiary of Unilever, a multinational consumer products company. Ben & Jerry's manufactures and markets packaged ice cream and frozen yogurt products in the United States and more than 30 other countries around the world. In addition, Ben & Jerry's has franchised scoop shops in more than 400 locations in the United States and around the world.

Ben & Jerry's is guided by a mission statement with three parts: Product, Economic, and Social. Our Social Mission in particular calls us to use our Company to improve the quality of life in the local, national, and global communities in which we operate. In addition, our Company has a long history of supporting grassroots efforts to promote social and economic justice, sustainable environmental practices, and strong communities. I submit this statement today guided by our Company's Social Mission and in a sincere effort to add our voice in support of the growing movement of citizens across the country who are working to reclaim the original spirit of democracy as envisioned by our country's founders. This spirit of democracy, as we understand it, is that the elected representatives who govern our country are accountable to the people alone.

In the interest of full disclosure, as a matter of long-standing Company policy, neither Ben & Jerry's nor our parent company, Unilever, contributes Company funds to political candidates, political parties, or organizations established to support candidates or parties. We do not have a Political Action Committee and we do not contribute to Super PACs.

Since we are not experts on the subject of campaign finance, we will leave it to others to document the specific harms caused by the current system of campaign finance. We certainly share the concerns of many citizens, public interest groups, and advocates of good government in the United States that the existing system of campaign finance is broken. It is clear that, through Political Action Committees, SuperPACs, political parties, nonprofit 501 c(4) groups, and other vehicles, many campaigns are now fueled primarily by large contributions and independent expenditures from a very small number of donors who essentially operate without meaningful campaign finance limits or disclosure requirements. This has created a system in which many of our elected leaders are dependent upon financial support from the wealthiest interests; are eager to support policies that benefit these interests; are loathe to

support any policy that challenges these interests; are no longer fully accessible to or accountable to the citizens they represent; and are therefore impaired in their ability to formulate policy that is exclusively focused on the common good. While wealthy donors and corporate interests have frequent access to elected leaders, the general public does not even know who is financing the political messages they see and hear. In short, the system of campaign finance has become profoundly undemocratic; and democracy itself is now in danger.

Ben & Jerry's believes it is not the proper role of any for-profit company to interfere in any way in elections for public office. These elections belong to the people. They exist only to allow citizens to choose their representatives in government. Corporate spending in elections, including direct contributions to candidates and political parties, independent expenditures, or contributions to nonprofit 501 c(4) groups, are in our view, inconsistent with the spirit and intent of candidate elections. Therefore, we would support an amendment to the Constitution that would restrict or ban corporate spending in elections, or that would allow Congress and state legislatures to restrict or ban corporate spending in elections.

There are many for-profit corporations that share our view. Ben & Jerry's is a signatory to a campaign called Business for Democracy, which includes more than 2,000 businesses and business leaders who have endorsed the following statement:

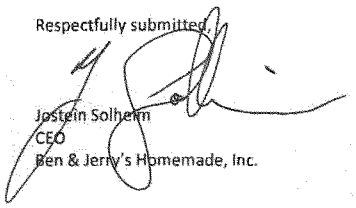
> We believe in the American democratic ideal of "government of the people, by the people, for the people."
>
> We believe the U.S. Supreme Court's *Citizens United v. FEC* decision, which allows corporations to spend unlimited money influencing the outcome of public elections, is inconsistent with longstanding American democratic principles and practice.
>
> We believe it is not the proper role of any for-profit corporation to support or oppose political parties or candidates for public office.
>
> Despite the *Citizens United* decision, we call on all companies doing business in the United States to refrain from spending money for the purpose of influencing the outcome of public elections.
>
> We support citizen efforts to overturn *Citizens United* through a Constitutional amendment. We believe this Constitutional amendment should not limit commercial free speech or prevent corporations from publicly expressing a point of view on existing or proposed legislation, regulation, referenda or other matters of public policy.

We recognize that corporate spending in elections is only part of the campaign finance problem. Additional reforms should also be considered to minimize the influence of wealthy interests in public elections. In our view, ALL entities and individuals should be subject to reasonable limits on contributions to candidates for public office; ALL entities and individuals should be subject to reasonable limits on independent election expenditures; and ALL entities and individuals should be required to fully disclose all spending in elections. This approach would be most closely in keeping with the spirit of democratic elections, as we understand them. Ben & Jerry's would support passage of an amendment or amendments to the U.S. Constitution that create and/or allow for these reforms.

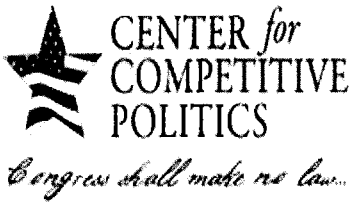
In summary, we support citizen efforts to restore true democratic government in the United States through meaningful and comprehensive campaign finance reform. We support passage of a Constitutional amendment or amendments to enable this reform. We want the subcommittee to understand that there are many businesses, including ours, that are fully aligned with citizen efforts in this direction.

Thank you for your consideration of our point of view.

Respectfully submitted,



Jostein Solheim
CEO
Ben & Jerry's Homemade, Inc.



Center for Competitive Politics' Comments on
Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights

"Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs"

Tuesday, July 24, 2012
2:30 pm

Center for Competitive Politics
124 S. West St., Suite 201
Alexandria, Va. 22314
www.campaignfreedom.org

Introduction:

The Center for Competitive Politics (CCP), a non- profit education organization based in Alexandria, Va. is dedicated to promoting and defending the First Amendment rights of speech, assembly, and petition. Our mission is to inform the public of the actual effects of money in politics and the results of a more free and competitive electoral process. We are the only organization dedicated solely to protecting First Amendment political rights. As such, and given our involvement as amici filers in support of Citizens United in the original *Citizens United v FEC*, we submit these comments into the official record of today's Senate hearing titled "Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs."

Last month, the United State Supreme Court summarily reversed a decision by the Montana Supreme Court that would have upheld a Montana law prohibiting corporate expenditures in political races, despite the clear holding to the contrary in *Citizens United v. Federal Election Commission.* 558 U.S. 50 (2010). This has given renewed vigor to efforts to overturn *Citizens United* via a constitutional amendment, including one recently proposed by Senator Baucus.

Although there are many reasons to support the Supreme Court's decision in *Citizens United* as a correct understanding of the First Amendment, CCP wishes to raise here three points in particular which have been widely overlooked in the post-*Citizens United* discussion.

1. First, while there is no doubt that opinion polls show that the public disagrees with "Citizens United," at least as that decision is described in most polls, such polls fail to account for the nuances of public opinion, ongoing support for the First Amendment, and, in fact, substantial majority support for the actual result in *Citizens United.*
2. Second, prior to *Citizens United*, a majority of states already allowed unlimited corporate spending in state elections, without suffering the negative consequences it is claimed will result from the Supreme Court's ruling.
3. Many proposed constitutional amendments would not only invalidate *Citizens United*, they would also repeal a host of other

important First Amendment precedents going back decades.

The Public is not clamoring for a Constitutional Amendment

Numerous public opinion polls have indicated that the public opposes the Supreme Court's decision in *Citizens United.* Of this there is no doubt. This may lead members to believe that a constitutional amendment to overturn the decision would meet with wide public approval. A fuller reading of polling data, however, casts serious doubt that this is true.

For example, a widely cited 2010 poll for the Washington Post/ABC News asked, "do you support or oppose the recent ruling by the Supreme Court that says corporations and unions can spend as much money as they want to help political candidates win elections?" http://abcnews.go.com/images/PollingUnit/1102a6Trend.pdf.

A 2012 poll by Greenberg Quinlan Rosner Research for Public Campaign asked a series of wildly biased questions to prime the pump against *Citizens United.* For example, respondents were asked if they agreed with the statements, "I am fed up with the big donors and secret money that control which candidates we hear about. It undermines democracy;" "There is too much big money spent on political campaigns and elections today and reasonable limits should be placed on campaign contributions and spending;" and "The middle class won't catch a break unless we start by reducing the influence of big banks, big donors and corporate lobbyists." Even with such pump priming, however, just 62% voiced opposition to *Citizens United.* http://campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf.

In contrast, in 2010, in the immediate aftermath of the CU decision, CCP authorized a poll on public attitudes towards *Citizens United* and campaign finance.[1] Rather than ask people if they agreed with "Citizens United," or describing the case in the terms routinely used in other polls, we asked respondents about the actual issues in the case. The results were quite different. For example, when we asked, "Do you believe that

[1] The poll was conducted by Victory Enterprises, an Iowa polling firm, of 600 likely voters on March 1-2, 2010. The poll's margin of error is +-4%.

the government should have been able to prevent Citizens United, an incorporated nonprofit advocacy group, from airing ads promoting its movie?," respondents agreed with the ruling in the case by nearly a three to one margin (51.2 percent to 17.5 percent, with 27 percent undecided and 4 percent refusing to answer). We then asked about the second issue in the case: "Do you believe that the government should have been able to prevent Citizens United, an incorporated nonprofit advocacy group, from making its movie available through video-on-demand technology?," with a nearly identical result (51.2 percent said no, the government should not; 19.0 percent said yes).

We asked likely voters, "Do you support or oppose giving the federal government the ability to censor the production and distribution of political books and movies that are produced and distributed by corporations, including publishers like HarperCollins and movie studios like Warner Brothers?" Fifty six percent opposed giving government that power, while only 25 percent were in favor. And when we asked, "do you support or oppose allowing the federal government to impose criminal or civil penalties against individual citizens or corporations for spending money to engage in political speech?," only 28 percent supported such power for the government, versus 50 percent opposed.

Finally, we asked voters directly about the core philosophy guiding the Supreme Court's decision in *Citizens United:* "Do you think that the government should have the power to limit how much some people speak about politics in order to enhance the voices of others?" By a nearly four to one margin, respondents said no. http://www.campaignfreedom.org/doclib/20100304_CCPpoll03042010.pdf.

These findings are actually consistent with deep public support for the First Amendment and for the Supreme Court's longstanding holding that campaign contributions and expenditures are a form of free speech protected by the First Amendment. For example, a Gallup poll taken on the eve of the *Citizens United* decision, in October 2009, found that by a twenty point margin, adults agreed that "money given to political candidates [is] a form of free speech protected by the First Amendment to the Constitution." Over sixty percent of both Republicans and Democrats agreed. http://www.gallup.com/poll/125333/public-agrees-court-campaign-money-free-speech.aspx.

Of course, public opinion on the issue is complex. For example, the same Gallup poll just cited found that majorities favored limits to candidate campaigns. Polling data on campaign finance is extremely sensitive to wording, and the public is inconsistent in its preferences. In a detailed study of polling data over many years, political scientist David Primo of the University of Rochester concludes that on any close examination, the public's views on the subject are "wishy-washy," and that "Reflected in these views may be a tension between freedom of expression and a desire to prevent corruption." But either way, notes Primo, the issue is relatively unimportant to the public at large: "although campaign finance arouses great passion among governing elites, the general public does not much care about the issue." David M. Primo, *Public Opinion and Campaign Finance,* 12 Indep. Rev. 207 (2002).

Further, in looking at public opinion, it is important to note that the public knows very little about the campaign finance laws. For example, a 1997 survey for the Center for Responsive Politics found that only four percent of the public knew that corporations were barred by law from contributing to campaigns. Further, only one percent of respondents could answer correctly five questions about campaign finance law. Princeton Survey Research Associates, Money And Politics Survey (Apr. 1-24, 1997). We would imagine that this number on corporate contributions might be even lower in light of the barrage of news articles talking about corporate spending after *Citizens United,* many of which have mistakenly stated that the ruling allows corporate contributions to campaigns. Another example: Last year, in another poll taken for CCP, this time by Pulse Opinion Research, we found that in the midst of heavy reporting about "super PACs," 76 percent of respondents still did not know that "super PACs" must disclose their donors.

Similarly, the aforementioned and oft-cited Washington Post/ABC News poll did not ask respondents what, or even if, they actually knew anything about the *Citizens United* case, before asking their opinion on it (in terms that we consider less than neutral). Our poll, taken approximately five weeks after the decision and just three weeks after the Post/ABC Poll, did ask that question. Specifically, respondents were asked, "Are you aware of or have you followed the recent *Citizens United* case, related to corporate and union spending in elections, decided by the Supreme Court last month?" Only 22 percent answered yes, while 60 percent said no and 18 percent were unsure or refused to answer. This

helps to further explain why, when asked specifically about the issues in the case, support for the result vastly outweighed opposition, even as other polls show strong opposition to something called "*Citizens United*" and to large campaign expenditures.

As Columbia University law professor Nathaniel Persily, one of the few professors who has attempted to learn what Americans really mean when they answer polls on campaign finance, concludes, "The low salience that campaign finance reform has in most Americans' political calculations and most Americans' lack of understanding about this complicated topic necessarily create challenges in tapping opinions on these issues." Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Penn. L. Rev. 119, 132 (2004).

To summarize, the assumption that Americans would welcome a constitutional amendment to amend the First Amendment to overturn *Citizens United* is likely misplaced. A poll taken by the left-leaning Public Policy Polling in November 2010, for the pro-constitutional Amendment Progressive Change Campaign Committee, found that only 46 percent of respondents thought that Congress should even consider – let alone pass – a constitutional amendment to overturn *Citizens United.* http://www.huffingtonpost.com/2010/11/23/voters-strongly-back-amen_n_787526.html. In probing deep into public opinion on campaign finance, Professor Primo found that the lopsided polls favoring "reform" were, on close inspection, not so clear: "those carrying the mantle of reform," he summarized, "often claim a groundswell of public support for their positions, which flies in the face of the evidence." Primo, *supra.*

Unlmited corporate spending was legal in a majority of states before Citizens United, without the problems predicted by critics of Citizens United.

Although it is frequently said that *Citizens United* overturned 100 years of precedent (this statement is itself untrue – *Citizens United* found unconstitutional part of the Taft-Hartley law, at the time a 62 year old statute, and overturned two precedents, the six year old *McConnell v. Federal Election Commission* and the 19 year old *Austin v. Michigan*

Chamber of Commerce), in fact on the eve of *Citizens United,* twenty-eight states allowed corporate spending in elections, and twenty-six states allowed *unlimited* corporate spending in elections. One member of this Committee described the threat *Citizens United* allegedly posed to his state by saying, "Vermont is a small state. It would not take more than a tiny fraction of the corporate money being spent in other states to outspend all of our local candidates combined." (Statement of the Hon. Senator Leahy.) Yet prior to *Citizens United,* Vermont already allowed corporate spending in elections. See National Conference of State Legislators, State Laws Affected by Citizens United, at http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx.

There is no sign that these states were uniquely poorly governed. In fact, in a rating of state governments by the Pew Charitable Trust and Governing Magazine, the six best graded states all allowed unlimited corporate spending in state elections prior to *Citizens United.* Katherine Barrett & Richard Green, Governing: Measuring Performance (2008).[2]

Research shows that there is no meaningful linkage between campaign finance laws and public trust and confidence in government. See Primo, *supra*; Persily & Lammie, *supra.*

In fact, the public is highly skeptical that more regulation will improve government. Id. *See also* CCP Poll, asking, "In 2002 Congress passed the Bipartisan Campaign Reform Act, also known as 'McCain-Feingold.' The law placed new restrictions on corporate and union political spending and contributions to political parties, with the goal of reducing special interest influence. Do you believe that McCain-Feingold has been successful in reducing special interest influence?" Only fourteen percent said yes; forty four percent said no and the remainder were uncertain or declined to answer. All of this is a further reason to believe that the public would not be supportive of a constitutional amendment, but also that an amendment would not have the desirable effects claimed for it.

Despite much loose language to the contrary, in the 2010 and now 2012 elections, the vast majority of campaign money continues to come from individuals; the elections have been highly competitive; and voter

[2] Those states were Utah, Virginia, Delaware, Missouri, Georgia, and Washington.

turnout has been up, not down,

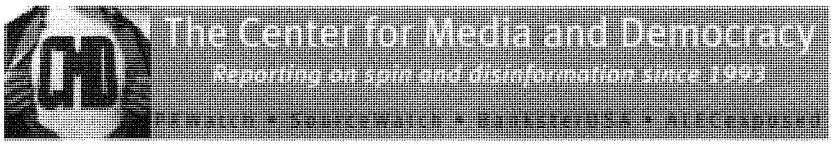
The Proposed Baucus Amendment would overturn far more than *Citizens United*

The proposed amendment to the First Amendment would do much more than overturn *Citizens United.* In its present form, it would invalidate *Buckley v. Valeo,* 424 U.S. 1 (1976), a landmark of First Amendment jurisprudence. While we will not review all of these cases here, this committee needs to consider that the Amendment would appear to overturn numerous free speech precedents, including but not limited to *United States v. C.I.O.,* 335 U.S. 106 (1948); *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290 (1981); *Federal Election Commission v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986); *Wisconsin Right to Life v. Federal Election Commission* 551 U.S. 449 (2007); *FEC v. AFL-CIO,* 628 F.2d 97 (D.C. Cir.), *cert. denied,* 449 U.S. 982 (1980); *Emily's List v. Federal Election Commission,* 531 F. 3d 1 (D.C. Cir. 2010); *Federal Election Commission v. Christian Action Network* 110 F. 3d 249 (4th Cir. 1997); *FEC v. American Federation of State, County and Municipal Employees,* 471 F. Supp. 315 (D.D.C. 1979), and *FEC v. Machinists Non-Partisan Political Action Committee,* 655 F.2d 380 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 897 (1981). .

In addition to overturning cases protecting the rights of politically active groups from across the political spectrum, its broad language would give the government power to regulate the public discussion of issues, and limit or ban speech that might be uncomfortable for incumbents or particular political actors. At its core, the proposed amendment creates an exception to the First Amendment, and does so in the area of political speech, where the courts have consistently noted that the First Amendment is most vital. Congress should move extremely cautiously in this realm, lest core and treasured rights to political participation be affected in unanticipated ways.

CONCLUSION:

As noted, many of our nation's best governed states, and a majority of all states, allowed unlimited corporate contributions in state elections even before *Citizens United*. These states did not suffer from the ill consequences advocates of a constitutional amendment have said will occur under *Citizens United*. The nation has yet to conduct a single presidential election since the decision in *Citizens United*; however, in the congressional elections of 2010 turnout was up and there were more competitive races than at any time since the Federal Election Campaign Act was passed prior to the 1976 election. It is far too early to begin talking about amending the First Amendment, and a careful reading of public opinion shows that such efforts will not likely be popular once the public actually sees the likely consequences of such an amendment.



Super PACs and Beyond:
How Shadowy Front Groups
Are Influencing Elections and Distorting Our Democracy

Statement of the Center for Media and Democracy*
Lisa Graves and Brendan Fischer**
Before the United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Human Rights

July 21, 2012

Thank you for holding this hearing on the accelerating crisis of how extraordinary sums of money are being raised and spent by CEOs and corporations to affect who wins political office and thus who wields power over people and policy. Our democracy *is* increasingly for sale.

These elections will by far be the most expensive elections in the history of the United States and, indeed, in the history of the world. And, that's based only on the spending that's disclosed.

Millions and millions of dollars will be raised and spent without any meaningful disclosure to the American people of the true identity of wealthy interests bankrolling influential ads and other activities. We may never know if they are individuals or corporations -- domestic or foreign.

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* The **Center for Media and Democracy** (CMD) is a non-profit investigative reporting group founded in Madison, Wisconsin. We publish **PRWatch.org**, **ALECexposed.org**, **SourceWatch.org**, **BanksterUSA.org**, and the **FoodRightsNetwork.org**. Our national reporting and analysis focus on exposing corporate influence on democracy and media. Recent awards include an Izzy (from the Park Center for Independent Media, named for investigative journalist I.F. Stone), a Sidney (from the Sidney Hillman Foundation, for investigative reporting), and an award for Excellence in Wisconsin Journalism (for a report written by CMD's executive director: "Group Called 'Citizens for a Strong America' Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?"). We share our work on Facebook under "Center for Media and Democracy" and "tweet" via **PRWatch** and **#ALECexposed**.

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Background. To understand what has changed, here is a thumbnail sketch of federal law in 2010 prior to the infamous Supreme Court decision known as *Citizens United* and the follow-on case named *SpeechNow*. If you had the money to spare, you could give a maximum of $2,500 to each candidate, $5,000 per PAC (which theoretically makes independent expenditures not coordinated with the candidate), and $30,800 to a political party, for a combined total limit of $117,000 per cycle. Donations to, and spending by, these entities would be disclosed for anyone to examine.

But, since 2010, there are no limits on how much money you can give to a PAC -- although the donors and spending will be disclosed. These "Super PACs," which are often run by friends of the candidates, are raising enormous sums via $500,000 or $1,000,000 checks. Most Americans couldn't afford to "max-out" under the previous campaign contribution limits, which well exceed the income of most voters. However, now a super-minority of people are limited only by their bank accounts in how much they can give to a PAC to try to alter the course of American history.

As a result, one recent analysis found that 80% of the tens of millions raised by SuperPACs, so far, came from only 196 individuals. They "represent" .0000006 of the country's population, and they will have an exponentially disproportionate impact on who wins and who loses this election. The other 99.9999994% of the population is basically out of the equation, except for the effort to manipulate the vote through attack ads or pro-candidate marketing pitches in feel-good TV ads.

Although substantial majorities of Americans (Democratic, Republican, Green, or Independent) believe the *Citizens United* decision was wrong, that corporations are not entitled to all the same rights as people, and that corporations already have too much power in our democracy, the PAC donations so far show that it is primarily people, not corporations, fueling these SuperPACs.

The reality is that some CEOs and their families have amassed such a massive "treasury" of money from their corporate investments that their personal capacity to put money into elections exceeds the treasuries of most companies -- and even some countries. The staggering amounts of their political donations may advance the corporate agenda and profits of these individuals (and their investments), but most of the SuperPAC donations so far are not directly *from* corporations. (That is one of the reasons why requiring shareholder approval of corporate election spending is the right thing to do in a democracy, but it is not sufficient; additionally, such rules will have not affect very powerful privately-controlled companies, like Koch Industries and Peabody Coal.)

But that's only the part of the spending to influence voters (mainly through ads) that *is* disclosed. Special interest groups that do *not* register as PACs have been emboldened -- by a number of judicial rulings, by the political deadlock at the Federal Election Commission, and by IRS rules that have not kept pace with the times. Some activities are advocacy and public education well within the rules, while others walk, talk, and spend like a PAC to influence elections.

Some act under the rubric of "issue ads" or partisan movies that purport to fall under the tax-exempt missions of non-profit groups. But it is no coincidence the ads or movies happen to be aired mainly before elections and are targeted mainly to battleground states and districts. That is precisely what the non-profit corporation calculatingly named "Citizens United" does. With the way the laws have been distorted, if a group does not "primarily" spend on ads with the magic words of "express advocacy" (vote for, vote against, or elect) and spends 51% annually on thinly-disguised "issue" ads under loosely-interpreted IRS rules, it can spend millions influencing voters or attacking candidates while insulating their donors from the public scrutiny that is now focused on SuperPAC donors. That is one of their perverse selling points.

Sunshine versus the Lure of Dark Money. Today's hearing shines a light on some of the big names who are openly spending money on Super PACs to help the candidate and agenda they want to win. Some of these billionaires or millionaires have long been public supporters of a particular political party or candidate. Notably, at least part of their spending in elections occurs in the light of day, although many people are rightly distressed by the influence of this money.

Though they may be vilified for trying to buy this election, some may be motivated to try to prevent the "other side" from buying the election and so attempting to fight fire with fire, as comedians Bill Maher and Stephen Colbert have suggested. Some may be quiet philanthropists who want to help make the world a better place. Others want to remake it in their own image and greedily grab more wealth through controlling the levers of power to privatize (profit-ize) and kill programs they ideologically hate, like Social Security or Medicare that they will never need.

Some "Super Donors" may relish the aura and reality of power that making such big political donations brings them among friends, colleagues, campaign workers, and others. The brands their wealth is associated with may be sufficiently enormous or popular or long gone that there is little risk of significant consumer reaction to their political agenda and much to gain if the horse they are betting on in the election wins the race. (Or they may believe they have much to lose if for example a candidate wins who believes that regulating their industry is in the public interest.) Long before there were Super PACs, many were already politically influential or were big-time "bundlers" whose connections or glamorous parties could generate many checks for campaigns.

In addition to the desire to shape public policy, such contributions can have socially competitive elements, a keeping-up-with-the-Jones' or an arms-race approach. Yet, there may still be some upper limit or outlier amount where such donations would provoke widespread public revulsion.

"Fortunately" for Super Donors and corporations that want to spend money secretly, nonprofit groups like Karl Rove's Crossroads GPS come to the rescue. Although their financial gifts to such groups are hidden from the rest of us, they need not fear their political beneficiaries won't know who's who. Informally, they can make sure everyone "who counts" will know them.

Efforts to address this have been thwarted. In sum, under provisions of Bipartisan Campaign Reform Act (BCRA, known as McCain-Feingold) that were *not* struck down in the *Citizens United* case, Congress sought to shed light on sham issue ads that were really "electioneering communications" by requiring that "all contributors who contributed" to the group running the ads be disclosed – if the donor gives $1,000 or more and the group spends more than $10,000.

But a group called "Wisconsin Right to Life" -- an instrument of James Bopp's agenda -- got the U.S. Supreme Court to strike BCRA's bar on corporations and unions spending from their general treasuries on electioneering communications if the ads did not contain the magic words of express advocacy or their "virtual equivalent," whatever that is. The FEC then decided donors only had to be disclosed if they *intended* the money be used in that way, although Congress avoided such a loophole. Rep. Chris Van Hollen challenged the FEC and won in district court.

Requiring disclosure only of those donors who say they are giving "for the purpose of furthering an independent expenditure" has resulted in more money being spent by nonprofit groups and a diminishing percent of donors disclosed. The rules operate like a "Don't Ask/Don't Tell" policy to keep the public in the dark. Meanwhile Senator McConnell is trying to use the First Amendment like a sword to prevent *any* disclosure, claiming disclosure chills speech (money).

Nonprofits Are Now the "Swiss Bank Accounts" of Spending on Ads to Influence Elections. Perhaps one of the grand ironies of the current partisan divide is that the same party that is demanding in many states that voters prove their identity to vote is fighting tooth and nail to prevent the disclosure of the identity of donors to special interest groups running ads to influence voters. The proponents of new restrictive laws to make it harder for Americans to vote have filled the airwaves with baseless claims of "voter fraud" to impose new identification restrictions -- that track the model bill of the American Legislative Exchange Council that has been outed by ALECexposed.org -- but they (like ALEC) simultaneously seek to keep the identity of donors to special interest groups influencing the elections and thereby public policy hidden from view.

Unlike for direct contributions to candidates, there are no bars on foreign national or foreign corporations contributing to nonprofit groups that are not PACs. There are also no limits on how much money can be given, as with Super PACs but without disclosure of donors, big or small.

Nonprofits really are becoming the Swiss bank accounts of spending to influence elections.

With nonprofit spending on ads, the donors are kept secret from the American people, basically forever. And, the spending is not counted in mandatory reports to the FEC that were designed to keep the press and public more aware of who is behind such advertising. Instead, nonprofit groups file an annual form with the IRS, usually months after an election is over, that summarizes their revenue and spending (often described as "educational" activities). The forms provide no details about what kind of ads were purchased, where they ran, or what they said.

The Federal Communications Commission, with three commissioners and a current Democratic majority, recently required TV stations -- in the 50 biggest media markets affiliated with the four major commercial broadcast networks (NBC, ABC, CBS, and FOX) -- to post information about political ads that are purchased. The rule – more than a decade in the making -- leaves out many cities (for example, all of Wisconsin except Milwaukee) and some whole states (such as Maine, Vermont, and New Hampshire) as well as major broadcast outlets like Univision. But it is a step in the right direction and an important interim measure while comprehensive reforms are pushed.

Meanwhile, Politico recently reported that Karl Rove's Crossroads operations (the PAC called "American Crossroads" and the nonprofit called "Crossroads GPS") plan to spend about $300,000,000 in the 2012 elections -- in combination with about $400,000,000 from entities connected with the Koch Brothers and another couple hundred million, for a grand total of one billion dollars. Only small part of Rove's part of this spending and donors will be disclosed, through the American Crossroads PAC, whose funders have been almost exclusively billionaires and corporations. Crossroads GPS is not registered as a PAC and is instead a 501(c)(4) nonprofit.

Just doing the math, Rove's PAC received nearly $6 million in funds last month and had $31.5 million in the bank. That leaves a couple hundred million of his $300 million spending pledge unaccounted for. Under current law, the public will not know the revenue of his nonprofit, Crossroads GPS, until mid-2013, and even then the American people will not know the identities of the corporations or individuals that bankrolled it, unless something dramatically changes.

Rove's public PAC and his dark money operations are enormously powerful and troubling. The IRS has reportedly begun scrutinizing such nonprofits and the New York Attorney General has opened an investigation about how much of his nonprofit's work is genuinely for the benefit of the general public as required by its tax exemption, versus for narrow or partisan gain. With only about 100 days before the election, neither of these will be resolved before that money is spent.

Conclusion. As case studies of nonprofit spending detailed in the appendix show, there are many types of groups besides candidates and SuperPACs whose spending influences elections. Some such groups fully comply with weak existing laws; some appear to exploit the lack of disclosure required about the corporations or individuals that are bankrolling their operations or their spending on ads. Some obscure even basic address information about who or what the group really is. In this Wild West environment, and with the impediments to enforcement of the current rules, it appears to be extremely easy for a nonprofit group to basically launder money to influence elections that a corporation or individual does not want connected to themselves.

There is no limit on the receipt of money from foreign corporations or individuals that is spent on such ads by 501(c)(3), (4), and (6) organizations. Despite misleading assertions that the Court has leveled the playing field between corporations and unions, the most closely regulated entities appear to be the (c)(5) unions, which constitute the only one of these major 501(c) categories that definitively represents an association of individual Americans and that is not a corporate-funded front group or fronting for some other hidden interests. They are also required to report their overall political spending to the Department of Labor in a way no other nonprofit category is.

That's why we know so much more about their spending in elections than other entities, which leads to many distortions in reporting on election spending since groups like Americans for Prosperity and Crossroads GPS are not counted. The other groups involved in elections, whether their listed name is "Citizens" or "Americans" "Coalition" "League" or some other such identifier, unlike unions, might have very few donors or members and their financial backers could be a mere handful of extremely wealthy individuals or closely held corporations.

In the current environment, this information is hidden from public view unless the group files as a PAC or independent expenditure group. Moreover, the definitions of an "independent expenditure" and the amount of political activity that would disqualify a 501(c) from tax-exemption need real clarification to drive as much fundraising and spending that influences elections into the sunshine and out of the darkness.

But, to be quite blunt, increased disclosure -- although very important -- is simply not enough.

As an organization that investigates front groups and the activities of shadowy nonprofits, the Center for Media and Democracy can attest that even full disclosure to the government of the real identities of the top few funders may not alert the audience to the financial or other interests behind such ads. And, as the CAVA example in the index shows, the funder disclosed may just be another unknown or secretive entity.

And, then you have the situation demonstrated by the SuperPACs themselves. People can learn who funds them but depending on the effectiveness of the ad, an audience provided with the names of the main funders may not know who they are or have time or capacity to look further.

In some, the activist judges, abetted by partisan politicians, who have changed the law to turn our elections into a "marketplace of ideas" have actually transformed it into just a marketplace. In that marketplace, voters are sold goods they cannot return (un-elect) for years at a time by groups whose financial interests or ideological agenda is secret and with no accountability for whether the ads are truthful or deeply misleading. A candidate's "independent" allies can run attack ads they can disavow if the ads go too far and they usually do know who the major group donors are.

Meanwhile, elected officials can be threatened by corporations or their front groups with the potential that they will be subject to potentially overwhelming (and indeed unlimited) spending if they vote the wrong way. That has certainly been one of the ways the NRA has wielded its financial heft even before *Citizens United.* The NRA does not always have to spend in each election to win its results; through its financial reserves it has Cold War-style deterrence powers.

And beyond all this, there is simply no rational denying that extraordinarily wealthy corporations and individuals now have more potential power over who wins elections than at almost any time in a century, since dating back to the era of the "robber barons." The system really is broken.

Given the short-time before the election and the political reality in Congress, there appears to be no time or power to do anything legislatively in response to the coming tsunami of ads. In some ways, the question is what happens next, *after* the first post-*Citizens United* presidential election.

Numerous public interest groups – such as Public Citizen, People for the American Way, Move to Amend, Free Speech for People, Common Cause, and the Center for Media and Democracy, several major labor unions, and other organizations, plus socially responsible businesses and several state officials – are on record calling for *Citizens United* and related decisions to be overturned.[2] We know the laws must be changed to restore the proper role f citizens (not unelected judges) in setting rules for our elections and the role of corporations in our democracy.

The movement that is being built in cities, counties, and states across the country to reject what *Citizens United* has come to symbolize grows stronger by the day. It will grow stronger still as Rove and his allies unleash their funds in this election, come what may on election day. The people know something's got to give. They know the laws must change because too many politicians are already too captured by the status quo of how they themselves must raise money to fund their elections and retention in office. We know that many laws must be changed to restore the proper place of We the People in our democracy: the Constitution and election, communications, corporation, and tax laws. It may seem daunting, but what is the alternative?

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[2] Here is the full list of endorsers of the statement of principles of the united4thepeople.org constellation of groups: 350.org, The Berkshire Environmental Action Team, California Church Impact, Campaign for America's Future, Campus Progress, Center for Biological Diversity, Center for Corporate Policy, Center for Environmental Health, Center for Health, Environment Justice, Center for Media and Democracy, Center for Science in the Public Interest, CivicSponsor, Clean Water Action, Clean Water Network, Coalition of Immokalee Workers, Code Pink, Coffee Party USA, Common Cause, Communications Workers of America, Consumer Action, Consumer Watchdog, CREDO Action, Corporate Accountability International, Democrats.com, Democracy Unlimited, Demos, Drinking Liberally, Des Moines Chapter, Earthworks, Earth Day Network, EnviroJustice, Ethical Markets, Food and Water Watch, Food Empowerment Project, Franciscan Action, Free Speech for People, Friends of the Earth, Generation Waking Up, Get the Dough Out, Global Alliance for Incinerator Alternatives (GAIA), Global Community Monitor, Grassroots Recycling Network, Greenpeace, Hip Hop Caucus, Indiana Alliance for Democracy, Institute for Agriculture and Trade Policy, Institute for Policy Studies Global Economy Project, International Forum on Globalization, International Labor Rights Forum, Liberty Tree Foundation for the Democratic Revolution, Main Street Alliance, Maryknoll Office for Global Concerns, Money Out of Politics, MoveOn.org, Move to Amend, National Alliance of Latin American and Caribbean Communities, National Congress of Black Women, National Council of Jewish Women, National Council of Women's Organizations, National Education Association, National Women's Health Network, The New Bottom Line, New Progressive Alliance, Oil Change International, OMB Watch, The Other 98%, Panchamama Alliance, Pax Christi USA, People for the American Way, Pesticide Action Network North America, Physicians For A National Health Program, Program on Corporations Law & Democracy, Progressive Democrats of America, Public Campaign, Public Citizen, Rainbow-PUSH Coalition, Rainforest Action Network, Rebuild the Dream, Renew Democracy, Responsible Wealth Project, RootsAction, Sacramento for Democracy, Sea Turtle Restoration Project, Service Employees International Union, Sierra Club, SisterSong Women of Color Reproductive Justice Collective, Story of Stuff, Sum of Us, The American Institute for Progressive Democracy, The New Bottom Line, The Other 98%, The Pachamama Alliance, UAW, Unitarian Universalist Association of Congregations, United for a Fair Economy, United Republic, U.S. PIRG, U.S. Youth for Sustainable Development, Veterans for Peace, VPIRG, We the People Campaign, Where's Our Money, Wisconsin Democracy Campaign, Wisconsin Wave, A project of the Liberty Tree Foundation, Wolf-PAC, Working Families Party, Working Families Win, and the World Constitution and Parliament Association.

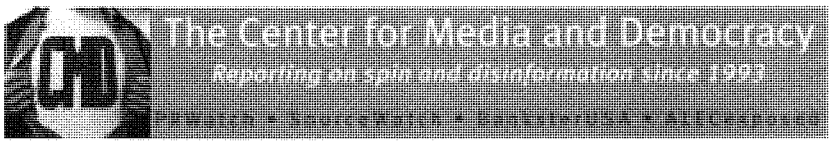
As this conversation moves forward in the months ahead, we must be clear about what proposed solutions might fix which identified problems, such as those identified by in our case studies and other investigative reporting. We must be mindful of both intended and unintended consequences of constitutional amendments to solve the vexing problems that are undermining the integrity of our elections and even what it means to be represented in this democracy.

To help work through these issues, Greg Colvin, who is a partner at the law firm of Adler & Colvin, who has studied and counseled on nonprofit political tax law issues for many years, has devised twelve questions he recommends that drafters and reformers answer, in addition to ensuring that the language of any amendment is as brief and clear as it can be:

Twelve Questions for Drafting a Constitutional Amendment on *Citizens United & Beyond:*

1. What is the main purpose? Is it to drive the big money, from all sources, out of elections? Or is it to abolish corporate personhood?
2. If none of the rights extended to corporations are still protected by the Constitution, what would the consequences be -- outside of the realm of elections?
3. What would happen the day after the amendment was adopted? Would corporate and business spending in elections stop or would legislation and litigation be required?
4. What kinds of legal entities does the amendment apply to?
    a. business corporations
    b. nonprofit corporations
    c. labor unions
    d. other forms of organization (associations, trusts, LLCs, partnerships)
    e. all of the above
5. How should the campaign spending of individuals (including candidates) be regulated?
    a. no limits on personal spending
    b. authorize Congress and the states to set limits
    c. set dollar limits in the Constitution
    d. prohibit completely
6. Should all campaign contributions and expenditures be publicly disclosed? Or should Congress and the states allow small donations to be anonymous? In view of all that secret money that flows through nonprofit groups for political "issue ads," how do we force them to disclose their sources?
7. Should public financing of campaigns be required, permitted, or prohibited?
8. Does the amendment cover both candidate elections and public votes on ballot measures?
9. Are all levels of government covered: federal, state, city, town, and county?
10. Is any special wording needed to protect freedom of the press?
11. Should other subjects be covered in the amendment, such as making election day a holiday, shortening the campaign season, simplifying voter registration, requiring paper ballots, addressing voter disenfranchisement?
12. Should there be two or more amendments on different issues, or one unified proposal?

We believe these important questions need to answered as part of any amendment strategy. In the view of the Center for Media and Democracy, the Supreme Court decision in *Citizens United* must be overturned because it allows the voices of real people to be drowned out by ventriloquists who throw their "voices" through money. The Court claims our democratic charter commands that we allow untrammelled amplification of those who have the money to fund the purchase of commercial TV ads over the rest of us who don't. We the People know it does not.



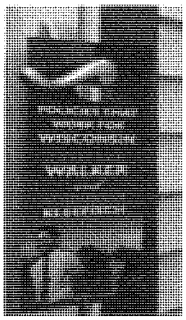
Beyond Super PACs
Appendix to the Testimony of the Center for Media and Democracy
July 22, 2012

Case Studies of Nonprofit Spending that Influences Elections. The Center for Media and Democracy has been working to expose corporate front groups for almost twenty years. Although Congress has previously passed measures to address some of the most egregious ways money and virtually anonymous attack ads are undermining the integrity of American elections (as with the 527 rules adopted in the middle of the 200 campaign and BCRA in 2002), some Senators have thwarted much needed disclosure.

In this climate, it should come as no surprise that groups that do not report their donors or their ad spending have flourished. Some of the groups, like the U.S. Chamber of Commerce and its Institute for Legal Reform, have been around for years and have been increasingly involved in activities that ordinary citizens perceive as political or electoral. Other groups have popped more recently, with little information about who they really represent, let alone who funds them.

Many groups running ads to influence elections are operating outside of the PAC rules as 501(c)(3), (4), (5), and (6) organizations. Concerns about them need to be part of the discussion of the problem and the search for solutions. The case studies below focus first on the most recent major post-*Citizens United* election (in Wisconsin) and on the dark money spent in the Iowa presidential primary.

Americans for Prosperity


Despite what AFP materials say, it claims this isn't about candidates...

David Koch's Americans for Prosperity (AFP) reportedly spent $10 million on Wisconsin's election that was held last month in which a million citizens petitioned to recall controversial Governor Scott Walker but fell short on election day. It spent more than Walker's opponent, Tom Barrett, raised or spent, but it did not register with the state elections board, did not disclose who besides Koch was funding its operations, and did not report how it spent the $10 million it bragged about spending.

AFP's activities provide a snapshot of the group's likely operations in the presidential race and other elections as part of the $400 million David Koch and his brother Charles have reportedly pledged as part of the billion dollar club Rove is helping in order win the White House and Congress.

In the weeks before the election, the director of AFP's Wisconsin arm, Luke Hilgemann, told reporters AFP's ads, bus tours, rallies, and mobile phone banks had nothing to do with the elections: "We're not dealing with any candidates, political parties or ongoing races." One the thousands of door hangers distributed by AFP is photographed above and plainly contradicts AFP's claims. Hilgemann also said "We're just educating folks on the importance of the reforms" of Walker -- which AFP previously backed with a "Stand with Walker" ad and sign blitz in 2011 when protests of the governor's reforms rocked the state.

The AFP Foundation is a "charity" registered under Section 501(c)(3) of the Internal Revenue Code. It spent at least $3 million on television ads that looked like clear appeals to re-elect Governor Walker. The

ads touted the alleged benefits of Walker's controversial changes to state law and reinforced similar themes of ads by the candidate. The AFP Foundation also organized a series of meetings across the state to "educate" voters on the importance of Walker's reforms. The ads and meetings were produced in collaboration with the Wisconsin-based MacIver Institute, which is also organized under Section 501(c)(3) of the Code.

As 501(c)(3)s, both the AFP Foundation and MacIver Institute are prohibited from intervening in political campaigns. This absolute prohibition on 501(c)(3) electoral activity has been justified because corporate or individual donations to groups like these can be written-off as tax-deductible charitable deductions. The policy and legal judgment is that American taxpayers should not forego tax revenue so a corporation or individual can influence elections – in other words, taxpayers should not be forced to subsidize a corporation's or person's political activity.

AFP organized rallies, canvassing, phone banks, and bus tours to promote Walker's reelection. Starting a week before the election, the group kicked-off the "A Better Wisconsin Bus Tour" and visited ten Wisconsin cities before concluding the tour three days before the election in Racine, where Walker's race and that of a state senator were particularly close. AFP's Illinois arm bused-in out-of-state residents to meet up with the rally and canvass Racine neighborhoods to "make our voices heard in support of the Wisconsin reforms." Attendees were charged only $5 for a round-trip bus ticket with lunch and dinner provided. (By comparison, a round-trip commercial bus ticket from Racine to Chicago would cost $47, lunch, dinner, and politics not included.)

AFP also boasted that it flew-in 70 paid staff members for the effort, and recruited students and others to call voters on AFP-provided cell phones (dubbed "Freedom Phones") and to canvass neighborhoods. Other AFP arms across the country organized "phone banks for patriots" to make phone calls to tell Wisconsin residents to "support the Wisconsin reforms" before the election. All these supposedly non-electoral activities stopped once Walker won the race.

AFP does have a (c)(4) wing which can engage in a limited amount of "independent expenditures," in the aftermath of the *Citizens United* decision, but based on Hilgemann's repeated denials that AFP was doing so, it is not clear if AFP actually classified the expenses for the canvassers, bus tours, and phone banks under the 501(c)(3), which gives a tax write-off to donors, or its 501(c)(4). What is clear is that it disclosed no independent or electioneering expenditures to the state, even though David Koch's right-hand man who manages AFP's daily activities, Tim Phillips, told CNN the group spent a total of $10 million supporting Walker in Wisconsin. **AFP refused to disclose its donors or report expenditures.**

Citizens for a Strong America

In addition to tracking AFP in Wisconsin and other states, the Center for Media and Democracy also identified another group spending to influence an election in the state that was linked to AFP staff.

That group, called "Citizens for a Strong America" (CSA), spent over $200,000 on ads in Wisconsin's Supreme Court race, but as the Center for Media and Democracy documented, its address of "834 Park Avenue #306" in Beaver Dam, Wisconsin, was nothing more than a drop box at a UPS Store. CSA ran attack ads about Joanne Kloppenburg in her race against David Prosser, a judge and former Republican state legislator.

When the ads were run, CSA listed no information about its leaders, employees, or funders on its website, citizensforastrongamerica.net. Its contact information was a free Google mail account: citizensforastrongamerica@gmail.com. Its website name was purchased by John W. Connors of Milwaukee, whose job at Koch's Americans for Prosperity was described as grassroots campaigns and marketing (his work email address routed to @afphq.org). CSA's website's domain registration listed Connors's own gmail account as the contact and the business address for the domain was 1126 S 70th Street, Suite S420, in Milwaukee, which is in the same building as AFP's Wisconsin arm, but a different

room number. There is no evidence that AFP orchestrated the group's operations. Connors, whose full-time job is with AFP, is the part-time "president" of CSA, operating in the same building.

But the plot thickens. CSA's address was the same as for another group named "Campaign Now." That group's web address was also registered to Connors. And Campaign Now used the same telephone number that AFP's Wisconsin arm used to register people for buses to support Walker. And yet another group, Watchdog.org, which is associated with the "Franklin Center for Government and Public Integrity" was also registered by Connors, who previously worked for Walker and also was listed as AFP's "Students for Prosperity Director." The Franklin Center is funding state-based "news" outlets that echo the Koch agenda and ideology. Its funders are not disclosed.

Connors has helped coordinate AFP's tea party summits in the state and also helped launch AFP's new "home headquarters kit," an update on AFP's "pyramid-type campaign" that was used by operative Mark Block and then-candidate George W. Bush in Wisconsin to identify voters and get them out to vote for his run for president in 2000.

At the time the ads were run in the Kloppenburg-Prosser race, it was very difficult for the press and citizens to find out who was behind hundreds of thousands reportedly being spent in ads during the election, although they were traced back to UPS mailbox and a staffer for AFP.

Several months after Prosser won the election, CSA filed its annual 990 as a 501(c)(4) organization for the year *before* these ads were purchased. Although CSA's expensive attack ads about Kloppenburg focused on a farming case it criticized her for and also falsely claimed she had attacked her opponent for not prosecuting a child molesting priest, CSA told the IRS its charitable mission was "to promote and conduct research on public policies that reduce tax burdens on families, increase public safety, and protect the rights of parents to make decisions about their children's medical, psychological, and educational well-being." In 2010, CSA did give over $179,000 of its $378,000 in revenue to the group "Wisconsin Right to Life" (which has been litigating against federal and state election disclosure rules) and it gave over $50,000 to a group called "Wisconsin Family Action."

To date, there is no public information about who funded CSA in 2011 and who underwrote its ads in the state Supreme Court election. Due to the gap in time between CSA's activities last year and IRS filing deadlines, even the general revenue and expenses of the group for that year are not known. Since CSA ran ads in the Supreme Court race, its website has had no changes for over a year.

In the current regulatory environment, there is almost nothing to prevent a nonprofit group like this from being created and used to hide the identity of donors funding ads to influence elections. What little disclosure there is comes long after the election results are in, and unless watchdog groups are keeping a close eye on such groups, the IRS may never discover the dissonance between the stated mission for which the group received its nonprofit status and its actual activities.

Moreover, under the disarray caused by *Citizens United* in creating a permissive environment for all sorts of shadowy nonprofit groups to run such attack ads, CSA is merely one example of groups operating out of mail dropboxes. **CSA does not disclose its donors or ad expenditures.**

Coalition for American Values

Another group that ran ads before the Wisconsin recall earlier this year was the "Coalition for American Values Action" (CAVA). Last year, CAVA registered as a corporation in Wisconsin under new rules requiring the registration of corporations making independent expenditures here. CAVA's state registration lists its address as 6650 W. State Street, Suite 271, in Wauwatosa on the edge of Milwaukee. It is the address of a UPS Store with mailboxes. CAVA disclosed one other business address to the state.

The name of CAVA's treasurer -- whose address is also listed at the UPS Store -- is Brent Downs. He is also listed as the treasurer a federal PAC linked to CAVA. (He was previously the contact person for the Marquette Chapter of Students for Prosperity, which is the student arm of Koch's Americans for Prosperity, and its address then was listed as the home of AFP's John W. Connors, mentioned above.)

In the PAC's Federal Election Commission filings from June for the prior month, it reported having spent only $78.63, raising only $4,265, and having $16,588 on hand at the end of May.

However, in Wisconsin, CAVA reported spending $400,080 on ads supporting Scott Walker's reelection during that same period. CAVA reported that all the funds for these ads came from itself in two donations, and made expenditures in the same amounts and on the same days: CAVA reported receiving $385,300 on May 24 and spending $385,300 on May 24 (on "Media-Videos"), and receiving and spending $14,780 on May 30 (on "Media-TV").

The real source of these funds, though, remains secret. The individuals or organizations that gave money to CAVA was not disclosed to any state or federal authority, and the people of Wisconsin are left in the dark about who is really behind these ads.

CAVA told the FEC its address is 119 S Emerson St #231 in Mt Prospect, IL. This is also the address given for CAVA's attorney, James Skyles, in its Wisconsin registration. Skyles is the Director of Operations for the Franklin Center for Government and Public Integrity (which John W. Connors helped in the launch of its Watchdog.org site.) During the recall election, the Franklin Center's Wisconsin operation, the "Wisconsin Reporter," advanced a pro-Walker, anti-union message in its reports.

Further investigation revealed that although CAVA told Wisconsin's elections board that it was also located in Illinois, it is apparently incorporated in Virginia. It incorporated on November 21, 2011, just as circulators in Wisconsin began collecting signatures to trigger the recall of Governor Walker. In Virginia, its registered agent is Matthew Muggerridge, who is also a staff attorney at the anti-union National Right to Work Foundation.

CAVA's ads flooded the airwaves in the final weeks before the election and attracted significant attention by making a unique appeal -- instead of promoting Walker or attacking his opponent, the ads attacked the premise of the recall itself. The ads depict individuals saying they didn't vote for Walker in 2010, yet will vote for him in 2012 because they oppose the recall.

Spending $400,000 in the Wisconsin media market, over a period of just two weeks, amounted to a lot of ads. These ads, coupled with similar messaging from Governor Walker, proved effective. Exit polls on June 5 showed that sixty percent of voters thought recalls were only appropriate for cases of official misconduct and ten percent thought recall elections should never be held. In contrast, a St. Norbert College/Wisconsin Public Radio poll of voters conducted in November 2011, just as the recall was launched and CAV was created, asked if voters supported using the recall to remove Walker from office. Fifty-eight percent of those surveyed said "yes" and 38 percent rejected the use of the recall to remove the governor. The secretly funded ads appear to have made a difference in the outcome of the election.

Wisconsin voters never knew who was really behind the ads, or that the ads, which talked about recall not being "the Wisconsin way," was funded by secretive out-of-state group. Without knowing who is really behind these ads, voters cannot know whether future legislative or governmental activity favors the funders. Whoever donated over $400,000 to CAVA to influence the recall election may have viewed their contributions as an investment, and accordingly, could communicate their identity to the politician who benefitted from that investment. If the public does not know who is funding these ads, it cannot hold elected officials accountable if they provide their benefactors a return on their investment that is untraceable. **CAVA's income sources are secret.**

The Iowa Presidential Primary Spending by Nonprofit Groups

In the Iowa presidential primary, an array of nonprofit groups organized under Section 501(c) of the tax code spent millions influencing the outcome of that state's primary and influencing the issues discussed in the primary. None of these groups disclosed their funding or spending.

Although none of the groups active in the Iowa primaries were very transparent about their funding and spending, some information about their activities was available through a review of television ad buys in the Des Moines and Cedar Rapids media markets. Compiling that data involved a site named "IowaPolitics" actually going to the four network TV stations in those markets and physically picking up the records, which helped provide some data for this snapshot of 501(c) activity in this crucial primary.

Crossroads GPS

Karl Rove's Crossroads GPS (CGPS) is a 501(c)(4) that spent $310,000 on ads in Des Moines and Cedar Rapids between June 28 and December 27, 2011. CGPS ran three so-called "issue" ads in summer of 2011 attacking President Obama, and two ads starting in October 2011 attacking both Obama and conservative Democrat Rep. Leonard Boswell for supposedly being too supportive of Obama. CGPS ran another ad in December attacking Obama about Solyndra.

Although this is a drop in the bucket compared with CGPS' anticipated spending in the general election, it spent more than any other non-candidate group. And, as noted earlier, its donors are not disclosed. So, for example, it is not known whether the ads attacking the President on solar energy are funded in part by corporations or CEOs with a financial interest in competition with solar energy, such as oil and gas companies that have long opposed federal investments in solar energy while zealously defending their own tax subsidies. **CGPS does not disclose its donors and did not disclose these expenditures.**

Citizens United

"Citizens United" is a 501(c)(4) that spent hundreds of thousands in Iowa in the run-up to the primary. Its president David Bossie is reportedly a friend of then-candidate Newt Gingrich.

According to ad buy records, Citizens United spent $29,600 in Des Moines and Cedar Rapids on ads that ran between July 25 and July 30. The group reportedly had spent a total of $75,000 on anti-Obama TV ads, as of December 2. The group also ran :30 ads in late December featuring Newt Gingrich and promoting a 2009 Ronald Reagan documentary Gingrich had produced. The ad does not mention the election or Gingrich's candidacy. In the ad, Gingrich says, "[Reagan's] rendezvous with destiny is a reminder that we all have a similar rendezvous, and that together, we can create a better future for America." According to Politico, the ad reportedly cost $250,000.

It also promoted its latest movie, "The Gift of Life," which reportedly spurred then-candidate Rick Perry to announce that he was changing his position to oppose the option of abortion if a woman becomes pregnant from rape or incest. (Citizens United's prior election-time movies focused on candidates, like Hilary Clinton.) **Citizens United's donors and its total expenditures in Iowa are secret.**

Strong America Now

"Strong America Now" (SAN) is a 501(c)(4) organization that claims not to support any particular candidate and is focused on advocating that government adopt a particular approach to cutting waste. However, in November 2011 the group's founder created a Super PAC with the same name to support Gingrich's candidacy.

During the Ames straw poll in August, SAN bussed people to the straw polls and held parties, spending $60,000 to buy tent space and the names of previous caucus-goers and straw poll voters. The group then sent 75,000 candidate "report cards" in December 2011 rating candidates and mailed caucus videos to likely caucus-goers. SAN also spent around $73,400 in the Des Moines and Cedar Rapids markets for 190 ads it ran between February and June 2011. These ads did not name President Obama or any of the Republican candidates were called "Our Debt & Our Future and promoted its cutting government waste. **The SAN (c)(4) does not disclose its donors and did not report its spending to influence the primary.**

American Petroleum Institute

The American Petroleum Institute (API) is a 501(c)(6) trade association funded by oil and gas interests. Like nonprofit groups organized under Section 501 (c)(3) and (c)(4) of the tax code, it is not required to disclose its funding or spending. Unlike a (c)(3), however, donations to it are not tax-deductible.

API did not endorse any candidate in the Iowa primary or any other primary state, but it did invest significant amounts of money to influence opinion about oil and gas interests, which is a precursor to what is likely to be heavy advertising in the general election for the White House. For example, API commissioned a poll in November purporting to show Iowa voters want domestic energy development. It commissioned another poll in March claiming Iowa voters oppose new oil and natural gas taxes.

API also formed the "Iowa Energy Forum," a corporate front group, some time before June, which according to Think Progress and the Des Moines Register, planted people in Iowa forums and candidate events to ask questions to candidates about domestic energy production. The IEF sponsored lectures at Iowa State University with API chief economist John Felty, who claimed that gas companies don't get oil subsidies (which was rebutted by the Iowa Renewable Fuels Association). Their lecture in May was attended by Gov. Terry Branstad. API/IEF also sponsored a lecture in November with API's John Felty called "Energizing America: Facts for Addressing Energy Policy."

Another API front group "Energy Citizens," which appears to be a 501(c)(4) nonprofit, also sent staffers to the Ames straw poll and provided an air-conditioned tent with music, food and entertainment, and provided free bus rides and free tickets to the straw poll.

According to ad data, API spent around $93,000 on ads in Des Moine and Cedar Rapids between March and October 2011. It is not known whether they ran more ads after October. The group also gave $100,000 directly to the Iowa Republican Party. **Although it is possible to discover which corporations are affiliated with API, it does not affirmatively disclose its member corporations or the amounts they generally provide.**

Coalition for American Jobs

Like API, the Coalition for American Jobs (CAJ) is a 501(c)(6) trade association, but it is not specific about what industries it represents. According to the group's website, it "represent(s) American businesses, industries and others concerned about the impact of potential EPA action on job creation." CAJ is reportedly supported by chemical and oil lobbies.

Like API, CAJ appeared focused on shifting the terms of the debate rather than supporting any particular primary candidate. For example, CAJ spent $56,650 on a :30 tv ad that ran near the Ames straw poll in mid-August on several stations in Des Moines, Cedar Rapids, and Waterloo. "In a rush to regulate, the EPA wants to impose unnecessary ozone rules – government regulations that will cost business up to $90 billion a year and threaten manufacturing and construction jobs in nearly every county in the country. Call today, and tell President Obama America needs jobs, not more government regulation," over an on-screen phone number. Other reports say CAJ spent around $75,000 on ads in Iowa. **CAJ does not disclose its donors and did not disclosure its ad expenditures.**

The U.S. Chamber of Commerce

The country's most politically active 501(c)(6) trade association, the U.S. Chamber of Commerce, spent $59,700 on 121 TV ads that ran between late September and late November. One ad touts Rep. Tom Latham's stance against President Obama's policies of "bigger government and higher taxes." Viewers are told to call Tom Latham and "tell him to keep fighting for Iowa jobs." **It is anticipated that the Chamber will spend millions more in this year's general election and it does report some of its election spending to the FEC.**

Coalition to Protect Patient's Rights

The Coalition to Protect Patient's Rights (CPPR) is a 501(c)(4) nonprofit formed in 2009 to oppose federal health care reform. It is managed by the infamous astroturf lobbying firm DCI Group. Exactly which healthcare, insurance, or pharmaceutical interests fund it are unknown.

The group spent $10,650 on ads that ran between August 16 and August 22 in Cedar Rapids and Waterloo. The ads say: "After cutting $500 billion from Medicare, the president's health care law created a new board of 15 unelected bureaucrats. Unaccountable -- like a Medicare IRS, with the power to cut payments to doctors, and deny seniors care to pay for more wasteful Washington spending. Tell Washington: bureaucrats shouldn't have the power to deny seniors care" with a phone number on-screen. This was part of a reported seven-figure national ad buy. **CPPR does not disclose its donors or report expenditures on ads like these.**

Know Your Care/Protect Your Care

Know Your Care (KYC) is a 501(c)(3) and Protect Your Care (PYC) is a 501(c)(4), which are is a pro-health reform group that was also active in Iowa. KYC ran :30 ads called "Bagel" in mid-August, around the time of the Ames straw poll and GOP debates, touting the benefits of President Obama's health care plan. Politico reported that the ad cost five-figures to run in the Des Moines market, but the IowaPolitics analysis of ad buys found only $16,636. The ad was reportedly accompanied by "saturation" level online ads in Des Moines and Ames. PYC reportedly had staffers on-the-ground in Iowa in advance of the Ames straw poll, and distributed a memo highlighting each of the GOP candidates' position on health care (and particularly the individual mandate). **KYC/PYC do not disclose their donors or report ad expenditures.**

Partnership to Protect Medicare

The 501(c)(4) Partnership to Protect Medicare (PPM) claims to fight purported cuts to Medicare, and ran a :30 tv ad asserting that "some in Congress want to come between seniors and their doctor, with more cuts to Medicare Part B" and asking viewers to call Rep. Tom Latham (R) and "thank him for protecting seniors at their greatest time of need." PPM spent $42,440 on 67 ads in Iowa between Nov 5 and November 18. The Iowa ads were part of a multi-million dollar ad buy thanking several Members of Congress for opposing cuts to Medicare Part B. **PPC does not disclose its donors or report its ad expenditures.**

COMMON CAUSE
Holding Power Accountable

Common Cause Testimony to the
Subcommittee on The Constitution, Civil Rights and Human Rights of the
United States Senate Committee on the Judiciary Hearing

Taking Back Our Democracy: Responding to* Citizens United *and the Rise of Super PACs

July 24, 2012

Submitted by Bob Edgar
President and Chief Executive Officer
Common Cause

Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. On behalf of our 400,000 members and supporters, we appreciate the opportunity to submit this testimony to this Subcommittee about the proliferation of Super PACs and the call for an Amendment to the Constitution to restore the voices of average, ordinary Americans in our elections once and for all.

Mr. Chairman, Super PACs have transformed our elections into the sport of kings. Billionaires and corporations are pooling unlimited sums of money into joint accounts, pledging astronomical sums in support of or opposition to candidates, and recklessly drowning out the voices of the American people. These corporations and mega donors are motivated by an expectation of influence and access, often at the expense of the public interest. We cannot afford to auction off our vibrant democracy to the highest bidder.

The Problem of Super PACs

Independent expenditure-only political committees, so-called Super PACs, are the byproduct of two federal court decisions. In the first case, *Citizens United v. FEC*, the United States Supreme Court ruled by fiat that corporations enjoy a constitutional right to spend an unlimited amount of their general treasury funds influencing our elections.[1] Overturning a century of law with the stroke of a pen, the five-Justice majority reasoned – without citing a shred of evidence – that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[2] Months later, a federal appeals court explicitly relied on *Citizens United* to hold that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The [Supreme] Court has effectively held that there is no corrupting 'quid' for which a candidate might exchange for a corrupt 'quo.'"[3]

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[1] 130 S. Ct. 876 (2010).
[2] *Id.* at 909.
[3] *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010).

These decisions turn common sense on its head. To rule that a corporation's spending on elections (the "quid") is not intended for an exchange of favorable policy, access and influence (the "quo") belies reality.

The breathtaking indifference of the Supreme Court to well-settled precedent (and facts) shook democracy to its core, and unleashed a torrent of secret money over our subsequent federal elections. Super PACs quickly opened for business, soliciting tens of millions of dollars, including money funneled through sham corporate front groups that exist for no other reason than to hide the identity of political spenders from the electorate.

The Money

2010 marked the first election year of Super PAC dominance in our elections. That year, 84 Super PACs collected over $84.9 million, spending $65.3 million of that amount on political expenditures.[4] Outside spenders, excluding party committees, dumped over $299 million in independent expenditures, electioneering communications and other communication costs.[5] Other non-disclosing groups, such as tax-exempt nonprofit organizations, spent over $132 million influencing our elections.[6] Disturbingly, 44% of outside spending in 2010 came from sources that failed to disclose their donors, compared to 25.2% in 2008, and just 1.3% in 2006.[7]

2012 will be the most moneyed election in our history. As of this writing, the number of Super PACs has risen exponentially to 678, and they have already spent $144 million of the $281 million that they have raised thus far.[8] By comparison, at this point in 2008 with over three months to go before Election Day, outside groups had spent a little over $36 million on independent political expenditures, even then a significant sum but paling in comparison to what's been spent already this year.[9] Some Republican-aligned groups led by Karl Rove, the Koch brothers and the United States Chamber of Commerce are planning to spend approximately $1 billion on federal elections this cycle.[10]

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[4] *Super PACs*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pacs/superpacs.php?cycle=2010/ (last updated July 8, 2012).
[5] *Total Outside Spending by Election Cycle*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=A&chart=N#viewpt (last visited July 17, 2012).
[6] *Spending by Viewpoint for Non-Disclosing Groups*, CENTER FOR RESPONSIVE POLITICS http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=U (last visited July 16, 2012).
[7] *Outside Spending by Disclosure, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/disclosure.php (last visited July 17, 2012).
[8] *Super PACs*, CENTER FOR RESPONSIVE POLITICS http://www.opensecrets.org/pacs/superpacs.php?cycle=2012 (last visited July 17, 2012).
[9] *Total Outside Spending by Election Cycle, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2012&view=Y&chart=N#viewpt (last visited July 17, 2012).
[10] Mike Allen & Jim Vandehi, *GOP Groups Plan Record $1 Billion Blitz*, POLITICO, May 30, 2012, http://www.politico.com/news/stories/0512/76849.html.

While a significant percentage of funds donated to Super PACs are directly paid out of for-profit corporate coffers, an even larger percentage is coming from wealthy individual donors - with 93% of Super PAC's itemized contributions from individuals in contributions starting at $10,000.[11] To be clear – the very few are determining which candidates are viable and which candidates will fail.

Although corporations shy away from negative publicity, that does not stop them from spending significant sums of money on our political campaigns. In 2010, the year *Citizens United* was decided, Target Corp. donated $150,000 to a political group, Minnesota Forward, that advocated for the election of a candidate opposed to the rights of gays and lesbians to marry.[12] Demonstrations quickly followed, showing that Target's shareholders and customers could, as *Citizens United* explained, "hold corporations and elected officials accountable for their positions."[13] Corporations have plenty of other options to participate in elections, however. The *New York Times* reports, for example, that American Electric Power, Prudential Financial, and Dow Chemical have each given at least $1 million each to (c)(4) organizations and other nonprofit groups spending money on political campaigns.[14] Insurance giant Aetna gave a Republican-leaning nonprofit known for attacking supporters of the Affordable Care Act over $3 million last year.[15] Whether spent secretly or publicly, however, the damage to representative democracy is done. Corporate spending distorts the political process by using funds generated for economic purposes on public policies that its own shareholders and customers oppose.

The Secrecy

While we know hundreds of millions of dollars are dominating the airwaves, there is no streamlined process to analyze precisely where all of the funds are coming from, other than that they are from corporate entities and wealthy individuals.

More than two years after *Citizens United*, because Congress and the Federal Election Commission have failed to enact an adequate system of disclosure,[16] Americans are still in the dark about who exactly is funding these shadow campaigns. That's because our current laws and regulations legalize money laundering. If corporations or wealthy individuals want to remain anonymous, they are free to give to shell organizations, which then give to Super PACs dedicated to the election or defeat of candidates. The Super PAC only discloses the name of the sham organization or 501(c)(4) that transferred money to the Super PAC, rather than the underlying donors. Satirical comedian Stephen Colbert has brilliantly educated his viewers

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[11] BLAIR BOWIE & ADAM LIOZ, AUCTIONING DEMOCRACY 1, Dēmos & U.S. PIRG (2012), http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election.

[12] Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, http://online.wsj.com/article/SB10001424052748703988304575413650676561696.html.

[13] 130 S. Ct. at 916.

[14] Mike McIntire & Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, N.Y. TIMES, July 7, 2012, http://www.nytimes.com/2012/07/08/us/politics/groups-shield-political-gifts-of-businesses.html.

[15] *Id.*

[16] Importantly, the Supreme Court upheld the constitutionality of disclosure requirements by a vote of 8-1, reasoning that disclosure of expenditures allows shareholders to "determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 130 S. Ct. at 916.

about these mechanics with his own Super PAC, forming his Anonymous Shell Corporation (a 501(c)(4) "social welfare" organization) to accept money for political purposes that is then donated directly to his Super PAC.[17]

Of course, corporations and other wealthy individuals can now bypass the minimum disclosure requirements of Super PACs all together and simply give to 501(c)(4) organizations, which can then make political expenditures without any disclosure of donors whatsoever. Karl Rove's American Crossroads GPS, a "social welfare" (c)(4) organization, is a prime example. Citing "sources" (because the organization is under no legal obligation to disclose any of its donors), news outlets credited the anonymity of c(4) organizations like Mr. Rove's as the motivating factor for a billionaire casino mogul to give generously – in the multiple millions of dollars – to fund the organization's political spending.[18]

The Relationships to Campaigns

Even without disclosure, the notion that Super PACs are "independent" from political candidates, and therefore cannot lead to corruption or the appearance of corruption, is farcical. While federal law holds that "coordination" between candidates and Super PACs and other spenders is prohibited, its legal definition is cramped, narrow and fails to capture conduct that is by no means "independent."[19]

The Federal Election Commission's advisory opinion on this matter is illustrative. It authorizes officeholders and candidates to "attend, speak at, or be featured guests at fundraisers for" Super PACs "at which unlimited individual, corporate and labor organization contributions will be solicited."[20] The behavior of the two presidential candidates demonstrates the absurdity of the "independence" of Super PACs. President Obama's own campaign website touts that "the campaign has decided to do what we can, consistent with the law, to support Priorities USA [a pro-Obama Super PAC] in its effort to counter the weight of the GOP Super PAC."[21] It continues that "White House and Cabinet officials will attend and speak at Priorities USA fundraising events" but "won't be soliciting contributions for Priorities USA."[22] Meanwhile, Karl Rove, the head of American Crossroads, spoke at a posh retreat for individuals that have hauled in six figure donations to Governor Mitt Romney's campaign.[23] Rove also spoke at a luncheon "held just outside" the retreat hosted by Solamere Capital, a private equity firm

[17] Interview by Terry Gross with Trevor Potter, *Fresh Air*, NAT'L PUBLIC RADIO (Feb. 23, 2012), http://www.npr.org/2012/02/23/147294509/examining-the-superpac-with-colberts-trevor-potter.
[18] Kenneth P. Vogel & Steve Friess, *Karl Rove Hits Big: The Birth of a Mega-Donor*, POLITICO, July 13, 2012, http://www.politico.com/news/stories/0712/78466.html.
[19] *See* 2 U.S.C. § 441a(a)(7)(B); 11 C.F.R. § 109.21
[20] FEC Advisory Opinion 2011-12, pg. 4, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3268.
[21] Jim Messina, *We Will Not Play by Two Sets of Rules*, Obama for America, Feb. 6, 2012, http://www.barackobama.com/news/entry/we-will-not-play-by-two-sets-of-rules.
[22] *Id.*
[23] Philip Rucker, *Romney Plans Posh Weekend Donor Retreat Featuring Rove and VP Hopefuls*, WASH. POST, June 20, 2012, http://www.washingtonpost.com/politics/romney-plans-posh-weekend-donor-retreat-featuring-rove-and-vp-hopefuls/2012/06/20/gJQApFYNqV_story.html; Peter H. Stone, *Karl Rove Gave Secret Speech Outside Romney Donor Retreat*, HUFFINGTON POST, July 9, 2012, http://www.huffingtonpost.com/2012/07/09/karl-rove-speech_n_1656013.html.

founded by Governor Romney's son.[24] It was reported that Mr. Rove "was pushing for Crossroads the whole time," "promot[ing] his Super PAC and an affiliated nonprofit, Crossroads GPS, to campaign donors during private meetings during the retreat."[25]

And yet, even with government officials authorized to appear at Super PAC fundraisers, and heads of Super PACs appearing at candidates' fundraising retreats, one is supposed to presume the official campaign and its shadow Super PAC are wholly independent, with zero risk of corruption or the appearance thereof.

Former Speaker of the House and presidential candidate Newt Gingrich summed up his failed campaign starkly. A journalist asked him if running for President is "a rich man's game."[26] Speaker Gingrich replied: "No. It's certainly a game which requires you to have access to a lot of money. We couldn't have matched Romney's Super PAC, but in the end, **he had I think sixteen billionaires and we had one, and it made it tough**."[27]

Advertising Scarcity

The corrupting influence of unlimited spending by wealthy individuals and corporations raises other questions of fairness and equality in the political process. Super PACs and other wealthy donors are muffling the voices of political participants by snapping up airtime at a premium. Participation is becoming more expensive, because airtime is a scarce commodity, particularly in swing states. The *National Journal* explained in a recent article that demand is already forcing airtime prices to "skyrocket."[28] The limited supply of remaining airtime will soon become a major issue as the political season heats up. With hundreds of Super PACs and other outside groups raising hundreds of millions of dollars, a television station sales manager in Pennsylvania said that 2012 "will be a record-setting year ... In the battleground states, running out of inventory is a possibility."[29]

Complicating the matter is the provision of federal law that requires stations to allow federal candidates "reasonable access" to the airwaves even if they need to pay market rate, which may rise exponentially at the height of election season.[30] State and local candidates have no such legal grounds to receive the same access as federal candidates. A campaign trade publication explained that these "[d]own ballot candidates and issue groups ... aren't protected by ... most-favored-advertiser status. They can be bumped to less favorable ad times, have their ads dropped for other content, or told that there isn't room for them on the airwaves."[31]

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[24] Stone, *supra* note 23.
[25] *Id.*
[26] Jonathan Karl et al., *Newt Gingrich's Advice for Mitt Romney: Sharpen Your Animal Instincts*, ABCNEWS/YAHOO! NEWS, June 19, 2012, http://news.yahoo.com/blogs/power-players-abc-news/newt-gingrich-advice-mitt-romney-sharpen-animal-instincts-105728293.html?_esi=1.
[27] *Id.*
[28] Reid Wilson, *Buy Early and Often*, NAT'L J., May 23, 2012, http://mobile.nationaljournal.com/columns/on-the-trail/buy-early-and-often-20120523.
[29] Sean J. Miller, *Could We Run Out of Airtime?*, CAMPAIGNS & ELECTIONS, Mar. 21, 2012, http://www.campaignsandelections.com/magazine/us-edition/314232/could-we-run-out-of-airtime.thtml

[30] 47 USC § 312; 47 C.F.R. § 73.1944.
[31] Miller, *supra* note 29.

Citizens United and its progeny – premised upon a constitutional right to spend unlimited funds on elections – actually has the deleterious effect of squelching speech. The voices of the wealthy and the corporations are able to speak the loudest, granting a very small minority the right to determine who is heard and who is relegated to silence on the airwaves. Where political commercials are stacked on top of each other – the overwhelming majority negative – the bombardment of political ads will desensitize voters, and lead to many tuning out from politics completely and disregarding the speech of even those who can afford to buy it in modest amounts.[32]

Amend the Constitution

While it is "emphatically the duty of the [courts] to say what the law is,"[33] it is We the People that adopt the Constitution as the law's most basic foundation. A line of Supreme Court cases, from *Buckley v. Valeo* through *Citizens United*, have wrongly interpreted the First Amendment, extending its application to artificial entities of government like corporations and protecting their ability to electioneer, even though their interests are, by law, radically different than those of living, breathing human beings. Further, the courts equate unlimited expenditures and sums of money as constitutionally-protected speech, when in fact it is property. The poisonous effects of these decisions present a grave harm to our democracy, as demonstrated by the rise of Super PACs and secretive nonprofit spending. It is necessary, therefore, that the people make permanent our core political values in a Constitutional amendment to provide that corporations are not entitled to the constitutional rights of real people, and that unlimited spending on politics is not free speech.

It is time for the people to reclaim our democracy.

Corporations are Not Entitled to the Constitutional Rights of Real People

Corporations are privileged with limited liability and perpetual life for economic purposes. Their interests are not always – nor often – the same as those of citizens. Corporate spending in our elections distorts the political process far more than even large donor money, because corporations are using their general treasury funds to influence policy, when its treasury's purpose was instead to drive the engine of economic growth. The law obligates corporations to put profits ahead of the greater societal good, whereas real living, breathing people must balance their narrow interests with a broader public interest when making political decisions at the ballot box.

The Constitution is intended to protect the rights of individual human beings. Corporations are mentioned nowhere in the Constitution –and their authority cannot exceed that of "We the People." While corporations make important contributions to society as engines of economic growth, the *government* grants them certain privileges that allow them to collect vast

[32] *Id.*; *see generally* Louisa Ha & Kim McCann, *An Integrated Model of Advertising Clutter in Offline and Online Media*, INT'L J. OF ADVERTISING (2010).
[33] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

sums of money, but has never considered them "real people" with rights to dictate electoral outcomes. In *Austin v. Michigan Chamber of Commerce*, the Court recognized that "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" posed a serious threat to our republican form of self-government.[34]

Unfortunately, *Citizens United* explicitly reversed *Austin* in its entirety.[35] Lamenting the majority's reckless decision, Justice Stevens dissented by writing that "corporations have no consciences, no beliefs, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. **But they are not themselves members of "We the People" by whom and for whom our Constitution was established.**"[36]

Most egregiously, corporations have abused their "rights" bestowed on them by the courts to overturn democratically enacted laws that municipal, state and federal governments passed to *curb* corporate abuse, impairing local governments' ability to protect their citizens against corporate harms.

Unlimited Spending on Politics is Not Free Speech

It was in *Buckley v. Valeo* that the Supreme Court upheld limits on contributions to *candidates* because such restrictions were justified by corruption or the appearance thereof;[37] but it wrongly rejected the compelling interest of leveling the playing field to guarantee that all citizens, irrespective of wealth and resources, have an opportunity to make their political views known.[38]

For too long, the *only* government interest compelling enough to protect the voices of average, ordinary Americans in our politics has been that of corruption or the appearance thereof. In the wake of *Citizens United*, even that compelling interest is crumbling. While protection against corruption is exceedingly important – and continues to justify important regulations that protect our democracy from embracing full legalized bribery – another important government interest must be recognized. Equality. Americans of every stripe must have an equal opportunity to be heard in the election process, and not be drowned out by mega-wealthy donors who equate the size of their bank accounts with their right to be heard over other citizens.

Justice Stevens put it most eloquently in his concurrence in *Nixon v. Shrink Mo. Gov't PAC*. He wrote to make "one simple point: money is property; it is not speech. … The right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases."[39]

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[34] 494 U.S. 652, 660 (1990).
[35] 130 S. Ct. 876, 882 (2010).
[36] *Id.* at 972 (Stevens, J., dissenting).
[37] 424 U.S. 1, 29 (1976).
[38] *See id.* at 48-49.
[39] 528 U.S. 377, 398-399 (2000) (Stevens, J., concurring).

Amend2012

Citizens across the country are rising up to instruct Congress that the time has come to enact a constitutional amendment that encompasses these principles. This fall in Montana, for example, citizens will vote on Initiative 166 – the "Prohibition on Corporate Contributions and Expenditures in Montana Elections Act." This initiative would charge Montana's delegation in Congress to support an amendment to the United States Constitution to nullify the Supreme Court's ruling in *Citizens United v. FEC*. The initiative is supported by leading Montana Democrats and Republicans, including many small businesses. The Committee collected more than 40,000 signatures – far more than is required.

Beyond the ballot box, legislatures in Hawaii, California, New Mexico, Rhode Island and Vermont and other towns and city councils across the country have passed resolutions calling for a constitutional amendment overturning the constitutional right of corporations to spend money on our political campaigns.

Conclusion

Mr. Chairman, your leadership and that of this Committee is critical to restoring the voices of the American people in their elections. The unchecked power of Super PACs and unlimited political spending by corporations and the very wealthy, left to its own devices, threatens to swallow the very democracy it seeks to buy.

Common Cause thanks you for the opportunity to submit this testimony.

Demos
IDEAS & ACTION

Testimony of Adam Lioz, Counsel at Demos
The United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

"Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs."

July 24, 2012

Introduction

Thank you for this opportunity to submit testimony regarding the damage that *Citizens United* and the rise of Super PACs has done to our system of democratic government. In the text below I will discuss why rules that govern the role of money in politics are important to our democracy; the impact of *Citizens United* and related decisions on our electoral system; and what Congress can and must do to promote the core American value of political equality.

What's at Stake

Before delving into the specific problems caused by the U.S. Supreme Court's misinterpretation of the First Amendment and the current Super PAC system, it is useful to take a step back and highlight why campaign finance laws are important in the first place.

We live in a representative democracy with a capitalist economy. This means that we hold different values dear in the economic and political spheres.

Most Americans will tolerate some economic inequality so long as it results from meritocratic competition, because we respect that other values such as efficiency and proper incentives have a role to play in structuring our economy. One's political ideology to a certain extent determines how much inequality one is willing to sanction in the name of other values—with, all else being equal, self-identified conservatives comfortable with a wider income gap than self-identified liberals or progressives. Few argue that everyone should receive the same income regardless of effort, talent, or other factors.

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Political equality, on the other hand, is a core American value. Regardless of partisan or ideological affiliation, the vast majority of Americans agree that it is critical that we all come to the political table as equals. Through multiple amendments and Supreme Court decisions, the concept of political equality ("one person, one vote") has become a core constitutional principle.

But, we cannot maintain a democracy of equal citizens in the face of significant economic inequality if we allow those who are successful (or lucky) in the economic sphere to translate wealth directly into political power. Our democratic public sphere is where we set the terms for economic competition. It is where we decide—as equals—how much inequality, redistribution, regulation, pollution we will tolerate. These choices gain legitimacy from the fact that we all had the opportunity to have our say. If incumbents are able to rig the rules in favor of their own success it undermines the legitimacy of the economic relations in society.

In short, democracy must write the rules for capitalism, not the other way around. And, the only way to ensure this happens is to have some mechanism for preventing wealthy individuals and institutions from translating their wealth into political power. Campaign finance rules are that mechanism. These common sense restrictions on the unfettered use of private wealth for public influence are the bulwarks or firewalls that enable us to maintain our democratic values and a capitalist economy simultaneously. When we remove these protections, we risk creating a society in which private wealth and public power are one and the same.

The Problem:

The core problem with our electoral system is that it gives a small number of wealthy individuals and institutions vastly outsized influence over who runs for office, who wins elections, and therefore who makes policy in the United States.

We know that financial resources make a huge difference in election campaigns. For decades, candidates who have raised the most money have won the vast majority of races—often more than 90% in a given year.[1] And, for decades, candidates have raised the majority of their funds from a tiny minority of very wealthy Americans.[2]

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[1] Bob Biersack, *The Big Spender Always Wins?*, Center for Responsive Politics: Open Secrets Blog, http://www.opensecrets.org/news/2012/01/big-spender-always-wins.html.

[2] Adam Lioz, The Role of Money in the 2002 Congressional Elections, U.S. PIRG Education Fund (2003).

This means that Americans who can afford to give thousands of dollars to political candidates or outside groups that support them are more likely to see candidates who share their views on the key issues of the day win office and assume positions of power. This is the influence of money on elections, rather than on politicians.

A second problem is the influence of money on politicians—the danger that winning candidates will feel more accountable to a narrow set of large donors than to the broad swath of constituents they are supposed to represent. This can lead to *quid pro quo* corruption—an officeholder supporting or opposing certain policies at the request of a donor. Or it can lead to a more subtle desire to please a political patron. A third and related problem is the appearance of corruption and the public's loss of confidence in the political system.

Wealthy contributors helping their favored candidates win elections or demanding their loyalty afterwards would not systemically skew politics or policy outcomes if these well-heeled donors were like the rest of us, if on average they had the same life experiences, opinions about issues, and political views as average-earning citizens.

But, unsurprisingly, this is not the case. We have long known that large campaign contributors are more likely to be wealthy, white, and male than average Americans. And recent research confirms that wealthy Americans have different opinions and priorities than the rest of the nation.

According to a nationwide survey funded by the Joyce Foundation during the 1996 congressional elections, 81% of those who gave contributions of at least $200 reported annual family incomes greater than $100,000. This stood in stark contrast to the general population at the time, where only 4.6% declared an income of more than $100,000 on their tax returns.[3] Ninety-five percent of contributors surveyed were white and 80% were men.[4]

We also know that wealthy Americans hold different views than average-earning citizens. Investigators for the Joyce study cited above found that large donors are significantly more conservative than the general public on economic matters, tending to favor tax cuts over anti-poverty spending.[5]

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[3] John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox. *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998).
[4] Id.
[5] Id.

A recent report by the Russell Sage Foundation confirms this finding. The authors surveyed "a small but representative sample of wealthy Chicago-area households."[6] They found meaningful distinctions between the wealthy respondents they surveyed and the general public on economic issues such as the relative importance of deficits and unemployment.

For example, wealthy respondents "often tend to think in terms of 'getting government out of the way' and relying on free markets or private philanthropy to produce good outcomes."[7] More wealthy respondents than average Americans listed deficits as the most important problem facing our country. Among those who did, "none at all referred only to raising revenue. Two thirds (65%) mentioned only cutting spending."[8] In spite of majority public support for raising taxes on millionaires, among respondents, "[t]here was little sentiment for substantial tax increases on the wealthy or anyone else."[9] And, in spite of recent scandals on Wall Street, "more than two thirds of [survey] respondents said that the federal government 'has gone too far in regulating business and the free enterprise system."[10]

Ultimately, it is harder for working and middle class families to get ahead in the U.S. because our political system causes our national priorities to be set by and for the wealthy minority who funds campaigns.

The Rise of Super PACs and (Sometimes Secret) Outside Spending

A long line of Supreme Court decisions have restricted Americans' ability to curb the influence of wealthy donors through the democratic process. Recent court decisions have made a bad problem worse, and introduced two new problems as well: direct business spending on elections and overall lack of transparency of political spending.

Since the 1976 Supreme Court decision *Buckley v. Valeo*,[11] individuals have been permitted to spend unlimited money to support favored candidates. The 2010 decision in *Citizens United v.*

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[6] Benjamin I. Page, Fay Lomax, Cook, and Rachel Moskowitz, ***Wealthy Americans, Philanthropy, and the Common Good,*** September 25, 2011 at 6; available at http://www.scribd.com/doc/75022549/Wealthy-Americans-Philanthropy-and-the-Common-Good.

[7] Id. at 11.

[8] Id. at 12.

[9] Id. at 13.

[10] Id. at 15.

[11] *Buckley v. Valeo*, 424 U.S. 1 (1976).

FEC[12] allowed corporations to spend general treasury funds—wealth they have aggregated through the benefits of the corporate form—to influence elections. This decision, along with D.C. Circuit Court of Appeals decision in *SpeechNow.org v. Federal Election Commission*[13] and a subsequent FEC advisory opinion,[14] gave rise to Super PACs and opened the floodgates to record levels of private money, much of which cannot be traced to an original source.

Super PACs may raise unlimited funds from virtually any source as long as they do not contribute to or "coordinate" directly with a candidate or political party. They are fast becoming a favored tool for wealthy individuals and interests to use to drown out the voices of average citizens. At the end of the 2010 election cycle, there were 84 active super PACs.[15] As of July 10, 2012, there are more than 657 registered Super PACs which have raised a combined $242,335,123.[16]

In February 2012, Demos partnered with the U.S. PIRG Education Fund to release *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, an in-depth analysis of Super PAC fundraising. We found that Super PACs raised the lion's share of their funds from very wealthy individuals and for-profit businesses, and a small but significant portion of their funding is secret money, not traceable to its original source.

Wealthy individuals account for the biggest portion of Super PAC funding. Just 37 people, giving at least $500,000 each, were responsible for more than half the itemized funds Super PACs raised from individuals between the advent of Super PACs in 2010 and the end of 2011.[17] Fully 93% of the itemized funds raised by Super PACs from individuals came in contributions of at least $10,000, from just twenty-three out of every 10 million people in the U.S. population.[18]

Not surprisingly, recent Sunlight Foundation research shows that these ultra-elite $10,000+ donors—"The One Percent of the One Percent"—are quite different than average Americans.

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[12] 130 S.Ct. 876 (2010).
[13] *SpeechNow.org v. FEC*, 599 F.3d 686 (2010).
[14] Federal Election Commission, Advisory Opinion 2010-11, available at http://saos.nictusa.com/aodocs/AO%202010-11.pdf.
[15] Super PACs & the Corporations Who Love Them, Coalition for Accountability in Political Spending (January 2012), available at http://politicalspending.org/docs/CAPS-SuperPAC-report.pdf.
[16] *2012 Outside Spending, by Super PACs*, OpenSecrets.org at the Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S (last visited July 10, 2012).
[17] Adam Lioz, Demos, & Blair Bowie, U.S. PIRG, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, (2012) available at http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election.
[18] Id.

In the 2010 election cycle, these 26,783 individuals were responsible for nearly a quarter of all funds contributed to politicians, parties, PACs, and independent expenditure groups.[19] Nearly 55% of these donors were affiliated with corporations and nearly 16% were lawyers or lobbyists.[20] More than 32% of them lived in New York City, Los Angeles, Chicago, or San Francisco, or Washington, DC.[21] The Super PAC system has further skewed political outcomes by giving even more power to even fewer people—who don't live, work, or think like the rest of us.

But in *Citizens United* the Roberts Court introduced new problems as well. More than 17% of the funds raised by Super PACs from their inception through the end of 2011 came from for-profit businesses.[22] Businesses play a critical role in our society and our national economy. But, contrary to the *Citizens United* ruling, for-profit businesses should not be permitted to spend treasury funds to influence elections. First, most businesses are constrained to participate only to maximize private profit, rather than out of regard for the public good. More important, this spending undermines political equality by allowing those who have achieved success in the economic sphere to translate this success directly into the political sphere.

In addition, our political system has become considerably less transparent as a result of *Citizens United*. In his opinion for the Court, Justice Kennedy relied on the proposition that voters would know who was funding campaign advertisements and thus would be able to judge the message accordingly.[23] But current federal disclosure laws do not provide shareholders and citizens with the "the information needed to hold corporations and elected officials accountable for their positions and supporters."[24] On the contrary, undisclosed political spending is on the rise, and Americans are increasingly in the dark about the money driving legislative and electoral outcomes.

Non-profit groups with meaningless names such as "Americans for Freedom" can accept unlimited contributions from anonymous donors. Their financial backers can remain anonymous because FEC regulations only require the identification of donors who specify that their funds were to be used for a particular political ad. "Americans for Freedom" can spend

[19] http://sunlightfoundation.com/blog/2011/12/13/the-political-one-percent-of-the-one-percent/
[20] Id.
[21] Id.
[22] Adam Lioz & Blair Bowie, *Auctioning Democracy*, supra note 8 at 6.
[23] *Citizens United*, 130 S.Ct. at 916 (2010).
[24] *Id.*

this dark money itself. Or it can direct the money to independent or affiliated political committees. While political committees are required to disclose their funders, there is no true informational value for a voter to learn that "Americans Who Love Freedom" (a Super PAC) is funded by "Americans for Freedom" (a nonprofit). The real identity of the source of the money remains hidden.

A small but significant portion of the money raised by Super PACs cannot be traced back to its original source. As mentioned above, Super PACs are required to report their donors, but they are permitted to accept contributions from organizations—such as 501(c)(4) nonprofits and trade associations—that are not legally required to report theirs. Six point four percent of the funds given to Super PACs between 2010 and the end of 2011 were secret, not traceable to an original source.[25] Nearly 20% of active Super PACs received money from untraceable sources in 2011.[26]

The 6.4% figure cited above greatly underestimates the total amount of secret money in the system. "Dark money" outside groups often spending directly rather than through Super PACs. In the 2010 election, undisclosed political spending by outside groups was already revealing some troubling trends. Groups such as 501(c)(4) and 501(c)(6) non-profit organizations reported spending over $130 million that cycle, meaning that over 46 percent of the outside spending in the election was unaccountable.[27] Moreover, seven of the top ten outside spending groups did not disclose the identities of their funders, which accounted for almost three-quarters of all of the outside spending directed to influence the 2010 election.[28]

The FEC recently projected that the total amount spent during the 2012 election cycle could top $11 billion—shattering previous records.[29] The sources of much of this money will not be fully disclosed. As Norman Ornstein of the American Enterprise Institute recently observed, "We're back to the Nixon era, the era of undisclosed money, of big cash amounts and huge interests that are small in number dominating American politics."[30] This denies voters the opportunity to

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[25] Adam Lioz & Blair Bowie, *Auctioning Democracy*, supra note 8 at 4.
[26] *Id.*
[27] Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (2011), available at http://www.citizen.org/documents/Citizens-United-20110113.pdf.
[28] Id.
[29] Message from FEC Chair Caroline C. Hunter, January 15, 2012, available at http://www.fec.gov/pages/fecrecord/2012/january/messagefrom2012chair.shtml.
[30] Andy Kroll, *Follow the Dark Money*, Mother Jones Magazine, (July/August 2012), available at http://www.motherjones.com/politics/2012/06/history-money-american-elections.

"follow the money" and understand the motives behind the messages that are flooding their airwaves during the weeks leading up to an election.

In addition to giving the wealthy an outsized political voice and skewing policy outcomes, large contributions and secret spending are demonstrably eroding public confidence in our political system. In *Citizens United*, Justice Kennedy confidently predicted that "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in democracy."[31]

Unfortunately, Justice Kennedy's confidence was misplaced. Polling has shown time and again that that big money in elections reduces Americans' trust in government. From 2001 to 2011, the United States fell from the 16th least-corrupt country on Transparency International's Corruption Perceptions Index to 24th place, and "nearly three in four Americans believe that corruption has increased over the last three years."[32] The World Bank also reported recently that corruption controls in the United States had weakened since the late 1990s and that it now trails most developed nations.[33]

Solutions

Congress, the President, federal agencies, and state legislatures can all act to reform our system. Because the Supreme Court had tied its hands, the U.S. Congress cannot immediately ban Super PACs or limit outside spending—but there is plenty it can do. Congress should:

Propose a constitutional amendment to clarify that Congress and the states may regulate individual and corporate political contributions and spending. Short of a dramatic shift in Supreme Court jurisprudence, the only way to break the dominance of wealthy individuals and institutions over our elections is to amend the U.S. Constitution to clarify that the First Amendment was never intended as a tool for use by corporations and the wealthy to dominate the political arena. To truly solve the problem, an amendment must overturn *Buckley*, not just *Citizens United*.

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[31] *Citizens United*, 130 S.Ct. at 910.

[32] Eduardo Porter, The Spreading Scourge of Corporate Corruption, THE NEW YORK TIMES, (July 10, 2012), available at http://www.nytimes.com/2012/07/11/business/economy/the-spreading-scourge-of-corporate-corruption.html.

[33] *Id. See also* "Worldwide Governance Indicators: Country Data Report for United States, 1996-2010," THE WORLD BANK, available at http://info.worldbank.org/governance/wgi/pdf/c228.pdf.

Amending the Constitution will require the support of two-thirds of both the House of Representatives and the Senate and then ratification by three-fourths of the state legislatures. This is, admittedly, a very high bar. But, we have reached this high bar in the past, often specifically to expand political participation and vindicate the core value of political equality. The Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments all extended the right to political participation to previously disempowered groups while limiting the disproportionate political influence of existing stakeholders.

In addition, public opinion is clearly on the side of reform. Since *Citizens United* was handed down, large majorities of Americans from both parties have indicated that they opposed the ruling.[34] Polls from around the time of the decision showed that 72% of Americans supported "backed congressional action to curb the ruling"[35] and nearly 80% would support a constitutional amendment.[36]

Propose and confirm only judges and justices who understand the importance of political equality and who will interpret the First Amendment properly. The vast majority of Americans understand that the First Amendment was intended to promote robust political participation by all the people, not lock in the privileges of wealthy individuals and institutions. We need the next generation of judges and justices to break from the Roberts Court's antiregulatory orthodoxy and give Congress, states, and localities more flexibility to promote political equality, safeguard our democracy, and strike the proper balance between liberty and equality.

Encourage small political contributions by providing vouchers or tax credits. Encouraging millions of average-earning Americans to make small contributions can help counter-balance the influence of the wealthy few. Several states provide refunds or tax credits for small political contributions, and the federal tax code did the same between 1971 and 1986.[37] Past experience suggests that a well-designed program can motivate more small donors to participate.[38] An ideal program would provide vouchers to citizens up front, eliminating disposable income as a factor in political giving.[39]

Match small contributions with public resources to encourage small donor participation and provide candidates with additional clean resources. Candidates who demonstrate their ability to mobilize

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[34] Stan Greenberg and James Carville, Democracy Corps, Erica Seifert, Greenberg Quinlan Rosner, & David Donnelly, Public Campaign Action Fund, "Two years after Citizens United, voters fed up with money in politics," (January 19, 2012), available at http://campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf; Dan Egan, *Poll: Large majority opposes Supreme Court's decision on campaign financing*, WASHINGTON POST, (February 17, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.

[35] *Id.*

[36] Hart Research Associates poll available at http://freespeechforpeople.org/

[37] Thomas Cmar, *Towards a Small Donor Democracy: The Past and Future of Incentives for Small Political Contributions*, U.S. PIRG Education Fund (2004).

[38] Id.

[39] See Bruce Ackerman and Ian Ayres, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

support in their districts should receive a public grant to kick-start their campaign, and be eligible for funds to match further small donor fundraising. This would both encourage average citizens to participate in campaigns and enable candidates without access to big-money networks to run viable campaigns for federal office.

Require robust disclosure of all contributions and expenditures used to influence elections. Voters have the right to know who is attempting to influence our elections and to whom their elected officials may feel accountable once elected.

Protect the interests of shareholders whose funds may currently be used for political expenditures without their knowledge or approval. Congress should require for-profit corporations to obtain the approval of their shareholders before making any electoral expenditures; and require any for-profit corporation to publicly disclose any contributions to a 501(c)(4) organization that either makes an independent expenditure or contributes to a Super PAC.

Tighten rules on coordination. Current rules prohibiting coordination between Super PACs and candidates are riddled with loopholes. The Federal Election Commission should issue stronger regulations that establish legitimate separation between candidates and Super PACs. For example, the Commission could prevent candidates from raising money for Super PACs; prevent a person from starting or working for a Super PAC supporting a particular candidate if that person has been on the candidates official or campaign staff within two years; and prevent candidates from appearing in Super PAC ads (other than through already-public footage).
If the FEC refuses to act, Congress can pass legislation codifying these common-sense rules.

Conclusion

For decades wealth individuals and interests have dominated the American political landscape. The *Citizens United* case and related rulings led to the rise of Super PACs and made a bad situation worse. Congress can and must act to vindicate the core American value of political equality by creating a democracy that is truly of, by, and for the people. Congress should refer a constitutional amendment to the states to overturn *Buckley* and *Citizens United*, move past the Roberts Court's anti-regulatory orthodoxy, and restore balance and common sense to our First Amendment. And, it can move forward on several other critical fronts, such as providing clean resources to qualified grassroots candidates, while advocates work to ratify the amendment in three-quarters of the states.

FREE SPEECH FOR PEOPLE .ORG

United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Human Rights

July 24, 2012

Hearing on Constitutional Amendment Proposals to Overturn the US Supreme Court's Citizens United Ruling

Written Testimony of Jeffrey D. Clements
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Chairman Durbin and Members of the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights:

I appreciate the opportunity to submit this written testimony on behalf of Free Speech For People (www.freespeechforpeople.org). You are to be commended for holding this hearing on one of the most important subjects now facing the American Republic.

As an attorney, I have handled public interest and private litigation matters on behalf of global corporations, small businesses, and people for more than two decades. Before opening Clements Law Office, LLC in 2009, I served as Assistant Attorney General and Chief of the Public Protection & Advocacy Bureau in Massachusetts, as a partner in the law firms of Mintz Levin and Clements & Clements, LLP in Boston, and as a litigation attorney in Portland, Maine.

Following the Supreme Court's announcement in June 2009 that the Court would hear re-argument in *Citizens United v. Federal Election Commission* on the question of overruling *McConnell v. Federal Election Commission* and *Austin v. Michigan Chamber of Commerce*, I filed an amicus brief on behalf of several citizen groups. When the Court announced its 5-4 decision in *Citizens United*, I co-founded Free Speech For People, and serve as its president. I am also the author of the new book, Corporations Are Not People (with a foreword by Bill Moyers), released in February 2012 by Berrett-Koehler Publishers.

Free Speech For People, launched moments after the *Citizens United* ruling, is a national, non-partisan organization that works to challenge the misuse of corporate power and restore republican democracy to the people.

- We catalyze and advance the movement to amend the U.S. Constitution to overturn *Citizens United*, *Buckley v. Valeo*, and the fabrication of corporate constitutional rights.
- We engage in legal advocacy to confront the misuse of the U.S. Constitution to claim corporate exemptions from our laws, which damage our communities and undermine freedom and self-government.
- We revive and renew corporate charter revocation laws and other tools to make corporations responsible and accountable to the public.

Since our founding, we have helped to lead the growing momentum across the country for a constitutional amendment to reclaim our democracy. As of this writing, six states (California, Hawaii, Maryland, New Mexico, Rhode Island, and Vermont) have gone on record calling for an amendment and others will soon join that list. Hundreds of

resolutions have passed in cities and towns throughout the nation. Millions of Americans have signed petitions supporting an amendment. Eleven state attorneys general have joined the call. More than 2000 business leaders are now on board. More than a dozen amendment bills are now pending in the US Congress. And, the President of the United States has said an amendment may be necessary.

The extraordinary response to the *Citizens United* decision reflects widespread understanding that the Supreme Court majority's radical interpretation of the First Amendment to hold that the American people and our elected representatives are powerless to regulate corporate political expenditures is fundamentally wrong as a matter of constitutional law, history, and our republican principles of self-government. The opposition to *Citizens United* and determination to overturn it cuts across all partisan lines: 82% of Independents, 68% of Republicans, and 87% of Democrats support a constitutional amendment to overturn the ruling (January 2011, Hart Research Associates survey conducted for Free Speech For People).

In this testimony, I will address the consequences of the pernicious "corporate rights" theory that resulted in the *Citizens United* holding, and the far worse consequences to come. I will also show why these consequences are not the result of the limitations or implications of our First Amendment and Bill of Rights, but arise from a new and deeply flawed activism on the bench. And, I will discuss the pressing need for a constitutional amendment to overturn the *Citizens United* ruling, make clear that corporations are not people with constitutional rights, and restore the authority of Congress and the States to regulate campaign spending in our elections.

Citizens United, *SpeechNow*, and the Impact on Our Elections

Citizens United involved a corporate challenge to the most recent effort to control the corrupting and unfair influence of corporate money in politics: the Bipartisan Campaign Reform Act passed in 2002, frequently called the McCain-Feingold law after its Republican and Democratic Senate sponsors. This law extended pre-existing statutes prohibiting corporations from using corporate funds to advocate voting for or against a candidate for federal office.

Sweeping aside *McConnell v. FEC*, decided only nine years ago, and overruling *Austin v. Michigan Chamber of Commerce*, a 1990 case upholding state law restrictions on corporate political expenditures, the Court held that the restrictions on corporate expenditures violated First Amendment protections of free speech. In effect, the majority decision (Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas and Samuel Alito) equates corporations with people for purposes of free speech and campaign expenditures.

The extraordinary ruling in *Citizens United* is unhinged from traditional American understandings of both the First Amendment and corporations. As Justice Stevens' dissent in *Citizens United* makes clear, *Austin*, *McConnell* and a substantial line of Supreme Court and lower court cases, backed by two centuries of Constitutional jurisprudence, correctly ruled that Congress and the States may regulate corporate political expenditures not because of the type of speech or political goals sought by corporations but because of the very nature of the corporate entity itself. In other words, cases challenging corporate political expenditure regulations are not really about the speech rights of the American people; they are about the power of the American people to regulate corporations and the rules that govern such entities. Justice John Paul Stevens' dissent rightly calls the majority opinion a "radical departure from what has been settled First Amendment law."

Remarkably, in a case where the central question is the role and place of corporations in our democracy, Justice Kennedy's opinion does not once define or explain what a corporation is, nor does he even touch upon the legal definition or features of a corporation. Instead, in what Justice Stevens' compelling dissent calls "glittering generalities," the majority opinion focuses on "associations of citizens," "speakers," "voices," and, apparently without irony, a "disadvantaged person or class." *Citizens United, slip op.* at 24.

It is a basic and fundamental understanding in the law that corporations are not "associations of citizens," but are creatures of statute, usually State statute, with characteristics defined by their charters and the state laws that authorize the use of corporate charters. "Those who feel that the essence of the corporation rests in the contract among its members rather than in the government decree ... fail to distinguish, as the eighteenth century did, between the corporation and the voluntary association."[1]

Corporations cannot exist unless elected representatives choose to enact laws that enable people to organize a corporation and provide the rules of the road for using a corporation. People can start and run businesses without government involvement or permission; people can form advocacy groups, associations, unions, political parties and other groups that exist without the government's authorizing statute. But people, or even "associations of citizens," cannot form or operate a corporation unless the state enacts a law providing authority to form a corporation, and providing the rules of the road that go with use of the corporate form.

Advantages of the corporate form are a privilege provided by government for sound policy reasons. We the people do that through our legislatures because we think,

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[1] Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy, Massachusetts, 1774-1861* at 92 and n. 18.

accurately I believe, that such advantages are economically to the advantage of all of us and society over the long haul. Yet corporations, particularly powerful global corporations, — and too many judges — confuse these privileges and policies with Constitutional rights.

The Supreme Court used to resist this confusion. As the Court said in *Austin v. Michigan*, one of the cases overruled by *Citizens United*:

> State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets . . . These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'[2]

Similarly, in *McConnell v. FEC*, the Court pointed to "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[3]

Following *Citizens United*, the DC Circuit Court of Appeals expanded the impact of the ruling through its decision in *SpeechNow.org v. FEC*, which removed all limits on contributions to independent expenditure committees and allowed for the creation of Super PACs. Yet, while the rise of Super PACs has gained significant attention in recent months, it is not the only vehicle through which big money interests have engaged in spending millions of dollars in our political process. *The New York Times* recently issued an extensive report on how for-profit corporations are funneling their general treasury funds through non-profit vehicles to influence our elections ("Tax-Exempt Groups Shield Political Gifts of Businesses," *The New York Times*, July 7, 2012). The *Citizens United* and *SpeechNow* rulings combined have resulted in an exponential rise of big money dominance of our politics, presenting a direct and serious threat to our democracy. Further details of the dangerous impact of these rulings on our elections can be found in the amicus brief Free Speech For People recently submitted before the US Supreme Court in *American Tradition Partnership v. Bullock* (available at: http://www.freespeechforpeople.com/sites/default/files/MT%20Amicus%20Brief.pdf).

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[2] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658- 59 (1990) (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986)).

[3] *McConnell*, at 205 (citations omitted).

Further, the impact of *Citizens United* goes far beyond the federal Bipartisan Campaign Reform Act and federal elections. With no State even in the case before the Court, the *Citizens United* majority essentially erased the law of twenty-four states that banned corporate political expenditures. Thus, with virtually no consideration of the federalism implications and the circumstances in the States, the Supreme Court transformed State elections.

The five Justice majority in *Citizens United*, in fact, recently reaffirmed its refusal to consider these federalism implications and circumstances in the States when it summarily reversed the Montana Supreme Court in *American Tradition Partnership v. Bullock* and struck down the Montana Corrupt Practices Act without any hearing on the merits. Since 1912, the Montana Corrupt Practices Act had barred corporate money in elections, and the Montana Supreme Court, in upholding the law, had cited the extensive factual record and history justifying the statute. The US Supreme Court's refusal to review that factual record demonstrates further the need for a constitutional amendment to overrule the Court and protect our democracy.

Citizens United also dramatically impairs the impartiality, and the perceived impartiality, of justice in America. Twenty-one states have elected Supreme Court justices, and thirty-nine states elect at least some appellate or major trial court judges. Even before *Citizens United*, as former Justice Sandra Day O'Connor has said, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."[4] Now corporations have even greater ability to bring their financial resources to bear on those elections, further undermining the independence of the state judiciaries.

Finally, because *Citizens United* rests on the transformation of the expenditure of corporate general treasury funds into new "corporate speech" rights under the First Amendment, every elected official and person interested in representing their fellow citizens in America, from candidates for the presidency to candidates for the local school and water district, must now reckon with the power of corporate money to change the outcome of elections.

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[4] See www.justiceatstake.org. State Supreme Court candidates raised $200.4 million from 1999-2008, compared with an estimated $85.4 million in 1989-1998. Source: National Institute on Money in State Politics. In *Caperton v. Massey*, 556 U.S. ____ (2009) the Supreme Court held that the due process clause required the recusal of a justice who was elected with the help of $3 million in campaign expenditures from a West Virginia coal executive whose corporation was in the midst of appealing a $50 million jury award against his company. The justice, once elected, cast the deciding vote to overturn the suit.

Beyond *Citizens United* and Campaign Finance

The damage to democracy from the dubious "corporate rights" doctrine goes, unfortunately, beyond *Citizens United* and beyond campaign finance. The disdain shown by the majority in *Citizens United* for the policy judgments of the people's elected representatives in Congress and the States is striking, but it reflects a growing disdain that has driven corporate speech activism in the judiciary for the past two decades.

Judicial respect for the people's choices about corporate regulation began to erode in the late 1970s and 1980s. The path to *Citizens United* follows from the fabrication beginning in those years of a corporate rights/commercial speech doctrine under the First Amendment. This new doctrine reached its zenith in *Citizens United*, but its damaging effects on democracy have already gone far beyond campaign finance laws.

For 200 years, there was no such thing as a right to corporate speech under the First Amendment. And the First Amendment did not prevent legislatures from enacting restrictions on corporate expenditures to influence elections. During the Nixon Administration, however, in reaction to increasing legislative efforts to improve environmental, consumer, civil rights and public health laws, corporate executives began aggressively to push back for the creation of corporate rights. They followed a playbook spelled out in a memo from Lewis Powell, then a private attorney advising the Chamber of Commerce.[5] President Nixon then appointed Lewis Powell to the Supreme Court. Over the following years, a divided Supreme Court, over powerful dissents by Justice William Rehnquist and others, transformed the First Amendment into a powerful tool for corporations seeking to evade democratic control and sidestep sound public welfare measures.

In 1978, several large corporations — including Gillette and Bank of Boston — challenged a Massachusetts prohibition on corporate expenditures to influence ballot questions.[6] In an opinion authored by the former Chamber of Commerce lawyer, the now-Justice Powell, a 5-4 decision agreed with the corporate First Amendment claim, and cast aside the people's wish to keep corporate money out of Massachusetts citizens referenda. With increasing aggressiveness, the judiciary has since used this new corporate-rights doctrine to strike down state and federal laws regulating corporate conduct. Even a partial list of decisions striking down public laws shows the range of regulations falling to the new corporate rights doctrine, from those concerning clean and fair elections; to environmental protection and energy; to tobacco, alcohol,

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[5] The background of the 1971 Lewis Powell memorandum and the text of the memorandum itself are available at http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html.

[6] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

pharmaceuticals, and health care; to consumer protection, lotteries, and gambling; to race relations, and much more.[7]

One example in particular illustrates how the new corporate speech doctrine departs from the meaning of the people's speech rights under the First Amendment. In the 1990s, the Monsanto corporation used recombinant DNA to develop a bovine growth hormone product that resulted in significant increases in milk from cows treated with the Monsanto drug. Most of Europe, Australia, New Zealand, and Canada banned the use of recombinant bovine growth hormone. The United States did not. Vermont, home to many of New England's surviving local dairies and a leader in organic and local

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[7] *See Bellotti*, 435 U.S. 765; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (as applied to issue advocacy advertisements of non-profit corporation, BCRA held to violate First Amendment); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002) (federal restriction on advertising of compounded drugs invalidated); *Lorillard v. Reilly*, 533 U.S. 525 (2001) (Massachusetts regulations of tobacco advertising targeting children invalidated); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (federal restriction on advertising of gambling and casinos held unconstitutional); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Rhode Island law restricting alcohol price advertising invalidated); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (federal restriction on advertising alcohol level in beer invalidated); *City of Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993) (municipal application of handbill restriction to ban news racks for advertising circulars on public property held unconstitutional); *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1 (1986) (invalidating California rule that utility corporation must make bill envelopes, which are property of ratepayers, available for other points of view besides that of the corporation); *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (New York rule restricting advertising that promotes energy consumption invalidated); *Bellsouth Telecomm., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008) (Kentucky may not prohibit corporation from stating on the customer bill that a fee that is to be assessed from the corporation and not passed on to consumers was a "tax" suggesting inaccurately that consumers paid in their bill); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (Texas law regulating advertising of auto body shops tied to auto insurers invalidated); *This That & the Other Gift & Tobacco, Inc. v. Cobb County, Georgia*, 439 F.3d 1275 (11th Cir. 2006) (Georgia ban on advertisements of sexual devices invalidated); *Passions Video, Inc. v. Nixon*, 458 F.3d 887 (8th Cir. 2006) (Missouri statute restricting advertisements of sexually explicit businesses invalidated); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 91 & n.1 (2d Cir. 1998) (New York regulation barring beer bottle label with gesture described by the Court as "acknowledged by Bad Frog to convey, among other things, the message 'fuck you'" held unconstitutional); *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (Vermont law requiring disclosure on label of dairy products containing milk from cows treated with bovine growth hormones invalidated); *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834 (2d Cir. 1994) (invalidating New York law authorizing the Secretary of State to declare "non solicitation" zones for real estate brokers); *Sambo's Rest., Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981) (First Amendment allows corporation to break agreement with City and use name found to be deeply offensive and carry prejudicial meaning to African Americans); *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980) (invalidating Maine law restricting billboard pollution, even though law allowed (and paid for) commercial signs put up by state of uniform size at exits and visitors centers); *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998) (invalidating federal law regulating drug manufacturers' use of journal reprints and drug corporation-sponsored educational seminars to promote off-label uses for prescription drugs); *Equifax Services Inc. v. Cohen*, 420 A. 2d. 189 (Me. 1980) (invalidating portions of Maine credit reporting statute as First Amendment violation). Many more such cases may be found in the state and federal reports.

agriculture, did not go so far as to ban the product but merely enacted a law requiring that milk products derived from cows treated with the Monsanto drug be labeled to disclose that information. That way, people could decide for themselves.

The law was challenged by the industrial dairies, and was struck down as a violation of the First Amendment. *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996). This result twisted First Amendment protections of conscience that prevent the government from compelling people to say what they do not believe into something to prevent people from knowing what corporate managers do not wish to disclose. Corporations, of course, do not have consciences and indeed, unlike people, do not exist in the absence of government action. Yet more and more corporations now misuse the First Amendment to advance narrow corporate interests at the expense of the public interest.

The examples of corporate misuse of the First Amendment continue to increase. Recently, tobacco corporations have sued the United States of America and tried to use the corporate speech doctrine to block enforcement of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (*Commonwealth Brands, Inc. et. al. v. United States of America, et. al.* (W.D. Ky.)); rating agency corporations accused of fraud and misrepresentation in connection with the financial crisis have claimed immunity under the First Amendment (*Abu Dhabai Commercial Bank v. Morgan Stanley Co.* (S.D.NY)); a pharmaceutical corporation has sued the United States of America claiming that the federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 352(a), rules that prohibit a drug manufacturer from marketing a drug for "off-label" uses, meaning purposes for which the FDA has not approved the drug, violate "corporate speech" rights (*Allergan, Inc. v. United States of America, et al,* (D.D.C.); The Caterpillar corporation, backed by the national Chamber of Commerce, used "corporate speech" claims to stonewall basic information requests about the corporation's membership and financial dealings with the Chamber of Commerce and 33 other organizations, with the Chamber filing an amicus brief claiming the right to conceal that information based on the corporate "defendants and the Chamber's First Amendment Rights to freedom and privacy." (*In re Asbestos Cases*, (http://www.uschamber.com/nclc/caselist/issues/freespeech.htm)

Restoring Our Constitution and Republican Democracy to the People

More than ever before, corporate money in politics corrupts and distorts our political and legislative process, and drowns out the voices and wishes of the American people. And even when a legislative victory in the people's interest occurs, armies of corporate lawyers go into battle to take the matter to a Supreme Court that has forgotten its place in the American experiment in self-government, and all too often, accedes to the corporate claims of immunity from regulation or control by the people.

It would be one thing if the Court's handcuffing of our ability to regulate corporate political money was an unfortunate but necessary price of liberty, or rooted in long-held Constitutional principles of free speech. We put up with views we find obnoxious and even repellent. We put up with rivers of crude and offensive expression in all media, and we tolerate every variety of dissent and opinion. That is a price we pay for freedom of speech.

But the notion of corporate First Amendment rights is not about freedom of speech, or even about any kind of speech or expression. It is about a kind of artificial entity that we ourselves create and permit by legislation because we chose to do so for economic policy reasons. To appreciate how radical the corporate rights claim in Citizens United is, it helps to remember our history.

The growing view among many people that we must restrain and control corporate power is not new in America and it is far from fringe. Throughout American history, at least until very recent times, that was the mainstream view. The American people have sought to keep corporate money out of elections virtually since the beginning of the Republic, and the root of the law struck down in *Citizens United* goes back to the 1907 Tillman Act, which banned corporate political contributions in federal campaigns.

For many years after the founding of our nation, state legislatures enacted corporate laws that allowed corporations, but only permitted these to be chartered for specific *public* purposes, and often limited the time period in which the corporate entity could operate.[8] Restrictions on corporate purposes were the norm, and distrust and concern about the ability of corporations to grasp political power prevailed.[9]

James Madison, often considered the primary author of our Constitution, viewed corporations as "a necessary evil" subject to "proper limitations and guards."[10] Thomas Jefferson hoped to "crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."[11] These views prevailed among Americans through the decades. Until recently, it was presidents and our leaders as much as those outside of politics who were vigilant about corporate power.

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[8] HANDLIN & HANDLIN, *supra* note 15, at 106-33; Louis K. Liggett Co. v. Lee, 288 U.S. 517, 548-60 (1933) (Brandeis, J., dissenting). Justice Brandeis's dissenting opinion comprehensively documents the development of the corporation in America. *See Liggett*, 288 U.S. at 548-67.

[9] *Liggett*, 288 U.S. at 549; *Head & Amory v. Providence Ins. Co.*, 6 U.S. 127, 166-67 (1804) ("corporation can only act in the manner prescribed by law").

[10] WRITINGS OF JAMES MADISON, VOL. 9 (Gaillard Hunt ed., G.P. Putnam's Sons, 1900), To J.K Paulding, http://oll.libertyfund.org/title/1940/119324 (last visited July 22, 2009).

[11] University of Virginia, Favorite Jefferson Quotes, Thomas Jefferson Digital Archive, To George Logan, http://etext.virginia.edu/jefferson/quotations/jeff5.htm (last visited July 22 2009).

President Andrew Jackson warned of the partisan activity of the second Bank of the United States corporation: "[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions."[12] President Martin Van Buren warned of "the already overgrown influence of corporate authorities."[13] Later, President Grover Cleveland in his 1888 message to Congress said, "Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters."[14] Theodore Roosevelt successfully called on Congress to enact federal restrictions on corporate political contributions, stating: "Let individuals contribute as they desire; but let us prohibit . . . all corporations from making contributions for any political purpose, directly or indirectly."[15]

Usually, the Supreme Court, with significant exceptions and deviations from time to time, respected this American consensus. Since the beginning of the Republic, the Court has affirmed that elected governments of the states and nation may regulate, in an even-handed manner, "the corporate structure" because governments create that structure. *Dartmouth College* described the corporate entity as "an artificial being ... existing only in contemplation of law," and created only for such "objects as the government wishes to promote."[16] The Court brought this understanding of the corporation to other Constitutional provisions, such as diversity jurisdiction under Article III and the Judiciary Acts.[17] In the Founders' era and beyond, the Court considered state citizenship of shareholders rather than the corporation itself to determine whether people who formed corporations could enter the federal courts in the corporate name.[18] The Court eventually

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[12] Andrew Jackson, 1833 Annual Message to Cong. (Dec. 3, 1833) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3640).

[13] Martin Van Buren, 1837 Annual Message to Cong. (Dec. 5, 1837) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3589).

[14] Grover Cleveland, 1888 Annual Message to Cong. (Dec. 3, 1888) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3758).

[15] Theodore Roosevelt, 1906 Annual Message to Cong. (Dec. 3, 1906) (transcript available at the University of Virginia, Miller Center of Public Affairs, http://millercenter.org/scripps/archive/speeches/detail/3778).

[16] 17 U.S. at 636-637.

[17] Article III provides "The judicial Power shall extend ... to Controversies ... between Citizens of different States...." U.S. CONST. art III, § 2.

[18] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (corporation is a "mere legal entity ... not a citizen"); *Hope Insurance Co. v. Boardman*, 9 U.S. (5 Cranch) 57, 58 (1809); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450 (1821); *Breithaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238 (1828); *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840).

bowed to expediency and overruled these cases, developing a shortcut strictly limited to diversity jurisdiction.[19]

In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), and *Paul v. Virginia*, 75 U.S. 168 (1868), the Court refused to extend "special treatment" for corporations to the protection of citizen rights under the Privileges and Immunities Clause of Article IV. Repeatedly, the Court has held that corporations are not citizens under that clause, nor under the Privileges or Immunities Clause of the Fourteenth Amendment.[20]

As the Industrial Revolution gathered pace, the Court maintained with clarity that "[t]he only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state...."[21] The Court did not examine the Constitution to determine rights "given to it in that character" because the Constitution does not create corporate rights. In upholding corporate contracts outside the place of incorporation, *Bank of Augusta* declined to rest on any Constitutional provision, instead applying the law that created the corporation, the law of the state where the corporation wished to enforce a contract, and "comity."[22]

While the increasingly dominant role of corporations in the American economy did not go unnoticed by the Court, most Justices did not see any grounds for infusing that development with Constitutional significance.[23] By 1868, corporations had "multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by

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[19] *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990) ("special treatment for corporations."). A thorough discussion of diversity jurisdiction corporate "citizenship" is beyond the scope of this testimony. In short, *Louisville Railroad Co. v. Letson*, 43 US (2 How.) 497, 557-558 (1844), decreed that a corporation "is to be deemed" a citizen of the state of its creation. 43 U.S at 557-8. Nine years later, the Court followed *Letson* but reiterated that "an artificial entity cannot be a citizen," and "State laws by combining large masses of men under a corporate name, cannot repeal the Constitution." *Marshall v. Baltimore and Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1853) (quotation and citation omitted). The Court soon began simply to treat "a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created the corporate body...." *Ohio and Mississippi Railroad Co. v. Wheeler*, 66 U.S. 286, 296 (1861). The Court confined this doctrine to diversity jurisdiction, and it has never been defended with enthusiasm for its soundness. *See Carden*, 494 U.S. 185. See also Frankfurter, Distribution of Judicial Power between United States and State Courts 13 CORN. L. Q. 499, 523 (1928).

[20] *Id.*; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181 (1888); *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945). Note that an unrelated part of *Paul* was overruled by *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

[21] *Bank of Augusta*, 38 U.S. at 587.

[22] 3 8 U.S. at 586-590.

[23] *But see McConnell*, 540 U.S. at 257-258 (Scalia, J. dissenting); *compare Liggett*, 288 U.S. at 548 (Brandeis, J., dissenting) ("The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation.")

corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them."[24] Despite this recognition, the Court denied the claim of corporations to the privileges and immunities of citizenship, as a corporation is "a mere creation of local law."[25]

The Court — with exceptions during the substantive due process era characterized by *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952) — continued through most of the twentieth century to distinguish between the rights of people and corporations. In *Asbury Hospital*, for example, the Court, citing numerous cases and without dissent, rejected a Constitutional challenge to a state law requiring corporations holding land suitable for farming to sell the land within ten years.[26] Five years later, the Court again emphasized the "public attributes" of corporations in turning aside corporate privacy claims:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.[27]

The Court has recognized, in a limited fashion, assertions of corporate rights under the Fourth Amendment.[28] As the Court has observed, however, a corporation has lesser Fourth Amendment rights because:

> Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.[29]

Accordingly, "it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons...."[30]

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24 *Paul*, 75 U.S. at 181-182

25 *Id.* at 181.

26 326 U.S. 207.

27 *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citations omitted).

28 *See infra.* Part II; Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577, 664-667 (1990); *GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations have "some Fourth Amendment rights").

29 *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204-205 (1946) (footnotes omitted).

30 *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978) (Rehnquist, J. dissenting) *citing United States v. White*, 322 U.S. 694, 698-701 (1944). *See also Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) ("The liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons.")

Justice Rehnquist closed his dissent in *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), by saying "[I] regret now to see the Court reaping the seeds that it there sowed [referring to the early corporate speech cases]. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence."

That day has come, and Congress and the States now are considering several worthwhile initiatives to address the Court's egregious error in *Citizens United* — public funding of elections, stronger disclosure requirements, and shareholder and governance reform, among others. As with so many previous challenges to democratic self-government, however, *Citizens United* also requires a 28th Constitutional Amendment to correct the Court, restore republican democracy to the people, and allow Congress and the States to regulate campaign spending.

A Constitutional Amendment to Defend Our Democracy

As discussed above, *Citizens United* presents two serious threats to our Republic: the threat presented by a fabricated doctrine of corporate constitutional rights and the threat presented by big money dominance of our elections. It is critical that we now use our Article V powers under the US Constitution to enact an amendment or amendments that will address both problems.

Of the 13 amendment bills currently pending in Congress, Free Speech For People strongly endorses the following two bills:

- H. J. Res. 88, introduced in the House by Rep. Jim McGovern (D-MA), *and*:
- The bicameral companion pair S.J. Res. 29/H.J. Res. 86, introduced in the Senate by Sen. Tom Udall (D-NM) and in the House by Rep. Betty Sutton (D-OH).

H.J. Res. 88 (McGovern) is the most effective amendment bill for addressing the problem of the fabricated doctrine of corporate constitutional rights. First, it states clearly that corporations do not have constitutional rights as if they were people, fully refuting the claim to the contrary at the core of *Citizens United.* Second, it does so even-handedly, applying equally to all corporations, be they for-profit, non-profit, or incorporated labor unions. Third, it already enjoys bi-partisan support, with the co-sponsorship of Rep. Walter Jones (R-NC), along with dozens of Democratic co-sponsors. It is one of only two amendments among the 13 pending bills that have bipartisan support today.

S.J. Res. 29 (Udall)/H.J. Res. 86 (Sutton), a companion pair, would restore the authority of Congress and the States to regulate campaign spending. This amendment would effectively overturn the US Supreme Court's 1976 ruling in *Buckley v. Valeo* which equated money with speech and struck down mandatory campaign spending limits passed by Congress in the wake of the Watergate scandal. The Udall/Sutton amendment bill would allow Congress and the States to enact campaign spending limits, including limits on independent expenditures, ending the corrupting influence of big money in our political process and ensuring that all Americans, regardless of their economic status, will have an equal voice in our elections.

The attached grid provides a comparison of all of the pending amendment bills in Congress and highlights further our reasons for endorsing the McGovern bill and Udall/Sutton bill. While it would be ideal to have the elements of both of these bills combined into one amendment bill, it is important that, if they are to remain separate, they both advance forward to ensure the most comprehensive and effective response to the threats posed to our democracy by *Citizens United* and related rulings.

Americans have amended the Constitution repeatedly to expand democratic participation of people in elections. Most of the seventeen amendments that followed the ten amendments of our Bill of Rights were adopted to eliminate barriers and strengthen democracy for everyone. Seven of our amendments overruled egregious rulings of the Supreme Court. We can and we must do that again to preserve our Republic and to protect that basic American promise: government of, for, and by the people.

A comparison of Constitutional Amendment bills responding to *Citizens United* in the 112th Congress

Free Speech For People endorses H.J. Res. 88 (McGovern) *and* S.J. Res. 29 (Udall) / H.J. Res. 86 (Sutton).

Bill number and principal sponsor	Has bi-partisan cospon-sorship.	States that corporations do not have constitutional rights. (Overturns *Citizens United* entirely.)	Restores authority of Congress and states to limit campaign spending by corporations. (Overturns part of *Citizens United*.)	Treats incorpor-ated labor unions, nonprofits, and for-profit corpora-tions equally.	Restores authority of Congress and states to limit campaign spending in all categories. (Overturns *Buckley* on spending limits entirely.)	Restores authority of Congress and states to limit campaign spending in some categories. (Overturns part of *Buckley*.)	Addresses other matters (specified in cells below).
Bills relating to the claim of corporate constitutional rights:							
H. J. Res. 88: Rep. Jim McGovern (D-MA)	Rep. Walter Jones (R-NC)	YES	n/a	YES	NO	NO	n/a
S.J. Res. 33: Sen. Bernie Sanders (I-VT)*	NO	YES	n/a	NO	YES	n/a	n/a
H. J. Res. 90: Rep. Ted Deutch (D-FL)*	NO	YES	n/a	NO	YES	n/a	n/a
Bills relating to campaign finance:							
S.J. Res. 29: Sen. Tom Udall (D-NM)*	NO	NO	NO	n/a	YES	n/a	n/a
H. J. Res. 86: Rep. Betty Sutton (D-OH)*	NO	NO	NO	n/a	YES	n/a	n/a
S.J. Res. 35: Sen. Max Baucus (D-MT)	NO	NO	YES	YES	NO	NO	n/a
H. J. Res. 78: Rep. Donna Edwards (D-MD)	NO	NO	YES	YES	NO	NO	n/a

**: Dotted lines between rows indicate companion bills across chambers.*

Table compiled by Free Speech For People, 2366 Eastlake Ave. East, Suite 311, Seattle, WA 98102, 206-723-1941, contact@freespeechforpeople.org

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H.J. Res. 92: Rep. Keith Ellison (D-MN)	NO	NO	YES	NO	NO	NO	n/a
H.J. Res. 97: Rep. John Yarmuth (D-KY)	Rep. Walter Jones (R-NC)	NO	NO	n/a	YES	n/a	• Clarifies Congressional authority to enact mandatory public funding of elections; • Establishes a national holiday for the purpose of voting.
H.J. Res. 8: Rep. Marcy Kaptur (D-OH)	NO	NO	NO	n/a	YES	n/a	n/a
H.J. Res. 72: Rep. Kurt Schrader (D-OR)	NO	NO	NO	n/a	NO	YES	n/a
H.J. Res. 100: Rep. Dennis Kucinich (D-OH)	NO	NO	NO	n/a	YES**	n/a	• Establishes mandatory full public funding of federal elections. **: Applies only to federal elections; silent on state authority to limit spending on state elections.
H.J. Res. 111: Rep. Adam Schiff (D-CA)	NO	NO	NO	n/a	NO	YES	• Clarifies Congressional authority to enact full or partial public funding of elections.

**: Dotted lines between rows indicate companion bills across chambers.*

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Testimony of
Hon. Chris Heagarty
Former N.C. State Representative
Former Executive Director, N.C. Center for Voter Education

Before the
Senate Hearing on Citizens United / Super PACs
July 24, 2012

My name is Chris Heagarty and I am a former member of the N.C. House of Representatives and the former Executive Director of the North Carolina Center for Voter Education. The N.C. Center for Voter Education is a non-partisan nonprofit organization, led by former elected officials and civic activists, and made up of Republicans, Democrats, and unaffiliated voters who want to improve the quality and responsiveness of our government and elections system. We were one of the architects of North Carolina's public campaign financing program for our judges and constitutional officers, as well as our state's nonpartisan voting guide and numerous important pieces of legislation promoting transparency, disclosure, and openness in government.

My purpose today is to share with you my experience, and those of my fellow legislators in North Carolina, as we found ourselves under attack by a campaign of several hard-hitting, coordinated, negative attacks all funded through so called "independent expenditures" and electioneering communications. Many established and legitimate organizations, of all political philosophies, engage or have announced their intent to engage, in independent advocacy efforts designed to promote their specific political viewpoint. To those groups, whether they are business groups or trade unions, advocates for second amendment rights or reproductive rights, or wherever they are on the political spectrum, Constitutional rights to political expression have long been recognized. It is not my intent to suggest any restraint of these rights. I am here today to warn of blatant political electioneering that occurs under the masquerade of legitimate issue advocacy and independent political expression. Specifically, I would like to address political activity created by groups that are created with no other purpose but to influence elections and that purposefully conceal the identity of their

funders from the public, and the problems created by such anonymity. This type of activity has been with us since before the *Citizens United* decision, but that decision by the Supreme Court has opened a flood-gate of new money into these types of efforts and emboldened those who might have previously been reluctant to engage in such tactics. We are on the brink of a new political arms race where cash, not principles, will determine the winners.

There are those that ask is money not just a tool to amplify speech, and is free and open speech not what our government is founded upon? There are those that believe unregulated political speech is a noble end, one that promotes rational discourse and enlightened debate. There are also those who believe in the tooth fairy. That is to say, we need open and honest debate in our political system. But the current system of how our campaigns communicate with voters is not open and it is becoming increasingly less honest. The side with more money has more speech and drowns out the other side. Thus, debate is not open. Nor is the debate honest, not merely as to the claims being stated but even as to who is actually making the claims printed or broadcast in many political advertisements.

Many voters believe, no matter how incorrectly, that candidates and interest groups simply cannot say things about us that are untrue. They believe that there is some legal protection out there to save us from false and misleading advertising and that if these attacks aren't true then maligned candidates can just sue and restore justice. This is simply not true as our First Amendment protections on political speech create exemptions for otherwise defamatory language. The price we pay to protect our citizenry from a government that can punish you for what you say is that we must tolerate malicious, misleading, or untrue true political speech when it occurs and hope that voters can be filter through it to find the truth. While extreme legal protections have been reserved to guard against the possibility that legitimate political expression might be chilled, recent court rulings protect and may actually encourage more uncivil political discourse, defamatory communications, and voter disinformation by affording a level of anonymity to entities that want to influence elections. Let us be clear: you can lie about a candidate without any legal sanction. The only defense most victims of willful and malicious lying had was that the liar could be held accountable and judged by the voters once the lie was exposed. However, when the liar is anonymous, even this protection evaporates. This legally protected anonymity creates a barrier to accountability and transparency so that voters are not informed of the identity of political actors and are therefore unaware of the possible bias and motivations of those funding destructive political communications. Much as the shield of anonymity empowers rogue bloggers to slander and allows cruel teenagers to torment each other on social media sites, many of these "independent" political actors can launch defamatory political attacks behind the shield of artificial corporations and shell organizations with no purpose other than to influence elections, and escape any judgment or accountability for their actions.

A powerful deterrent against untrue advertising is that voters find it distasteful and those who engage in it may incur the wrath of voters who will not tolerate being lied to. That deterrent, however, is effectively neutralized when voters do not know who is responsible for inaccurate information, such as when political actors can act from behind a curtain of anonymity and not be held accountable for their claims.

Likewise, while many of us who serve, or who have served, in public office know that we will have to work with those on the other side of the aisle and most of us try to follow some code of decorum and respect for our colleagues, no such honor or code exists when it comes to electioneering by many of these so-called "independent expenditure" entities, and their teams of hired-gun campaign consultants, who often jet in from out of state, launch their attacks, and disappear again and don't have to live with the consequences of their actions. Ads that would be abhorrent to many of those that serve, or who want to serve, in the legislature are often run without the knowledge or consent of those candidates. Candidates that might reject such tactics themselves may nevertheless find themselves the beneficiaries of independent expenditure efforts. Or worse, they might be held accountable and suffer political damages for attacks which they never would have condoned.

The good news is that a number of states have had the foresight to enact very strong disclosure laws in the wake of *Citizens United* decision. The bad news is that the direction of the United States Supreme Court threatens those reasonable steps, overturning state solutions and even recently going so far as to tell states that what appears to be the appearance of impropriety and corruption in Montana according to the Montana Supreme Court, simply isn't. This leaves the states and our local government unprepared for the tens or hundreds of millions that may be spent influencing voters, with few options for requiring transparency or accountability.

In 2010, in my state, many different interests all came together, some of them from out of state, to overthrow our House and Senate, giving the Republican Party control for the first time since the 1800's. However, despite numerous actors ultimately involved, primary credit should be given to one individual, who envisioned, organized, and funded the electioneering infrastructure that made this all possible. Funding a campaign that fell outside most of our campaign finance laws, this former member of our State House, who was the heir to his father's wealth and fortunes, created a web of organizations, from charitable non-profits to 501(c)4 advocacy groups, 527 electioneering organizations and corporate donors to overturn the legislature on the cusp of our decennial redistricting.

Now, if you're a Republican, you likely don't see the Republican takeover of both legislative chambers as a bad thing. Why would you? A healthy turnover can be a good thing. What you should know is that, before the independent expenditure campaigns of our 2010

elections, there was a test-run, where this same individual exploited "issue advertising" campaigns against his fellow Republicans.

This same individual, just a few years before, decided that many of the state's senior Republican legislators were not "pure" enough, and purged them in nasty primaries filled with attack ads that exploited the margins of our campaign finance laws and sent home those Republican legislators who did not comport to the model of what he thought a Republican legislator should be. Who should say what that model Republican legislator is? The Republican voters who have loyally supported home-town civic leaders for several terms that have worked hard for their districts? Or a Raleigh millionaire and former politician in a new role, as puppet-master, recruiting his own loyal cronies and politically assassinating those, Democrats and Republicans, who disagree with his narrow vision of North Carolina's future?

In defense of this purge, you might be told that it was the voters in the districts of these ousted Republicans, not any one person, who turned these Republican incumbents out of office. You might be told that it was an informed and motivated electorate who desired a change and who simply expressed their preferences at the ballot box. Yet, these same voters held these ousted lawmakers in high regards, until the independent attacks came, distorting the incumbents' voting records and painting them in a defamatory light. Before the attacks, these were respected lawmakers. After the attacks they were seen as pariahs within their own party. Why did these voters turn on their former representatives? They were largely influenced by the "information" sent to them by the independent expenditure groups and 527's which, while shockingly negative, was accepted as factual by many voters because these same voters firmly believe that that these groups "couldn't say it if it wasn't true."

One man may not be able to buy a legislature, but one man, if he is a millionaire and has the financial means of a large corporation behind him to do so, can be the catalyst that set in motion a huge influx of secret money, corporate money, and out of state money, that sent into retirement dozens of North Carolina House and Senate members.

Let me state for the record that there is no proof of any illegal activity that occurred in any of this electioneering. Let me also state that the rights to contribute to candidates and to express one's viewpoints are clearly protected by our Constitution. Now it seems these rights have been extended to artificial corporate constructs and not simply the citizenry. Our United States Supreme Court has equated political spending with political speech and zealously protects the rights of individuals, and now corporations, to political expression. Though this may seem to create an inequality of political influence and political worth from citizen to citizen, it is the law. While I may not like the political choices made by millionaire Art Pope in how he has chosen to spend his money, and his corporation's money, and the tactics he and

his agents have chosen to use as they spend this money, our courts recognize and uphold his right to spend it.

However our courts have also recognized the compelling state interest served by the disclosure of political spending and transparency in attempts to influence our elections. It is here that I think North Carolina's voters were denied and where I believe the real wrong-doing was committed in these elections. Here is how *Citizens United* foils the few protections that were left to provide some measure of transparency in elections and some way for voters to hold political actors accountable for their communications.

Let me explain how this worked:

Art Pope, the millionaire and former state house member, could contribute to the campaigns of candidates he supported just like any citizen under our state law. Individuals are limited to donations of no more than $4,000 per election cycle per candidate. In my race, he gave $3,000 to my opponent, and found three other family members to also give $3,000, for a total of $12,000 to my opponent.

However, his influence did not stop there. Using his family's charitable foundation he was able to fund organizations he created that would conduct political research, on political issues and messages, and share it with candidates he supported by injecting it into the public domain, thereby avoiding any in-kind contribution reporting or coordination restrictions. Whether posting the information behind links to seemingly outdated articles or other low-traffic areas of an organization's website is truly injecting into the public domain is a matter of debate but one which went unchallenged. Candidate training seminars and conferences on political messaging also benefitted like-minded candidates. Though valuable, this type of activity was of indirect aid to the candidates he supported, and is duplicated by other organizations.

More significant was the creation of various 527 electioneering organizations that were created expressly for the purpose of influencing that year's legislative elections, but which were described as promoting issues of importance to voters. One of the newly created organizations, Real Jobs NC, Inc., spent over $45,000 against me by running negative and, in several cases, factually inaccurate attacks by direct mail. Another group, the Civitas Action organization, added another $25,000 in reported spending against me. A third group, the state chapter of Americans for Prosperity, spent another $21,000 in support of my opponent. The first of these groups was created by Pope, the second spun out of a charitable non-profit created and funded by Pope and was itself funded by Pope, and the third was the state chapter of a national organization, which received significant funding by Pope. The heavy funding

that three organizations received came from Variety Wholesalers, the corporation that owned the Pope family's chain of discount retail stores.

Between Art Pope's personal contributions, family contributions, and the corporate contributions from his family business, over $92,000, that can be tracked, was spent against me in my election by Pope. Studies tracking his spending reveal at least $2.2 million, directly attributable to him and his corporation, that was spent on directly influencing our state elections. This does not account for any influence spent on polling, message research, and candidate training provided through his charitable enterprises. Nor does it include an extensive amount of additional private and corporate money that was solicited by Pope's agents and funneled through these organizations.

The Democratic leadership never saw it coming. These millions of dollars did not appear in any of the candidate committees of the Republican leadership, other than Pope's personal contributions. Only his personal contributions appeared in the campaign disclosures of the state Republican Party. None of the millions appeared in the regularly disclosed political action committee reports of any business or industry groups. This was an off-book cornucopia of political funding that was purposefully raised and distributed through a network of shell organizations with no other purpose but to influence election outcomes. But because the method for influencing these elections was to link candidates to unpopular, sometimes inaccurate or just untrue, positions on issues, this spending escaped the disclosure expected of other political actors in our state.

Couldn't these attacks be refuted? Couldn't these attempts be matched? Only if the attacked candidates had the resources to defend against them, and few had the financial ability equal to what had been aggregated behind these multiple political vehicles. What could a candidate do when he or she was attacked, not just by a negative claim, a distorted vote, or an allegation of wrong-doing but with factually untrue information? Who is accountable? Does the new corporate entity which now directs political action and spends millions of dollars to express it own political opinions, whatever opinions that corporation might have, have any accountability? Can it be sued? Can there be any recovery? Or is it simply a legal construct, a shield that protects the true funders of the speech from any liability or civil action, even in the few cases where negative advertising does cross the line into actual defamation?

Attacks in direct mail used against me claimed I had voted for a billion dollars in pork barrel spending as part of the 2009 state budget. That could be an effective attack against me and my voting record, and one voters might have a legitimate need to know. Except that I wasn't even in the legislature during the 2009 budget session and could not have voted on the budget, yea or no, because I wasn't a state representative yet. How do I respond to that without the campaign war chest of these assembled corporations and millionaires? Voters had

access to disclosure legends, sometimes printed upside down, that told them that these attacks were funded by groups with names like Real Jobs, NC. Our state law says that 527 groups must go a step farther and further identify significant funders of these kinds of electioneering attacks. Yet under *Citizens United*, with corporations freely spending on direct advocacy, and corporations being created merely for the purpose of direct advocacy, the "funders" were often newly created organizations with little or nothing to identify them, with names such as "RealChange.Org" or other 527 organizations, non-profits, or shell groups. The web of money from a funder through one organization through another and then through another became so complex that I was once approached shortly after my defeat by a donor to one of these groups, a very significant donor, who shared his regret that I had lost my race. When I asked him about his organization's funding of attacks against me he expressed genuine surprise and disbelief, claiming that his organization wasn't even active in state elections. Only when I produced the IRS records months after the elections did I receive an apology and a statement that even he did not that this is how his money was being spent.

In closing, money has and always will be part of our elections process so long as money is necessary to communicate with voters. However, voters are entitled to know who is paying to influence their elections so that they can make their own independent and informed choices about whether to accept or reject the political messages that bombard them. Clearly votes need to be educated to learn that, yes, political organizations can, and do, often say things that are not true, and are allowed to get away with it. Yet, the ability of states and local governments to enact and enforce even the most basic disclosure laws that promote transparency and accountability in electioneering are threatened by recent rulings by our United States Supreme Court. In North Carolina we thought we had adequate protections in place that would give voters the information they needed to scrutinize and evaluate the political mailings they received. We thought we had done a good job of requiring the types of disclosure needed to reveal who was behind the electioneering in these types of political communication. As you have seen, we were wrong. As you move forward, I hope you will keep in mind the kinds of electioneering that took place in North Carolina and work for a solution that allows states to protect and preserve the transparency and accountability in their own election laws.

RICK HUBBARD - MBA, JD

July 13, 2012

Senator Patrick J. Leahy
Chairman, U.S. Senate Committee on the Judiciary
437 Russell Senate Bldg
United States Senate
Washington, DC 20510

Senator Dick Durbin
US Senate Committee on the Judiciary
Chairman, Subcommittee on the Constitution, Civil Rights and Human Rights
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Testimony of Rick Hubbard of South Burlington, Vermont for the record at the July 17th, 2012 Hearing on Citizens United Constitutional Amendment Proposals.

Honorable Senators,

I submit this testimony on behalf of myself, on behalf of tens of thousands of Vermonters, and on behalf of tens of millions of like minded U.S citizens.

As you hold hearings on constitutional amendment proposals related to Citizens United we urge you NOT to look at the Citizens United issue narrowly.

Much evidence in our recent political history documents that our entire political process today - the way we conduct our elections, the way we finance candidates, and the way Congress and other branches of our government enact law, regulation and policy - does not, on balance, serve the best medium and long term interests of the majority of U.S. citizens. Rather than engage here in the involved task of documenting this evidence, we ask you to take judicial notice of it.

Thus we urge you to consider very broadly and in depth the root causes which underlie this result, to propose an amendment or amendments to our U.S. Constitution which will rectify these problems, to submit them for further discussion and approval by two-thirds of both houses of Congress and to then further submit them for ratification by the legislatures of three fourths of the several states as set forth in Article V of said Constitution.

I am a seventy year old native Vermonter with an excellent graduate level education in two disciplines; law, and business and economics. Though now retired, the majority of my professional life has been spent working as an attorney, though formerly I worked as an economic consultant. I have a keen lifetime interest in public policy and in making our political system work effectively.

In this latter regard, this past winter I organized an effort to collect petitions in my city of South Burlington in support of statewide efforts which resulted in voters of 64 Vermont towns and cities passing resolutions urging our Vermont congressional delegation and the U.S. Congress to propose legislative or congressional action to address the issues raised by Citizens United.

In my city of South Burlington alone, the consensus of the 43 petition gatherers of almost 1,000 South Burlington signatures is that a proportion even greater than 9 out of every 10 persons approached, wanted to sign. This percentage of support is huge and it crosses all ideological lines. Similar results were reported in practically every Vermont community that addressed this issue. All of us are affected, whether we are conservative, moderate, liberal or progressive.

In my personal experience, I've never seen an issue resonate more with voters.

In addition I organized a gathering on Thursday, Feb. 23rd of this year in which a wide variety of individuals and organizations from around Vermont met in South Burlington's City Hall. There, more than 50 of us from many Vermont organizations, leaders from many Vermont towns, concerned citizens and Vermont State Directors for both Senator Leahy and Rep. Welch, discussed the components of a complete fix of the widely perceived problem that, nationally, our democratic process fails citizens by tipping law, regulation and policy in ways that often benefit the interests of wealthy campaign contributors and members of Congress rather than the interests of most Americans.

Discussion participants listed the following as among the major components of a complete fix, all of which together would likely result in a democratic process that much better reflects the overall interests of the American people:

- Complete public financing of our federal elections, crafted in a way that allows virtually all U.S. citizens to have a meaningful say in who qualifies to access finances to spread their message more broadly.
- Much shorter federal election periods.
- Free and equal access to our public airways for candidates during the election period.
- A process by which voting citizens exert the primary influence on election outcomes, which requires restraining the influence of corporations and all other outside organizations.

Participants also concluded that reform efforts should not be side-tracked by partial, incomplete solutions which might result in an improvement without resolving the major underlying problems.

The 2002 McCain-Feingold law is an example of this. As you know, it attempted to limit the influence of outside "soft money" from organizations as well as "issue advocacy ads" during election periods. During the two-year 2000 Federal Election Cycle, this "soft money" amounted to only about 17-18% of the total $2.9 billion election cost.

But before, during, and after McCain Feingold, evidence suggests that the reform offered by this law failed to substantially correct the underlying problems.

The recent Citizens United decision from our U.S. Supreme Court effectively voided most of McCain-Feingold, thus re-opening the floodgates for outside money to again hugely influence campaigns in even larger amounts. In reaching its conclusions our Supreme Court focused on the right of citizens to be able to hear political speech from others without distinguishing the opposite - that with enough money, a wealthy person may, in effect, purchase a much bigger megaphone than most of the rest of us, to amplify

their speech and repeat it over and over in the national media, effectively overwhelming and drowning out *our* free speech, i.e. the speech of most of the rest of us.

Across our country, millions of U.S. citizens perceive this result as wrong, unfair and extremely damaging to our country's democracy.

Tellingly, of those participating at our February 23rd gathering, not a single person believed that a constitutional amendment simply reversing the effects of Citizens United would resolve the broader underlying problems. We support a solution that may include this, but to be effective in resolving the issues negatively affecting our current democracy and political process, any amendment or amendments must be much broader and more comprehensive.

This widely perceived issue of our damaged democratic process underlies, and can connect, widely different groups in America today:

- in both red states and in blue states
- in both the Tea-Party and Occupy Wall Street

It also can connect conservatives, moderates, liberals, progressives and independents.

Although these disparate groups cannot yet agree on exactly what an appropriate fix for this issue is, there is widespread agreement that our current political process has gone terribly wrong, and that it needs to be broadly and systematically addressed and that effective solutions are required.

For all of the above reasons, I and millions of Americans urge you to discuss and propose an amendment or amendments to resolve this issue in a broad and comprehensive manner.

We are aware that the way we currently finance and conduct our political process makes it easier for incumbents to remain in office and continues to allow wealthy contributors unequal extra access resulting in laws, regulations and policies to often serve their interests rather than the interests of the broader public.

This in turn moves, in the aggregate, many hundreds of billions of dollars out of our pockets and into their pockets. In comparison, the cost to prevent this result by reforming and publically financing our political system is but a tiny fraction of these amounts.

We are also aware that incumbent members of Congress who benefit from this current system, as well as those financial contributors who receive large financial benefits from this current system, all have great incentive to oppose broad reform, to offer partial reforms that will not be effective in a broad sense, to downplay the need for broad reform, and to denigrate and discredit those who support broad reform.

We ask you to rise above all this and to assist in reforming our democracy and its political processes in a manner that will serve the interests of most U.S. citizens in future generations.

We realize that this will take time, but we will be watching to see if such broad reform actually happens in the months and years ahead.

Should Congress fail to act within what most citizens regard as a reasonable time, you are certainly aware, as we the people are, that Article V provides us with a way to circumvent Congress.

As you know, our forefathers as representatives of the thirteen united States of America, on July 4th of 1776 chose to declare our Independence from Great Britain when they believed that the King of Great Britain was placing his interests and the interests of his wealthy backers ahead of the interests of a majority of those inhabiting our original American colonies.

As you also know, because of this historical awareness, in creating our U.S. Constitution as signed on September 17th 1787, our founding fathers realized that there might again come a day when citizens would widely perceive that our elected Senators and Representatives in Congress, instead of acting in the broad public interest, were often acting in ways that primarily benefitted themselves and their wealthy backers. Thus our founders included in Article V, a second way to amend our U.S. Constitution.

Should Congress fail to act, we the people can (and we shall) appeal in accordance with Article V directly to the legislatures of two thirds of the several states to call for a convention for proposing amendments, which, shall be valid to all intents and purposes, as part of our Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress;

This second way to amend our Constitution has, as you are well aware, never been used to date. It would be terribly controversial and would undoubtedly take many years and great effort by U.S. citizens to effect.

It is for this reason we urge that Congress preempt such efforts and propose broad and comprehensive amendments to our U.S. Constitution which will effectively achieve these needed reforms and submit these amendments to the states for ratification.

In closing and on a personal note, I wish you to know that I think of myself as a rational person, inclined to reach opinions only after considering a wide variety of evidence and argument. If I, along with millions of other U.S. citizens, can reach the conclusions expressed in this testimony, I'm equally convinced that with time and much more discussion, effort and debate, tens of millions of additional U.S. citizens will join us.

While I am prepared, should Congress fail to act, to expend considerable effort working with others to organize these tens of millions of U.S. citizens to appeal directly to the legislatures of two thirds of our states to call for a convention for proposing amendments, I'm now age seventy and would rather spend my retirement years focused on more mundane matters.

Thank you Senators for convening this hearing and for considering and entering into the record this testimony.

Respectfully,

Rick Hubbard

Rick Hubbard

A PROPOSAL TO CONVENE A SERIES OF "CITIZEN CONVENTIONS" FOR PROPOSING AMENDMENTS TO THE CONSTITUTION

SUBMISSION OF
LAWRENCE LESSIG
ROY L. FURMAN PROFESSOR
OF LAW AND LEADERSHIP
HARVARD LAW SCHOOL

SENATE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS

HEARING ON
"TAKING BACK OUR DEMOCRACY:
RESPONDING TO *CITIZENS UNITED*
AND THE
RISE OF SUPER PACS."

JULY 24, 2012

As I have argued in my submission to this Committee today, the challenge for this Congress is both to identify the right reforms that our Constitution needs, and to do so in a manner that might earn the confidence of a skeptical public. Any process controlled exclusively by Congress, or its delegates, would not, in my view, earn that confidence. Too cynical are we to believe that a process this Congress itself controls is one that could rightly reform this Congress.

Instead, I would propose that Congress build upon a procedure that Professor James Fishkin of Stanford has developed — "deliberative polling" — to convene a series of *citizen conventions*, to identify the amendments, if any, that this Congress should consider. These "citizen conventions" would have no legal authority. But if conducted well, they could provide critical persuasive authority to a skeptical public about what reforms are needed.

"Deliberative polling" ties the *representativeness* of well-conducted polls with an opportunity for participants to *deliberate* in an informed environment about the questions at issue. A representative sample of the relevant public is identified and then gathered in a single place to deliberate, both in small groups and as a whole. The participants are given carefully balanced materials that present the issues in a way that they understand and can deliberate about. And the process produces a mature and stable view about the issues presented. More than twenty such polls have been conducted in the United States and abroad, on topics ranging from the future of the European Union to technical questions about utility regulation in Texas.[1]

In this context, I would propose that "citizen conventions" be constituted as a kind of deliberative poll. Three hundred citizens, perhaps from specific regions of the nation, would be randomly selected. They would be given materials that fairly describe the nature of the perceived problem, and then gather in a single location to deliberate about that problem, and a range of proposed solutions. These conventions would be advisory to Congress, or perhaps to this Committee, but they would be framed by rules to assure that they are constituted properly.

Those rules should conform to the following principles:

1. *Delegates should be selected randomly and proportionately.* For these conventions to earn the trust of the American people, they must be constituted outside of the ordinary process of politics. Congress should not populate these conventions, either itself or through its delegates. Professional politicians should not populate these conventions, either themselves, or through the people they help to elect. Instead, like a jury, a random and proportionate selection of citizens should be gathered to deliberate about the reforms that are necessary.

[1] See http://bit.ly/LHuME5.

2. *To assure that a random selection could afford to participate, the law must secure to the delegates certain privileges.* Delegates should be paid from the Treasury at a rate that equals 150% of their current income,[2] capped at some reasonable level; their expenses to attend the convention, including additional home-care expenses, should be provided as well; the law should secure protection for the jobs those delegates must leave, by compensating employers to save the jobs of the delegates. These privileges need to be generous enough to make it possible for a random selection to participate. But like the draft to serve in the military, the excuses for being exempted from this service should be few and strictly policed.

3. *These citizen conventions should be conducted as a "deliberative poll."* The procedures for constituting these conventions should form them on the model of Fishkin's "deliberative polling." That system requires a careful process for selecting the material that the delegates will be exposed to, and to assure the delegates come to understand the substance of the materials, and given a chance to deliberate about them. This process can be open, and observed by the general public. But the delegates themselves should be sequestered from other individuals during the deliberation. The only source of influence that should be permitted is the influence of one delegate on another.

4. *The results of these citizen conventions should be transmitted to Congress, and Congress should vote on whether to adopt the proposals agreed upon.* For the process to be meaningful, delegates must believe their work will have consequence. The rules should therefore require that Congress to debate the proposals that were agreed upon by the citizen conventions, and in a roll call vote, adopt them or not through a resolution. The process should be completed by July, 2014, to give the political process time to digest the results. The vote on the resolution should be conducted before that election.

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[2] The disruption of service, especially for modest earners, justifies a premium for service.

There is precedent both across the world and within our own tradition for this mode of *sortition* to decide important policy questions.[3] Our judicial system in some states gives just a dozen citizens the power to determine the life of a convicted murderer. Our tradition also secures, through the grand jury, citizens participating in the decision whether to prosecute or not.

Likewise, Canada to this day has a process by which citizens are randomly selected to serve on "citizen assemblies" to advise the government about policy proposals. And Iceland has just completed an extraordinarily ambitious process by which citizens participated to enable the drafting of Iceland's first constitution.

Such processes work well when citizens are given the information they need to understand the problem, and an opportunity to deliberate about alternative solutions. They work better than the ways in which we currently elicit views from citizens — through polling, or focus groups, or even elections — because in those cases, there is no guarantee the citizen knows anything. But with sortition properly conducted, the citizens are given a chance to understand the issue before they give their views about how best to respond.

In the face of the extraordinary lack of confidence that Americans have in their government, it is critical that Congress think creatively about ways to rekindle participation and confidence. Such creativity will often generate new ideas. It will sometimes remind us of the value in old ideas.

Turning to the People to resolve fundamental questions of governance is as old in our Republic as the Republic itself. Indeed, as Professor Akhil Amar reminds us,[4] ours was the first constitution of a nation in the history of man to be adopted by ratification by the people in convention. This Congress should feed that tradition, by giving "the People" another meaningful and informed way to participate in this, the most urgent problem this government faces: Restoring the faith of the governed in their government.

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[3] See Oliver Dowlen, *Sorted: Civic Lotteries and the Future of Public Participation* (2008), http://www.masslbp.com/publications.php.

[4] *America's Constitution* (2005).

END CORPORATE RULE. LEGALIZE DEMOCRACY.

MOVE TO AMEND

July 18, 2012

Sen. Patrick J. Leahy
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510
Sen. Dick Durbin

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Human Rights
Move To Amend's Written Testimony for the "Responding to Citizens United and the Rise of Super PACs" Subcommittee Hearing, July 24, 2012

Dear Senator Leahy and Senator Durbin:

We are heartened that Senate Subcommittee on the Constitution, Civil Rights, and Human Rights is holding these hearings to examine pending constitutional proposals to remedy the Supreme Court's 2010 *Citizens United* decision. It is not possible to overstate the existential threat posed to our small "d"/small "r" democratic/republican form of government by that odious decision. Thank you for having the courage to take the first necessary steps towards overturning it.

As you know, the Supreme Court's *Citizens United v. FEC* decision in January 2010 expanded constitutional First Amendment speech rights for

corporations and reinforced the fiction that corporations have inalienable rights under the U.S. Constitution. With that decision, the Supreme Court opened the floodgates to corporate and secret money in our elections. Already in 2012 outside spending is double what it was in the record-breaking 2008 elections and nearly all of that money has come from groups that do not disclose their donors.

In granting corporations the inalienable constitutional right to spend unlimited money to influence elections, the Supreme Court has given powerful special interests undue influence in the democratic process, and that deluge of corporate cash, when added to obscenely large independent expenditures from the extremely wealthy, is drowning out the voices of ordinary citizens.

We, at Move to Amend, are concerned about what we see as a growing Washington bandwagon to address only the campaign finance loopholes created by the *Citizens United* decision, and not the problem of "corporate personhood," which is equally destructive to our democracy.

We understand that, as significant as they are, the problem posed to our "small d" democracy by unlimited corporate spending in our electoral process is not the "root cause" of the problem. The torrent of corporate spending unleashed by *Citizens United* is just a symptom of the two fatal diseases afflicting our democracy – the specious, Supreme Court-created doctrines of "Corporate Personhood" and "Money as Speech." For any proposed constitutional amendment to be effective, it must address both of those root-causes.

For those of you on the Subcommittee who do not know us, Move to Amend is a nation-wide coalition of hundreds of organizations, and hundreds of thousands of individuals, committed to social and economic justice, and building a vibrant democracy that is genuinely

accountable to the people, not corporate interests. We are dedicated to promoting an amendment to the U.S. Constitution that says two things, clearly and unequivocally: 1) that inalienable rights recognized under the constitution belong to human beings, only; and, 2) that money is not speech and that, thus, regulating political contributions, and political expenditures, is not equivalent to regulating political speech.

Move to Amend has drafted a proposed constitutional amendment – "the Move to Amend amendment" - which satisfies those requirements. It reads:

> **Section 1 [A corporation is not a person and can be regulated]**
>
> The rights protected by the Constitution of the United States are the rights of natural persons only.
>
> Artificial entities, such as corporations, limited liability companies, and other entities, established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law.
>
> The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.
>
> **Section 2 [Money is not speech and can be regulated]**Federal, State and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, for the purpose of influencing in any way the election of any candidate for public office or any ballot measure.
>
> Federal, State and local government shall require that any permissible contributions and expenditures be publicly disclosed.
>
> The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.
>
> **Section 3**
>
> Nothing contained in this amendment shall be construed to abridge the freedom of the press.

Our proposed amendment is unique in that it has been forged in the crucible of nearly 20 years of movement building, grassroots organizing, and legal research.

As it relates to the issue of "corporate constitutional rights," the Move to Amend amendment is based on a simple premise - that inalienable rights guaranteed under the Constitution belong to human beings, only. NO exceptions. NO loopholes. We recognize the obvious – that human beings create artificial legal entities such as corporations, and labor unions, and non-profit issue advocacy groups, and that those artificial legal entities only need, and should only have, those "legal rights" that we, collectively, decide that they should have. For example, artificial legal entities, such as corporations, need legal status in order to do business. They need to be able to enter into binding contracts, and to sue and be sued. So, we, the people, acting as our government, give them those "legal rights" when states pass laws governing incorporation. In that regard, Move to Amend's position is not extreme. Instead, our position – that corporations are only entitled to those legal rights granted by statute - was a matter of well-settled law from the founding of this country until into the 20th Century. For example, in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819), Chief Justice Marshall explained that a corporation is a "mere creature of law . . . [which possess] only those properties which the charter of its creation confers upon it. . ." Furthermore, in *Bank of Augusta v. Earle*, 38 U.S. 519 (1839), the Court rejected a claim that a corporation was protected by the Privileges and Immunities Clause, because "[t]he only rights [the corporation] can claim are the rights which are given to it [by the charter], and not the rights which belong to its members as citizens of a state. . . ." *Id.* at 587. Likewise, in *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906), the Supreme Court stated, that a "corporation is a creature of the state. . . incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject

to the laws of the state and the limitations of its charter. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. . ."

And it was not just the judiciary that held a healthy skepticism about the nature of the relationship between corporations and their human creators. It is safe to say that there is a thread of anti-corporatism that runs through the fabric of our nation. It is bred into our political DNA. What was the "Boston Tea Party" other than an act of anti-corporate vandalism against the largest, most powerful, multi-national corporation of its day – the British East India Company?

The founding generation, who knew what corporations were, and who had just fought a revolutionary war to throw off the power of not just the King, but also the King's crown corporations, did not mention corporations in the documents that established our government - the Constitution and the Bill of Rights. That should tell us everything that we need to know about their "original intent." It should be clear to all that the founders did not intend corporations to play <u>any</u> meaningful role in our political system.

Furthermore, throughout our history, presidents have warned us of the threat posed by unbridled corporate power. In 1816, Thomas Jefferson said "I hope we shall crush in its infancy the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength and bid defiance of our laws." In 1817, James Madison said "The power of all corporations ought to be limited in this respect. The growing wealth acquired by them never fails to be a source of abuses." In 1910, Teddy Roosevelt said "The great corporations which we have grown to speak of rather loosely as trusts are the creatures of the State, and the State not only has the right to control them, but it is duty bound to control them wherever the need of such control is shown." In 1936, Franklin Delano Roosevelt advised the nation that "We struggle with old enemies of peace - business and financial monopoly, speculation, reckless banking, class

antagonism, sectionalism, war." And, in 1959, Dwight D. Eisenhower warned "We must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."

In light of that truly American history, it is clear to us that we, at Move to Amend, are on the right side of the law, and the right side of American history, when it comes to our unwavering belief that inalienable constitutional rights belong to human beings, only.

For this reason, we believe that any proposed constitutional amendment must go beyond simply overturning *Citizens United,* because the problems posed by "corporate personhood" go far beyond *Citzens United.* It is NOT an exaggeration to state that, with the possible exception of the right to a jury trial recognized under the 7th Amendment, corporations have abused every constitutional right recognized on their behalf.

Corporations have decimated the 1st Amendment – and not just in the *Citizens United* context. In recent years, oil, coal, and utility corporations, tobacco corporations, chemical and pharmaceutical corporations, alcohol corporations, and banking corporations have all successfully claimed corporate free speech rights to invalidate federal, state and local laws. Cigarette companies have been found to have the 1st Amendment to right to advertise cigarettes near schools and playgrounds. *Lorillard Corp. v. Reilly*, 533 U.S. 525 (2001). And, when Vermont became the first state in the nation in 1994 to require labels on milk and dairy products derived from cows injected with the controversial genetically engineered Bovine Growth Hormone, Monsanto sued in Federal Court and won on a judge's decision that dairy corporations have the First Amendment "right" to remain silent on whether or not they are injecting their cows with rBGH - even though rBGH has been linked to severe health damage in cows and increased

cancer risk for humans, and is banned in much of the industrialized world, including Europe and Canada. *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996).

Corporations have also abused the 4th Amendment. People are literally stunned when they are told that OSHA cannot do a surprise inspection in their place of employment. But OSHA cannot, because the Supreme Court has held that surprise OSHA inspections violate the business's inalienable right to be free of unreasonable search and seizure under the 4th Amendment. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

And Wal-Mart has attempted to use the 14th Amendment to as a cudgel, both to insinuate itself into a town that passed a City Council resolution to keep out "big box" stores, *Wal-Mart Stores, Inc., v. City of Turlock* 483 F.Supp.2d 987 (2006); and, to beat back a Maryland law requiring employers with 10,000 or more Maryland workers to spend a percentage of their total payrolls on employees' health insurance costs, or pay the state the amount their spending falls short. *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007).

We, the People, have a moral, and an ethical, obligation to regulate the corporations, and other artificial legal entities, that we create. It is clear from the examples, above, that corporations are using the "inalienable constitutional rights" that they were never intended to have to go to court to argue that our reasonable laws and regulations violate those "inalienable constitutional rights." We need to amend the Constitution, ending "corporate personhood," because NO corporation, or other artificial legal entity, should be empowered to overturn our democratically enacted laws and regulations.

The notorious 1886 case of *Santa Clara County v. Southern Pacific Railroad* is just one in a long series of Supreme Court cases that entrenched "corporate personhood" in law. Justices since have struck down hundreds of local, state and federal laws enacted to protect people from

corporate harm based on this illegitimate premise. Armed with these "rights," corporations wield ever-increasing control over jobs, natural assets, politicians, even judges and the law.

We believe corporations are not persons and possess only the privileges citizens and their elected representatives willfully grant them. Our Amendment will reverse the Court's invention of "corporate personhood" and limit corporations to their proper role: doing business under state charter.

In our opinion, any proposed constitutional amendment must also include a provision that clearly and unequivocally states that "money is not speech, and can be regulated." There are others who support the passage of a constitutional amendment to overturn *Citizens United*, including Professor Lessig who will testify at this hearing, today, who "[do not support] any amendment that purports to declare 'Money is not Speech.'" (Lessig Blog, v2, February 6, 2012). Opponents of a constitutional amendment that would declare that "Money is not speech" fear that it would allow "the government [to] constitutionally prohibit anyone to spend or contribute even a single dollar in the political process. In a world in which speech costs money, this would give a huge advantage to incumbents and effectively destroy our democracy." (Professor Geoffrey S. Stone, "Is Money Speech?" The Blog, posted February 5, 2012).

With all due respect to Professors Lessig and Stone, our democracy has already been destroyed by the tens of millions of dollars in unaccountable donations and spending that have poured into the political system since *National Bank of Boston v. Belloti* (1978) and *Citizens United v. FEC* (2010). (In that regard, Move to Amend's amendment is not about "preserving" our democracy. Rather, it is about establishing the conditions necessary to allow us to establish, for the first time in American history, a truly democratic, truly republican, form of government that represents the interests of all Americans, as opposed to the privileged few.) To borrow an

analogy from Prof. Garrett Epps (Professor Garrett Epps, "Don't Blame 'Corporate Personhood,'" The American Prospect, April 16, 2012) money in politics today is being used like a privately-owned bullhorn to drown out all of the free speech of all political speakers who aren't rich enough to afford an equally large amplification system.

Imagine that a representative of Citizens United, LLC, had been invited to give testimony at this hearing, but that, after that representative had spoken, she used a privately-owned bullhorn to drown out the testimony of all of the witnesses that followed. Certainly, Senator Durbin, as the Chairman of the Subcommittee, would have the power to order the representative from Citizens United, LLC, turn down the volume on the bullhorn, or to prohibit the use of bullhorns in the hearing room all together, if that is what he deemed necessary to make sure that as many points of view as possible are heard.

The same is true of political speech outside of this hearing room. The voices of hundreds of millions of ordinary Americans are being drowned out in the halls of Congress by corporations, and by the extremely wealthy, with their multi-million dollar bullhorns. Certainly, Congress should have the power to tell those corporations, and those million-dollar donors, to "turn down the volume on their privately-owned bullhorns" – by passing reasonable campaign finance regulations; or, to "turn their bullhorns off completely" if need be.

Although we do not have a congressional sponsor for our Amendment, yet, we do have broad popular support. As of yesterday, a petition in support of the amendment, which can be found online at www.movetoamend.org/amendment, has been signed by 218,124 people. Additionally, Move to Amend supporters have been at the forefront of the recent efforts to raise public awareness about this issue.

In Vermont, the resolution introduced by State Senator Virginia Lyons was based on Move to Amend's language, as were the successful ballot initiatives in Madison, WI; Boulder, CO; and Bozeman, MT. In Los Angeles, the resolution passed by the City Council actually incorporated, by reference, Move to Amend's proposed constitutional amendment, and dozens of resolutions have passed across the country that are modeled on our language and spearheaded by our volunteers.

People around the country are gravitating to this issue. They are in the streets, carrying signs that read "Corporations are NOT People" and "Money is NOT Speech!" Those are Move to Amend's core values. Nobody is carrying signs saying "SOME Corporations are NOT People" or "A Little LESS Money in Politics."

We urge you, as members of the Senate to hear the voices of WE, THE PEOPLE, and to move forward with the passage of a Constitutional Amendment that says clearly, and unequivocally: that inalienable rights recognized under the Constitution belong to human beings, only; and, that money is not speech.

Thank you,

Move to Amend, National Executive Committee

Ashley Sanders, Ben Manski, Daniel Lee, David Cobb, Egberto Willies, Jerome Scott, Kaitlin Spooky-Belknap, Laura Bonham, George Friday, Nancy Price, Stephen Justino

July 24, 2012

Senate Judiciary Committee
Senate Subcommittee on the Constitution, Civil Rights and Human Rights

Re: **Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs**

Dear Chairman Durbin and Members of the Subcommittee:

People For the American Way (PFAW) commends you for holding this extremely important hearing. We appreciate this opportunity to address the serious problems that have arisen since the Supreme Court's disastrously misguided ruling in *Citizens United v. Federal Elections Commission.*

Introduction

The January 2010 *Citizens United* decision granted corporations the right to make unlimited independent expenditures to support or defeat electoral candidates. The narrow 5-4 majority decision was based on two severely flawed foundations: (1) that corporations have the same First Amendment rights as people to make independent expenditures to affect elections; and (2) that such independent expenditures cannot possibly cause real or perceived corruption and, therefore, any government interest in limiting such expenditures is outweighed by the corporation's First Amendment right.

Within weeks of *Citizens United,* the DC Circuit relied on that case in its *SpeechNow v. Federal Elections Commission* opinion. The court ruled that since independent expenditures do not cause real or perceived corruption, then an individual's giving contributions to groups that make only independent expenditures also cannot create real or perceived corruption. Therefore, according to the court, the Constitution prohibits laws limiting individuals' contributions to such entities. And so the current phenomenon of unlimited contributions to the "super PAC" was born.

Americans have responded to *Citizens United* and its progeny with remarkable agreement. A nation that is split down the middle on so many political issues nonetheless agrees overwhelmingly that the people's constitutional authority to hold elections with integrity must be restored. Surveys show lopsided supermajorities opposing *Citizens United.* For instance, polling from earlier this year, two years after the Court handed down the opinion, reveals that 62% of Americans oppose the Court's decision, and more than half say they would support a constitutional amendment to reverse it.[1] Around the nation, local and state governments are

[1] Democracy Corps and Public Campaign Action Fund, *Two Years After Citizens United, Voters Fed Up with Money in Politics,* http:// campaignmoney.org/files/DemCorpPCAFmemoFINAL.pdf. The survey was conducted by Greenburg Quinlan Rosner Research.

responding to their constituents by passing more than 275 resolutions urging Congress to send a constitutional amendment to the states for ratification. Six state legislatures are on record in support of constitutional remedies: Hawaii, New Mexico, Vermont, Rhode Island, Maryland, and California. They have been joined by towns, cities, and counties both large and small, in red states and blue states, like Kansas City (Missouri), Fayettesville (Arkansas), Los Angeles and San Francisco (California), Alleghany County and Asheville, (North Carolina), Albany and New York City (New York), Missoula (Montana), Wilkes-Barre and Pittsburgh (Pennsylvania), South Miami (Florida), and Madison (Wisconsin).

In distorting the Constitution, the Supreme Court has created a "movement moment," where Americans are joining together to fix the country we love. During today's hearing, we look forward to an honest examination of the damage that *Citizens United* and its progeny have done to our nation, damage that can be repaired only through a constitutional remedy.

Corporations do not have the same First Amendment rights as people.

Citizens United treated corporations and people the same for the purposes of a First Amendment analysis of campaign spending rules. In elevating the constitutional rights of a corporation to those of a person in the context of affecting elections to public office, the Roberts Court has radically transformed the fundamental premise of the Constitution: For the first time, corporations are, as a constitutional matter, members of the political community of the United States. Sovereign power no longer flows only from the people, but now must be shared by people and non-human corporations.

The First Amendment was never intended to equate multibillion dollar corporations with real persons. Nothing in the Constitution even requires governments to allow corporations to exist. A corporation is an artificial creation whose basic nature is determined by the state law where it is incorporated. Governments allow businesses to organize as corporations in order to limit the financial liability of their owners and managers. A corporation, unlike an individual, does not retire, die, and distribute its wealth among its descendants. A corporation, unlike an individual, can consist of thousands of people working full time across the country, operating in several sectors of the economy simultaneously. The corporation can take risky actions that lead to big payoffs, but its owners and managers are not personally liable for those actions if they fail. In other words, the law grants corporations vast, superhuman abilities that are denied to individuals. And with those vast abilities, granted to these artificial creations at the discretion of the government for the purpose of advancing commerce, the corporation can amass far more wealth than an individual can.

So the idea that the First Amendment *requires* governments to treat these corporations *identically to people* for the purposes of regulating how corporations spend that wealth to influence elections is bizarre.

This recognition of the obvious differences between people and corporations – and the subsidiary role the latter play in our constitutional structure – was not lost on those who adopted the Constitution. As Chief Justice John Marshall wrote in 1818, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law,

it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."[2]

The *Citizens United* majority went on at great length about how the campaign finance laws in question purportedly restricted and even punished the political speech of "associations of citizens" during election seasons. A gathering of Bostonians challenging George III is an "association of citizens," but that term can hardly be used to describe creations of the state licensed solely to do business and make a profit. Moreover, the laws in question did not restrict or punish any people. A law that restricts *corporate* spending does not at all affect *individuals'* ability to talk or to spend their own money, either alone or in conjunction with other people. It does prevent the use of funds from a corporation's general treasuries to spend money to influence elections.

Before *Citizens United* was decided, the people who ran corporations were not having any difficulty making their voices heard during election campaigns, including on matters of direct interest to their corporations. They could have their corporation set up a PAC, then give their personal money directly to the PAC for electoral purposes, with the PAC either giving directly to a campaign or making independent expenditures. In addition, like anyone else, they could contribute directly to candidates running for office subject to contribution limits.

What these businesspeople could not do before *Citizens United* was spend *the corporation's* money to advocate for or against a federal political candidate. But in the wake of *Citizens United*, corporate officers can now tap into the potentially vast resources of the corporate treasury, essentially spending someone else's money. Ordinary people have no such luxury; the money they donate must be their own. But corporate CEOs and business owners can now give millions of dollars for independent expenditures without losing a dime of their own money. This is a stunning new inequality given constitutional legitimacy by the Supreme Court: Those with positions of influence have been handed even more influence.

Massive funds from large corporations and a sliver of extremely wealthy individuals cannot help but have a destabilizing influence on our national political structure and effectively silence the majority.

In 2008, before *Citizens United*, Exxon-Mobil set up a PAC that raised more than $1 million from corporate officials. That is a significant amount of money, but it all came from individuals. That same year, Exxon-Mobil earned $70 billion in profits. Had *Citizens United* been the law, the company could have devoted a mere 10% of those profits to affecting elections and dwarfed the PAC's spending by a factor of 7000. The $7 billion it could have easily spent would have been more than was spent by the campaigns of Barack Obama, John McCain, and every Senate and House candidate combined.

And that is just one company.

[2] *The Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1818).

Imagine the most powerful corporations in the nation devoting these enormous sums to affect elections. The voices of 99% of the population would be completely drowned out, with the airwaves filled with corporate-sponsored ad after corporate-sponsored ad.

All this spending would have something in common: the corporate officers who write the checks have a fiduciary duty to maximize shareholder returns. The goals that animate people acting on their own behalf – concern for their community, concern for their neighbors, concern about values – are irrelevant to how that corporate electoral money is spent. In fact, in some cases, corporate officers who allow themselves to be swayed by such human factors may be violating their fiduciary duty to the companies that employ them.

Of course, to accomplish its goals, a corporation need not actually spend such sums in every race they are interested in. Far from it. Especially for offices or in areas where electoral races are generally not overwhelmingly expensive – in other words, for most state and local legislative and judicial elections throughout the United States – the implied threat to spend large expenditures against elected officials could easily be enough to "persuade" them to take the "right" position. Conversely, the promise of an enormous windfall in supportive corporate independent expenditures could have an equally persuasive effect.

Such corruption leaves no evidence: no paper trail, no recordings, no ads. But it poisons our nation's democracy.

Unfortunately, limitless spending from the wealthy and powerful need not be corporate in source to drown out the voters and intimidate elected officials: Especially through super PACs, we are seeing a tiny number of phenomenally wealthy individuals exert obscenely oversized influence over elections. For instance, during the 2012 presidential primary campaigns in Alabama and Mississippi, 91% of the television ads promoting presidential contenders were paid for by the candidates' super PACs.[3] Certain candidates with little public support and thus minimal funding to their campaigns were nevertheless able to campaign for months on the "generosity" of one or two billionaires, whose support for single-candidate super-PACs grossly disrupted the electoral process.

Does anyone doubt the influence these mega-donors would have had in a White House run by the individuals whose efforts they indirectly bankrolled?

Whether those super-PACs are funded by phenomenally wealthy individuals or phenomenally wealthy corporations, they are doing serious damage to our democracy. The lesson is being learned not just on the national stage via the presidential campaign, but in states and communities across America.

In Arizona, for instance, corporate money brought into play by *Citizens United* may have decided that state's election for Attorney General in 2010. The race between Republican Tom Horne and Democrat Felecia Rotellini was expected to be the closest statewide race that year, and the two candidates' campaigns' spending were relatively close to each other. But during the

[3] Bloomberg News, *Super-PAC Ads Dominate Republican Race in Alabama, Mississippi*, http://www.businessweek.com/news/2012-03-12/super-pacs-dominate-republican-ads-aired-in-alabama-mississippi-primaries.

final weeks of the campaign, a conservative organization called Business Leaders for Arizona [BLA] spent more than half a million dollars on independent expenditures attacking Rotellini, the Democrat. This happened when her campaign was low on cash, making it harder to respond. Horne – buoyed by BLA's election spending – ended up winning by five percentage points. Discussing the race earlier this year, Rotellini's campaign manager credited the independent expenditures with throwing the race to the Republican: "If he hadn't have had access to all that money, it would've been a different race -- and I think it clearly would've been a different outcome."[4]

And just who were the business leaders of Business Leaders for Arizona? After the election, BLA's campaign finance report to the state[5] revealed that only 25% of its contributions in those critically important final weeks came from individual contributions (and less than 15% of those individual contributions came from people in Arizona, despite the organization's name). BLA reported that 75% of its funds came from three business contributions:

- NCP Finance Limited - $30,000
- Texas Loan Corporation - $15,000
- RSLC - $350,000

RSLC, BLA's largest funder, turns out to be the Republican State Leadership Committee. According to the Annenberg Center's FactCheck project[6], the RSLC was a 527 political committee whose top donors were the U.S. Chamber of Commerce, Wal-Mart, Pfizer, Devon Energy, AT&T, Reynolds American (the tobacco company), and the American Justice Partnership, an organization seeking legislation to limit liability awards and reduce what it calls "abusive lawsuits."

Arizona's state constitutional provision protecting its elections from corporate domination[7] was just one of many state and local provisions across America upended by *Citizens United*.[8]

The premise that independent expenditures don't cause real or perceived corruption has been proven to be wrong.

Even the Roberts Court acknowledges that the American people, through our elected governments, have an important interest in preventing public corruption, both real and perceived. Where *Citizens United* departed from the reality-based world was its assertion that independent expenditures cannot possibly cause real or perceived corruption and, therefore, any government interest in limiting such expenditures is outweighed by the corporation's First Amendment right.

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[4] http://www.azcentral.com/news/articles/2012/04/02/20120402attorney-general-tom-horne-under-investigation.html.

[5] State of Arizona Campaign Finance Report, Amended 2010 Post-General Election Report of Business Leaders for Arizona, http://www.azsos.gov/cfs/PublicReports/2010/C10F8C6B-F26E-44A8-B770-8D50F934D16A.pdf.

[6] Annenberg Public Policy Center, FactCheck.org entry for Republican State Leadership Committee (posted August 10, 2010), http://www.factcheck.org/2010/08/republican-state-leadership-committee.

[7] "It shall be unlawful for any corporation, organized or doing business in this state, to make any contribution of money or anything of value for the purpose of influencing any election or official action." AZ Const. Art. 14, §18.

[8] National Council of State Legislatures, *Life After Citizens United*, http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx.

While *Citizens United* involved corporate spending, the logic was that applied (and limited) to individuals in *Buckley v. Valeo*. But even that 1976 case's finding was narrow and tentative, with the majority concluding that "the independent advocacy restricted by the provision does not *presently* appear to pose dangers of real or apparent corruption comparable to those identified with large [direct] campaign contributions."[9] *Citizens United* was more doctrinaire, concluding "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[10]

Survey data show that statement to be demonstrably false.

- According to a Democracy Corps and Public Campaign Action Fund survey from January 2012, two years after the decision, two-thirds of Americans agree with a statement that says: "Given what I see in the presidential race, I am fed up with the big donors and secret money that control which candidates we hear about. It undermines democracy."[11]
- An April, 2012, survey by the Brennan Center[12] revealed that:
    - 68% of all respondents agreed that "a company that spent $100,000 to help elect a member of Congress could successfully pressure him or her to change a vote on a proposed law"
    - 77% agreed that "A member of Congress is more likely to act in the interest of a group that spent millions of dollars to elect him or her than to act in the public interest."
    - 69% believe that "the new rules that let corporations, unions and people give unlimited money to Super PACs will lead to corruption."
    - 26% said they are "less likely to vote because big donors to Super PACs have so much more influence over elected officials than average Americans." The withdrawal from the most basic and most important activity in democracy was even more pronounced among African Americans (29%), Latinos (34%), and people with annual incomes under $35,000 (34%).

Unfortunately, the laissez-faire campaign finance system that *Citizens United* made possible has clearly shown that enormous independent expenditures not just can, but *do*, lead to the appearance of corruption. This key factual premise upon which *Citizens United* was based is simply not true. Earlier this year, millions of Americans were hoping that the Court, perhaps having made an honest error, would take advantage of the recent Montana campaign finance case to reexamine the assumptions underlying Citizens United. The Montana Supreme Court had cited that state's dark history of political corruption caused by corporate influence on elections in upholding a state law prohibiting corporations from making independent expenditures in state and local races (including judicial elections). But when the same narrow majority as *Citizens United* reversed the Montana Supreme Court without even giving the state the opportunity to

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[9] *Buckley v. Valeo*, 424 U.S. 1, at 46 (1976) (emphasis added).
[10] *Citizens United v. Federal Elections Commission*, No. 558 U.S. ___, ___ (2010) (slip op. at 42).
[11] Democracy Corps and Public Campaign Action Fund, above.
[12] Brenan Center for Justice, *Super PACs, Corruption, and Democracy: A National Survey of Americans' Attitudes about the Influence of Super PAC Spending on Government and the Implications for our Democracy*, http://brennan.3cdn.net/bcb50100c0dda6d39a_g3m6bc9py.pdf. (Executive Summary: http://brennan.3cdn.net/5d2ff3bdfc12b2eb27_pym6b9cdv.pdf.

present oral arguments[13], Americans saw that *Citizens United* had been no honest mistake. The five conservatives on the Roberts Court knew exactly what they were doing.

So now the American people perceive a significant increase in political corruption as a result of the spending let loose in *Citizens United* and its progeny. When people regularly regard their government as corrupt and available for sale to the highest bidder – when elections are no longer seen as reflecting the voice of the people – then faith in our democracy is severely undermined.

Amending the Constitution to Overturn Citizens United Shows Respect for the Constitution.

Amending the United States Constitution is not something we recommend lightly, but the danger caused by the Roberts Court's distortion of the First Amendment requires us to take corrective action. Some who are genuinely concerned about the threat to our democracy might nevertheless be reluctant to tamper with perhaps the greatest legal document in world history. As an organization that deeply respects the Constitution, we understand that reluctance, and we address this section of our comments to those of that view. We also extend an invitation to engage with the nationwide grass roots coalition united in wanting a constitutional remedy and discussing the various forms that such an amendment might take.

Some may be concerned because a Citizens United amendment has been characterized as the first to take away a constitutional right. This description is inaccurate for two reasons. First, *Citizens United* did not extend any new rights to individuals, to any member of the "We The People" who are this nation's sovereign power, with the sole exception of corporate officers who were given the new right to write checks from their extensive corporate treasuries to affect elections that are supposed to represent the people's voice. The right to spend our own money in politics was one already enjoyed by every citizen, and restoring the person/corporation distinction would restore each person's right to engage in a vigorous debate over public issues.

Second, constitutional reform that has protected and expanded rights has always been characterized by the forces of reaction as "taking away rights." The Thirteenth Amendment took away the property rights of white southerners who dehumanized African Americans and reduced them to property to be bought and sold. White men's voting power was undeniably diluted by the Fifteenth and Nineteenth Amendments, granting the right to vote to non-whites and women. The 16th Amendment took away the right of plutocrats to not pay their fair share in the taxes needed to run the country that allowed them to make their fortunes. The 17th Amendment took the right of often-corrupt state legislatures to pick senators, placing that right in the hands of the American people. In all of these cases, the Constitution was amended to make it better reflect the values on which our nation was founded. A constitutional amendment to strengthen our elections and prevent corporate and special interest money from drowning out all other voices would be in that same tradition of improvements to the ideal and thus would protect the First Amendment rights of actual people.

[13] *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. ____ (2012).

It is also important to note that even as the fundamental purposes of the First Amendment remain constant through the years – to protect the freedom of the individual and promote the vigorous exchange of ideas – the means through which the First Amendment accomplishes those functions evolves along with changes in technology and society.

For instance, at the time our nation was founded, requiring a government license in order to speak via popular media could not have had any purpose or effect but to limit speech. Although the founders could not have imagined a world where people send electronically amplified spoken messages over the air at the speed of light to far-away listeners, the First Amendment was able to adapt to this major technological change. In the early days of radio broadcasting, unregulated facilities interfered with each other and often prevented *anyone* from being heard over the airwaves. The traditional idea that more speech facilitates debate was turned upside down; additional broadcasting significantly curtailed the ability of other radio operators to be heard, often silencing them altogether. A content-neutral broadcast licensing system was developed to ensure that speakers could be heard, thereby protecting the First Amendment interests of both speakers and the public.[14]

The First Amendment did not change, but the world within which it operates did.

We now live in an economic, technological, and media environment where the ability of ordinary people to be heard in their communities' political debates is being eviscerated. Corporate and special interests with wealth that would have staggered our nation's founders purchase huge amounts of air time, drowning out the diverse voices of the 99%. Even worse, the identity of the speakers is often deliberately concealed, ensuring that voters are denied a key fact needed to analyze the reliability of the message being sent.

We can amend the Constitution to ensure our society accomplishes the fundamental purposes of the First Amendment. Currently, debate is in an early phase on how to accomplish that: To address the status of corporations under the Constitution? To address the damage to our elections caused by vast inequalities of access to effective means of communication? Perhaps some other way that has not yet been broached? An effective amendment will strengthen the First Amendment, not weaken it.

Conclusion

As an organization dedicated to defending the Constitution and, especially, the First Amendment, People For the American Way understands that a constitutional amendment is not an endeavor to be taken lightly or without great care to protect the rights and liberties of individual Americans. But the Supreme Court's decision to effectively silence the voice of the American people by invalidating restrictions on spending in elections by the nation's most powerful, wealthy, and elite is such that a constitutional amendment is the only appropriate and direct response.

[14] The Supreme Court discussed the early days of radio and the need for a government licensing system to ensure that speakers could be heard in *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-213 (1943).

That a constitutional amendment is needed to protect the viability of our democracy is something most Americans agree on. We also agree that it must be done with great care, which is why the nation has launched a conversation about the exact form that such an amendment will take. By highlighting the current threats to our democracy, the subcommittee is providing the American people with the information needed to ensure a vigorous and productive debate.

Michael B. Keegan
President
People For the American Way

Take Back the Constitution from the Corporate Court

Constitutional Progress over the Enemies of Popular Democracy is the American Way.

By Jamie Raskin

The American people have been forced several times to amend the Constitution to reverse the damage caused by the Supreme Court when it acts in collusion with the enemies of social justice and popular democracy.

In 1857, in the *Dred Scott* decision, the Supreme Court ruled that white supremacy was built into the Constitution as the original intent of the Framers, that African-Americans therefore could not be citizens entitled to bring suit in federal court, and that African-Americans had no rights that the white man was bound to respect. After the Civil War, the Radical Republicans moved to reverse that infamous decision through the 13th, 14th and 15th Amendments, which abolished slavery, proclaimed equal protection and due process under the laws, and protected the right to vote of all citizens regardless of race.

In 1875, in *Minor v. Hapersett*, the Court ruled that the Equal Protection Clause did not protect the right of women to vote, declaring that the domestic sphere was women's proper place. In response, the suffragists mobilized campaigns in the state legislatures and Congress, committed civil disobedience by chaining themselves to the White House fence, and accomplished passage in 1920 of the 19th Amendment.

In 1937, in *Breedlove v. Suttles*, the Court rejected an Equal Protection attack on the imposition of poll taxes as a condition for voting. This decision cemented the plutocratic and racist practice in many Southern states but the Civil Rights Movement finally won passage of the 24th Amendment in 1964 banning poll taxes in federal elections. Still, many states continued to charge poll taxes for voting in state elections, a practice that did not end until the Court read the 24th Amendment as changing the meaning of Equal Protection and struck it down in *Harper v. Virginia Board of Elections* (1966).

Indeed, most of the 17 constitutional amendments passed since the Bill of Rights have been franchise-expanding and democracy-reinforcing provisions that strengthen the progress of what Lincoln called "government of the people, by the people and for the people."

Of the Corporations, By the Corporations, For the Corporations

Now, in the bitterly divided *Citizens United* decision (2010), five Justices on the Roberts Court have held that corporations have the right to spend unlimited sums of money promoting or

disparaging political candidates. This decision – built on the dangerous fallacy that state-chartered corporations enjoy the same political free speech rights as the people – strikes another dangerous blow against popular democracy. It is a blueprint for government of the big corporations, by the big corporations and for the big corporations.

Citizens United upended the bedrock understanding, more than a century old, that corporations, because of their "artificial" nature and all of the legal benefits bestowed upon them, have no "money speech" rights in political campaigns. The decision capsized at least four prior Court decisions, wiped out dozens of federal and state laws banning corporate political expenditures that go back more than sixty years, and undermined the rationale for the federal ban on corporations giving contributions directly to candidates that began with the Tilman Act in 1907.

The new doctrine is that, when it comes to campaign finance rights, the "identity of the speaker" is wholly irrelevant, and corporations have a First Amendment right to spend freely in politics because the speech they purvey is intrinsically valuable. Followed faithfully to its logic, this amazing doctrine protecting corporate political spending in the name of speech by citizens will end up not only toppling the ban on direct corporate *contributions* to candidate campaigns but also empowering churches, non-profit corporations, aliens, cities (municipal corporations), states and foreign corporations to spend their treasury money on behalf of political candidates too, both as campaign spenders and campaign donors. If the identity of the speaker is irrelevant, well, then, the identity of the speaker is irrelevant – unless, of course, this triumphantly proclaimed categorical doctrine is, like the decision in *Bush v. Gore*, actually a one-way ticket good only for special persons and classes favored by the ruling faction on the Court.

Furthermore, James Bopp and the other pro-corporate lawyers driving this train are also now making clear that they want to do away with the campaign finance disclosure laws that we were originally told were the certain antidote to a full-blown corporate takeover of our politics. Today, corporate conservatives challenge campaign finance disclosure requirements as unconstitutional *compelled speech*, like making Jehovah's Witness school children pledge allegiance to the flag. They argue that corporations should not have to disclose their political expenditures and contributions at all because they will face intimidation and reprisal, even – God forbid – *boycotts*, from consumers who disagree with their political commitments. In other words, corporations have a right to speak because they are like citizens, but they should be completely insulated from the speech reactions of real citizens and given the power to channel their money not only massively but secretly to promote the corporate bottom line. This is some "marketplace of ideas" that the champions of corporate power have in mind for our democracy.

Many people have read *Citizens United* as establishing rights of "corporate personhood" but that step was taken long ago by another corporate-friendly Court, acting under the Equal

Protection Clause, in the *Santa Clara County v. Southern Pacific Railroad* decision in 1886. The Court has essentially recognized since that time that, since the property of real people is tied up in artificial corporations, it cannot be taken or seized outside of the ordinary protections of the constitutional system. But *Citizens United* advances a far more radical proposition: corporations must be treated not just fairly as economic entities but as equal rights-bearing political citizens of the Republic that may use the vastly greater wealth and resources they have earned from their economic activity to win political power and favorable public policy. This is not corporate personhood, as everyone says; *it is super-personhood.*

Conservative Judicial Activism Triumphant

The parties in *Citizens United* had not even asked the Supreme Court to reach this radical result. Indeed, the five conservative jurists sympathetic to Citizens United in the case had available to them numerous statutory routes for finding that the group had a right under the Bipartisan Campaign Reform Act to release its anti-Hillary Clinton movie before the 2008 election. As Justice Stevens suggested in dissent, an on-demand movie that people have to order is nothing like a ubiquitous television ad, and the vast majority of the money raised by Citizens United was from individual political contributions, only a *de minimis* amount from for-profit corporate sources--a situation that offered another easy way to find for Citizens United without overturning many decades of jurisprudence..

But the conservative justices obviously had much bigger game to kill. They ordered the parties to go back and brief and argue the big question they wanted to answer. And what do you know, after looking at the question they posed, the 5-justice bloc discarded the central canon of "constitutional avoidance" (the judicial preference for deciding cases on statutory rather than constitutional grounds whenever possible and interpreting statutes whenever possible so as not to create constitutional conflict) and came back with a decision that amounts to a declaration of political independence for corporations.

This decision reflected the triumph of a conservative judicial activism that has been pushing hard for decades to make corporate power king in our politics. One key player in this drive was corporate lawyer Lewis Powell, who wrote a memorandum to the Chamber of Commerce in August 1971, just two months prior to his nomination by President Richard Nixon to the Supreme Court, proposing a strategy for restoring corporate political dominance in the country. Once on the Court, Justice Powell authored the thin majority opinion in *First National Bank of Boston v. Bellotti* (1978), which gave banks and corporations the right to spend unlimited amounts of money in public initiative and referendum campaigns and first floated the radical concept that, when it comes to corporations seeking the right to be financial players in politics, the "identity of the speaker" is wholly irrelevant. Corporations are plain old folk, just like you and me.

The victory of the corporate mindset on the Court became complete in the first decade of the 21st century. Five conservative justices began the decade by shutting down the manual counting of more than 100,000 ballots in Florida and brazenly deciding the 2000 presidential election for George W. Bush, the candidate of right-wing corporate power. Since the next two Court vacancies were filled by Bush, the Court's conservatives engineered a dramatic pro-corporate makeover of the Court. As a result, five conservative justices ended the decade by authorizing corporations to become key money actors in every election in a way that no one had seen since the Watergate period when big businessmen passed bags of cash to President Richard Nixon's operatives and bagmen.

Demolishing the Wall of Separation Between Corporate Treasuries and Public Elections

To appreciate the radicalism of *Citizens United* requires an understanding of what the law was before 2010. Corporations could lobby Congress, states and localities and spent billions of dollars doing so. They could spend freely on "issue ads" promoting their policy positions and castigating their critics. They could spend money on voter registration drives and on internal corporate campaigning. They created Political Action Committees (PACs) and solicited contributions to them from their CEOs, executives and directors; the PACs could then contribute money directly to federal candidates or spend independently. Meantime, CEOs, other executives and directors—people whose income and wealth have soared over the last several decades in relation to the rest of the country – contributed directly to federal, state and local candidates as individuals. In other words, despite all of the ludicrous whining by *Citizen United*'s defenders, the corporate perspective was never missing in American politics.

But there was one crucial thing that CEOs could not do prior to this outburst of right-wing judicial activism: they could not reach into their corporate treasuries to spend directly to advocate on behalf of (or against) the election of candidates for Congress or President. This prohibition essentially established a wall of separation between corporate treasury wealth and federal public elections. This wall was first erected by the Tillman Act of 1907 banning corporate campaign contributions to federal candidates, a policy decision advocated by President Theodore Roosevelt and made after a series of scandalous raids by insurance company executives on what Louis Brandeis called "other people's money" to finance the campaigns of friendly politicians. The wall was fortified over the last century by progressively stronger bans on independent corporate expenditures enacted in both federal and many state laws These bans were affirmed by the Supreme Court in *Austin v. Michigan Chamber of Commerce* (1990) and *McConnell v. FEC* (2003), decisions which recognized the necessity of maintaining sharp distance between corporate wealth and democratic politics to prevent what the *Austin* Court called "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

The Roberts Court's demolition of this wall of separation crushed a specific understanding of the corporation that goes back two centuries and had been accepted not only by liberals but by most of the leading conservative justices in our history. A corporation has never been seen as a constitutional person with voting rights or even as a political membership organization, but rather as an "artificial entity" chartered by the states or federal government to serve economic purposes. Chief Justice John Marshall wrote in the *Dartmouth College* case (1818) that, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence." Any constitutional rights claimed by corporations are totally derivative of natural persons and if those rights are separately vindicated for the individuals, the corporation will have none to claim.

In the *Bellotti* case, conservative Justice Byron White pointed out that we endow private corporations with all kinds of extraordinary legal benefits and subsidies – "limited liability, perpetual life and the accumulation, distribution and taxation of assets" — in order to "strengthen the economy generally." But, he argued, a corporation has no constitutional right to convert its awesome state-enabled economic resources into political power. As he so cogently put it: "The state need not permit its own creation to consume it." Chief Justice William Rehnquist agreed, arguing that business corporations, which are magnificent agents of capital accumulation and wealth maximization in the economic sphere, "pose special dangers in the political sphere."

While champions of corporate political power pretend as if it would be impossible to disentangle corporations from politics, we have an easy model to follow, which is that of municipal corporations and states, which also have the capacity to "speak" on policy issues through their leaders but no constitutional right to spend money in our political campaigns. Of course, if the "identity of the speaker" is truly irrelevant, as the new dogma insists, then cities and states will inevitably come to acquire the corresponding right to spend money in politics influencing people's votes. Of course, this would be a bizarre inversion of democratic relationships—the same kind of inversion effected by *Citizens United* itself. Yet, if we fail to pull back from treating corporate wealth as a fountain of political expression, we may be forced to get cities and states involved as political actors as a very modest counterweight to the awesome power of the private corporations. Of course state and municipal governments captured by corporate-backed elected officials could just as well come to promote, rather than counter, the already-immense political voice of private corporations. At a certain point, Big Business and Big Government will just merge.

Enthroning Corporations

By demolishing the wall separating our campaigns from the trillions of dollars of corporate wealth in America, the Roberts Court has enthroned for-profit corporations in our politics and proved itself to be far to the right of the Rehnquist Court.

Consider what the decision might mean in the case of Exxon-Mobil, the nation's largest company and a powerful political actor even before Citizens United.

In the 2008 election cycle, Exxon-Mobil's PAC raised more than a million dollars from executives and directors, money that came from the pockets of real-live human beings (and could not be reimbursed to them by the corporation). That not insubstantial sum undoubtedly gave enhanced collective voice to whatever contributions the donors had made individually. Poor people don't have PACs to compete, but fair enough, this is how the system has worked for many decades.

But imagine if *Citizens United* had already been the law.

In 2008 the company made $70 billion in profits. If the CEO had taken a modest 10% of those annual profits and spent $7 billion promoting the corporate agenda in elections that year, it would have been more than the Obama campaign, the McCain campaign, and every Senate and House candidate *combined.*

That's *one* company in the Fortune 500. Multiply that new power by the other Big Oil players, the pharmaceutical industry, and the military-industrial complex, and you get a sense of how the Court has replaced the "one person one vote" relationship with the madcap ethos of Wall Street traders playing Monopoly and Risk with other people's money. *All of this money, by law and by the very definition of what a corporation is, must be spent advancing the company bottom line and increasing shareholder value.* Concern for the local or national community is an irrelevant, and potentially wrongful and actionable, distraction from maximizing shareholder returns.

Of course, Exxon-Mobil need not spend anything like billions of dollars in order to make its point. If the CEO drew down a mere 1% of its annual profits to spend $700 million, this would be more than enough to propel its agenda and end the political careers of the two or three most difficult Members of the Senate and House, sending a sharp signal to all the others about the price of crossing its path.

We have already seen the difference that free-flowing corporate money makes. The 2010 election should have been defined by three recent corporate catastrophes--the BP Oil spill in the Gulf of Mexico, which wrecked an entire eco-system and inflicted billions of dollars of damage on the economy; the Massey company's collapsing coal mines in West Virginia, which cost 29 people their lives and were made possible by the corporation's aggressive lobbying and

corruption of government; and the sub-prime mortgage meltdown brought to us by the misconduct and political machinations of AIG and Wall Street, which cost the American people trillions of dollars in lost home values (and lost homes), ravaged pension and retirement funds and destroyed stock equity.

But the massive infusion into the 2010 election campaign of tens of millions of dollars in corporate and personal wealth through secretive 501(c)4 and 501(c)6 organizations and the new super-PACs completely changed the subject away from these debacles. With 84 special-interest super-PACs in action and unknown numbers of 501c4 and 501c6 organizations pumping in secret money, the dominant theme of the election became—amazingly—the importance of further *deregulating* corporations. The Republican Party and the corporate-backed Tea Party captured control of the U.S. House of Representatives and brought near paralysis to national government. The corporate catastrophes experienced by the nation went unaddressed in the campaign and ignored by Congress.

Citizens United did not accomplish this feat alone but rather had a key strategic partner in *SpeechNow v. FEC*, another carefully staged 2010 right-wing legal production. This decision came from the U.S. Circuit Court of Appeals for the District of Columbia, which wiped out any limits on what individuals can give to independent expenditure campaigns and thus made Super-PACs what they are today. While *Citizens United* freed the corporations, *SpeechNow* emancipated the billionaires, like Sheldon Adelson, the casino king, whose $20 million Super-PAC spending kept Newt Gingrich's 2012 presidential campaign on a system of parallel life support through barrages of negative advertising unleashed on Mitt Romney in the Republican primaries. After Romney won the nomination, Adelson put $10 million into an anti-Obama Super-Pac and promises to spend tens or even hundreds of millions dollars more to elect Romney president.

Today there are 577 Super-PACs and experts predict that more than $1 billion will be channeled into the 2012 election.

A Constitutional Amendment is Democratic Self-Defense

Amending the Constitution today to rebuild the wall of separation between corporate treasury wealth and political campaigns is an act not only of essential democratic self-respect but urgent democratic self-defense and self-preservation.

An Amendment gives us the chance to exorcise the plutocratic demons that have haunted us since the rise of industrial capitalism and were constitutionalized when the Court in *Buckley v. Valeo* ruled that wealthy individuals cannot be limited in their independent political expenditures. The *Buckley* Court dismissed as invalid a democratic interest in promoting the conditions for political speech equality. Ignoring the rigorously equal speech allotments we use

in every major political and legal institution--including the Senate, the House of Representatives, and the Supreme Court itself, not to mention candidate political debates and the equal access rules governing broadcast radio and television, the Court simply declared that the "concept that government may restrict the speech of some [in] order to enhance the relative voice of others is wholly foreign to the First Amendment. . .." This was the moment when the Court drove a deep wedge between political liberty and political equality in favor of class power.

A constitutional amendment that empowers Congress and the states to regulate campaign contributions and expenditures would permit revival, on a viewpoint-neutral basis, of the essential but invalidated prohibitions on corporate political expenditures and unlimited billionaire spending. Such an Amendment could also reassert the public's imperiled interest in campaign finance disclosure and, as Professor Laurence Tribe has pointed out, the public's much-eroded interest in building public campaign financing regimes that make publically financed candidates at least minimally competitive with privately financed candidates--an interest that the Supreme Court has trashed of late, in cases like *Davis v. FEC* (2008) and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011). In these decisions, the Court has, in essence, ruled that privately financed candidates backed by wealthy interests have not only a right to spend to the heavens to win office but a right to freeze their financial advantages over publically financed candidates, whose campaigns may not be subsidized or aided by government in any way to enlarge their power to communicate effectively against candidates of massive private wealth. Here, as distorted beyond recognition by the Roberts Court, the First Amendment becomes not the guardian of equal democratic liberties but the guarantee of *unequal* protection of the laws.

Many civil libertarian stalwarts, like Burt Neuborne and Professor Geoffrey Stone, have not fallen for this prostitution of the First Amendment and some have expressed strong support for a constitutional amendment to undo the damage.

But it is a matter of some melancholy that others, like the esteemed Laura W. Murphy, head of the Washington office of the ACLU, have been condemning a constitutional amendment strategy. Murphy wrote in the Huffington Post that, "The Constitution's radical stability is its greatest strength." But the people have repeatedly amended the Constitution when the Supreme Court makes common cause with the opponents of popular democracy. As Justice Thurgood Marshall observed in his famous speech on the Bicentennial of the Constitution, "the true miracle was not the birth of the Constitution, but its life, a life nurtured through two centuries of our own making . . ."

Yet, Murphy argues that this proposed Amendment would be different from others because "this would be the first amendment in history to *limit* individual, constitutionally guaranteed rights." This claim is flawed for two reasons. The first is that the *Citizens United* case extended

no new rights to any individual citizens, with the singular exception of individual CEOs who now enjoy the "right" to write checks from their corporate treasuries to advance or disparage political campaigns. The right to spend our *own* money in politics was one already enjoyed by every citizen.

The second problem is that, throughout American history, there have been loud complaints that progressive constitutional amendments strip certain people of preexisting rights. The slavemasters and their apologists were adamant that the 13th Amendment deprived them of their property rights – and surely it did under existing law; similarly, many white males felt as if the weight of their votes were diluted by the addition of black and women voters--and surely they were; the opposition to the 16th Amendment on income tax was organized around property rights and some people's aversion to taxes; and so on. It is simply false to say that kicking corporate money out of political campaigns would be the first time that a constitutional amendment would realign the balance of rights in our country or make some people feel as if they are losing an edge in the legal system.

Plutocracy Distorts the Market as well as Our Politics

We have to face the fact that the new regime being developed by the Supreme Court is straight-up plutocracy, rule by the wealthy, and its structural foundation is private corporate wealth. Defenders of the regime like to point out that there are tens of thousands of corporations in America, most of them small, but this is an irrelevant distraction from how the corporate "wealth primary" works in the real world. Major industries that have an "extractive" character and a parasitic relationship on government—Wall Street, Big Oil, Big Pharma, major military contractors like Haliburton—cultivate a financial dependency in politicians which permits the corporations to continue what economists call "rent-seeking" arrangements with the government.

These arrangements operate on a simple investment and return basis: corporations invest several million dollars in campaigns and lobbying, collect an astounding return of hundreds of millions or billions of dollars in tax breaks, corporate welfare, corporate warfare, sweetheart contracts, big bailouts, deregulation, and inside deals. This squalid form of "public policy" is splendid for the corporations involved but dismal for everyone else, including the smaller businesses that do not have the finance capital to invest in the political system. A plutocratic state denies both political justice and a fair and competitive market economy in which businesses thrive by virtue of their creativity and initiative rather than the size of their campaign spending and their stable of lobbyists. Adam Smith would be just as appalled as Thomas Jefferson and John Adams at this state of affairs.

America has a market economy, which has served us very well in many ways. But we cannot afford to have a total market society in which major corporate power is dominant in our politics, superior to the voices of the people, and controlling of major public policy questions.

We should want all private corporations, even the larger ones, to succeed, innovate, create, thrive and prosper, but never to govern and thereby thwart the will – and replace the essential political sovereignty – of the people.

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July 20, 2012

Public Campaign's Testimony for the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights: *"Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs"*

July 24, 2012

Thank you for allowing Public Campaign to submit written testimony for the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights hearing on "Taking Back Our Democracy: Responding to *Citizens United* and the Rise of Super PACs." Public Campaign is a national nonpartisan organization that works to raise the voices of everyday people in our democracy through advocating common sense campaign reforms and holding politicians accountable for actions they do on behalf of their donors.

We see legislation like the Fair Elections Now Act, championed by Sen. Dick Durbin (D-Ill.) and Rep. John Larson (D-Conn.), as one of the best responses to the Supreme Court's *Citizens United* decision. The bill would create a voluntary public financing system that emphasizes small donor fundraising. At the federal level, such a system has significant support: more than one-third of the U.S. House and one-quarter of the U.S. Senate cosponsored the Fair Elections Now Act in the last Congress to create a voluntary public financing system, and we commend Sen. Durbin for his leadership on Fair Elections. But public financing is just one part of a broader democracy agenda, one that must also include increased disclosure of political contributions and a Constitutional amendment to overturn the *Citizens United* decision. We appreciate the efforts of Sens. Tom Udall, Sanders, and Baucus

for each introducing a Constitutional amendment to address the *Citizens United* decision.

Massive spending after *Citizens United* by shadowy outside groups has led to the need for a Constitutional amendment, and the Supreme Court's flawed ruling has significant consequences not only at the federal level, but also at the state level. The secretive money spent in the Wisconsin recall election is a sign of things to come, and shadow front groups will likely continue to spend huge amounts of hidden money in states and localities, especially smaller ones with less expensive media markets.

Certain states in particular saw a dramatic rise in outside spending after *Citizens United*. In Maine, outside groups spent $5.3 million in 2010, compared to $1.3 million in 2006,[1] an unprecedented increase for such a small state. Nearly $1.5 million of that 2010 total was spent on legislative races, more than double what was spent ($629,271) on the comparable elections in 2006. Of the almost $1.5 million total, $400,000 was spent by just one organization—the Republican State Leadership Committee—targeting a handful of state Senators, including Deb Simpson. The RSLC spent almost $200,000 in the Senate District 15 race between Republican Lois Snowe-Mello and Democrat Deb Simpson, including more than $87,000 in negative ads against Simpson.

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[1] http://www.sunjournal.com/news/state/2011/12/24/report-2010-election-showed-big-spike-outside-camp/1132096

At the federal level, the amount of secret and special interest spending has increased even more dramatically. Through March 8, 2008, outside interests spent nearly $40 million in federal elections, versus almost $90 million by this same date in 2012.[2] However, this doubling in outside spending doesn't mean that more Americans are participating in the political process. Instead, just the most privileged and wealthy Americans are contributing millions of dollars, which drown out the voices of everyday Americans. Just 0.000063%—196 Americans—have contributed more than 80% of the super PAC money spent in the presidential elections so far in this cycle. Contributions given directly to congressional campaigns follow a similar pattern: only 0.26% of Americans have given at least $200, only 0.05% have donated $2500 to any congressional candidate, and 0.01% has contributed more than $10,000 in the election cycle.[3]

Since the Supreme Court continues to say that corporations have the same first amendment rights as do individuals, how can nurses, firefighters, and teachers, each whose median salary is less than $70,000, have their voices heard? Of the 20 largest super PACs, the mean donation through June 18, 2012, is $61,372.[4] Nurses, firefighters, and teachers certainly can't be expected to donate nearly all of their salary to a super PAC to have their voices heard. Instead, a Constitutional amendment overturning *Citizens United* to help put citizens back in charge of elections should be part of the discussion.

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[2] http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt571/pdf/CRPT-112hrpt571.pdf
[3] http://www.theatlantic.com/politics/archive/2012/07/big-campaign-spending-government-by-the-1/259599/#
[4] http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election

This debate is not just about campaign finance reform, though; it is fundamentally about who should be included: the many or the money? Everyday Americans or just the wealthy? Five Supreme Court justices chose the money over the many. Too often, many congressional Republicans are protecting wealthy donors and their moneyed interests at the expense of hardworking Americans. Congress must ensure that all Americans, not just the wealthy, have the opportunity to participate in the political process and have their voices heard. Pursuing a voluntary small-dollar matching system, coupled with robust disclosure and a Constitutional amendment, is the most comprehensive way to put everyday citizens back in charge of elections.

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Re: Hearing scheduled July 24, 2012, before the Constitution Subcommittee of the U.S. Senate Judiciary Committee on proposals to amend the U.S. Constitution to remedy the decision of the U.S. Supreme Court in Citizens United v. Federal Election Commission

Honorable Senator Richard Durbin, Chairman
U.S. Senate Subcommittee on the Constitution

Dear Senator Durbin:

On behalf of Washington Public Campaigns (WPC), I thank you and your colleagues on the Constitution Subcommittee of the Senate Judiciary Committee for holding a hearing, scheduled for July 24, 2012, on the most important issue facing our democracy today: Can our democracy survive the tsunami of money being poured into our political campaigns by a small group of extremely wealthy individuals and corporations?

The Supreme Court's decision in Citizens United v. FEC in January 2010, followed by the DC Circuit Court decision in SpeechNow.org v. FEC in March 2010, has unleashed this flood of money which is overpowering even the candidates' own campaign donations, which are still limited.

WPC is a citizens' organization in the State of Washington with an original goal of establishing publicly funded political campaigns in the State of Washington and for the U.S. Senate and U.S. House of Representatives. WPC successfully promoted a 2008 state law, which authorizes local governments (cities, counties, PUDs and port districts) to establish their own publicly-funded political campaigns. WPC is also working for the passage in Congress of the Fair Elections Now Act, to provide public financing for U.S. House and U.S. Senate campaigns.

We have now concluded that in addition to promoting publicly funded political campaigns, we must work for approval of the following goals, which have become necessary to preserving democracy itself:

Overturning Citizens United v. F.E.C. and SpeechNow.org v. F.E.C. with a constitutional amendment establishing that corporations do not have the constitutional rights of human beings, and money is not speech and that contributions and expenditures in political campaigns, whether funneled through candidate campaigns or independent groups, may be lawfully regulated by our elected state and federal representatives,

Enacting the DISCLOSE 2012 Act, which is currently before the Congress, calling for greater transparency in campaign financing.

Our members support many organizations such as Public Citizen, Common Cause, Free Speech for People, Move to Amend, and People for the American Way, with whom we worked to support the City of Seattle's recent resolution urging Congress to propose to the states a constitutional amendment of similar nature to that indicated above.

We remain committed to the America we once knew, where each person's voice had equal weight in the marketplace of ideas, and money did not determine the outcome of elections.

We ask that a copy of this message be made a part of the hearing record.

For the WPC Board of Directors,

John King

John E. King
President

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Torres-Spelliscy, Ciara, Assistant Professor of Law, Stetson Law, Tampa, Florida, Part 1, see link: *http://papers.ssrn.com/sol3/papers.cfm?abstract—id=2046832py.pdf*

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