HEARING—DOLLARS AND SENSE: HOW UNDISCLOSED MONEY AND POST-McCUTCHEON CAMPAIGN FINANCE WILL AFFECT THE 2014 ELECTION AND BEYOND

WEDNESDAY, APRIL 30, 2014

UNITED STATES SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 3:15 p.m., in Room SH–216, Hart Senate Office Building, Hon. Angus S. King, Jr. presiding.

Present: Senators Schumer, Udall, Klobuchar, King, Walsh, Roberts, and Cruz.

Staff Present: Jean Bordewich, Staff Director; Kelly Fado, Deputy Staff Director; Stacy Ettinger, Chief Counsel; Veronica Gillespie, Elections Counsel; Ben Hovland, Senior Counsel; Julia Richardson, Senior Counsel; Abbie Sorrendino, Legislative Assistant; Philip Rumsey, Legislative Correspondent; Jeff Johnson, Clerk; Matthew McGowan, Professional Staff; Benjamin Grazda, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Sarah Little, Republican Communications Director; Trish Kent, Republican Senior Professional Staff; and Rachel Creviston, Republican Senior Professional Staff.

OPENING STATEMENT OF SENATOR KING

Senator KING. The Rules Committee will come to order. Good morning, everyone. The format that we are going to follow for the next few minutes will be that I will deliver an opening statement, then followed by Ranking Member Senator Roberts, and Chairman Schumer, and then we will hear from Justice Stevens, and following his testimony, we will have the panel, and if other Senators join us during the course, they will deliver their opening statements after Justice Stevens joins us.

I am deeply worried about the future of our democracy. For over 100 years, we have struggled with the issue of money and politics, always seeking to find the right balance between freedom of political expression and the corrosive influence of the unchecked flow of money to public officials.

We have had periodic scandals and periodic corrections. We have had new laws and new ways to evade those laws. But we have never before seen what is happening today. As we will learn this morning, a perfect storm of new forces—court opinions, clever political operatives, and the high stakes inherent in governmental decisions—have created a qualitatively new political landscape where candidates are compelled to raise more and more money, and yet, at the same time, have to contend with virtually unlimited spending by shadowy entities representing nameless donors.

What has occurred in the past five years represents revolutionary, not evolutionary, change in the way campaigns are financed in America. These are changes I view as a threat to undermine the fundamental principle of American democracy—one person, one vote. There are well-intentioned people, people who I respect, who believe that restrictions on who can give to campaigns and how much they can give trespass on cherished First Amendment freedom of speech protections.

Others, and I am among them, are worried that the recent decision's elimination of even modest limits on campaign contributions, combined with a Byzantine system that, in too many cases, masks disclosure of who is giving and allows a flood of so-called dark money into the process, has the very real potential to corrode the integrity of the system itself.

Historically, the flow of money has rested in and out of political campaigns on three pillars: Regulation of sources, regulation of amounts, and disclosure. Recent decisions have severely restricted our ability to control sources and amounts. But in those decisions—and I am referring, of course, to Citizens United and McCutcheon, the Court has explicitly invited Congress to utilize disclosure as the protection of the public interest in these situations.

Justice Kennedy and Justice Roberts, in their opinions, cite disclosure as the reason that the limitations do not have to be upheld. Unfortunately, the disclosure requirements that they mention in those opinions as the bulwark against abuse and corruption simply do not exist.

For example, according to a new study by the Center for Responsive Politics, total individual expenditures reported to the FEC by outside groups totals about $70 million to this point in 2014, nearly three times more than was spent at this point in 2010. That is the point I want to emphasize, is that this is not a gradual growth of a change of a few dollars here and there. What we have is an explosion of this kind of money, not only of outside expenditures, but also of expenditures where we do not know the source.

We have created a kind of parallel universe of campaign finance, the traditional candidate-based system with clear limits on sources and amounts and strict disclosure requirements and the independent system with no control of sources, no limits, and no disclosure.

Naturally, this troubling new world of campaign finance impacts how we as elected officials interact with the fund-raising process, quantitatively, in the amounts of money that elected officials need to be made. An average U.S. Senator—and of course, all Senators are above-average—but an average U.S. Senator running for reelection has to raise something on the order of $5,000 to $8,000 a day every day, 365 days a year for six years in order to accumulate the funds necessary to run for reelection. And I can tell you, at the rate of $5,000 to $6,000 a day, you very quickly run out of friends and family.

My concern here is the system. This is not a Democratic or a Republican issue, and the country does not benefit from an undisclosed contribution and an arm's race in contributions. Disclosure in this context is not an infringement on the First Amendment. But what we are allowing to happen before our eyes is already having

its inevitable effect, the erosion of confidence in our system and in us as stewards of our country's future.

The challenge here, the challenge before us is to find the balance between competing goods, the freedom to exercise our political voice on the one hand, and the public's interest in safeguarding the integrity of the political process on the other, to restore that balance in what feels like an increasingly unbalanced system.

I welcome our witnesses today and look forward to their contributions to these important deliberations. Senator Roberts.

OPENING STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Well, thank you, Mr. Chairman. I am pleased to be here today on this very important subject, and I brought my own chart. We in the minority do not have enough money for another display unit over there, so I would ask unanimous consent. We could put our chart up where you had your chart.

Senator KING. Without objection.

Senator ROBERTS. The chart bears the text of the First Amendment to the Constitution of the United States. And I believe that is what we are talking about today, the rights of citizens to express themselves, to make their views known on the issues that affect their daily lives and pocketbooks, or any other issue they wish to discuss.

The First Amendment protects those rights and it prevents the Government from restricting them. The exercise of those rights does not threaten our democracy. It is the attempt to restrict these rights that we must fear. We are living today with the consequences of the failed attempt to restrict them. This failure was not hard to perceive. It is not the fault of the courts or the Federal Election Commission.

It is the direct consequence of the poor decision Congress made when it passed the McCain-Feingold bill. I opposed that bill. I and others who voted against it did so because we knew it would restrict people's right to participate in the political process. It would not get money out of the system, but would simply divert it to other avenues.

Supporters of the bill, of course, denied it. They assured us it would not happen, that our system would be better. It should be clear now who was right and who was wrong. But rather than admit they were wrong, the proponents of speech regulation have just proposed new regulations. Because the courts have properly found much of their last efforts to be unconstitutional, they have proposed new regulatory schemes under the guise of disclosure.

No longer able to simply prohibit speech they do not like, they seek to prevent it by imposing onerous disclosure requirements on those who wish to speak. Now, respectfully, Mr. Chairman, as we consider suggestions for ways to improve the system, the last people we should be asking for advice at this hearing are those who helped write the law that created the problem in the first place.

Let us stop this fool's errand of speech regulation. Let us stop trying to prevent people from criticizing us. Let us stop demonizing citizens who exercise their First Amendment rights. Let us stop pretending more speech somehow threatens our democracy. We have nothing to fear from a free marketplace of ideas. We do, how-

ever, need to fear a Government empowered to investigate its own citizens for exercising their rights. The revelations of the Internal Revenue Service targeting of conservative groups and others have shown this to be a real danger.

We hear a lot about corruption when this issue is debated. I think for many people that the definition of corruption is the promotion of ideas with which they disagree. It is amazing how for years George Soros has been spending millions of dollars to promote liberal and progressive causes. None of my friends on the other side of the aisle seem to be concerned about it.

Now that the Koch family is spending money to promote free markets and private enterprise, we are supposed to believe that our democracy is at risk. That is absurd. Corporate spending is supposed to be a concern, but corporations have long exercised unfettered rights to express themselves, provided they were media corporations.

I am pleased to say that the Citizens United case changed that. The Supreme Court recognized the First Amendment does not allow this Congress to choose who gets to speak and properly ended this nonsensical distinction with the only consequence being that now more voices are heard. And I know, I know, there are some in this body who do not want those voices to be heard and they are doing everything they can to silence them.

Our majority leader, unfortunate, who has a fixation with the Koch family that can only be described as bizarre, takes to the floor on an almost daily basis to attack them. Why? I think it is because he fears they pose a threat to his hold on power, or the majority. He wants them to stop talking. Well, that is why the First Amendment begins, Congress shall make no law. The First Amendment does not allow us to silence those who oppose us. That applies to corporations, labor unions, Mr. Soros, and the Koch family. It applies to everyone.

Let us stop trying to do so, Mr. Chairman. Let us stop trying to impose regulations designed to deter and harass our opponents. Instead, let us just admit the mistake we made when we tried to regulate political speech in the first place. Let us remove those restrictions. Let us allow those who want to contribute and engage in our political system to give money where they want as long as they follow the law.

Everyone in this country has the right to express themselves, Mr. Chairman, even people who do not manage to get themselves invited to appear on television shows or to testify at Senate hearings. People, all people, individually and as groups, have every right to make their views known. Instead of trying to stop them, let us reinvigorate our system.

New restrictions and regulations are not going to improve the system. Getting rid of those we already have imposed will. That is the course we should take, Mr. Chairman. Simply, let us just do it. Thank you for your time.

Senator KING. Senator Schumer.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Thank you. First, let me thank you, Senator King, for suggesting this hearing and for your chairing the

hearing, as well as your invitation to Justice Stevens, who I look forward to hearing from.

Well, I think McCutcheon is a real turning point in our debate about money in politics. McCutcheon seemed to say that free speech absolutely defined, as McCutcheon does, allows anyone to spend any amount of money in any way in our political system. McCutcheon, carried to its logical extreme, will get rid of individual limits, will get rid of limits on corporations, will just allow money to totally, totally envelope our system.

It is frightening. It is frightening. And the reason we have this hearing is not because of some new ads—Koch Brothers have been doing ads for years and years—but because of the McCutcheon decision and its implications for our democracy. The bottom line is very simple. I respect my colleagues' fidelity to the First Amendment, but no amendment is absolute.

Most of my colleagues on the other side of the aisle support anti-pornography legislation. That is a limitation on the First Amendment. Most everyone here believes you cannot falsely scream fire in a crowded theater. That is a limitation on the First Amendment. We have many, many, many different laws that pose limits on the amendments because through 200-and-some-odd years of jurisprudence, the Founding Fathers and the Supreme Court have realized that no amendment, no amendment is absolute.

We have noise ordinances. Everyone accepts them. That is a limitation on the First Amendment. So if you impose a view that just when it comes to allowing one person to put the 7,112th ad on television that the First Amendment is absolute, but in so many other areas it is not, you have to ask why. You have to ask why.

And then, when many on the other side of the aisle do not support disclosure, which is actually an enhancement of the First Amendment, free debate, free knowledge, one wonders why. One wonders why. The First Amendment protection of free speech is part of what makes America great. So is the concept of one person, one vote. And when a small group of people, 700 in this case, who were affected by McCutcheon, have so much more power to influence the political process than everybody else, our democracy is at risk. That is the problem here.

There is a balancing test and there are many concepts in the Constitution, the concept of having a somewhat level playing field so that those who have overwhelming wealth and choose to spend it, whether they be on the left or the right, the laws we are proposing affect the Koch Brothers and George Soros, and should.

And so, because now legislation could bring disclosure, but could now will not stop the path McCutcheon is on, Senate Democrats are going to vote this year on my colleague, Tom Udall's constitutional amendment which once and for all would allow Congress to make laws to deal with the balance between equality, each vote is equal, each person is equal, and the First Amendment, a careful balance.

But not what the five members of the Supreme Court have said, no balance. We will bring that amendment to the floor shortly, and we will vote on it, and I will be working with Senator Udall and Majority Leader Reid, and hopefully every Republican who cares about honest elections, to bring it to the floor this year.

When the Supreme Court, or any of my colleagues, say that the Koch Brothers' First Amendment rights are being deprived, that they are not being heard, it defies common sense, it defies logic. And the same would apply to some very liberal person who put on 10,000 ads. The ability to be heard is different than the ability to drown out every other point of view using modern technology simply because you have a lot more money than somebody else who has an equally valid view.

So I hope that Senator Udall's amendment will track bipartisan support, but it will draw to a fine point where we are at, and that is that the First Amendment is sacred, but that the First Amendment is not absolute. And by making it absolute, you actually make it less sacred to most Americans.

We have to bring some balance to our political system. If people lose faith in this system, which they are rapidly doing, in large part, because they feel, correctly, that people with a lot of money have far more say in the actual political dialogue than they do, this great democracy could falter. We do not want it to happen. And the best way to stop it is to show the Supreme Court or limit the Supreme Court, show them that their absolutist view is wrong and support and amendment like Senator Udall's. Thank you, Mr. Chairman.

Senator KING. For the information of Senator Cruz, Senator Walsh, and Senator Udall who arrived after my introduction, the schedule we are going to follow is I am now going to invite Justice Stevens to speak, and then each of you will be asked to provide a statement, if you wish to do so. Justice Stevens, if you would join us at the table?

Justice John Paul Stevens is a retired Justice of the United States Supreme Court, was appointed to the Court in 1975 by President Gerald Ford, I think the third longest sitting Justice of the Supreme Court. Justice Stevens, I knew that you were a distinguished jurist, but my eye was caught by a headline in the paper over the weekend that says, Pope to Move John Paul for Sainthood. I realized later it was not the same John Paul.

In any case, we are delighted to have you here today. Thank you very much for joining us, Justice.

STATEMENT OF THE HONORABLE JOHN PAUL STEVENS, ASSOCIATE JUSTICE (RET.), UNITED STATES SUPREME COURT, WASHINGTON, D.C.

Justice STEVENS. Thank you very much, Senator. Senator King, Chairman Schumer, Ranking Member Roberts, and distinguished members of this Committee, I thank you for the opportunity to appear before you today to discuss the important issue of campaign finance.

When I last appeared before this body in December of 1975, my confirmation hearing stretched over three days. Today, I shall spend only a few minutes making five brief points. First, campaign finance is not a partisan issue. For years, the Court's campaign finance jurisprudence has been incorrectly predicated on the assumption that avoiding corruption or the appearance of corruption is the only justification for regulating campaign speech and the financing of political campaigns.

That is quite wrong. We can safely assume that all of our elected representatives and candidates for office are law-abiding citizens, and the laws against bribery provide an adequate protection against misconduct in office. It is fundamentally wrong to assume that preventing corruption is the only justification for laws limiting the First Amendment rights of candidates and their supporters.

Elections are contests between rival candidates for public office. Like rules that govern athletic contests or adversary litigation, those rules should create a level playing field. The interest in creating a level playing field justifies regulation of campaign speech that does not apply to speech about general issues that is not designed to affect the outcome of elections.

The rules should give rival candidates, irrespective of their party and incumbency status, an equal opportunity to persuade citizens to vote for them. Just as procedures in contested litigation regulates speech in order to give adversary parties a fair and equal opportunity to persuade the decision-maker to rule in their favors, rules regulating political campaigns should have the same objective.

In elections, the decision-makers are voters, not judges or jurors, but that does not change the imperative for the equality of opportunity.

Second, all elected officials would lead happier lives and be better able to perform their public responsibilities if they did not have to spend so much time raising money.

Third, rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions. An important recent opinion written by Judge Brett Kavanaugh of the D.C. Circuit, and summarily affirmed by the Supreme Court, Blumen against the Federal Election Commission, upheld the constitutionality of the Federal statute that prohibits foreign citizens from spending money to support or oppose candidates for Federal office.

While the Federal interest in preventing foreigners from taking part in elections in this country justified the financial regulation, it placed no limit on Canadians' freedom to speak about issues of general interest. During World War II, the reasoning behind the statute would have prohibited Japanese agents from spending money opposing the reelection of FDR, but would not have limited their ability to broadcast propaganda to our troops.

Similar reasoning would have justified the State of Michigan placing restrictions on campaign expenditures made by residents of Wisconsin or Indiana without curtailing their speech about general issues. Voters' fundamental right to participate in electing their own political leaders is far more compelling than the right of non-voters such as corporations and non-residents to support or oppose candidates for public office.

The Blumen case illustrates that the interest in protecting campaign speech by non-voters is less worthy of protection than the interest in protecting speech about general issues.

Fourth, while money is used to finance speech, money is not speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities

should not receive precisely the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries, actions that clearly were not protected by the First Amendment.

Fifth, and this perhaps is the most important thing I want to say, is the central error in the Court's campaign finance jurisprudence is the holding in the 1976 case of Buckley against Valeo that denies Congress the power to impose limitations on campaign expenditures. My friend, Justice Byron White, was the only member of the Court to dissent from that holding.

As an athlete and as a participant in Jack Kennedy's campaign for the Presidency, he was familiar with the importance of rules requiring a level playing field. I did not arrive at the Court in time to participate in the decision of the Buckley case, but I have always thought that Byron got it right.

After the decision was announced, Judge Skelly Wright, who was one of the Federal judiciary's most ardent supporter of a broad interpretation of the First Amendment, characterized its ruling on campaign expenditures as, quote, tragically misguided, unquote. Because that erroneous holding has been consistently followed ever since 1976, we need an amendment to the Constitution to correct that fundamental error.

I favor the adoption of this simple amendment, quote, Neither the First Amendment nor any provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office or their supporters may spend in election campaigns, unquote.

I think it wise to include the reasonable, the word reasonable, to ensure that legislatures do not proscribe limits that are so low that incumbents have an unfair advantage or that interfere with the freedom of the press. I have confidence that my former colleagues would not use that word to justify a continuation of the practice of treating any limitation as unreasonable.

Unlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who provide them with money than to the interests of the voters who elected them. That risk is unacceptable. Thank you.

[The prepared statement of Justice Stevens was submitted for the record:]

Senator KING. Mr. Justice, thank you very much for your considered remarks. We appreciate your willingness to share them with us here today. Thank you.

Justice STEVENS. Thank you very much.

Senator KING. You are excused.

In accordance with the process that we discussed at the beginning, I will now turn to Senator Cruz for an opening statement, if you choose to make one.

OPENING STATEMENT OF SENATOR CRUZ

Senator CRUZ. Thank you, Mr. Chairman, and I would like to thank Justice Stevens for being here and joining us. Prior to being in the Senate, I spent much of my professional career as an advo-

cate before the Court, and I must say it is a different position to be on this side of the dais rather than answering questions from Justice Stevens. And I will note that of all the Justices, Justice Stevens most often disagreed with the position of my clients.

And there was no Justice whose questions were more incisive, more friendly, and, frankly, more dangerous than Justice Stevens. Always with a twinkle in an eye, he would ask a question, "Counsel, would you not just agree with this small little thing?" And if you said yes, it would walk you down a road that would unravel the entire position in your case. So it is very nice to have the good Justice with us.

I want to thank all of the witnesses who are here for our second panel as well. This topic is a topic of great importance. Of the entire Bill of Rights, the First Amendment is the most important. It is the foundational right of every other right of citizens that is protected.

I will say that the issue of campaign finance reform, is perhaps the most misunderstood issue in all of politics, because campaign finance reform restrictions are always pitched as, "Let us prevent corruption, let us hold politicians accountable." And they do exactly the opposite. Every single restriction this body puts in place is designed to do one thing; protect incumbent politicians.

And it is powerfully good at that because, at the end of the day, there are three speakers in a political debate. There are politicians, there is the media, and there are the citizens. Campaign finance reform is all about silencing number three so that the politicians can speak unimpeded. And I will say there are colleagues of mine in both parties who will stand up and say, "These pesky citizen groups, they keep criticizing me."

Well, that is the nature of our democratic process. If you choose to run for public office, there are 300 million Americans who have a right to criticize you all day long and twice on Sundays. That is how our system was built. And I will tell you this, I am certainly one who will defend the rights of our citizens to speak out, whether I agree with their speech or not.

The Sierra Club has an absolute right to defend their views, as does the NRA. Planned Parenthood has an absolute right to defend its views, as does the National Right to Life. That is the way our system operates. And campaign finance reform is all about lower the limits, lower the limits, restrict the speech, restrict the speech.

And what happens is the only people who can win elections then are incumbent politicians, because incumbent politicians have armies of lobbyists and entrenched interests that raise the money and fund them, and any challenger that comes across has to raise the money. And if you do not have an army of thousands upon thousands of bundlers, you cannot effectively challenge an incumbent, and that is not the unintended effect of these laws. That is the intended effect.

Our current system makes no sense. Right now we have super PACs that are speaking on the sidelines. And you have politicians who play games. Since they cannot speak directly under the law, they simply will say, "Who will rid me of this troublesome cleric?" And a group springs up and speaks and if this group is supporting you, you kind of hope what they say bears some resemblance to

what you believe, but you are not allowed to talk to them. So if they happen to get it wrong, there is not a darn thing you can do.

A far better system would be to allow individuals unlimited contributions to candidates and require immediate disclosure. As John Stuart Mill said, let the marketplace of ideas operate, let more speech counter bad speech, rather than this silly game we play right now.

Now, I will note there are a series of canards that get discussed in this issue. The number one canard is money is not speech. We can restrict money because it has nothing to do with speech. That statement is categorically, objectively false. Money is and has always been used as a critical tool of speech, whether publishing books, or putting on events, or broadcasting over the airwaves.

And I would suggest to each of the witnesses and to everyone thinking about this issue, ask yourself one question. For every restriction that members of Congress or advocates put forth, ask yourself one question. Would you be willing to apply that same restriction to the New York Times? And let me know. The New York Times is a corporation, so anyone who says corporations have no rights, fine.

There are some who say, "Let us restrict political speech within 90 days of an election." Very well then. Would you be willing to say the New York Times may not speak about politics within 90 days of an election? McCutcheon said you cannot tell citizens they can only support nine candidates. If they want to support 10 or 11 or 12, they are entitled to do so.

If you think McCutcheon is wrong, would you be willing to tell the New York Times, "You may only speak about nine candidates, or only candidates in New York?" Look, those restrictions are all obviously and facially unconstitutional, and I would ask you, Why does a corporation like the New York Times or CBS or any other media corporation, in Congress's view, enjoy greater First Amendment rights than individual citizens?

Our democratic process is broken and corrupt right now because politicians in both parties hold onto incumbency. We need to empower the individual citizens, and I will say this in closing. I agree very much with Justice Hugo Black who famously said, with regard to the First Amendment, the words Congress shall make no law abridging the freedom of speech means exactly what it says.

No law means no law, and we should be vigorous protecting the rights of individual citizens to be engaged in the political process and hold every one of us on both sides of the aisle accountable. It is the only thing that keeps our democratic process working. Thank you, Mr. Chairman.

Senator KING. Senator Udall.

OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you very much, Chairman King, and good morning, and thank you for holding this very important hearing. I want to thank the witnesses that I know are going to be here later to discuss what I think is a very, very important topic.

Let me say to the Chairman of the Rules Committee, Chairman Schumer, I really appreciate your statement that we are going to have a vote this year on a constitutional amendment. I think it is

about time. We have had several votes. I think we had one in 1997, we had one in 2001, but these rulings by the Supreme Court have gone so far that we are really ripe for having a vote and trying to coalesce around something.

I know that Justice Stevens has left, but I want to say the words I had in my statement to him. I am sure it will get to him. As the author, Justice Stevens, of the dissent in Citizens United, you wrote that, "The Court's ruling threatens to undermine the integrity of elected institutions across the nation."

And I have found myself agreeing with Justice Stevens. Unfortunately, this is another of those times. Four years after Citizens United, the damage continues. The Court's decision this month in McCutcheon was one more step in dismantling our campaign finance system. It is now crystal clear an amendment to the Constitution is necessary to allow meaningful campaign finance rules.

And as I heard Chairman Schumer talk about the issue of it being absolute, that is what we are talking about, is allowing meaningful campaign finance rules, not in any way abridging the First Amendment.

Most Americans do not have unlimited dollars to spend on elections around the country. They only get their one vote. They can support one candidate, the one who represents their district or state, but for the wealthy and the super-wealthy, McCutcheon says they get so much more. That decision gave them a green light, full speed ahead to donate to an unlimited number of candidates.

Now a billionaire in one state gets to influence the elections in 49 other states. Under McCutcheon, one donor can dole out $3.6 million every two years, just like that. Consider this: An American citizen working full-time making minimum wage would have to work 239 years to make that kind of money, 239 years.

The Court has shown a willingness to strike down sensible regulations by a narrow majority and is returning our campaign finance system to Watergate-era rules, the same rules that foster corruption, outraged voters, and promoted campaign finance standards in the first place.

But our campaign finance system was in trouble long before. The Citizens United and McCutcheon decisions just picked up the pace. The Court laid the groundwork many years ago, and I know Justice Stevens mentioned this, in the case of Buckley versus Valeo. It goes all the way back to 1976.

The Court ruled 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 and ignores the reality of political campaigns. The outcome is not surprising. Elections have 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. That is why I introduced SJ Res. 19 last June. It now has 35 cosponsors, and I think—I believe Senator King and Senator Schumer are both on it. It is similar to bipartisan resolutions in previous Congresses. Actually, it started with Senator Ted Stevens, I believe, back in 1983. So it has true bipartisan roots and is consistent with the amendment that Justice Stevens has proposed.

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 the same at their level. It would not dictate any specific policies or regulations, but it would allow Congress to pass sensible campaign finance reform, reform that withstands constitutional challenges.

In the Federalist Paper Number 49, James Madison argued that the U.S. Constitution should be amended only—and he used this term—only in great and extraordinary occasions should we go with a constitutional amendment, and I agree with him. I also 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.

This effort started decades ago. There is a long, and I might add, bipartisan history here. Many of our predecessors from both parties understand the danger. They knew the corrosive effect money has had 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 mine. Senator Schumer and Cochran continued the effort in the 109th Congress. And that was before the Citizens United and McCutcheon decisions, before things went from bad to worse.

The out of control spending after Citizens United has further poisoned our elections, but it has also ignited a broad movement to amend the Constitution. McCutcheon is the latest misguided decision, but it will not be the last. It is time for Congress to take back control and pass a constitutional amendment.

And again, Chairman King and Chairman Schumer, I thank you for holding this hearing and I think it is very, very timely on the heels of McCutcheon. Appreciate it.

Senator KING. Thank you, Senator.

OPENING STATEMENT OF SENATOR WALSH

Senator WALSH. Thank you Senator King, Chairman Schumer, and Ranking Member Roberts.

Citizens United unleashed a torrent of dark money into our elections, allowing wealthy donors and corporations to shuffle money among third party groups to evade disclosure laws and influence elections.

Last month, the Supreme Court again promoted the influence of the wealthy in our democracy by striking down a 40-year-old limit on how much the richest donors can give to candidates and parties.

As it is, less than one-percent of Americans provide over two-thirds of contributions. Small-dollar donors, the average American, are being made irrelevant by a campaign finance system that allows wealthy donors to secretly fund attack ads.

Concentrations of wealth and dark money have a big impact in Montana. Our airtime is cheap and our state contribution limits are relatively low. Montana's voters don't yet need to be able to write million dollar checks to get a candidate's attention, but this

ease of access makes Montana's elections a prime target for dark money.

Indeed, Montana has frequently been at the center of the campaign finance debate. Our state ban on corporate campaign expenditures and donations, passed by voter initiative in 1912 after William Clark used his mining wealth to buy a Senate seat, was struck down because of Citizens United. Since then, we've seen dark money groups like American Tradition Partnership ignore our disclosure laws and illegally coordinate with candidates to influence elections.

The role of average Americans in our democracy is in danger if wealthy donors and secretive groups can spend vast amounts of undisclosed money to influence elections.

We must act to strengthen our disclosure requirements, and we must find a way to empower small, individual donors. Otherwise, our elections will be controlled by the few Americans that can afford to write million-dollar checks. I want to thank the Chair and the witnesses, and I look forward to their testimony.

Senator KING. If our next panel could take their seats, I will introduce you. We are going to hear from this panel in alphabetical order. First is Mr. Donald F. McGahn, a partner with the law firm of Patton Boggs. Previously he was a Commissioner and Chairman of the FEC. He also served as the general counsel for the National Republican Congressional Committee for ten years.

Second is Norman Ornstein, Resident Scholar at the American Enterprise Institute, well-known columnist, and frequent commenter on campaign finance issues. Third is Mr. Trevor Potter, President and General Counsel for the Campaign Legal Center. Previously he was a Commissioner and Chair of the FEC and later served as general counsel to John McCain's 2008 presidential campaign.

Fourth, Ms. Ann Ravel, former Chair of the California Fair Political Practices Commission, currently Vice Chair of the Federal Election Commission. And finally, Neil P. Reiff, who is a founding member of the law firm of Sandler, Reiff, Young & Lamb, and a former deputy general counsel for the Democratic National Committee.

Thank you all for joining us today and I welcome your opening statements. If you have more lengthy statements, they can be submitted for the record, but we look forward to hearing from you and then we will discuss these issues. Mr. McGahn.

STATEMENT OF DONALD F. McGAHN, ESQ., PATTON BOGGS, LLP, WASHINGTON, D.C.

Mr. MCGAHN. Chairman King, Ranking Member Roberts, and members of the Committee, thank you for the opportunity to appear before you today. It is an honor and a privilege, particularly in light of the appearance of former Justice John Paul Stevens. Per the Committee's request, I submitted written testimony prior to the hearing, jointly filed with another panelist here today, Neil Reiff.

Mr. Reiff and I are practitioners in the area of campaign finance and our views are shaped by decades of experience in advising and representing real people who wish to participate in politics in a legally compliant manner.

Although we have similar clients, and are not here to represent the views of any of those clients, we differ in one significant way. One of us represents Republicans, conservatives, and Libertarians; while the other represents Democrats, liberals, and progressives. Such a partisan difference in the modern world would ordinarily preclude any notion of common ground, but not here.

Recently we co-authored an article that was published in Campaigns and Elections magazine that explained our views on the good, the bad, and the ugly of the current law, particularly the aspects imposed by the Bipartisan Campaign Reform Act of 2002, commonly called McCain-Feingold.

In our article which we have already submitted to the Committee, we explained that much of what many perceive to be the problems in the current system can be traced back to the underlying statute itself. As we predicted back in 2002, McCain-Feingold has become a warped version of itself, where heavily regulated candidates and party committees have taken a backseat in our current system.

We suggest a different approach, one that flows from a different premise firmly grounded in our shared First Amendment tradition, that in order for voters to be truly informed, they need to hear directly from the candidates themselves. Thus, the candidate's voice ought to be the central voice in American democracy. In our view, the parties are the best vehicles to assist with achieving that goal. In other words, political parties are uniquely situated to echo their candidate's message.

Critically, our views and suggestions are not designed to simply transfer relevancy back to the parties for relevancy's sake. Recall that the plaintiff in Buckley versus Valeo, Senator James Buckley of New York, was not nominated by either of the two major parties, and it was precisely that sort of candidate, one outside of that era's establishment, that felt the burdens of that wave of reform the most.

We care, first and foremost, about grassroots and local activity by ordinary citizens, and believe that McCain-Feingold in its effort to change the culture of Washington, D.C. has reached too far into state and local politics and contributed to pushing local activists outside the parties.

Unfortunately, current law has placed parties at a competitive disadvantage and has federalized virtually all state and local party programs, which brings us to the 2014 campaign landscape. Certainly direct contribution limits remain, albeit at artificially low levels that do not match the rate of inflation that has occurred since they were first instituted.

For example, the $10,000 state party limit in today's dollars ought to be, if adjusted for inflation, about $48,000. In addition to regular inflation, the cost of campaigning has skyrocketed, particularly due to the cost of television advertising. Other prophylactic measures imposed by the law have been struck by the courts, except those that limit the ability of political party committees to effectively assist their candidates.

Candidates are struggling to be heard over the din of single issue and other groups and the party committees who historically had been a candidate's natural ally has significantly diminished and es-

sentially been replaced by independent super-PACs and single-issue non-profits. So that just seems backwards and, ironically, is the opposite of the so-called reform.

Some claim more disclosure is the answer. Separate and apart from my work with Mr. Reiff, in my own view, this is not the answer. Certainly campaign disclosure has survived judicial review, albeit in a more limited form than that which was originally passed. But disclosure has had a mixed record in the courts, sometimes upheld, but often struck or limited.

Whether one looks to Talley versus California, Thomas v. Collins, NAACP versus Alabama, Buckley versus Valeo, or most recently, Davis versus FEC, disclosure has its limitations. As Justice John Paul Stevens himself said, writing for the Court's majority in McIntyre versus Ohio, quote, Anonymity is a shield from the tyranny of the majority. It exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular, unquote.

Justice Stevens also said, speaking for the Court, quote, the freedom to publish anonymously extends beyond the literary realm, unquote. Continuing, On occasion, quite apart from any threat or prosecution, an advocate may believe her ideas would be more persuasive if the readers are unaware of her identity. Anonymity, thereby, provides a way for a writer who may be personally unpopular to ensure that readers will not be prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric where the identity of the speaker is an important component of the many attempts to persuade, the most effective advocates have sometimes opted for anonymity, unquote.

And what of McCutcheon versus FEC? We anticipate that McCutcheon will help address the unfairness, the parties, and most candidates to some degree, but it did not strike limitations and prohibitions on direct contributions to candidates and party committees. What was struck was the so-called biennial limit, essentially an umbrella limit that prevented citizens from giving to more than a few handful of candidates and party committees.

Thus, the impact of McCutcheon. More candidates, including challengers and those that are not seen as safe bets, will have access to additional financial support. Hopefully, direct contributions will no longer be the province of a select few well ensconced within the ruling class.

Similarly, the upstart challenge of candidates' natural ally, the political party, will no longer have to compete with each other for resources to the degree caused by McCain-Feingold. But this sort of change is not enough to fix what ails our system of privately funded campaign finance. McCain-Feingold must be revisited. Thank you for the opportunity to present these views.

[The prepared joint statement of Mr. McGahn and Mr. Reiff was submitted for the record:]

Senator KING. Thank you, Mr. McGahn. Mr. Ornstein.

STATEMENT OF NORMAN J. ORNSTEIN, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. ORNSTEIN. Thanks so much, Mr. Chairman, and it is really a pleasure to be here to talk about this issue. I want to start by commending Senator Cruz for his full-throated support of disclo-

sure, and I look forward to his vote for the DISCLOSE Act when it comes up in the Senate.

Senator KING. I wrote that down myself.

Mr. ORNSTEIN. I also want to thank Senator Roberts for putting up the text of the First Amendment, which I read and re-read as I have done so many times and I am still looking for the word money in the First Amendment. And I just have to say that if money is defined as speech, then the rights of citizens as equals in this process to participate simply gets blown away. Those who have lots of money have lots of speech; those who have little money have very little or no speech.

Having said that, I want to really talk about two larger concerns that are generated by the multiple recent moves that I believe have knocked the pins out from under the regulatory regime that has long operated in American politics.

I wrote my testimony going back to the Tillman Act in 1907, but as I have reflected on it, it really does take us back at least to the 1830s, and the two things I want to talk about are, first, the corrosive corruption that has caused when you remove the modest limits on money that have existed, and second, a real focus of the hearing, of course, is the efforts to limit disclosure and enable these huge flows of dark money to enter the system without the accountability necessary in a democratic political system.

As I look through history, what we know is that the focus on corruption, the concerns about corruption and money are not new at all. They go back at least to an attempt, in 1837, to prohibit the parties from shaking down Government employees and giving contributions.

As historian John Lawrence noted, Abraham Lincoln, who I believe was a Republican, warned that concentrated capital had become, quote, enthroned in the political system, and he worried about an era of, quote, corruption in high places until the republic is destroyed. I have to believe that if Abraham Lincoln were around today, he would be reinforced in that particular judgment.

As we went through the corruption in the Grant Administration that led to the Pendleton Act in 1883, the corruption involving outsized corporation influence on President Theodore Roosevelt that led to the Tillman Act in 1907, the Teapot Dome scandal that resulted in the Federal Corrupt Practices Act of 1925, the abuse of Federal employees that led, in 1938, to the passage of the Hatch Act, the Taft-Hartley Act in 1947, the Watergate scandal spurring the Federal Election Campaign Act of 1974, and that was revised, of course, by Buckley, and on through the abuses of soft money and in other ways that brought about the Federal Election Campaign—the Bipartisan Campaign Reform Act of 2002.

It was scandals that led to corruption that led to change. All of that focus was turned on its head by Citizens United brought as a very narrow, as applied, decision and then broadened out to basically take away almost all of those protections, at least going back to 1907, and then to McCutcheon.

Now, I want to make a couple of broad points, particularly about McCutcheon. Despite some of the other focal points, what has alarmed me the most about the McCutcheon decision was Justice Roberts basically now taking corruption out of the equation, and

the appearance of corruption entirely out of the equation, and defining corruption in the narrowest way, as a quid pro quo that would only be applicable in a case like ABSCAM or its more popularized American Hustle variety where you have videotape and an exchange of money in return for a favor.

That is so far away from the real world, and in particular now with McCutcheon, where officials, elected officials can solicit large contributions, something that we tried to restrain deeply in the McCain-Feingold bill. It takes me back to an era that I remember well where we had president's clubs and speaker's clubs and leader's clubs around here with a menu of access.

Give $10,000 and you get to meet with all the Committee chairs. Give $25,000, you could have a one-on-one with the Speaker. This is a trade of access-for-money and it leads down a dangerous path and a path that becomes even more dangerous when we do not have disclosure of who is involved with a lot of these contributions.

Frankly, the notion that McCutcheon is going to enhance disclosure was, I think, blown out of the water by Justice Breyer's very compelling dissent, and what we have already seen happening within a day after McCutcheon was passed where high-priced lawyers, some of whom are in this room, are working very feverishly to make sure that these contributions get channeled through multiple committees back and forth in different ways so that we will not have any effective disclosure.

Let me end with just a few recommendations for the Committee or for what Congress could do from now on. First, Congress should make every effort to pass the DISCLOSE Act. Let us get some reasonable disclosure. Second, the Senate should hold public hearings, and this Committee, on the dysfunctional Federal Election Commission and look to reform it to make it a reasonably functional body that acts to enforce the law, not to thwart it.

Third, for every hearing that we see on the purported scandal at the IRS, which is trying to apply the law now, which says that organizations called 501(c)(4) shall be exclusively social welfare organizations, we should have a hearing on the real meaning of social welfare organizations and the need to clarify those regulations.

Fourth, the Senate should pass a rule amending its ethics code to make it a violation for Senators or senior staffers to solicit the large contributions for party committees now allowed under McCutcheon. Next, you should consider the broader reform of the campaign finance system, and I am delighted that there will be a vote on Senator Udall's constitutional amendment.

We have a lot of work and a lot of heavy lifting to do. The next huge scandal is going to bring about a new drive for reform, but before that, I fear that things will get a whole lot worse. Thank you.

[The prepared statement of Mr. Ornstein was submitted for the record:]

Senator KING. Thank you, sir. Mr. Trevor Potter.

STATEMENT OF TREVOR POTTER, ESQ., PRESIDENT AND GENERAL COUNSEL, CAMPAIGN LEGAL CENTER, WASHINGTON, D.C.

Mr. POTTER. Mr. Chairman, thank you for the opportunity to testify today, Senator Roberts, Senator Udall. I appreciate the opportunity to be here to talk about these important issues.

I know, Mr. Chairman that you have said that you would like the focus to be on the McCutcheon case and the issue of disclosure and the lack of disclosure. I would make two brief points in response to testimony and comments today about the McCain-Feingold law.

First, I was pleased to see the endorsement by my colleagues on this panel, Mr. McGahn and Mr. Reiff, in their written testimony today of the McCain-Feingold goal of prohibiting, "six and seven-figure contributions", to national party committees, "in exchange for access to Executive Branch personnel as well as members of Congress."

I agree such huge contributions were and are potentially corrupting and give rise to the appearance of corruption, and thus, are bad for our democracy. I worry that they will resurface after the McCutcheon decision through the device of contributions to party committees participating in joint fundraising committees. I also worry that the Supreme Court's majority in Citizens United and McCutcheon does not share the same concern about the corruption inherent in Congress or the Executive Branch selling access that Mr. McGahn, Mr. Reiff, Mr. Ornstein and I do.

My second point about party committees under McCain-Feingold is that they have actually done quite well financially. Look at the picture of two elections, 2000, the last presidential campaign before McCain-Feingold, and 2012, our most recent.

In 2000, the two political parties and their presidential candidates raised and spent a combined total of $1.1 billion in that election, a huge sum. Today, adjusted for inflation, that would be $1.45 billion. Compare that to the amount spent in the most recent election by the parties and their candidates. In 2012, the total was $2.5 billion, double the actual amount, up 80 percent in inflation-adjusted dollars.

It is true that outside groups also spent significant sums in 2012, but the national party committees and their candidates clearly were well-resourced, better than before McCain-Feingold.

In terms of disclosure, or the lack of disclosure, my written testimony describes how we have ended up in a situation where the Supreme Court stated in Citizens United the importance to our democracy of full disclosure of the sources of campaign funding, but we have less and less of it. My written testimony says that the FEC has deadlocked repeatedly on whether to issue a Notice of Proposed Rulemaking to deal with the question of disclosure after Citizens United. That is correct. The Commission appears to still be deadlocked on this issue.

However, I would like to note for the record that the Commission, in late 2011, managed to issue a Citizens United rulemaking notice that did not mention disclosure. The Commission even had a hearing, but that is the end of the story. No new regulation, no action on disclosure.

Mr. Ornstein's written testimony demonstrates how dramatically disclosure of the sources of funding of public advertising has fallen. In 2004, the first election under McCain-Feingold, 98 percent of outside groups running campaign ads disclosed their donors. A few years later, that number was down to 34 percent. In absolute dollars, the amount spent on advertising, only 40 percent was disclosed as to source in 2012 by these outside groups.

Why is this a problem? Let me turn to Justice Kennedy's explanation in Citizens United. He said, "with the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." Shareholders can determine whether their corporations 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."

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

So Justice Kennedy said the deal was unlimited independent expenditures, but full disclosure of funders. And today, we have only half the deal, and as Justice Kennedy says, speaking for eight justices, that is a problem for our democracy.

How can shareholders hold their corporations accountable for the shareholder money spent in political campaigns if they have no idea what is being spent, and for and against which candidates? How can voters hold elected officials accountable if they do not know which moneyed interests are financing those officials' election?

Finally, how can the electorate, voters, make informed decisions and give proper weight to different speakers and messages, as the Court says is important to the functioning of our democracy, if voters do not know who is financing the constant barrage of advertising run by these groups? Thank you, Mr. Chairman.

[The prepared statement of Mr. Potter was submitted for the record:]

Senator KING. Thank you, Mr. Potter. Our next panel member is Ann Ravel, former Chair of the California Fair Political Practices Commission and currently Vice Chair of the Federal Election Commission. Ms. Ravel, thank you for joining us.

STATEMENT OF THE HONORABLE ANN M. RAVEL, VICE CHAIR, FEDERAL ELECTION COMMISSION, WASHINGTON, D.C.

Ms. RAVEL. Thank you, Mr. Chairman, Ranking Member Roberts, and Senator Udall. Thank you for inviting me to testify today. As indicated, I am the Vice Chair of the Federal Election Commission, but I am not testifying in that capacity today, nor am I speaking for the Commission. Instead, my testimony concerns a case pursued during my tenure as Chair of the California Fair Political Practices Commission, FPPC, to expose dark money in a California election.

FPPC versus Americans for Responsible Leadership—and I am going to use the word of the day—is a Byzantine story of campaign contributions being funneled all over the country in an apparent effort to avoid revealing to the public who is behind political campaigns.

We discovered that networks of non-profits anonymously injected millions of dollars into our election by using shell corporate entities, wire transfers, and fund-swapping. This allowed donors to skirt disclosure laws and cloak their identities from the public view.

Just a few weeks before the 2012 election, a California political action committee, which was focused on supporting one and defeating another ballot measure, received an $11 million contribution. This was the largest anonymous contribution ever made in the history of California elections. The contribution came from an Arizona non-profit, Americans for Responsible Leadership, or ARL, which had never before spent a dime in California.

After a complaint was filed with the FPPC, we attempted to determine whether ARL abided by the requirements of California law to disclose the source of the contribution. We eventually had to seek relief in court. The California Supreme Court ruled unanimously in an emergency Sunday session that ARL had to hand over its records.

Because of this, the day before the election, ARL revealed that the sources of the $11 million were two other non-profits, one based in Virginia and another in Arizona called CPPR. ARL admitted that it functioned solely as an intermediary to receive the money from the two non-profits and funnel it to the California political action committees.

This is a clear violation of the law that prohibits making contributions in the name of another. After the election, a full investigation found that approximately $25 million raised from California donors who wished to remain anonymous went to the Virginia non-profit and then was transferred to the other non-profit, CPPR.

There was a tacit understanding that CPPR would direct other funds back to California in the same amount or more through an intricate web of groups. After passing through multiple non-profits around the country, $15 million was then returned to California to the original political committees to spend on the ballot measures. $11 million of that money was funneled through ARL and $4 million through an Iowa non-profit.

Because of the FPPC litigation that was pending, the remaining $10 million of the original $25 million raised from the California donors was not anonymously pumped back into the California election. The FPPC, which is a bipartisan commission, unanimously levied a record-setting fine of $1 million, and also sought disgorgement from the recipient committees of the $15 million in improperly disclosed funds.

The FPPC's investigation and litigation demonstrates clearly that public officials from both parties can work together to uphold disclosure laws, but the story of FPPC versus ARL also shows that dark money is a national problem that is best solved on the Fed-

eral level. I would be glad to answer your questions about this case. Thank you again for the opportunity to speak.

[The prepared statement of Ms. Ravel was submitted for the record:]

Senator KING. Thank you for joining us today. Finally, Neil P. Reiff, as I mentioned, a lawyer here in Washington and former Deputy General Counsel for the Democratic National Committee. Mr. Reiff.

STATEMENT OF NEIL P. REIFF, ESQ., SANDLER, REIFF, YOUNG & LAMB, WASHINGTON, D.C.

Mr. REIFF. Mr. Chairman, thank you for the opportunity to testify today. I am here today as a practitioner in the field of campaign finance law and I represent over 40 Democratic state party committees. As a recent article explains, McCain-Feingold has had a profound effect on state and local party committees, and I would like to provide a couple of examples that illustrate how the law has federalized most of the state parties' activities in connection with state and local elections.

As Mr. McGahn said, it ought to be revisited. In our article, we agree that national party soft money ban and the limitation on solicitations by national party officers, Federal candidates, and officeholders achieve the goals to address soft money practices at the national level at the time of its passage.

However, Congress could have and should have stopped there. Instead, with little forethought to its consequences, McCain-Feingold extended its reach to state and local party committees who, unlike national party committees, were thoroughly invested and acted in state and local elections.

Under McCain-Feingold, state parties have been subject to a labyrinth of regulation that seeks to intercept all of their activities and force them in the Federal system, regardless of whether those activities have any relation to Federal elections or candidates. McCain-Feingold federalized all elections through its introduction of a new term, Federal election activity, which subjected traditionally local activities, such as voter registration and get-out-the-vote to Federal regulation and limitation.

The implementation of this new concept has proven rocky. When passed, it was claimed to be a narrowly targeted anti-circumvention measure. Defense of the law followed suit and minimized the reach of the new law. After the law was upheld in McConnell versus FEC, however, supporters changed their tune and argued that the Federal Election Commission, the agency charged with enforcing the law, was not reading the new mandates broadly enough. Additional litigation ensued and courts instructed the FEC to rewrite and broaden its rules governing state and local parties.

For example, under the FEC's recently redefined definition of get-out-the-vote, essentially all public communications undertaken by a state party committee, even those made totally independent of any Federal candidate involvement, are subject to Federal law merely by exhorting the voter to go vote for a state or local candidate. Therefore, if a party committee wishes to air a television or radio ad that tells listeners or viewers to go vote for Smith for Gov-

ernor, Federal law may mandate that this advertisement be paid for entirely or in part with Federally regulated funds.

Prior to McCain-Feingold, state law governs state or local candidate support, but today, parties are governed by Federal law; whereas, a non-party group could run the same exact advertisement free of such Federal limitation.

In addition, under the FEC get-out-the-vote definition, if a party committee sends out a mailing on behalf of a state or local candidate and merely informs the voter on when the polls are open, the location of their polling place, or how to obtain an absentee ballot, Federal law regulates and limits the funding of the mail piece based upon the provision of such information in the mailer even when the mailing makes no reference to any Federal candidate.

It is common practice for state parties to avoid including such information in mailings in order to avoid federalizing those communications. Simply put, party committees have been muzzled when it comes to their ability to inform voters of the most basic voting information if they want to avoid being subject to Federal regulation. We cannot conceive of any policy justification that would support this, particularly when other groups who engage in the exact same sort of activity do so without such regulation.

McCain-Feingold has had other detrimental effects. Its federalization of state parties has created disincentives for state parties to run joint campaigns that feature the entire party ticket. Prior to McCain-Feingold, it was commonplace for state parties to pay for communications that featured candidates from the top of the ticket to the bottom of the ticket.

In addition, state and local candidates have bypassed party committees when engaging in advocacy and get-out-the-vote activities due to the incompatibility of Federal and state law. The current structure of the law has caused a significant demise in state and local party relevancy as funding sources seek out less regulated organizations such as Federal, state, and local super PACs who may independently spend money without any restriction on how those communications are funded and how much voting information that they can provide.

The demise of parties has had serious implications for the American political system. Party committees have played a vital role in grassroots campaigning. Historically, parties have been instrumental in delivering positive party messaging, an increasing turnout in American elections to grassroots voter contact methods, now what some may characterize as single issue outside groups have come in to fill the void.

Although such activities are perfectly legal, it seems to be exactly the opposite system of what was envisioned by proponents of reform. Recently, the Association of State Democratic Chairs passed a unanimous resolution at its meeting in November of last year that calls on Congress and the FEC to reevaluate how state and local party committees are regulated.

We have provided a copy of this resolution and legislative recommendations made by the ASDC for your review. None of the proposals made by the ASDC advocate for the repeat of any contribution limit. Rather, the ASDC seeks common sense regulation that

balances the need to have vital party organizations along with the need to provide safeguards against political corruption.

Although Mr. McGahn and I each have a number of ideas and suggestions regarding specific changes to the law, we both believe that any common sense steps to help revitalize state and local party committees would be helpful. I have a few examples.

Refine and simplify the existing volunteer exemptions for grassroots activities to make them easier to use by state party committees and consider expanding them to other grassroots activities.

Repeal the McCain-Feingold provisions that have needlessly federalized joint and non-Federal campaign activities undertaken by state party committees. In the alternative, modify the FEC's current interpretation of the existing rules to scale back the expansive scope that essentially federalizes all party campaigning on behalf of state and local candidates.

And finally, index contribution limits to party committees as these limits were inexplicably excluded from the contribution indexing provisions provided for by McCain-Feingold. Similarly to the extent that limitations on coordinated party expenditures are still required, update those limits to more closely reflect modern economic reality.

In the short time we have today, we can only briefly touch upon the Byzantine nature of Federal regulation that state parties are subject to. Thank you for the opportunity to present our views.

Senator KING. Thank you, Mr. Reiff. We are going to have seven-minute question rounds. I would like to begin. First, the term Byzantine has been used a couple of times. This is a chart prepared by the Center for Responsive Politics that is a chart of money in 2012. I think we are insulting the Byzantines, frankly, by likening this to their conduct. This chart will be available in larger form.

It is illustrative of what is going on. I did a rough calculation. There are $300 or $400 million here that is flowing through all of these various organizations. They have even come up with a name which I think is a marvelous one, a disregarded entity. That is—I do not know quite what that it is. It is an oxymoron, I would think.

Mr. Ornstein, in preparing for this hearing, to coin a phrase, my conclusion was it is worse than I thought. We got a report just yesterday from the Wesleyan Media Project, which is a very interesting project that does not try to track contributions, because a lot of them are not disclosed, but tracks ads on television all over the country and then attributes a value to them based—estimated value—based upon the air time in the media market. And, of course, it is only air time. It is not production or other costs.

But the startling thing, this is spending by non-disclosure groups' cycle to date, in other words, to April 29th, yesterday. And what struck me is the gigantic growth in these independent expenditures. And that is what I meant in my opening statement, that this is not a little incremental change. This is a revolutionary change. And the same thing, this is non-disclosure money cycle to date. This is outside spending cycle to date and these are the off-year elections, and you can see between 2010 and 2014 an enormous growth, almost ten times more.

Would you say that this is an accelerating problem and that is one of the reasons we should have to address it?

Mr. ORNSTEIN. It is an exploding problem, Mr. Chairman, and I think what we have seen is a set of very often explicit efforts to try to hide where the money is coming from. It is not only through these—I will not call them Byzantine—bizarre sets of arrangements. And Ann, I think, described very well how this can play out across many state lines.

I only briefly alluded to the role of the IRS in all of this, and one thing that we know is that moving towards 2012, there was another explosion which was applications for 501(c)(4) status from groups that, in many cases, and we knew leading up to this, were moving into influence elections and were using that IRS status simply to hide the names of donors.

We know that American Crossroads created another entity, Crossroads GPS, and basically the head of it said very clearly, this is for people who do not want to disclose. So lots of groups moved in there. The IRS, in a pretty ham-handed way, tried to deal with this explosion by using code words.

Of course, the reality is, if you have a group that has the name party in it and they say in their application that they want to influence elections, they should be registering under Section 527 of the Code. And now the IRS is moving to try and come up with common sense regulations that keeps these sham groups that are not social welfare organizations in any way, shape, and form from doing what the law intended and they are being attacked viciously.

Senator KING. We all remember the Swift Boat Veterans for Truth in 2004. That was a 527. But that required disclosure of donors. As I understand it, that vehicle has atrophied and is very rarely used, and now it is the 501(c)(4)s, which do not require disclosure of donors and that is where all the money seems to be going. Is that correct?

Mr. ORNSTEIN. That is correct. And some of the other 501(c)s may be used as well. But we know that in 2000, before McCain-Feingold, Congress actually did move to try and require disclosure, more disclosure from 527s.

It is also important to emphasize what Trevor Potter put very eloquently into his testimony, which is, so much of the problem here is not based on either the law or the court, which is very much in favor of disclosure. It is the Federal Election Commission which has tried to redefine—you know, take Pat Moynihan's term of defining deviancy down.

They have tried to define disclosure down to make it even more difficult, and that is the root of some of the problems here as well.

Senator KING. Well, Mr. Potter, as I went back and looked at Citizens United and McCutcheon, it was clear that the whole holding was based upon a premise of vigorous disclosure. That was how the courts justified—those two courts—justified eliminating the limits, but they posited a disclosure regimen that does not exist. Is that correct?

Mr. POTTER. Yes. As an outsider, I think one of the mysteries to the Supreme Court's decision in Citizens United is the very strong language by Justice Kennedy where he says "until today, we have not had a system with unlimited corporate spending but full disclo-

sure." And now that we have corporate spending allowed in Federal elections and full disclosure, and then he goes as I quoted in my opening statement, "Citizens will be able to figure out who is spending the money. Shareholders will know what their corporations are up to."

So the question is, why did Justice Kennedy say that? I think the answer is pretty clear, which is he is looking at the law. He is looking at McCain-Feingold, the Bipartisan Campaign Act, which requires disclosure of the sources of spending of advertising if someone gives more than $1,000 to the groups that are doing it or if it is done through a separate group they set up for that spending.

Senator KING. Before my time expires, the issue about disclosure, as I have heard it articulated, that if donors' names are disclosed, they will be subject to intimidation and threats and those kinds of things. My old colleague from Virginia law school, who I know as Nino Scalia—I understand is now Antonin Scalia—said requiring people to stand up in public for their political acts fosters civic courage without which democracy is doomed.

In Maine, we have town meetings every spring. Nobody is allowed to go to a Maine town meeting with a bag over their head. If they are going to make a speech, they have to acknowledge who they are, and that is part of the information that the voters need, it seems to me.

Mr. Ornstein, what do you make of this argument that disclosure will lead to reactions and intimidation and threats?

Mr. ORNSTEIN. I agree with Justice Scalia very much in this front. I must say, Mr. Chairman, you know, as I have been watching the pictures from Ukraine and you see these people not with bags but with masks over their heads, it made me think about this a little bit, that there are societies where they try to hide identities. That is not what America is all about.

And some of the discussion here that goes back to a case involving the NAACP is really not a very good parallel. It is one thing if you have threats of death and the like, but in a democracy where there is rough and tumble, and it is something actually that I think both Senator Roberts and Senator Cruz talked about, that is the nature of a democracy.

If you are going to be involved in this process and somebody is going to criticize you for it, there is nothing wrong with that. You have to have some reasonable limits, it is true, if you do have direct intimidation, but there are laws very much that guard against that already on the books.

Senator KING. Thank you. Senator Roberts.

Senator ROBERTS. I would just like to observe that no one spending money exercising their First Amendment rights, to my knowledge, is endorsing fire in theaters or pornography or noise pollution. I suspect, however, that many on both sides of the aisle have characterized their opponents as stating noise pollution or conducting themselves with regard to noise pollution.

The other thing I would say is the exercise of free speech that one disagrees with is not pornography, although we all know it when we see it, when we put on our partisan glasses, nor is it necessary to label repeatedly, repeatedly to characterize those with whom you disagree as un-American.

Mr. Ornstein, Norm, the IRS is not moving to promulgate the regulations that were in place, the exact regulations that were in place that some of us believe caused the problem with the IRS trampling on the rights, the First Amendment rights of some conservative groups, primarily the Tea Party.

They are not moving because they received over 200,000 comments, and by law, you have got to go through them and so they have stopped, but they have also stopped because Senator Flake of Arizona and myself, at least suggested to John Koskinen, the new Commissioner of IRS, that it might be a good thing to withhold writing the regulations until the Finance Committee of the United States Senate, Ways and Means Committee of the House, and the Inspector General would get done with the investigations.

We are having problems, like every other investigation, with redaction and other things, but we are persevering and we are trying to do it in a bipartisan manner, more especially with the Senate Finance Committee. So they have held off right now, and I think that is a good idea, and I think once we finish the investigations, we can determine what actually happened.

I have some feeling about that as to where that really came from and I think it came from more than a number of Senators writing basically to the IRS stating that they felt the activities of various groups were not in keeping with what they envisioned the provision to call for. But that aside, I just wanted to mention that.

You referenced the Hatch Act. Yesterday it was announced that an FEC attorney resigned for admitted violations of the Act. According to a release from the Office of Special Counsel, the employee posted dozens of partisan political tweets, including many soliciting campaign contributions to the President's 2012 election campaign and other political campaigns, despite the Hatch Act restrictions that prohibit the FEC and other further restricted employees from such activity.

The employee also participated in a Huffington Post live Internet broadcast via webcam at an FEC facility criticizing the Republican Party and the presidential candidate at that time, Mitt Romney.

I think you can understand why reports of this nature make Republicans somewhat wary of the FEC and their ability to regulate their behavior. Are we to believe that there are not others at the Commission who share these views but just have not been caught expressing them? Now, I mentioned you, Norm, but really that question is directed to Ms. Ravel, who I think could give a better answer, although I am sure you could give a good answer.

Ms. RAVEL. Well, as I indicated, Senator Roberts, I cannot speak on behalf of the FEC, but I will tell you that the FEC responded very quickly to that issue when it came to the attention of people within the agency, and understood that it was totally inappropriate behavior on behalf of an employee.

And further, there has been an investigation internally and there is no reason to believe that this is extensive or goes beyond anybody except this one individual who has since been terminated.

Senator ROBERTS. That was my next question and you have already answered it. My question was, in your experience at the Commission, are any negative views of the Republican Party widespread among the employees there or members of the FEC? Even

sitting around and having coffee and saying, My God, what are those crazy Republicans doing now?

Ms. RAVEL. Senator——

Senator ROBERTS. Or what Roberts is doing?

Ms. RAVEL [continuing]. I have never heard your name mentioned——

Senator ROBERTS. Thank you.

Ms. RAVEL [continuing]. At the FEC.

Senator ROBERTS. At least I am not part of that dark money scandal.

Ms. RAVEL. No. And as I indicated, I was speaking on behalf of—relating to an incident, the case at the FPPC, but I, in my six months at the FEC, have never heard any partisan communications by either employees or Commissioners. While we all are appointed based on our party——

Senator ROBERTS. That must be one agency that is an island in the sun. Mr. McGahn, what do you think about this? What was your experience in this regard? Should we view this as an isolated incident or as evidence of a broader problem?

Mr. MCGAHN. I saw the news and I was very troubled by it. When the FEC has that issue, I think it is very serious. I think it certainly calls into question what many of the reform lobbyists have sold for years, which is that there is this idea of a non-partisan staff that can exist divorced from politics and provide objective advice and that sort of thing.

That being said, what I can say is, most of the folks at the FEC play it straight. They show up on time, they do their job well, they are very committed to their job, and they do not have an agenda. But there are some folks who seem to get a little carried away with themselves from time to time and I think that is troubling.

The cure for this is, one, the Hatch Act; two, keep in mind what the FEC is and that it is not. It is not an independent agency composed of career staff. It is actually six persons appointed by the President, confirmed by the Senate. It is not a non-partisan agency. It is a bipartisan agency. And under the statute, in order for the Commission to actually take action, it takes at least four of six Commissioners to confirm that.

So if staff get a little carried away, that is not good, but in my view, the Commission is then—this is a reason why Commissioners need to remain vigilant and really exercise the power the Congress has given them under the statute to run the agency.

The idea that the Commissioners want to delegate to staff and that sort of thing, I have never been a big fan of that and I think the unfortunate release that came out yesterday is evidence that my view of the law is sound that really it shows the wisdom of the original system of the FEC where the Commissioners have to act in a bipartisan manner to avoid one party essentially targeting the other party.

Senator ROBERTS. I appreciate that. My time has expired, Mr. Chairman.

Senator KING. Thank you, Senator. Senator Udall. Oh, sorry.

Senator KLOBUCHAR. We look similar.

Senator KING. I am awfully sorry. Senator Klobuchar, welcome to the hearing.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, and I had two previous hearings, including the Joint Economic Committee where I am the Senate Chair. So I apologize for getting here now, but I think this is an incredibly important topic. I thank you for holding this hearing. I thank Justice Stevens for his testimony and his support for a constitutional amendment. I also thank my colleague here, Senator Udall, for his work in leading the constitutional amendment, which I am a co-sponsor.

I am very troubled by the recent Supreme Court decision, the McCutcheon decision, extending the damage Citizens United caused in my mind. I looked back. I was cleaning out a back room in my house in Minnesota last week and found a bunch of things from my campaign for Hennepin County Attorney, where, Mr. Chairman, we had a $100 limit on contributions in the off election years and $500 in the election year.

I literally found letters where we returned $10.00 if people had gone over the $100 limit. I then thought of my first days. I found a bunch of stuff from the 2006 Senate campaign where I knew no one to ask money from nationally. I literally went through my entire Rolodex and I remember setting the all-time Senate record of raising $17,000 from ex-boyfriends.

[Laughter.]

Senator KLOBUCHAR. Those days are behind us as we head into this new era, after the Supreme Court decisions, and I am incredibly troubled by these decisions when you can have a few thousand people be able to give hundreds of thousands of dollars, and I just think it destroys our campaign finance system.

I guess I will start with you, Mr. Potter. There has been a lot of discussion about what the real world impact of Citizens United has been and how McCutcheon will affect it going forward. Can you describe what trends or major shifts you see in campaign finance since the Citizens United ruling and how McCutcheon will impact those trends in the future?

Mr. POTTER. Yes, thank you, Senator. Well, I think the first trend, which was noted in the Chairman's question a moment ago, is that contrary to what the Supreme Court said in Citizens United, we are seeing secret spending. The Court's assumption was that although we would have new sources of spending, corporations and then unions, that they would be disclosed and that shareholders and citizens therefore would know who was speaking, and could evaluate that speech.

That is not what is happening now. Because of the FEC's position on what has to be disclosed, because of the proliferation of tax exempt groups that do not disclose their donors, we have ended up with a parallel avenue of spending in elections.

Essentially, if someone wants to influence an election today, if they are being solicited for money, the first question is, "well, am I willing to have my spending disclosed or not?" And if not, then you look at all of these vehicles that are available to spend the same money, to run the same ads, but have it avoid being a matter of public record, so that——

Senator KLOBUCHAR. Yes. I remember $99.00 contributions in my $100 race for county attorney, and I know that, but this is taking

it to a whole different level, as you point out, when there is no disclosure and the effect that will have.

I guess the other question—you took this even a step further, Mr. Ornstein, when you talked about how the definition of corruption is so narrow in the Supreme Court case. It says that we can only regulate donations to prevent actual quid pro quo bribery. Why do you think this is problematic, and should we be able to regulate this?

Mr. ORNSTEIN. First of all, let me say that you were a great Hennepin County Attorney. But beyond that, anybody, I think, who has been around the political process at all knows what happens when you have money intersect with power and the many ways, indirect and otherwise, that you get corrupting influences.

I have had some of your colleagues tell me, in the aftermath not just of Citizens United, but what I think was an equally corrosive decision, Speech Now, that followed it that created the explosion of the super PACs and in other ways, say that they are visited by somebody who says, I am representing Americans for a Better America, and they have got more money than God and, you know, pouring in $10 million in the final two weeks of a campaign to destroy somebody, that is easy.

They really want this amendment. I do not know what will happen if somebody opposes them, but that is the reality, and they leave. And human beings are going to think, well, it is one little amendment, or will think, I had better raise $10 million not just what I need for my campaign, but as an insurance fund just in case because I cannot do that in the final two weeks of a campaign.

That is just one set of examples. Now in the aftermath of McCutcheon, I can imagine a bunch of people coming in and waving checkbooks and saying, each one of us has checks that can total $3.75 million now that we will give to the hundreds of committees, the joint fund-raising committees, spread it around, and, of course, we will have candidates we would prefer. The notion that this will actually keep the individual limit is out the window.

We will all write these checks, but there is one little thing here in the legislative arena that we want in return. You do not have to say it directly and it will not be on videotape. This is corrupting. We saw it in the gilded age, and what I think both Justice Kennedy and Justice Roberts have now done in these decisions is to open up a new gilded age.

Senator KLOBUCHAR. And you being a political scientist and not just a campaign expert here understand that one of the problems is we have had people so polarized, you know, whatever special interest is to the left or the right, and one of the things I am worried about as I looked at this McCutcheon decision, even more than the expenditures decision, is that it will just play to the poles.

It will make it even harder for people to do things in the middle where they have to compromise and they have to be able to kind of go in the face of some of the people from their own base, from their own party, if they are just going to be punished in a big way by major donors. Do you think there is any truth to that?

Mr. ORNSTEIN. I think you get, when it comes to big donors, maybe four categories of people. There are two that represent the

poles and they are trying to use their money as electoral magnets to pull people further apart.

Senator KLOBUCHAR. That is a good analogy.

Mr. ORNSTEIN. A third type are those who may not have a deep ideological interest, but they have pecuniary interests and they will use money to make money. I, frankly, am surprised that we do not have more spending by big corporate interests in Washington because it is the best investment you can make. Put in, you know, $20 million that goes into funding of campaigns. Maybe you will get a billion dollar contract out of it. And we will see more of that now and I think we are heading down a slippery slope of direct contributions by corporations to candidates.

And then maybe you have a category of those who are just looking out for the broader public interest. But I think that is a much smaller category than the other three.

Senator KLOBUCHAR. I think the last thing I would raise, no question, and maybe we can go back after you are done, Senator King, but it is just this issue where even when you are making a decision as an elected official to do what you consider the right thing for your state, you know, maybe you have a lot of employees in a certain area and you think it is very important or you think it is the right thing for the country.

I think with this lack of trust with all these big contributions, people still will now look at it, even though you know in your heart you made the decision for the right reason, and they look and they see, Oh, but you got money from these interests. I just think even when you are doing it for the right reason, it completely breaks down trust from the public about why you are doing things.

And that is one of the major problems and why I support this constitutional amendment.

Senator KING. Thank you. A couple of follow-up questions. In listening to this and thinking about these organizations that essentially are designed to disguise identify, the term identity laundering comes to mind. I mean, that is what is really going on here. It is a reverse on the whole idea of money laundering.

Ms. Ravel, which was essentially exactly what was going on in your case, where there were donors in California who the money went to Virginia to Arizona back to California. It was all about laundering the identity out of that contribution. Is that not correct?

Ms. RAVEL. Yes. Yes, Mr. Chairman. The initial request for the money in California was, if you want your identity to be known, you can give directly to a PAC. If you do not want your identity to be known and you want to remain anonymous, it can go to this Virginia non-profit.

And so, the money that went to the Virginia non-profit was specifically for the purpose of not revealing identity and it was then moved circuitously through all the other non-profits for the same reason.

Senator KING. Thank you, Ms. Ravel. That is exactly the way it appeared. Mr. Ornstein, one of the situations is, whenever you try to do something about an issue like this—and by the way, I really enjoyed this morning sitting literally in the center between Senator Roberts and Senator Schumer—but when you try to do something,

everybody thinks of it in partisan terms. Does this advantage my party versus the other party, my candidate versus the other?

But this data I referred to that came out yesterday indicates that the gap—the red or the more conservative-leaning groups, the blue are more liberal groups, and the gap between them is diminishing significantly. It was 85 or 90 percent conservative back in 2010. As you see here, there is still a big disproportionate in 2012. But the gap is now 60–40.

Hopefully, both sides are going to realize that this is a danger. I think this is not a partisan issue to me. I think this non-disclosed money is a danger to the republic no matter who it favors one year to the next. As the Old Testament says, if you sow the wind, you will reap the whirlwind. I am afraid that people are sort of saying, Okay, right now today this benefits my party, but next year or the year after that, it could benefit the other party. That is why I think we need to make a change like this.

Mr. ORNSTEIN. You know, it is interesting, Mr. Chairman, that before McCain-Feingold, you really did have a bipartisan consensus on the need for more disclosure. And indeed, when Congress was considering, in 2000, requiring more disclosure of 527 groups, we had overwhelming bipartisan majority support it.

One who did not was the Senate Republican leader, Mitch McConnell, but what Senator McConnell said at the time was he did not support it because it did not require enough disclosure, including what he said was a requirement for disclosure from these non-profit groups, now what we think of as the 501(c)(4)s.

We have a very different attitude now. It has become more polarized. And I do not see why disclosure should be a partisan issue at this point. I do not see why we cannot cut through that, and I do think that this is something where now that there are more avenues for money, people who have interests, and that includes the polar opposites as well on both sides, are going to start to pour more and more money into it and, in many cases, they are going to try and hide where that money is coming from.

One of the things that we have seen is, they will often use inappropriate vehicles, 501(c)(3)s, the pure non-profits, to then give grants of money to other groups that can go to other groups that can go to other groups that finally end up in a 501(c)(4) that does not get disclosed.

There are so many opportunities here to hide identities and to hide money that how can voters figure out when a message is coming who is providing that message, which is a requirement of context, to know whether to believe it.

Senator KING. Well, one of the interesting data points in this new study from Wesleyan is that voters tend to put more credit to ads that come from these groups than they do from the candidates, even though they do not know who the groups are. The groups may be Americans for Greener Grass and voters tend to think, well, it is not a candidate ad, it must have more authority, but they do not know who is funding Americans for Greener Grass. By the way, I am in favor of these ads.

Mr. ORNSTEIN. One of the things as well, we have talked, and Senator—excuse me—Justice Stevens talked about a level playing field. One of the things that concerns me is that the level playing

field is moving very much away from the candidates of both parties and in a host of ways. Candidates have to raise money in $2,600 increments and groups that now can spend untold amounts, that can pour it in at the end of a campaign when a candidate does not have an opportunity to answer those messages have now, I think, an overweening influence.

And it is not that that money will necessarily be spent. The threat of spending, unless something is done, is enough. In many cases, we will see actions taken by Government behind closed doors or by changing amendments that nobody will know about without a dime being spent under these circumstances as anonymous groups apply that threat. It is not a good way to run business in a democracy.

Senator KING. Mr. Potter, I thought one of the most interesting moments today was when Senator Cruz said, unlimited contributions and immediate disclosure. React to that concept.

Mr. POTTER. Well, I think there are two different issues here. One is the idea of full and immediate disclosure, which is the one Senator Cruz talked about, I believe, in the context, in fairness to Senator Cruz, in the context of contributions to candidates. The other is the issue of how much candidates should be able to accept as contributions, or party committees which are comprised of candidates, without citizens thinking that they have been bought.

That has been the debate, really, since certainly Watergate where you had million-dollar contributions.

Senator KING. But if you have full disclosure, the citizens can make that decision. They can say, look, my candidate took half a million dollars from XYZ and I do not like that.

Mr. POTTER. They can and that is where we were in the early 1970s when there were million-dollar contributions to the Nixon reelection campaign. The reaction was, something is being sold or something is being bought for a million dollars. The Supreme Court in Buckley said, it is not an irrational conclusion. It is common sense that people will believe that huge contributions are intended to buy access and influence legislative results, and that people who take those contributions are in some way being bought.

So that is why the Court in Buckley said it makes perfectly good sense to limit the size of contributions to candidates and party committees because of the perception, the danger and the perception that there is a transaction.

If you have an unlimited contribution that is fully disclosed, you still have the million dollars coming in. And the question, Justice Stevens' question asked is, so what about people who do not have a million dollars? They just do not get to buy any access or influence?

That has been the justification for the contribution limits. The debate has been, what size should they be? The assumption has been that those contributions will be disclosed, and as far as we know they are all fully disclosed, but that the independent expenditures that the Court allowed in the Buckley decision, which the Court said were not going to be corrupting because they would be totally, wholly, completely independent of candidates, would also be fully disclosed.

We have ended up, in a way, with the worst of both worlds, which is contrary to what the Court said, these expenditures are not fully disclosed, as we have discussed, or they need not be. There is an option there. And secondly, they are not wholly, totally, and completely independent of candidates either.

The Court's assumption was they cannot be corrupting because candidates and parties will have nothing to do with them, but the reality, as we have seen, is that many of these super PACs are created by former employees of candidates and close associates of candidates. They are, in many ways, tied to the candidates.

Candidates have appeared at events for these groups to thank donors for giving to them so they are not totally, wholly independent as the Court expected. In that sense, they are not fulfilling the role that the Court thought they would.

Senator KING. We have used the word—and this is a subject that really has not come up today—we have used the word perception a number of times. I do not think there is much question, and polls support this, that this whole money and politics is part of what is turning off the American people to the process. It is part of what is undermining the confidence and trust in the system, which is ultimately what our system rests upon.

I think that is part of it. It does not have to be a bribe. It just is unseemly and people realize that. It may be one of the reasons that our collective approval rating around here is below al Qaeda. And it just strikes me. There has not been enough discussion of that, is the underlying distaste for this whole system that is undermining trust and confidence in our Government.

Senator Klobuchar, you wanted to follow up?

Senator KLOBUCHAR. Sure. I was just listening to Mr. Potter, so I am a big fan of transparency, but I do not think in any way will it solve all the problems because I think what is going to happen, I want to get it, but it is going to happen, I know it. Certain people who give in certain states where maybe their entity or what they have done is not as unpopular, and then someone else will give money in another state.

They will just find a way. I think with good disclosure law, they will have to disclose, but I just do not think it is going to fix the problem of the trust that Senator King just talked about, as well as the amount of money that can be spent. Not just the unseemliness, but it is a thin line between what is unseemly and what is almost a bribe.

So, Mr. Potter, what do you think? Do you think disclosure is enough?

Mr. POTTER. Well, as you point out, if you get full disclosure, you now know what is happening. Will people like what is happening? That is a different question. And it may well be that full disclosure leads the American public to think that only a limited number of people are being able to buy access, that these campaigns cost so much that members have to spend so much time raising money and they are going to spend it logically with the people who have money.

So full disclosure does not get you everywhere. Full disclosure is, I think, a start to a larger discussion of how we want to finance campaigns.

Senator KLOBUCHAR. So you think it is very possible we need to do more than just disclosure?

Mr. POTTER. Oh, absolutely.

Senator KLOBUCHAR. Okay, good. But I think that your argument would be that if you have disclosure, then maybe that will more easily lead to other measures.

Mr. POTTER. Right. My concern here, going back to the McCutcheon decision—is that I think the five Justices in the Court majority are in a position where they are saying, Congress, you cannot do more. We have said disclosure is fine, Internet disclosure, all that is really great, but unless it is bribery, it is okay.

So this intermediate area that the Chairman talks about, which is it is unseemly, that it diminishes confidence in Government, that used to be covered by the, "appearance of corruption", the notion that Congress could legislate, as it did with soft money, not because there was proof of quid pro quo bribery with people going to jail, but because of the unseemliness of six and seven figure contributions, as Mr. Ornstein says, these were often solicited in terms of join the Chairman's Club, have a breakfast meeting with the Chairman of the XYZ Committee.

Congress said, you cannot do that because it is bad for the institution and it is bad for public confidence in Congress. And what I worry about is that the five Justices in the Court majority are saying, too bad, you cannot fix that, and you cannot regulate that. If it is not actual outright bribery, Congress cannot prevent that sort of activity. And that seems to me to be a crisis for this institution in terms of public confidence.

Senator KLOBUCHAR. Mr. Ornstein.

Mr. ORNSTEIN. Senator Klobuchar, I want to add a couple of points to this. One is, when we think about corruption, it goes both ways, and I think one of the problems with removing all the limits is that the pressure on big donors who can no longer say with an umbrella of protection, I have maxed out, being pushed to give more and more.

Or in some instances, as we have seen before, being told that if they give to the other side, then mayhem will ensue upon them in the legislative process, is another part of this that is a very real problem. And then what I would also like to say, if you will give me permission is, Senator Cruz said none of these reforms have done anything except increase corruption.

I think it is important to set the record straight in the sense that, you know, Mr. Potter talked about Watergate and it led to a law that changed the way presidential campaigns were funded. And to me, it is just incontrovertibly clear that for decades after, we changed the presidential system.

So there were voluntary spending limits and there were public grants. We had a much cleaner and better system. It fell apart because we did not adjust those numbers and it became absurd. There was not enough money there. And to be frank, there was not enough public support for public money in the campaigns.

Now I think you are absolutely right, Senator King, that—and we have lots of polls that show it—the sense that the public believes that all of politics, and particularly in Washington, is thoroughly corrupt, that citizens do not have much of a say here, that

other interests are prevailing, has a corrosive impact on the ability of a democracy to function with legitimacy.

And these two Supreme Court decisions pretty much blithely push that aside, to me, is a really troubling development.

Senator KLOBUCHAR. And I am convinced that it is not just a perception issue, which it is, but I think in Minnesota where we have had some very strong limits at the local and the state levels—I mentioned the ones I had for county attorney—it made a difference. It makes a difference in the kind of politics. It makes a difference in the civility.

It has made a difference in the outcome. It gave us Governor Jesse Ventura, which is for sure, because we had the public funds. But it gave the citizens a say and we have the highest voter turnout in the country nearly every single year, and a lot of that, I think, is because people can have a better trust in their Government and they do not see that big money, at least at the state level.

Speaking of that, Ms. Ravel, you were talking about the dark money and the Virginia and Arizona in the case that you worked on. One of the things that has been debated is the impact of these decisions on foreign entities to be involved in funding. You know, if you can do this from state to state to state and it is all hidden, do you think that these decisions could make it easier for foreign entities to fund United States elections?

Ms. RAVEL. I do not think there is any question about that. One of the positive things about transparency and disclosure for all groups, regardless of their tax status or how they are set up, is that the public will know, or prosecutors could know whether or not some of the contributions are made illegally, and that includes foreign money.

Senator KLOBUCHAR. All right. Just last, a trust issue. Under Federal law, super PACs, as you know, are not allowed to coordinate with their candidates' campaigns or coordinate activities. I already see you having a smirk on your face, Mr. Ornstein.

But there has been a lot of discussion over the fact that the organizers of some super PACs have had very close ties to candidates that they have supported. This is on both sides. What impact do you think this has on the public trust of Government?

Mr. ORNSTEIN. When you have presumed independence and then you see big funders standing behind candidates as they give their speeches, appearing with them at fund-raising efforts, riding with them on their private planes and sitting right next to them, and then we have the idea which is infused in Citizens United, that because they are independent, then these entities can give as much money as they want and we do not need to worry about corruption or the appearance of corruption, it is a big joke, frankly. For that, we have to thank, as I said, not just Citizens United, but Speech Now.

Senator KLOBUCHAR. Right. Thank you very much.

Senator KING. Senator Klobuchar, since you brought up my independent gubernatorial colleague, Jesse Ventura, I have to——

Senator KLOBUCHAR. Is it true that he once asked you to be his running mate for President?

Senator KING. The answer to that is true.

Senator KLOBUCHAR. I just thought we should get that on the record.

Senator KING. If you would like to say no to Jesse, you are welcome to.

[Laughter.]

Senator KING. But it has been attributed to him, I think, one of the most ingenious suggestions on this issue. He believes that members of Congress should have to wear jackets like NASCAR drivers with their sponsors on the jacket. Only Jesse would come up with an idea as creative as that.

Mr. ORNSTEIN. You would need trench coats, actually.

Senator KING. I want to thank all of you on behalf of the Rules Committee for your important testimony today. I also want to thank the Center for Responsive Politics and the Wesleyan Project for their help, as well as Fred Wertheimer at Common Cause, Dean Olsen, Citizens for Responsibility and Ethics in Washington who helped develop a lot of the background.

This concludes the second panel for today's hearing. Before we adjourn, I would like to ask unanimous consent that a Supreme Court brief written on this subject by Senators McCain and Whitehouse be included in the record without objection.

[Brief of United States Senators Sheldon Whitehouse and John McCain as Amici Curiae in Support of Respondents was submitted for the record:]

Senator KING. And also without objection, the hearing record will remain open for five business days for additional statements and post-hearing questions submitted in writing for our witnesses to answer. I want to thank my colleagues for participating and joining us in this hearing, sharing their thoughts and comments on this important topic. This hearing of the Rules Committee of the United States Senate is now adjourned.

[Whereupon, at 12:04 p.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

April 30, 2014

Statement of Justice John Paul Stevens (Ret.)

Senator King, Chairman Schumer, Ranking Member Roberts, and distinguished Members of this Committee, thank you for the opportunity to appear before you today to discuss the important issue of campaign finance.

When I last appeared before this body in December 1975 my confirmation hearing stretched over three days. Today I shall spend only a few minutes making five brief points:

First, campaign finance is not a partisan issue. For years the Court's campaign finance jurisprudence has been incorrectly predicated on the assumption that avoiding corruption or the appearance of corruption is the only justification for regulating campaign speech and the financing of political campaigns. That is quite wrong. We can safely assume that all of our

candidates for public office are law abiding citizens and that our laws against bribery provide an adequate protection against misconduct in office. It is fundamentally wrong to assume that preventing corruption is the only justification for laws limiting the First Amendment rights of candidates and their supporters. Elections are contests between rival candidates for public office. Like rules that govern athletic contests or adversary litigation, those rules should create a level playing field. The interest in creating a level playing field justifies regulation of campaign speech that does not apply to speech about general issues that is not designed to affect the outcome of elections. The rules should give rival candidates - irrespective of their party and incumbency status - an equal opportunity to persuade citizens to vote for them. Just as procedures in contested litigation regulate speech in order to give adversary parties a fair and equal opportunity to persuade the decision-maker to rule in their favor, rules regulating

political campaigns should have the same objective. In elections, the decision-makers are voters, not judges or jurors, but that does not change the imperative for equality of opportunity.

Second, all elected officials would lead happier lives and be better able to perform their public responsibilities if they did not have to spend so much time raising money.

Third, rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions. An important recent opinion written by Judge Brett Kavanaugh of the D.C. Circuit and summarily affirmed by the Supreme Court, *Bluman* v. *Federal Election Commission*,[1] upheld the constitutionality of the federal statute that prohibits foreign citizens from spending money to support or

[1] 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct 1087 (Jan. 9, 2012).

oppose candidates for federal office. While the federal interest in preventing foreigners from taking part in elections in this country justified the financial regulation, it placed no limit on Canadians' freedom to speak about issues of general interest. During World War II, the reasoning behind the statute would have prohibited Japanese agents from spending money opposing the re-election of FDR but would not have limited their ability to broadcast propaganda to our troops. Similar reasoning would justify the State of Michigan placing restrictions on campaign expenditures made by residents of Wisconsin or Indiana without curtailing their speech about general issues. Voters' fundamental right to participate in electing their own political leaders is far more compelling than the right of non-voters such as corporations and non-residents to support or oppose candidates for public office. The *Bluman* case illustrates that the interest in protecting campaign speech by non-voters is less

worthy of protection than the interest in protecting speech about general issues.

Fourth, while money is used to finance speech, money is not speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries - actions that clearly were not protected by the First Amendment.

Fifth, the central error in the Court's campaign finance jurisprudence is the holding in the 1976 case of *Buckley* v. *Valeo*[2] that denies Congress the power to impose limitations on campaign expenditures. My friend Justice Byron White was the only member of the Court to dissent from that holding. As an athlete and as a participant in Jack Kennedy's campaign for the presidency, he was familiar with the importance of

[2] 442 U.S. 1 (1976).

rules requiring a level playing field. I did not arrive at the Court in time to participate in the decision of the Buckley case, but I have always thought that Byron got it right. After the decision was announced, Judge Skelly Wright, who was one of the federal judiciary's most ardent supporters of a broad interpretation of the First Amendment, characterized its ruling on campaign expenditures as "tragically misguided."[3] Because that erroneous holding has been consistently followed ever since 1976, we need an amendment to the Constitution to correct that fundamental error. I favor the adoption of this simple amendment:

> Neither the First Amendment nor any provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for

[3] J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Col. L. Rev. 609, 609 (1982).

public office, or their supporters, may spend in election campaigns.

I think it wise to include the word "reasonable" to insure that legislatures do not prescribe limits that are so low that incumbents have an unfair advantage or that interfere with the freedom of the press. I have confidence that my former colleagues would not use that word to justify a continuation of the practice of treating any limitation as unreasonable.

Unlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who provided them with money than to the interests of the voters who elected them. That risk is unacceptable.

Thank you.

Prepared Joint Testimony of Neil Reiff and Donald McGahn

Before the Senate Committee on Rules and Administration

April 30, 2014

"Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond"

Executive Summary

Our testimony today focuses on the detrimental effects that McCain-Feingold has had on the American political system. It was hailed by the so-called "reform" groups who supported its passage as landmark legislation that would cure the ills of the American campaign finance system. Rather than correct the campaign finance system, it has created a perverse scheme of regulation that was caused by the law's own myopia and a string of Supreme Court decisions that were decided in response to the law's overreach.

As passed, McCain-Feingold claimed to accomplish three main goals: (1) End the soft-money system that dominated the national parties during the 1990's; (2) reduce the number of so-called "negative ads" by prohibiting a large portion of issue advocacy spending; and (3) penalize self-funding candidates by providing their opponents with unusually large contribution limits in response to self-funders.

Instead of achieving its core goals, the Supreme Court has struck two of those three goals as unconstitutional. To the extent that McCain-Feingold was ever a carefully balanced compromise, it is certainly not that today. As for the surviving goal, it has succeeded in profoundly altering the state of American politics by severely weakening American political parties to the benefit of outside spending groups who may raise and spend unlimited funds in connection with federal elections.

Since the passage of McCain-Feingold, the American political system has seen an increase in spending, primarily on independent television advertising. However, the data relating to political parties shows that campaign spending by the state and local party committees has essentially flat-lined. This phenomenon has been caused in large part by the plethora of regulation placed upon state and local party committees by the McCain-Feingold law, while other players in the political system have benefitted from judicially mandated deregulation.

It is time for Congress to reconsider what is left of McCain-Feingold, particularly its overreaching provisions that unnecessarily weakened state and local party committees. We believe that empowering state and local party committees will improve voter education and involvement, accountability, as well as effective governance and transparency.

Prepared Joint Testimony

Thank you for the opportunity to appear before you today. We are practitioners in the area of campaign finance, and our views are shaped by decades of experience in advising and representing real people who wish to participate in politics in a legally compliant manner. Our clients include candidates for office, political party committees, political action committees, and other persons who wish to either participate in elections directly or otherwise be part of the debate regarding issues of public importance. Although we have similar clients (and are not here to represent the views of any of those clients), we differ in one significant way: one of us represents Republicans, conservatives and libertarians, while the other represents Democrats, liberals and progressives. Such a partisan difference in the modern world would ordinarily preclude any notion of common ground. But not here. Despite our party difference, we agree on much about the current state of campaign finance law: what the law is, what the law ought to be, problems with the law and – most critically – real solutions to those problems.

Recently, we co-authored an article that was published in *Campaigns & Elections* magazine that explained our views on the good, the bad, and the ugly of the current law, particularly the aspects imposed by the Bipartisan Campaign Reform Act of 2002, commonly called McCain-Feingold. In our article, which we have attached, we explain that much of what many perceive to be problems in the current system can be traced back to the underlying statute itself. To be fair, much of what Congress has passed over the years has been declared unconstitutional or otherwise rewritten by the courts. But that is precisely the point. As we predicted, McCain-Feingold has become a warped version of itself, where heavily regulated candidates and party committees have taken a back seat in our current system.

We suggest a different approach, one that flows from a different premise firmly grounded in our shared First Amendment tradition: That in order for voters to be truly informed, they need to hear directly from the candidates themselves. Thus, the candidates' voice ought to be the central voice in American democracy. In our view, the parties are the best vehicles to assist with achieving that goal – in other words, they are uniquely situated to echo their candidates' message. Unfortunately, current laws place parties at a competitive disadvantage. Laws ought to be designed to ensure the parties can once again play a critical role in our democracy and to further liberty. That liberty must be the governing principle is abundantly clear from a mountain of Supreme Court precedent that dates back decades. To us, it makes no sense to engage in academic debates over whether or not the courts got it right or not. At least since *Marbury v. Madison*, Court opinions are the law of the land. Any solution to any problem, whether real or imagined, ought to be grounded in the reality that court decisions are law that must be followed. Unfortunately, it has been the so-called "reforms" that sought to overcome such precedent, and that have had the effect of diminishing the voice of candidates and the political parties. Ultimately, recalibrating the law to strengthen candidate

and party speech will be forces for better voter education and involvement, accountability, effective governance and transparency – precisely the sorts of things that many believe to be sorely lacking in American politics today.

Which brings us to the 2014 campaign landscape. Certainly, direct contribution limits remain – albeit at artificially low levels that do not match the rate of inflation that has occurred since they were first instituted. For example, the $1,000 candidate contribution limit imposed by the 1974 amendments to the law would translate to about $4,800 today – almost double the current $2,600 limit. The effect on the parties is even more apparent, as the $10,000 state party limit in today's dollars ought to be about $48,000. And in addition to regular inflation, the cost of campaigning has skyrocketed, particularly due to the cost of television advertising. Other prophylactic measures imposed by the law have been struck – except those that limit the ability of the political party committees to effectively assist their candidates. Meanwhile, nonparty single-issue groups are free to spend in ways that, if undertaken by parties, would be illegal. And campaign disclosure has survived, albeit in a more limited form than that which was originally passed. The result? Candidates are struggling to be heard over the din of single issue and other groups, and the party committees – who historically had been a candidate's natural ally – have been significantly diminished and essentially replaced by independent Super PACs and single issue nonprofits. To us, this seems backwards, and ironically, is the opposite of the "reform" goal of equality.

We anticipate that *McCutcheon v. FEC* will help address this problem to some degree. To see this, one needs to be clear as to what *McCutcheon* did and did not do. First, it did not strike the limitations and prohibitions on direct contributions to candidates and party committees. Corporate money is still banned, and candidates can still receive only $2,600 per individual per election. What was struck was the so-called biennial limit – essentially an umbrella limit that prevented citizens from giving to more than a few handfuls of candidates and party committees. Chief Justice Roberts illustrated the underlying faulty logic of the biennial aggregate limit in operation: "If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime." Thus, the immediate impact of *McCutcheon*: more candidates, including challengers and those that are not seen as "safe bets," will have access to additional financial support. Similarly, such a candidate's natural ally – the party committees - will no longer have to compete with each other for resources to the degree caused by McCain-Feingold.

But this sort of change is not enough to fix that which ills our system of privately-funded campaign finance. McCain-Feingold must be revisited. What was billed as a carefully constructed balance between breaking the link between so-called "soft money," while at the same time limiting so-called "negative ads," is in shambles. As we stated in our recent article, the national party soft money ban was well intended and helped stop practices at the national level, where national party

committees were leveraging 6 and 7 figure contributions in exchange for access to executive branch personnel, as well as Members of Congress. A narrow fix would have been to limit such funds. Congress could have, and should have, stopped there. But Congress did not simply limit "soft money" accounts of national party committees, or limit how much money national party committees, members of Congress and candidates for Congress could solicit. McCain-Feingold went much, much further.

Perhaps in anticipation of other hypothetical tools of evasion, McCain-Feingold gutted state and local party committees by essentially federalizing all of their important and effective activities, even activities that are designed to only benefit state and local candidates. The unchecked rationale of such "reforms" was that any attempt to elect a candidate somehow benefits a federal candidate, to a degree that if unchecked would create an appearance of corruption. By virtue of this rationale, the framework of McCain-Feingold saw no downside to requiring state and local party committees to use federally regulated and limited funds to engage in campaign efforts up and down the ticket, even when those activities were targeted solely to benefit state and local candidates. This approach ignored the fact that there are 50 other campaign finance regimes that regulate state and local elections, several of which are wholly incompatible with federal law. Also ignored was that our party committees had been a stabilizing force in our democracy for almost 200 years, and an effective way for citizens to participate in politics at the grassroots level.

The effects of this approach have been devastating to state and local party committees and grassroots activists, and have driven an unnecessary wedge between them and the candidates they wish to support. Under McCain-Feingold, state parties and their supporters have been subject to a labyrinth of regulation that seeks to intercept all of their activities and force them into the federal system, regardless of whether those activities have any relation to federal elections or candidates. In addition, some of the regulatory choices that McCain-Feingold have forced party committees to make in order to operate in compliance with the law can only be seen as bizarre.

McCain-Feingold federalized all elections through its introduction of a new term, "federal election activity," which subjected traditionally local activities such as voter registration and get-out-the-vote to Federal regulation and limitation. The implementation of this new concept has proven rocky. When passed, it was claimed to be a narrowly targeted anti-circumvention measure. Defense of the law followed suit, and minimized the reach of the new law. After the law was upheld *McConnell v. FEC*, however, supporters changed their tune, and argued that the Federal Election Commission (FEC), the agency charged with enforcing this law, was not reading the new mandates broadly enough. Litigation ensued, and courts instructed the FEC to rewrite and broaden its rules governing state and local parties.

Today, McCain-Feingold's "federal election activity" covers virtually any state and local party activity that matters. For example, under the FEC's recently redefined definition of "get-out-the-vote," essentially all public communications undertaken by a state party committee – even those made totally independent of any Federal candidate involvement -- are subject to federal law, merely by exhorting the voter to go vote for a state or local candidate. Therefore, if a party committee wishes to air a television or radio ad that exhorts listeners or viewers to go "Vote for Smith for Governor," federal law may mandate that this advertisement be paid for entirely or in part with federally regulated funds. Prior to McCain-Feingold, state law governed such state or local candidate support. But today, parties are governed by federal law, whereas a non-party group could run the same exact advertisement free of such federal limitation. Worse, state party organizations are disproportionately subjected for audit by the FEC, and pay a disproportionate amount of the fines levied on non-candidate committees. This is not necessarily a reflection of targeting by the FEC, but a predictable result caused by the complexity and scope of the laws that regulate state and local party committees.

In another example, if a state party undertakes certain mailings that exhort readers to vote exclusively for a state or local candidate, it can only pay for the mailing if the exhortation to vote is "incidental" to the entire mailing (a term that has not been defined by the FEC) and as long as the mailing does not provide the voter with any information on how to actually vote. In other words, if a party committee informs the voter on when the polls are open or how to obtain an absentee ballot, federal law regulates and limits the funding of the mail piece. Yet a non-party nonprofit could send the same exact mail piece, free of any federal election law limitations. That the parties are disadvantaged limits the ability to assist ordinary citizens in obtaining information on where and when to vote.

Simply put, the party committees have been muzzled when it comes to their ability to inform voters of the most basic voting information if they want to avoid being subject to federal regulation. We cannot conceive of any logical policy justification that would support this – particularly when other groups who engage in the exact same sort of activities do so without such regulation. Much of the current regulation of state and local parties is at odds with recent Supreme Court precedent. This is best illustrated by example. In light of *Citizens United v. FEC*, a corporation could fund a multi-million dollar independent expenditure advocating the election of a candidate. But if a party committee wished to do the same advertisement, even if done independently of the candidate, it could only use money subject to federal limitations. Given that the Supreme Court has repeatedly made clear that the application of regulation cannot turn on the identity of the speaker, it is hard to see how the restrictions that apply only to parties can withstand constitutional scrutiny.

McCain-Feingold has had other detrimental effects. Its federalization of state parties has created disincentives for state parties to run joint campaigns that feature the entire party ticket. Prior to McCain-Feingold, it was commonplace for state parties to pay for communications that featured candidates from the top of the

ticket to the bottom of the ticket. Due to the barriers of federal law, such communications are now few and far between and have been replaced mostly by single candidate communications in the most competitive of races, where state parties can allocate their scarce resources. In addition, state and local candidates have bypassed party committees when engaging in advocacy and get-out-the-vote activities, due to the incompatibility of federal and state law. The current structure of the law has caused a significant demise in state and local party relevancy as funding sources seek out less regulated organizations, such as federal, state and local Super PACs, who may independently spend money without any restriction on how those communications are funded and how much voting information that they can provide. All this has had a detrimental impact on the ability of ordinary citizens to be involved in politics at the grassroots level.

This demise of the parties has had serious implications for the American political system. Party committees have played a vital role in grassroots campaigning. Historically, parties have been instrumental in delivering positive party messaging and increasing turnout in American elections through grassroots voter contact methods. Now, what some may characterize as single-issue, outside groups have come in to fill the void. Although such activities are perfectly legal, it seems to be exactly the opposite system of that envisioned by proponents of "reform."

That the Republican Party has generally been opposed to the typical "reforms" should come as no surprise. After all, the Republican National Committee was one of the plaintiffs in McCain-Feingold. Now, however, as the real effects of the law have become apparent in actual application, opposition has become significantly more bi-partisan. Recently, the Association of State Democratic Chairs passed a unanimous resolution at its meeting in November of last year that calls on Congress and the FEC to reevaluate how state and local party committees are regulated. Attached is a copy of this resolution and legislative recommendations made by the ASDC for your review. None of the proposals made by the ASDC advocate for the repeal of any contribution limit. Rather, the ASDC seeks common sense regulation that balances the need to have vital party organizations along with the need to provide safeguards against political corruption.

Critically, our views and suggestions are not designed to simply transfer relevancy back to the parties for relevancy's sake. Recall that the plaintiff in *Buckley v. Valeo* – Senator James Buckley of New York – was not nominated by one of the two major parties. And it was precisely that sort of candidate that felt the burdens of that wave of "reform" the most. Certainly, history teaches that anything taken to the extreme can cause problems, and parties have had their share of issues. But in our view, freeing the parties from the shackles of McCain-Feingold is the best way to counteract recent trends and encourage more effective grassroots activism. Whether one looks to the rise of the Tea Party or the Occupy Wall Street movement, grassroots activists will organize and speak. The law ought to encourage such

grassroots involvement, and not single-out and deter the party committees from participating in such activism in ways that they had in the past.

Although we each have a number of ideas and suggestions regarding specific changes to the law, we both believe that any common sense steps to help revitalize state and local party committees would be helpful, such as:

- Refine and simplify the existing volunteer exemptions for grassroots activities to make them easier to use by state party committees and consider expanding them to other modes of grassroots campaign activities.

- Repeal those McCain-Feingold provisions that have needlessly federalized joint and non-federal campaign activities undertaken by state and local party committees. In the alternative, modify the FEC's current interpretation of the existing rules to scale back their expansive scope that essentially federalizes all party campaigning on behalf of state and local candidates.

- Index contribution limits to party committees, as these limits were inexplicably excluded by the contribution limit indexing provided for by McCain-Feingold. Similarly, to the extent that limitations on coordinated party expenditures still are required, update the limits to more closely reflect modern economic reality.

In the short time that we have today, we can only briefly touch upon the byzantine nature of federal regulation that state parties are subject to. Thank you for the opportunity to present our views.

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Biographies

Neil P. Reiff is a founding member of the firm of Sandler, Reiff, Young & Lamb, P.C., in Washington, D.C., with over fifteen years of experience concentrating advising national and state party committees, candidates and other political organizations in campaign finance and election law matters.

Mr. Reiff's primary field of expertise is federal and state campaign finance law. He has successfully represented numerous clients before the Federal Election Commission and various state election agencies. Mr. Reiff has spoken on numerous panels on campaign finance law and has provided public testimony before the Federal Election Commission on numerous occasions. Mr. Reiff has also co-authored two amicus briefs pertaining to campaign and election law before the United States Supreme Court. In addition, Mr. Reiff was a member of the legal team representing plaintiffs in the landmark Supreme Court case *McConnell v. FEC.* Mr. Reiff has authored and co-authored several published articles on campaign finance law.

Prior to becoming Deputy General Counsel at the DNC, Mr. Reiff served the DNC as Deputy Compliance Director (1990-1991) and Compliance Director (1991-1993). In that capacity, Mr. Reiff was responsible for ensuring DNC compliance with federal and state election laws, as well as the filing of all disclosure reports by the DNC with federal and state election authorities. From June 1993 until May 1998, Mr. Reiff served as Deputy General Counsel of the Democratic National Committee, until joining Joe Sandler in founding Sandler, Reiff, Young & Lamb.

Mr. Reiff graduated from the National Law Center at George Washington University in 1992. He graduated Phi Beta Kappa from the State University of New York at Binghamton in 1989.

Donald McGahn is a Partner at the law firm of Patton Boggs LLP in Washington, D.C., where he advises and represents elected officials, candidates, national and state parties, political consultants and others on election law and related issues. Prior to joining Patton Boggs, Mr. McGahn served as a commissioner of the Federal Election Commission (FEC). Nominated by President George W. Bush in May 2008, his nomination received unanimous consent of the U.S. Senate the following month, and in July 2008 Mr. McGahn was elected chairman of the FEC. During his time at the FEC, Mr. McGahn led what has been called a "revolution" in campaign finance.

Before his appointment to the FEC, Mr. McGahn served as the head of McGahn & Associates PLLC, a Washington-based law practice which specialized in political law. In his capacity as head of the practice, Mr. McGahn counseled numerous federal and state candidates, members of Congress, national and state political party committees, leadership political action committees (PACs),

corporations and corporate PACs, nonprofits, trade associations and political consultants. Representations have included issues related to campaigns, including the regulation of broadcast television and radio, direct mail, telephones, defamation, polling, ballot access, voter identification, get-out-the-vote, election contests and recounts, election day operations and party conventions. Mr. McGahn has represented those involved in politics before the FEC, the House and Senate Ethics Committees, several state agencies, and in federal and state court as well as in connection with grand jury proceedings.

Mr. McGahn served as general counsel for the National Republican Congressional Committee (NRCC) for nearly 10 years. As general counsel, he updated the NRCC's legal operations and compliance and introduced several innovations, including what has become the standard structure for making independent expenditures. In this role he also managed and oversaw legal issues for the party, including compliance with federal and state campaign finance laws (and the transition mandated by the passage of McCain-Feingold), defending FEC or state regulatory matters, defending and managing all civil litigation, and other related legal issues. Mr. McGahn assisted countless House campaigns with a variety of legal.

Mr. McGahn has been featured in both the *Wall Street Journal* and the *New York Times*, which referred to him as one of the "architects of the campaign finance revolution." His writings have appeared in national publications, including *Campaigns & Elections, The New York Times, The Washington Post, Politico, Roll Call, The Hill* and the *Washington Examiner*. Mr. McGahn has spoken or lectured at several law schools, including Harvard, the University of Pennsylvania, New York University, the University of Virginia, George Washington University, William & Mary, and American University, and appeared as a keynote speaker for the Practicing Law Institute and NABPAC. Mr. McGahn has addressed members of Congress and their senior staff at several House and bi-cameral retreats regarding congressional ethics and appeared numerous times on television, including on *Fox News*, *PBS* and *C-SPAN*. He graduated from the University of Notre Dame and the Widener University School of Law.

TESTIMONY ON DARK MONEY AND CAMPAIGN FINANCE REFORM

SENATE COMMITTEE ON RULES AND ADMINISTRATION

APRIL 30, 2014

NORMAN J. ORNSTEIN

Mr. Chairman and members of the Committee, it is both an honor and a privilege to testify before you today on the challenges of money in politics. In my testimony, I want to raise two larger concerns generated by the multiple recent moves that have knocked the pins out from under the regulatory regime that has long operated in American politics, going back at least to the Tillman Act in 1907. First is the corrosive corruption caused by removing the modest limits on money that have existed. Second is the many efforts to limit disclosure and enable huge flows of dark money to enter the system without the accountability necessary in a democratic political system.

There are many who believe there should be no regulations on campaign finance, requirements for disclosure of contributions and spending, or limitations on contributions. This is not a new question in American politics. Concerns about corruption-- the understanding that money in campaigns can be a corrosive force, both from well-heeled individuals and groups seeking influence in government and from government actors shaking down individuals and groups to raise money-- were present quite early in our country's history.

The concerns were real. Periodically, scandals would engulf the system, leading to a backlash and a drive for reform. The scandals occurred, of course, because a wide open system, where anything goes, provided ample room for that corruption. Government has power-- power to provide jobs, via a spoils system; power to provide opportunities for individuals and interests to make huge sums of money via government contracts, tax breaks, regulations or rights of way, and in many other ways. And the power of government can be used to extract money from those seeking favor or afraid of punishment. This is not a problem unique to America; it is a cancer afflicting societies across the globe, a danger to free governance and systemic legitimacy everywhere.

The history of American politics and political money shows that for at least 150 years, and arguably for more, concerns about corruption and the appearance of corruption often triggered by scandal, led to efforts to balance First Amendment freedoms by putting modest and reasonable restrictions on campaign fundraising and contributions, to push for more disclosure as a disinfectant, to find ways to limit the overweaning influence of monied interests, including corporations and labor unions. Attempts to prohibit parties from shaking down government employees for contributions began in 1837. Historian John Lawrence has noted, Abraham

Lincoln warned that concentrated capital had become "enthroned" in the political system and he worried about an era of "corruption in high places ... until the Republic is destroyed." The first actual restriction on campaign funding came after the Civil War, with an 1867 provision prohibiting the solicitation of contributions from naval yard government employees. The very modest change did not have any appreciable impact on the overall system.

Corruption in the administration of Ulysses S. Grant led to more calls for reform, culminating in the Pendleton Act in 1883, which resulted in the end of the patronage system and assessments. The end of the spoils system led to the rise in influence of corporations, which filled the vacuum in party and campaign funding. A backlash against huge corporate and business contributions, including allegations of outsized corporate influence on President Theodore Roosevelt, led Roosevelt to lead a new reform movement in 1905 and 1906; that led to the Tillman Act of 1907. The Tillman Act made it illegal for "any national bank, or any corporation organized by authority of any laws of Congress" to make a contribution relating to any election for federal office. In 1910, the Federal Corrupt Practices Act required national party committees and congressional campaign committees to disclose their contributions and expenditures after each election.

Scandal continued to spur reform efforts and reform. The Teapot Dome scandal resulted in the Federal Corrupt Practices Act of 1925, which expanded disclosure and adjusted the spending limits upward. Reports of abuse of federal employees working for the re-election of Speaker of the House Alben Barkley in 1938 led to passage of the Hatch Act in 1939, a revision of the 1883 Pendleton Act, which prohibited partisan political activity by most federal employees and also banned solicitation of contributions from workers on federal public works programs.

Labor's increasing political activity during the presidency of Franklin D. Roosevelt led to several efforts to limit labor's contributions, like those of corporations. In 1947 the Republican Congress made a ban on labor contributions to campaigns permanent, as part of the Taft-Hartley Act.

The Watergate scandal spurred the Federal Election Campaign Act of 1974, which was substantially revised by the landmark Buckley v Valeo decision in 1976. The Bipartisan Campaign Reform Act of 2002 was spurred by scandals over soft money fundraising and the misuse of the funds from corporations and unions for electioneering communications.

Then came Citizens United. The longstanding concerns about corruption, or its appearance, were brushed aside; Justice Kennedy's opinion suggested that campaign activity and money raised or spent independently could have neither a corrupting influence nor the appearance of corruption, unless there was a direct quid pro quo. But Citizens United also upheld vigorously the importance of disclosure. By 8 to 1, the Court otherwise deeply divided on the issues upheld disclosure requirements for corporations, including nonprofit corporations, making independent expenditures, saying "With the advent of the Internet, prompt disclosure of

expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

Now comes McCutcheon. And here I want to paraphrase from a column I wrote recently on this most recent and most destructive Supreme Court decision. Many analysts have written a lot about the decision, with a natural focus on its direct implications for campaigns. Those are huge and important. But they are, I believe, overshadowed by the impact of the decision on corruption in America.

Some have suggested that McCutcheon was not a terribly consequential decision—that it did not really end individual-contribution limits, that it was a minor adjustment post-Citizens United. Others have said that it may have a silver lining: more money to parties, more of the money disclosed. I disagree on both counts. Justice Stephen Breyer's penetrating dissent to the decision pointed out the many methods that campaigns, parties, and their lawyers would use to launder huge contributions in ways that would make a mockery of individual limits. Chief Justice John Roberts pooh-poohed them as fanciful. And, of course, they started to emerge the day after the decision.

As for disclosure, the huge amounts that will now flow in through political parties will be channeled through joint committees, state and local party committees, and others in complex ways that will make real disclosure immensely difficult, if not impossible.

More significant, in any case, were Roberts's sweeping conclusions about corruption and the appearance of corruption in the decision. The chief justice took the shaky conclusion reached by Justice Anthony Kennedy in the Citizens United decision—that money given "independently" of campaigns could not involve corruption or its appearance—and applied it in an even more comprehensive fashion to money given directly to candidates and campaigns. Thanks to McCutcheon, only quid pro quo corruption is sufficient to trigger any restrictions on campaign contributions—meaning, direct bribery of the Abscam or American Hustle variety, presumably captured on videotape for the world to see. The appearance of corruption? Forget about it. Restrictions on elected officials soliciting big money? Forget about them, too.

To anyone who has actually been around the lawmaking process or the political process more generally, this is mind-boggling. It makes legal what has for generations been illegal or at least immoral. It returns lawmaking to the kind of favor-trading bazaar that was common in the Gilded Age.

With intense competition between parties over election outcomes, with the stakes incredibly high over who will capture majorities in a polarized era, and with money everywhere and intense competition for dollars, the trade of favors for money—and the threat of damage for the failure to produce money—will be everywhere. Access to lawmakers, presidents, their aides, and subordinates is precious, including when they are actually marking up legislation. In the aftermath of Roberts's decisions, this precious access will be sold to the highest bidders.

I remember well the pre-reform era where there were "Speaker's Clubs" and "President's Clubs" with menus for soft-money donors: for $10,000, lunch with key committee chairs and a day hobnobbing with important lawmakers and committee staffers; for $25,000, all that and a small breakfast or lunch with the speaker; and so on. Those will be back, with the dollar amounts higher and the access more intimate. Big donors will make clear to party leaders that multimillion-dollar donations are one step away—and will be forthcoming if only the leaders will understand the legislative needs of the donor. McCutcheon not only made all that legal but also gave it the Supreme Court's seal of approval.

On disclosure, I have already noted the full-throated endorsement of full disclosure of campaign donors in Citizens United and McCutcheon. Of course, it was always going to be a priority for high-priced campaign lawyers to try to find ways around the system, to hide donors where they could. In that sense, the dynamic is no different than high-priced tax attorneys looking for loopholes to enable their wealthy clients to avoid paying taxes. We count on aggressive regulators to keep them honest, and to keep the integrity of the system intact.

It is clear that when it comes to disclosure, the direct and manifest intent of both Congress in Buckley and BCRA and the Supreme Court in Citizens United and McCutcheon has been repeatedly undermined by a feckless set of commissioners at the Federal Election Commission, and by the failure to implement the clear intent of the tax law by the IRS.

Trevor Potter, in his compelling testimony, details how the FEC, through the Republican members of the Commission, worked actively to undermine the language and intent of the law, and has chosen to narrow the disclosure requirements regarding electioneering communications to a point where they are almost meaningless. A Public Citizen report in 2010 showed the impact of the FEC's action on disclosure:

- While most groups making electioneering communications in 2004 and 2006 reported their sources of funding, by 2010 only 1 out of 3 did.

- In 2004, 47 groups reported expenses, 46 of which reported their donors (98%);
- In 2006, 31 groups reported expenses, 30 of which reported their donors (97%);
- In 2008, 79 groups reported expenses, only 39 reported their donors (49%);
- In 2010, 53 groups reported expenses, only 18 reported their donors (34%). The top 10 spenders reported spending $63 million, but reported only $6.9 million in contributions—or about 1 out of every 9 dollars.
- Of the 308 groups—excluding party committees—that reported spending money on the 2010 elections, only 166 (54%) provided any information on the sources of their funding. These groups spent $136 million in 2010, which was almost double the total amount spent by all groups ($69 million) active in the 2006 midterm election.

It is not only the FEC that has been derelict here. So too has the IRS, which now is trying finally to provide clarity under the law for nonprofit groups that have misused tax categories, namely those under Section 501(c)4, as a means to channel dark money through the system. As I wrote in a column in the Atlantic, tax law has many provisions for nonprofit organizations, including 29 under Section 501(c) in the Internal Revenue Code. Federal credit unions, for example, are under 501(c)1, business trade associations are under 501(c)6, mutual insurance companies are under 501(c)15, black-lung benefit trusts are under 501(c)21, and so on. Most of what we think of as nonprofits—religious, educational, scientific, and charitable organizations—are under Section 501(c)3.

Section 501(c)4 applies to "social-welfare organizations," nonprofits that promote social welfare through public-education campaigns, including some lobbying. What about nonprofits that aim to influence elections and engage in campaigning as their primary activity? Those entities organize under Section 527 of the code. That includes political parties, PACs, and other related groups. The law clearly and unequivocally defines 501(c)4s as *exclusively* social-welfare organizations. But for decades, in direct contradiction to the clear language of the law, the IRS has used regulations that define 501(c)4s as *primarily* social-welfare organizations. Why did the IRS do this? Tax experts in this area tell me that this is a convention used at times by the agency to give it a tiny bit of flexibility to avoid rigid characterizations and applications of the law—meaning that if an organization accidentally or unknowingly used an insubstantial portion of its resources in ways that were not within the rubric of social-welfare organizations, the agents or auditors would not be forced to throw the book at it.

Groups classified as 501(c)4s do not have to disclose the identity of their donors. Before 2000, 527s did not have to disclose their donors either—outside organizations used 527s to run ads clearly designed to elect or defeat candidates, but they were called "issue ads" because they did not explicitly say "elect" or "defeat" Candidate X or Y. These outside groups gravitated to

527s to escape disclosure and run their campaigns in secret—and to avoid contribution limits. But after Congress changed the rules in 2000, the new way to avoid disclosure became the 501(c)4s. Following the *Citizens United* decision in 2010—which opened the door to corporations, including nonprofit groups, to make direct expenditures in federal elections—enterprising and aggressive lawyers pushed the envelope. They used the IRS's application of "primarily" in its regulatory approach to social-welfare organizations to mean 50.01 percent of the organizations' activities, and encouraged the newly formed groups to spend a fortune on political ads during a campaign, and then afterward run so-called "issue ads"—many of which were in fact barely disguised campaign ads—to meet their 50.01 percent standard.

For a group intent on influencing the outcome of elections, there was only one reason to create a 501(c)4 instead of turning to a 527 or simply forming an independent super PAC—secrecy. For many groups, that was explicit: When Karl Rove and his colleagues formed Crossroads GPS to operate alongside his super PAC, American Crossroads, the communications to potential donors made it clear that if they wanted to remain anonymous, the GPS route would enable them to do so.

If you are a "Tea Party" group, with a direct goal of influencing elections, you clearly belong as a 527.

For a federal revenue service that is understaffed and deeply sensitive about getting in the middle of a political dispute, the easiest way out was the passive one: Accept the standard that flew directly in the face of the law but was insisted upon by aggressive political consultants and their consiglieri to inject huge amounts of dark money into federal races. When the IRS publicly announced that it would consider applying gift taxes to donors to these groups that went over the line, the organized and concerted campaign of intimidation by the pols forced the agency to back off.

After *Citizens United* and another related appeals-court decision, *SpeechNow*, we saw an explosion of super PACs and of outside money flooding into campaigns, and an explosion in groups trying to get 501(c)4 status. Many clearly did not deserve it—if you are a "Tea Party" group, with a direct goal of influencing elections, you belong as a 527. The same is true of many organizations aimed at influencing elections with the word "party" in the name, or even of others using words like "progressive" or "occupy." Faced with a flood of applications, and recognizing, thanks in part to efforts by reform groups and lawmakers, that their handy interpretation of "primarily" in the regulations had exploded into a gaping loophole, the IRS began its ham-handed and overreaching efforts to screen groups.

Now, appropriately and commendably, the IRS is trying to write new and clear regulations that meet the test of complying with the explicit language of the law, as the Supreme Court itself, in decisions like *Better Business Bureau v. the United States*, has said means exactly what it says: Exclusively means exclusively. A very modest amount of political activity can fit under the rubric of social-welfare organizations, and the IRS is trying to make it easy for organizations by defining both what those political activities are and what proportion of the organization's budget can be applied.

Not surprisingly, opponents are going to DEFCON 1—for one reason, and one reason only: They want to keep secret the hundreds of millions in dark, undisclosed money to run attack ads and muddy the waters. This attack on the IRS, by lawmakers like Mitch McConnell, Darrell Issa, and Dave Camp, and by their outside political hacks and counselors, is all about muzzling the IRS to maintain secrecy and avoid the disclosure that the Supreme Court has wholeheartedly and overwhelming endorsed.

What can Congress do? First, despite the steeply uphill battle to enact any reasonable laws these days, it should make every effort to pass the DISCLOSE Act. Second, the Senate should hold probing hearings on the dysfunctional Federal Election Commission and look to reform it to make it into a reasonably functional body that acts to enforce the law and not to thwart it. Third, for every hearing in the House highlighting the purported "scandal" at the IRS, the Senate should hold a hearing on the real meaning of social welfare organizations and the need to clarify in IRS regulations what the law specifically intends. Fourth, the Senate should pass a rule amending its ethics code to make it a violation for senators or senior staffers to solicit the large contributions for party committees now allowed under McCutcheon. Fifth, Congress should begin serious consideration of a broader reform of the campaign finance system, one that would empower small donors as a counterweight to the oligarchs, having it ready for the day when, as John McCain has predicted, the next huge scandal creates a new momentum for reform. Before that happens, I fear that deep damage will be done to the fabric of the American political system.

Testimony of Trevor Potter* before the Senate Rules Committee at its hearing:
Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Elections and Beyond

April 30, 2014

Thank you for the invitation to appear before you today as you take a much needed look at the effect of the flood of undisclosed money on our elections. Because it is difficult to map the road ahead without knowing how we got where we are, I would like to talk about how we moved from the full disclosure of electioneering communications required by Congress in 2002 as part of the Bipartisan Campaign Reform Act (BCRA), to where we are today, post-*Citizens United* and post-*McCutcheon*. What we have seen in the dozen years since Congress enacted BCRA is the steady unraveling of the Act's disclosure requirements. However, that unraveling has been the result of political developments and administrative action and inaction, not federal court decisions.

Both *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 572 U.S. ___ (2014), reversed over half a century of the Supreme Court's deference to Congress's understanding of how large aggregations of wealth used to influence elections corrupts our democracy. But, even as the Court tossed aside longstanding limits and prohibitions on the sources of campaign contributions or expenditures, it spoke of—in fact, relied upon—the importance of disclosure, and the value of providing the electorate meaningful information about the funding of political communications in order to help them make decisions about their elected officials. In his *Citizens United* majority opinion, Justice Kennedy referred to prior Supreme Court precedent and wrote glowingly in favor of disclosure:

> In *Buckley,* the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens "'make informed choices in the political marketplace.'"
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> . . .
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> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporations political

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> 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. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United, 558 U.S. at 370-71 (internal citations omitted). Importantly, this is the only part of the *Citizens United* opinion joined by eight out of the nine justices, demonstrating a broad consensus across the Court on the importance of the disclosure of the sources of funding of political speech.

Earlier this month in *McCutcheon*, Chief Justice Roberts again emphasized the importance of disclosure in our campaign finance system and echoed Justice Kennedy's reliance on modern technological means for achieving such disclosure rapidly in our connected world:

> [D]isclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. . . . With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.

McCutcheon, No. 12-536, slip op. at 35-36 (internal citations omitted).

I agree with the Court about the fundamental importance of disclosure in providing voters with critical information about who is funding communications supporting and opposing candidates. Unfortunately, the high value the Supreme Court places on such disclosure is not reflected in the reality of how those laws are currently interpreted and administered by the Federal Election Commission (FEC). In fact, the FEC's actions have eviscerated the reach of Congress's disclosure requirements, and Commission deadlocks have made the situation worse. What remains of federal campaign finance disclosure laws does not comport with the Supreme Court's description in *Citizens United* and *McCutcheon*, and thus does not deter corruption or provide citizens with sufficient information to properly evaluate speakers in the way the Court envisions.

The short history of this state of affairs, so dangerous to our democracy and so contrary to the Supreme Court's expectations, began with the proliferation of so-called "issue ads" in the elections of the 1990s and 2000 paid for by unregulated and undisclosed soft money, where the "issue" was which candidate deserved your vote. In response to this, Congress included a provision in BCRA creating a new category of campaign spending called "electioneering communication." BCRA defines electioneering communication as a broadcast, cable or satellite communication referring to a federal candidate, made within 30 days of a primary or 60 days of a general election and targeted to the candidate's electorate. Crucially, BCRA required all persons, including corporations and labor organizations, who make disbursements exceeding

$10,000 in a calendar year for electioneering communication to disclose the names and addresses of all contributors who contributed $1,000 or more to the person making the disbursement, or the disclosure of all contributors who contribute $1,000 or more to a segregated account of the organization used to make the disbursement.

The FEC's initial regulation implementing BCRA's electioneering communication disclosure requirement tracked the language of the statute. Unfortunately, the Commission thereafter promulgated a revised, and significantly narrowed, regulation in 2007 after the Supreme Court's decision in *FEC v. Wisconsin Right to Life* (*WRTL*). In that case, the Supreme Court narrowed BCRA's ban on corporate electioneering communications to only apply to communications containing express advocacy or its functional equivalent. However, the Supreme Court expressly said that this narrowing construction did not apply to the disclosure requirements for electioneering communications. In response to the decision and a petition for rulemaking to incorporate the *WRTL* holding into its regulations, the FEC initiated a rulemaking. Although the Supreme Court had said the *WRTL* holding did not apply to the disclosure rules, and the rulemaking petitioners had not raised the issue of disclosure in their petition, the Commission nonetheless proposed to revise its electioneering communication disclosure regulation. Specifically, the Commission asked for public comments regarding whether the electioneering communication disclosure requirement should be limited to "funds donated for the express purpose of making electioneering communications."

In its final rule, the Commission adopted this narrow "for the purpose of furthering" language. The consequence was to make it easy for organizations to hide the source of the money funding electioneering communications. As long as there was no proof that a person "earmarked" the donation or gave it specifically for the purpose of furthering such ads, the Commission regulation does not appear to require disclosure of the donor. This is true even where it was clear that the organization would be producing electioneering communications.

But that was not the end of the FEC's attack on disclosure. When it came to actually enforcing its electioneering communication disclosure regulation, the FEC has effectively further limited the already narrow regulation. In 2010, three members of the six-member Commission blocked an enforcement investigation into whether Freedom's Watch, a 501(c)(4) corporation, violated the law by failing to disclose its major donor, Sheldon Adelson, after making electioneering communications. The three Commissioners interpreted the regulation even more narrowly than what is required by the plain language of the regulation, stating that donor disclosure is required "only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report. Otherwise, the corporation or union is under no obligation to disclose such information." In other words, unless a donor specifically designates their contribution for the airing of a particular ad, the Statement of Reasons of those three Commissioners held that no donor disclosure is required by law. Given that political ads are typically created after the money is raised to pay for them, this effectively means there is no required donor disclosure, even where the donor specifically designated their contribution for the general purpose of funding electioneering communications that have not yet been created.

It is also worth noting that in addition to the Commission's failure to adequately define and enforce the existing law, the Commission has failed to update its regulations in response to

Citizens United. To date, more than four years after *Citizens United*, the FEC has failed even to approve a Notice of Proposed Rulemaking to begin the process of revising its rules on disclosure in response to the Court's decision. In 2011 alone, the Commission deadlocked three times on the simple question of whether to initiate a post-*Citizens United* rulemaking before compromising and issuing a NPRM which does not address disclosure . This is important because the Supreme Court's endorsement of the value of disclosure of the sources of funding of such campaign advertising, and its apparent unawareness that the Commission had gutted the disclosure requirement of BCRA, can and should be addressed by the FEC in such a rulemaking. If it did so, the Commission could undo the lawless change made in its 2007 rulemaking, and restore the BCRA disclosure requirements mandated by Congress and upheld by the Supreme Court.

In 2011, Representative Chris Van Hollen brought suit against the FEC challenging the Commission's narrow electioneering communication disclosure regulation. The district court agreed with Representative Van Hollen that the FEC's disclosure regulation was contrary to law, resulting in the reinstatement of the BCRA statutory electioneering communication donor disclosure requirement. However, in September 2012, the D.C. Circuit Court of Appeals reversed the district court's decision and sent the case back to the district court for further review and proceedings. The district court has not yet rendered another decision in the *Van Hollen* case. Thus, independent expenditures and electioneering communications are both currently subject to the "for the purpose of furthering" donor disclosure requirements. As a result of the FEC's regulation, corporate and other donors to 501(c) organizations and other non-political committee entities may refrain from designating contributions "for the purpose of funding" election ads, and by so doing, avoid the statutory federal campaign-finance law donor disclosure requirements.

The result of these court decisions and the FEC's narrow interpretation and application of the electioneering communication disclosure requirement has been a steep decline in the disclosure of donors funding outside spending (spending that excludes the party committees). In 2008, outside groups (that did not register with the FEC or IRS as political entities) spent $69,187,001 on political ads without disclosing the funders of that advertising. This number more than quadrupled to $310,818,577 in secret funding in the 2012 election cycle. The numbers do not look much better when you consider the percentage of outside spenders that disclosed their donors. In 2008, only 64.5% of outside spending was accompanied by full donor disclosure. In 2012, this number had dropped to only 40.7% of outside spending accompanied by donor disclosure.[1]

The reason for these enormous drops in the level of donor disclosure is that these "dark money" expenditures are occurring through groups that claim that their "major purpose" is something other than participating in federal elections, and therefore do not register or report with the FEC as political committees or with the IRS as 527 organizations. Instead, they file as 501(c)(4)s, 501(c)(6)s, 501(c)(7)s or other non-profit legal entities. As a result they do not disclose their donors in their IRS public filings, and because they claim that they received no funds designated for political advertisements as defined under the FEC's 2007 regulation, they do not report their

[1] Numbers courtesy of the Center for Responsive Politics, *available at* http://www.opensecrets.org/outsidespending/disclosure.php.

donors to the FEC either. By contrast, contributions to Super PACs (which are entities registered with the FEC as political committees) are publicly reported—unless the contributions are made through shell corporations or other entities designed to avoid disclosure of the true funder.

There are several promising proposals out there to begin to address the current lack of transparency and provide better disclosure in political fundraising. Senator King introduced a bill earlier this month, S.2207, that would require political committees to report all cumulative contributions of $1,000 or more to the FEC within 48 hours of receipt. The DISCLOSE Act, introduced in 2012, would have required any "covered organization"—a corporation, labor union, 501(c) organization (other than (c)(3)), Super PAC and section 527 organization—that spends $10,000 or more on a "campaign-related disbursement" to file a disclosure report with the FEC within 24 hours of the spending and to file a new report each time an additional $10,000 or more was spent. Covered organizations could have established a segregated bank account to make its campaign-related disbursements and would have then been required only to disclose the donors of more than $10,000 to that segregated account. If, however, the campaign-related disbursement was paid for out of its general treasury fund, the organization would have been required to disclose the source of all donations totaling more than $10,000. Finally, the American Bar Association adopted a resolution earlier this year urging Congress to mandate consistent disclosure of all political expenditures and contributions by all entities, regardless of type or tax status.

I would like to again quote Chief Justice Roberts' opinion in *McCutcheon*, "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information." I would take the Chief Justice's remark even one step further and say that we have never had such powerful tools available to provide comprehensive and easily accessible disclosure of the sources of large donations to groups making significant expenditures in federal elections. Unfortunately, we do not have meaningful content to put these tools to good use.

Finally, I would like to address the arguments made by opponents of full disclosure that requiring such disclosure chills First Amendment-protected speech. These arguments rely on a line of Supreme Court cases that exempt organizations from disclosure requirements "if there [is] a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370.

The case most often cited to oppose disclosure requirements is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In that case, the Supreme Court held that the free speech and association protections of the Fourteenth Amendment Due Process Clause prohibited the state of Alabama from compelling the NAACP to disclose its membership list. 357 U.S. at 466. The NAACP had made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. The Court concluded that the state's purported interest in disclosure of the NAACP's membership list—determining whether the organization had violated state law by failing to register as a foreign corporation doing business in the state—was insufficient "to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." *Id.* at 463-64.

In today's debates, billionaires and associations of large corporations sometimes claim that they are in the shoes of the NAACP in Alabama in the 1950s. This distorts the context of that case, where a small and vulnerable minority organization faced not only threats of physical violence, including lynching, and cross burnings, but also the organized repression by the state of Alabama, including its state and local police forces, so that it had no reasonable expectation of protection by public safety officials.

Instead, the proper standard for an analysis of the disclosure obligations of wealthy and powerful individuals and business corporations in 2014 begins with the Supreme Court's decision in *Buckley v. Valeo*, where the Court made it clear that the constitutional standard for the "threats, harassment, or reprisals" exemption is exceedingly narrow. Under the formulation articulated in *Buckley*, the exemption is only available when the "threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [the challenged disclosure requirements] cannot be constitutionally applied." 424 U.S. 1, 71 (1976). The *Buckley* Court explained that the narrow exemption from disclosure requirements that the Court described is "necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights[,]" but "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Id.* at 66 (citing *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). "The governmental interests sought to be vindicated by [the Federal Election Campaign Act] disclosure requirements are of this magnitude." *Id.*

The Supreme Court applied *Buckley*'s "reasonable probability" of "threats, harassment, or reprisals" standard for exemption from disclosure laws in *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982). The case involved another very small and vulnerable political organization, in many ways similar to the NAACP. The Supreme Court held: "In light of the substantial evidence of past and present hostility from private persons and government officials against the SWP [*i.e.*, Socialist Workers Party], Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id.* at 102. The Court reviewed the evidentiary record compiled in the district court, explaining that the SWP had introduced evidence of incidents including "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office." *Brown*, 459 U.S. at 99. The Court continued: "There was also evidence that in the 12- month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership." *Id.* The Court explained that although the state of Ohio "contend[ed] that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court's conclusion that 'private hostility and harassment toward SWP members make it difficult for them to maintain employment.'" *Id.*

More recently, in *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003), the U.S. District Court for the District of Columbia rejected an argument by the ACLU, Chamber of Commerce, National Association of Manufacturers, and National Rifle Association that, due to their "controversial" nature, the groups were entitled to the "threats, harassment, or reprisals" exemption from FECA's "electioneering communication" disclosure requirements. *Id.* at 242-47. The court explained that "[n]either *NAACP* nor *Brown* stand for the proposition that disclosure laws that apply to organizations 'whose positions are often controversial and whose

members and contributors frequently request assurances of anonymity' are facially unconstitutional." *Id.* at 245.

Most recently, the Supreme Court referenced *Buckley*'s "threats, harassment, or reprisals" standard in *Doe v. Reed*, 130 S. Ct. 2811 (2010). In *Doe*, proponents of a referendum to deny certain benefits to same-sex couples claimed that disclosing the referendum petitions would unconstitutionally subject signatories to threats, harassment and reprisals. *Id.* at 2820-21. The Court rejected the plaintiffs' facial challenge to the disclosure of referendum petitions and Justice Scalia observed:

> Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. . . . There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.

Id. at 2836-37 (Scalia, J., concurring).

All of these cases show that the "threats, harassment, or reprisals" exemption is intended to carve out a narrow protected space for speakers who are sufficiently weak and vulnerable that they would otherwise be forced to retreat from the "marketplace of ideas" in the face of physical attack or other extreme reprisals. Thus, the "threat, harassment, or reprisals" exemption does not cover individuals and groups seeking anonymity merely because they are expressing controversial or potentially unpopular ideas. Instead the Court has wisely acknowledged that publicly taking responsibility for speech is an important element of debate in our representative democracy.

I thank this Committee for the invitation to testify today.

Executive Summary of Testimony

Although Ann Ravel currently serves as Vice Chair of the Federal Election Commission, she is not testifying in that capacity nor is she speaking for the Commission during this hearing. Instead, her testimony concerns a case pursued during her tenure as Chair of the California Fair Political Practices Commission (FPPC). *FPPC v. Americans for Responsible Leadership* revealed how dark money networks use a variety of tactics to move large amounts of money into the political process while avoiding disclosure rules.

Just a few weeks before the 2012 election, an $11 million contribution was made to a California political action committee focusing on two initiatives on the California ballot. After receiving a complaint, the FPPC attempted to determine whether the contributor, Americans for Responsible Leadership (ARL), was in compliance with California disclosure law. Following a unanimous ruling by the California Supreme Court, ARL revealed the day before the election that it was solely an intermediary and that two other non-profits actually were the sources of the contribution.

The FPPC's subsequent investigation found that approximately $25 million was transferred to those two non-profits. Then, after being routed through a series of non-profits around the country, $15 million was returned to California to be spent on the initiative campaigns. $11 million of it was funneled through ARL, and another $4 million went through an Iowa non-profit. Based on these findings, the FPPC levied a record-setting $1 million fine and sought disgorgement of $15 million in inadequately disclosed funds.

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Testimony of Ann M. Ravel
Former Chair, California Political Practices Commission

Before the Committee on Rules and Administration
United States Senate

At a Hearing Entitled
"Dollars and Sense: How Undisclosed Money and
Post-*McCutcheon* Campaign Finance Will Affect the 2014 Election and Beyond"

April 30, 2014

Mr. Chairman, Ranking Member Roberts, and distinguished Members of the Committee:

Thank you for inviting me to appear before you today. Although I am Vice Chair of the Federal Election Commission, I am not testifying in that capacity nor am I speaking for the Commission today. Instead, my testimony concerns a case from my tenure as Chair of the California Fair Political Practices Commission (FPPC) during the 2012 election cycle.

That case, *FPPC v. Americans for Responsible Leadership*, revealed how dark money networks are able to anonymously inject large amounts of money into our political process. Using shell corporate entities, wire transfers, and fund swapping with no apparent purpose other than to hide the sources of funds, these national networks skirt disclosure rules with relative ease.

In 2012, California voters had two statewide initiatives on the California ballot — Proposition 30, which proposed to raise taxes, and Proposition 32, which sought to prohibit unions from using automatic payroll deductions to raise money for political campaigns. On October 15, 2012, just a few weeks before the election, an $11 million contribution was made to a California political action committee, the Small Business Action Committee PAC (SBAC), a group that opposed Prop 30 and favored Prop 32.

This was the largest anonymous donation in California campaign history. It was made by an Arizona nonprofit corporation, Americans for Responsible Leadership (ARL), a group that had never before made a contribution in California. Indeed, ARL had never made a contribution over $500,000 to any political action committee, even in Arizona. The group's generic-sounding name revealed little or nothing about its donors or incorporators.

A complaint was filed with the FPPC concerning this contribution. In response, the FPPC requested information from ARL to determine whether it had followed California law in documenting and disclosing the source of its $11 million contribution.

California law requires groups like ARL to maintain records related to their contributions. The law also requires these groups to disclose the source of the contribution if the money was given to the group in response to a solicitation. Or if the funds were earmarked for a political committee, the original source would have to be reported. In short, California law requires adequate disclosure *before* the election so that voters can make informed choices at the ballot box.

ARL did not provide information showing it had complied with California law. So, with only two weeks before the election, the FPPC and California's Attorney General's Office filed suit to compel an audit. On the Sunday before the election, a unanimous California Supreme Court issued an unusual weekend decision ordering ARL to immediately provide records to the FPPC. The next morning, the day before the election, ARL finally disclosed the source of the contribution — two other nonprofit groups.

ARL disclosed that the $11 million originated from a Virginia-based nonprofit, which transferred the funds through an intermediary group called the Center to Protect Patients Rights (CPPR). CPPR then passed the money to ARL to give to SBAC. With this disclosure, ARL admitted that it was solely an intermediary, meaning it contributed money that actually originated with another source.

ARL's admission and the FPPC's subsequent formal investigation revealed how dark money networks sidestep disclosure rules and are able to anonymously infuse large amounts of money into an election. Ultimately, the FPPC discovered that $15 million — not the $11 million originally thought — was used to influence California's election. Yet none of it was adequately disclosed.

The genesis was with a California consultant who began raising money in connection with Propositions 30 and 32. Some of the money went to political action committees in California, which are required to disclose their donors. But approximately $29 million was sent out of state, to the Virginia nonprofit, because the donors did not want their identities disclosed. The Virginia nonprofit planned to use the funds to run issue advertisements in California.

In September 2012, when it became known that California law might require donor disclosure of issue ads within 60 days of the election, the money was transferred to CPPR. But this arrangement — seemingly a no-strings-attached gift of millions of dollars to CPPR — was not entirely arm's length.

The California consultant had worked closely with CPPR's founder on the California ballot initiative strategy and understood that he had access to a national network of nonprofits. So when the money was transferred to CPPR, it was done with confidence and the founder's assurance that other funds from other groups in the network would be guided back to California to help oppose Prop 30 and support Prop 32. In fact, the California consultant told investigators that he believed CPPR's founder may have been interested in the fund-swapping arrangement because the infusion of funds from the Virginia nonprofit could help CPPR avoid disclosure of its activities under federal law.

With this tacit understanding, the Virginia nonprofit began transferring nearly $25 million to CPPR. CPPR, in turn, began directing funds through a series of other groups back to California's ballot initiatives. In two sets of transactions involving four different nonprofits, CPPR and ARL funneled $15 million into California's 2012 election.

In the first series of transactions, a transfer of $4.05 million was made to CPPR, and shortly thereafter an almost identical amount — $4.08 million — was transferred to a group called California Future Fund (CFF). FPPC investigators discovered that, at the California

consultant's suggestion, CPPR had transferred funds to an Iowa-based group that, in turn, sent funds to CFF for use on the California ballot initiatives. This entire chain of transactions — routed through multiple nonprofits — occurred within three days and without disclosure.

The second series of transactions, involving the $11 million contribution that originally raised suspicions, followed a similar pattern but used different groups in the network. The California consultant told investigators that, around the time of a $14 million transfer to CPPR, he requested $11 million from CPPR for the California ballot initiative. CPPR then routed $11 million to SBAC, using ARL as an intermediary. This $11 million transfer was arranged via text message, illustrating the ease with which a network is able to avoid disclosure. After traveling a circuitous route through multiple nonprofits around the country that obscured its true origins, the money then returned to SBAC in California, where it was disclosed as a contribution from ARL.

The *Americans for Responsible Leadership* case shows that enforcing compliance with disclosure requirements is complicated by the nationwide scope and elusiveness of these networks. The web of organizations involved in this case stretched from Virginia to Arizona to Iowa. None of these out-of-state groups had any apparent connection to California, each had generic names revealing nothing about their donors or incorporators, and they may have been little more than shell entities.

For example, although California Future Fund was a registered California political committee, it had an Iowa address and its principal officers had no apparent connection to California. CPPR's office address was listed as a post office box in Arizona and apparently no longer exists with that same name. With entities operating across state lines, popping up and then disappearing or changing names, it is difficult to ensure meaningful disclosure.

These tactics have no apparent purpose other than to conceal the sources of funds. The U.S. Department of Justice has expressed concern that the lack of disclosure increases opportunities for unseen *quid pro quo* corruption. In testimony before the Senate Judiciary Committee's Subcommittee on Crime and Terrorism last year, a Justice Department official explained that without transparency it is much more difficult to detect, for example, the payment of bribes to corrupt officials or the use of foreign funds to influence elections. And section 81002(a) of the California Government Code provides that "[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."

Just as important, without timely action to require disclosure, voters can be denied information when it matters most — *before* the election. The FPPC's quick action in *Americans for Responsible Leadership* resulted in some disclosure of the sources of the $11 million contribution on the eve of the 2012 election. That disclosure was significant to the people of California, but it took another year to untangle the web of transactions and provide the public with more information about the full scope of the transactions.

Ultimately, a record-setting $1 million fine was levied against CPPR and ARL. In addition, California law requires the final recipients of the inadequately disclosed funds to disgorge the total amount.

The purpose of the California Political Reform Act was to "assure public trust in government" by requiring disclosure. Dark money in the political system not only increases the risk of corruption and undermines the ability to ferret out that corruption, it also contributes to public distrust and disassociation from government.

The litigation and investigation by the FPPC in this case shows that public officials from both political parties can work together in a responsible way to enforce the law. In addition, improving disclosure laws at the state and local level certainly can make a difference. But because dark money has a nationwide impact, it would be most effectively remedied by a federal solution.

While I am not here to comment on FEC-related matters, I would be glad to answer your questions about the *Americans for Responsible Leadership* case.

Thank you again for the opportunity to appear before the Committee.

* * *

Biography of Ann M. Ravel
Vice Chair, Federal Election Commission

Commissioner Ann M. Ravel is Vice Chair of the Federal Election Commission for 2014. Ms. Ravel was nominated to the Federal Election Commission by President Barack Obama on June 21, 2013. After her appointment received the unanimous consent of the United States Senate, Ms. Ravel joined the Commission on October 25, 2013.

From March 2011 until her appointment to the Commission, Ms. Ravel served as Chair of the California Fair Political Practices Commission (FPPC), to which Governor Edmund G. Brown, Jr. appointed her. At the FPPC, Ms. Ravel oversaw the regulation of campaign finance, lobbyist registration and reporting, and ethics and conflicts of interest related to officeholders and public employees. During her tenure at the FPPC, Ms. Ravel was instrumental in the creation of the States' Unified Network (SUN) Center, a web-based center for sharing information on campaign finance.

Before joining the FPPC, Ms. Ravel served as Deputy Assistant Attorney General for Torts and Consumer Litigation in the Civil Division of the United States Department of Justice. Ms. Ravel also worked as an attorney in the Santa Clara County Counsel's Office, ultimately serving as the appointed County Counsel from 1998 until 2009. Ms. Ravel represented the County and its elected officials, provided advice on the state Political Reform Act, and initiated groundbreaking programs in elder abuse litigation, educational rights, and consumer litigation on behalf of the Santa Clara County government and the community.

Ms. Ravel has served as an elected Governor on the Board of Governors of the State Bar of California, a member of the Judicial Council of the State of California, and Chair of the Commission on Judicial Nominees Evaluation. In 2007, the State Bar of California named Ms. Ravel Public Attorney of the Year for her contributions to public service.

Ms. Ravel received her B.A. from the University of California, Berkeley and her J.D. from the University of California, Hastings College of the Law.

* * *

A DECADE OF McCAIN-FEINGOLD

The Good, the Bad and the Ugly

By Neil Reiff & Don McGahn

Feature

Challenges to McCain-Feingold's provisions have profoundly altered the state of campaign finance law in America. Was the initial effort worth the trouble?

We're now five election cycles removed from the passage of McCain-Feingold, which drastically altered the landscape of campaign finance law and has been at the center of countless court challenges over the past decade. It's more than enough time to properly assess the long-term impacts of the law and judge how its major provisions have fared through the years.

Since the 2004 election cycle, when McCain-Feingold took effect, we've had a front row seat, representing candidates, party committees and third party groups grappling with the ever-changing campaign finance landscape. So from the perspective of a Democratic campaign finance attorney and a Republican former chairman of the Federal Election Commission, what follows is a bipartisan perspective on the law—the good, the bad and the ugly.

Let's flash back to 2002. A Democrat-controlled Congress sought to address several issues it believed to be destroying American politics. Party committees were supposedly running amok. Spending by "unregulated" outside groups, which were running issue ads with unregulated funds, was rising. And the effects of the 1996 election scandals were still being felt—highlighting fundraising practices in both parties, as well as troubling attempts by foreign donors to funnel money into American elections.

Although McCain-Feingold faced many hurdles, adept political maneuvering by its proponents created a law that was quite different than the one initially introduced. McCain-Feingold was carefully crafted to achieve two goals: break the link between politicians and soft money, and reduce the number of so-called negative sham issue ads that had begun to make incumbents nervous.

Once passed, it wasn't a slam dunk that then-President George W. Bush would sign the bill into law. Yet he did sign the Bipartisan Campaign Reform Act of 2002 (commonly referred to as McCain-Feingold) into law in March of 2002. The law's provisions were to take effect after the 2002 elections. Unsurprisingly, even before the ink on the president's signature was dry, legal challenges were filed. Although the reform groups and the federal government successfully defended most of these initial facial challenges, several subsequent challenges to McCain-Feingold's provisions have profoundly altered the state of campaign finance law in America. This leaves us wondering: Was the initial effort worth the trouble?

THE GOOD

THE SOFT MONEY BAN

The lynchpin of McCain-Feingold was the prohibition on national party committees raising funds from sources and in amounts that were inconsistent with federal law—that is, unlimited soft money contributions from corporations, individuals and labor unions. To date, the ban has withstood constitutional challenge.

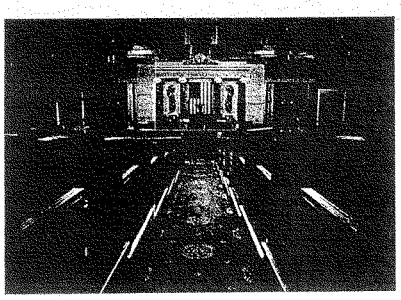
In theory, these funds were intended to help pay for a portion of the party's overhead and for their activities in state and local elections. Starting in the mid-90s, party committees began using these funds to pay for "issue ads" that promoted their candidates and attacked their party opponents. Based upon FEC rulings, the party committees could pay for such ads, without limit, in full coordination with their candidates, and in large part, with soft money.

As you could imagine, the success of these ads created a significant dependence on these large contributions by the national party committees and party leaders, which brought to light many unseemly fundraising practices where six-figure donors were offered special access to lawmakers and the president. One of the more celebrated examples of this practice: sleepovers in the White House.

To the extent that McCain-Feingold sought to break the link between national parties and soft money, it has achieved this stated goal. Some claim the parties have more than made up for this shortfall, pointing to gross fundraising numbers. For example, in the 2012 cycle, the Democratic National Committee and the Republican National Committee raised over $650 million combined, as compared to approximately $330 million combined in the 2000 election cycle (the final presidential cycle before McCain-Feingold took effect).

Such comparisons over-simplify the harm the law has caused. First, in the 2000 cycle, the two major national party committees raised over $300 million combined in soft money. Second, such comparisons tend to be selective, ignoring the other national party committees dedicated to House and Senate elections and the negative effect it's had on these entities, particularly in non-presidential cycles. Third, it ignores the exponential increase in the cost of communicating with voters. From the cost of postage to the explosion in the cost of broad-

McCain-Feingold placed a complex set of regulations upon state and local party committees, which make the law regulating state parties look like a Rube Goldberg contraption.



cast air time, party committees simply do not have the buying power they used to have. In absolute dollars, the parties appear healthy; but in political bang-for-the-buck, they are a shadow of what they used to be.

CONTRIBUTION LIMITS

Although not included in the original bill, McCain-Feingold was amended to raise contribution limits to candidates and party committees, and also index many of those limits for inflation. The change was a long time coming, and it was the first amendment to the incoming contribution limits since the mid-70s.

The new limits helped replace some of the money being excluded from the system by the soft money ban. The limits for national party committees were raised from $20,000 to $25,000 and the candidate limit was doubled from $1,000 per election to $2,000 per election, both of which were indexed for inflation. However, these increased limits had some other consequences. For one, they have permitted candidates to raise more money. This can either be perceived as a good or bad trend, depending on how you look at the issue. In the 2012 cycle, congressional candidates raised over $1.8 billion compared to $980 million during the 2002 cycle.

At the presidential level, the increased contribution limits, combined with successful Internet fundraising, have made the current presidential public financing system completely irrelevant. President Obama and his Republican challenger Mitt Romney collectively raised more than $1 billion in 2012. Had each agreed to the public grant for the general election period, each candidate would have been limited to spending no more than $92 million in the general.

While the numbers are staggering, raising contribution limits to catch up to inflation, and indexing them to inflation, is a good thing for the political system. Several states have either higher limits than those in federal races, or no limit at all, without any additional threat of corruption. It helps campaigns to keep up with rising costs. Critically, it can help some challengers raise the funds necessary to wage a credible campaign against entrenched incumbents.

On the other hand, the ability to raise more funds, coupled with the rising costs of political messaging, significantly increased the average spending in federal races, which may deter otherwise enthusiastic challengers. More and more campaigns are being dominated by self-funders, who need not rely on smaller contributions or party committees.

THE BAD

STATE AND LOCAL PARTY COMMITTEES

Although sold as a national party soft money ban, buried in the details of McCain-Feingold were several provisions that have harmed state and local parties. Essentially, McCain-Feingold federalized almost all elections, even those for state and local office, and forced the state and local parties to pay for most everything they do with hard money.

McCain-Feingold created a new concept called "federal election activity," which includes the traditional party programs to register voters, develop voter lists, provide sample ballots and get voters to the polls on Election Day. The law piled on several restrictive provisions that apply even if those activities also benefitted state and local candidates, and even if not undertaken to assist federal candidates.

In addition, McCain-Feingold placed a very complex set of regulations upon state and local committees, which make the law regulating state parties look like a Rube Goldberg contraption. Of course, most state campaign finance laws are less restrictive than federal law. Therefore, the new law has created disincentives for state and local party committees to engage in a consolidated effort to elect both federal and state candidates together.

As spending from candidates, national party committees and outside groups is skyrocketing, state party spending has stayed relatively flat.

The days of spending on ticket-wide mailings and slate cards have been replaced by separate appeals for federal and maybe, if they can afford it, state and local candidates. Although state party federal limits were doubled in McCain-Feingold, total receipts from the 100 Democratic and Republican state party committees in the 2012 election cycle (not including joint fundraising projects) were only about $200 million, or an average of $2 million per committee. State party committees have lagged far behind candidates, national party committees and the nascent Super PACs in their ability to raise federal funds. Many state parties had received significant transfers of funds from the national parties as well, which all but disappeared with the passage of McCain-Feingold.

As spending from candidates, national party committees and outside groups is skyrocketing, state party spending has stayed relatively flat. This may be an indication that state and local party committees are becoming marginalized in the current campaign finance scheme. This is unfortunate. The two-party system has been a stabilizing force in our democracy for over 200 years. Without that stabilizing force, however, there has been a significant rise in the number of single-issue candidates, nasty primaries pitting the middle against the hard partisan flank, and a general polarization. It is time for Congress to reconsider whether some of the regulations placed upon state party committees should be revisited, especially in light of the rise of Super PACs and other outside spending.

CANDIDATE FUNDRAISING

Recognizing that nothing can feel more awkward than a phone call from your party chairman, member of Congress, or perhaps even the president, asking you to contribute $100,000 or more to a national or state party committee, McCain-Feingold altered the ability of politicians to raise funds. Under McCain-Feingold, party officers, candidates and members of Congress were limited to soliciting only federally permissible funds for outside groups that participate in elections or for the non-federal accounts of party committees. But the First Amendment limits the ability to impose such limits, and based upon FEC and court rulings, candidates have found it relatively easy to continue to appear at events that raise large contributions. Ironically, they at the same time have been restricted in raising contributions, under state rules, for their state and local party committees.

Prior to McCain-Feingold, state party committees relied heavily on the ability of their candidates for federal office to raise non-federal funds for their campaign efforts. By cutting off the ability of members and candidates to raise these otherwise legal funds, the struggle for state and local party committees to be relevant in the campaign finance system has been further exacerbated. Add to this the new practice of a candidate's ability to raise funds for Super PACs, but not being specific in how much they can ask for, and it is not hard to see that McCain-Feingold's promise of breaking the link between politicians and money has not come to pass.

MILLIONAIRES

One of the more bizarre additions to McCain-Feingold was its so-called Millionaire's Amendment. It raised contribution limits to the opponents of self-funding candidates whereby they could accept, in some cases, up to $12,000 from each donor to match self-funded candidates. This provision was largely perceived as an incumbency protection measure to shield entrenched incumbent members from self-funded challengers. This provision was declared unconstitutional by the United States Supreme Court in 2008. One side consequence of the Supreme Court decision: the logic of the Court's opinion was applied to strike down several state laws that attempted to incorporate outside spending in the context of public funding programs. Another consequence: much of the opinion was a precursor of things to come, particularly the Supreme Court's landmark decision in *Citizens United v. FEC*.

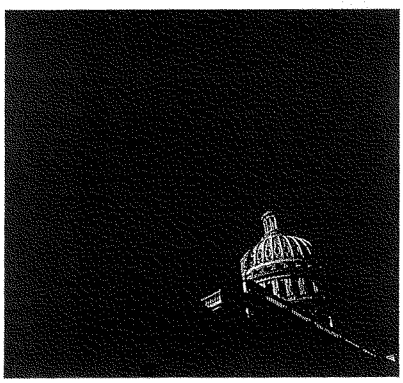
THE UGLY

OUTSIDE SPENDING

In addition to the regulation of party spending, the other major objective of McCain-Feingold was to rein in the exploding amount of spending on "issue ads" being undertaken by outside groups that had paralleled the explosion of party "issue ad" spending since the mid-90s.

Similar to the Millionaire's provision, this was largely seen

The answer to the cries and complaints about so-called "dark money" groups is not more regulation. The candidate's voice should be the central voice in American democracy.



by the law's opponents as something passed by members of Congress who were tired of being held accountable for their various legislative positions. No incumbent wanted to be bashed with millions of dollars in spending by groups whose ads were declared by some to be craftily designed campaign ads in the guise of issue discussion. During this period, the favored vehicles of choice for this unregulated spending were groups organized under section 527 of the tax code.

In 2000, prior to the passage of McCain-Feingold, Congress hastily passed a law that required these organizations to disclose their spending. It was through this law that Congress and reformers had their first chance to shed light on the amount of spending being undertaken by these groups and the individuals, unions or corporations who were funding them. McCain-Feingold attempted to regulate issue ad spending by requiring broadcast ads shortly before an election to be disclosed within 48 hours to the FEC, and by banning such spending from corporations and unions. (Simply referencing someone who was a candidate was banned in certain instances.)

This provision did little to stem issue ad spending and these ads were prevalent during the 2004 presidential election. In addition to its failure to stop issue ad spending, the provision triggered lawsuits that would reach the Supreme Court and significantly alter the state of campaign finance.

Ultimately, in *Citizens United v. FEC*, the Supreme Court invalidated the issue ad spending provisions of McCain-Feingold. Some hyperbolically claimed that it reversed a 100-year ban on express advocacy spending by corporations and unions in the process. Although not really true, the Supreme Court certainly issued a watershed opinion, which undercut or otherwise rejected much of the assumptions upon which campaign finance regulation is based. Overnight, many of the assumptions made by reform groups and regulators were swept away.

The world after Citizens United is dominated by two major developments: 1) the rise of Super PACs, which are federal PACs that are no longer restricted on how much they can raise from any source and engage in independent expenditures that can expressly advocate the election or defeat of a federal candidate without limit; and 2) the reemergence of issue advocacy, not by 527 organizations but by 501(c)(4) organizations, which are not currently required by IRS laws to publicly disclose their donors.

Some think the jury is still out on McCain-Feingold, but the evidence is pretty clear. While it had some laudable goals, the law and its aftermath have profoundly changed the landscape of campaign finance law. Today, corporations and unions are free to run explicit election ads that, if run by party committees, would still be subject to the onerous restrictions of McCain-Feingold. It makes no sense that the law now permits certain speakers to speak, yet effectively precludes others (particularly party committees, which fully disclose their activities) from doing so.

The answer to the cries and complaints about so-called "dark money" groups is not more regulation. Instead, any offered solution ought to flow from a common premise: The candidate's voice should be the central voice in American democracy. The party committees have historically been the obvious echo chamber for the message of candidates, and they ought to be free to ensure that our voters have as much information about those candidates as possible. McCain-Feingold has frustrated this goal, and it has left the candidates untethered from their historical political party allies.

It is time to revisit McCain-Feingold. It was sold as a balance to reduce the corrupting influence of money by banning party soft money and banning certain negative advertising. The second part has been declared unconstitutional. It is time to revisit the first part, and permit the parties to once again provide the stabilizing force to our system of government that they had historically been. As we illustrate, there ought to be bipartisan support for this.

From where we sit, the good, bad and the ugly impacts of the law, presented above, aren't all that debatable. But you can be sure the proponents and opponents of campaign finance regulation will continue to debate (and probably litigate) its legacy for years to come.

Neil Reiff is a founding member of the law firm Sandler, Reiff, Young & Lamb, and a former deputy general counsel at the DNC. Don McGahn is a partner with the law firm Patton Boggs LLP, and is the former chairman of the Federal Election Commission.

No. 11-1179

IN THE

Supreme Court of the United States

AMERICAN TRADITION PARTNERSHIP, INC., F.K.A. WESTERN TRADITION PARTNERSHIP, INC., ET AL.,

Petitioners,

v.

STEVE BULLOCK, ATTORNEY GENERAL OF MONTANA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Montana

BRIEF OF UNITED STATES SENATORS SHELDON WHITEHOUSE AND JOHN MCCAIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT. 3

II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE. 5

A. Political Spending After *Citizens United* Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System. 8

B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for *Quid Pro Quo* Corruption. 17

C. The Appearance of Corruption Created by Independent Expenditures is Strong. 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

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Page(s)

Kenneth P. Vogel, *Both Sides Now in Dash for Political Cash*, Politico, Jun. 29, 2011, http://www.politico.com/news/stories/0811/60731.html 15

Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, Politico, Dec. 13, 2010, http://www.politico.com/news/stories/1210/46355.html 15

Voltaire, Candide (1759) 7

Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All*, ProPublica, Nov. 21, 2011, http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all 8, 10, 12

Drew Westen, *Why Attack Ads? Because They Work*, L.A. Times, Feb. 19, 2012, http://articles.latimes.com/2012/feb/19/opinion/la-oe-westen-why-negative-campaigning-works-20120219 6

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STATEMENT OF INTEREST[1]

Amici are U.S. Senator Sheldon Whitehouse of Rhode Island and U.S. Senator John McCain of Arizona.

Amici file this brief for two reasons. First, as active, democratically elected legislators, they have a direct understanding of the effects of unlimited independent election expenditures on our legislative system and our democracy. *Amici's* observations about both the risk and the appearance of corruption created by unlimited independent expenditures will assist the Court as it decides to consider "whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway," 132 S. Ct. 1307 (2012) (statement of Justices Ginsburg and Breyer).

Second, as national political leaders, *amici* have a strong interest in the proper functioning of our democracy. In their view, the appearance of corruption undermines trust and participation in our elections, the opportunity for corruption makes the legislative process more difficult, and both diminish the standing of our democracy in the eyes of the world. Accordingly, *amici* respectfully ask the Court to confirm that Congress and state legislators may, upon an appropriate record demonstrating the potential for corruption or perceived corruption created by independent expenditures, enact legislation in response to that real and significant threat.

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[1] Pursuant to Rule 37.6, counsel certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.

SUMMARY OF ARGUMENT

This case concerns an issue of paramount importance to our nation: the effective functioning of American democracy. America's democracy has long stood as a model to the world. The costs of disrupting a fair and effective American democracy are high – to our states, our nation, and our world.

1. The Montana court reviewed extensive record evidence of corruption, evidence of the type this Court deemed a "cause for concern" in *Citizens United* v. *FEC*, 130 S. Ct. 876, 911 (2010). *Citizens United* held that when a legislature "finds that a problem exists" – when it makes a legislative finding based on evidence that "elected officials succumb to improper influences from independent expenditures" – judges "must give that finding due deference" and "must give weight" to laws that "seek to dispel the appearance or reality of these influences." *Id.* That is what the Montana Supreme Court did in this case, which is reason enough to deny the petition. Sup. Ct. R. 10. Petitioners' inevitable disagreement with the ruling against them does not justify the exercise of certiorari here.

2. If the Court does grant the writ, however, summary reversal is not the appropriate disposition of the case. Full briefing and argument, and a decision in the ordinary course, would allow the Court to confirm lawmakers' continuing authority to respond when the evidence shows "that a problem exists." *Citizens United*, 130 S. Ct. at 911.

And a problem does exist. Evidence from the 2010 and 2012 electoral cycles has demonstrated that so-called independent expenditures create a strong potential for corruption and the perception thereof. The news confirms, daily, that existing campaign finance rules purporting to provide for "independence" and "disclosure" in fact provide neither. Regulatory

filings show that much of the funding for independent expenditures comes from shell companies, pass-through entities, and non-profit organizations that conceal the true source of the individuals and companies supporting them. These non-disclosed funding sources were not what the Court had in mind when it issued its ruling in *Citizens United*, and therefore it did not consider the strong potential for corruption and the appearance of corruption they would create, including through threats and promises of spending.

In light of these developments, if the Court grants the petition, it should revisit *Citizens United*'s finding that vast independent expenditures do not give rise to corruption or the appearance of corruption. The Court should clarify that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriate preventative legislation in response.

ARGUMENT

I. THE MONTANA SUPREME COURT APPLIED THE CORRECT LEGAL STANDARD TO THE FACTUAL RECORD BEFORE IT.

The Court in *Citizens United* explained its holding as an application of the basic principle that when an elected legislature "finds that a problem exists," it may not choose a remedy that is "asymmetrical" to the risk. 130 S. Ct. at 911. The Court anticipated that if Congress found that "a problem exists" as the result of independent expenditures, the Court would "give that finding due deference" and "give weight" to any legislative remedy. *Id.* These statements are inconsistent with Petitioners' *per se* rule prohibiting laws like the Montana Corrupt Practices Act.

The Montana Supreme Court did just as this Court instructed. First, it determined that the State had a "compelling interest" justifying the law based on the extensive evidence in the trial record (a record this Court did not enjoy in *Citizens United*). *See* Pet. App. 17a-29a. It noted the historical evidence of actual corruption, including vote-buying in the legislature, *id.* at ¶¶ 24-26, 36; gubernatorial misconduct, *id.* at ¶ 24; and judicial bias and bribery, *id.* at ¶¶ 23, 36, noting a particular danger in Montana, where advertising is cheap. *Id.* at ¶¶ 29-32, 38. It cited concerns about the independence of the State's judiciary. *Id.* at ¶¶ 42-45. The court also found substantial evidence that Montana voters believe that corporate independent expenditures lead to corruption, and that this belief has contributed to widespread cynicism and low voter turnout. *See id.* at ¶¶ 28, 33, 38.

Then, the Montana Supreme Court assessed whether the State's prohibition of corporate expenditures was "narrowly tailored" to the problem identified in the record. *See* Pet. App. 31a-32a. Looking specifically at the characteristics of Petitioners' corporate entities, the Court concluded that the law, *as it applied to them,* had no more than a "minimal impact," if any. *Id.*

This Court has "rarely granted" a petition for certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The Montana Supreme Court faithfully applied the law to the factual record before it. No further justification should be needed to deny the petition.

II. THE COURT SHOULD IN ALL EVENTS DECLINE PETITIONERS' INVITATION TO SUMMARILY REVERSE.

If this Court concludes that review of the Montana court's decision is nevertheless warranted, a full hearing is necessary. Summary reversal is plainly not the appropriate course, whatever this Court concludes about the petition's merits. *Cf. Youngblood* v. *West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting) ("In vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the special deference owed * * * to state courts") (internal quotation marks omitted).

The linchpin of the Petition concerns this Court's statement in *Citizens United* that vast corporate independent expenditures "do not give rise to corruption or the appearance of corruption." *Citizens United*, 130 S. Ct. at 909. Petitioners repeatedly refer to that statement from *Citizens United* as a "holding" and "a matter of law." Application to Stay Decision at 19; *see* Pet. at 15, 16.

That cannot be so. Whether independent expenditures pose dangers of corruption or apparent corruption depends on the actual workings of the electoral system; it is a factual question, not a legal syllogism. In a passage from *Buckley* v. *Valeo* discussed in *Citizens United*, this Court stated 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 campaign contributions." 424 U.S. 1, 46 (1976) (emphasis added). The *Buckley* Court's use of the phrase "presently appear" reflects that the risk of corruption is in reality a factual determination to be made about the functioning of the electoral system at a particular time.

The peculiar posture of *Citizens United* deprived the Court of a factual record (in contrast to previous decisions of this Court, such as *McConnell* v. *FEC*, 540 U.S. 93 (2003), which relied heavily on exhaustive records developed by Congress and in the litigation).[2] The Court acknowledged that "[w]hen Congress finds that a problem exists, we must give that finding due deference" and "give weight to attempts by Congress to seek to dispel either the appearance or reality of these influences." *Citizens United*, 130 S. Ct. at 911.

Evidence from the 2010 and 2012 election cycles confirms that "a problem exists" – new political expenditures have opened the door to *quid pro quo* corruption and the appearance thereof. Massive new spending, most of it on negative attack ads that are proven to change voting patterns,[3] has been closely coordinated with campaigns, and much of it has been undisclosed. As a result, outside groups can now spend – or credibly threaten to spend – overwhelming amounts of money in support of or against a candidate, without a publicly disclosed paper trail. If spent on negative attack ads, the substance of the ads may not even yield a clue to the interest of the attackers, let alone their identities.

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[2] The Supreme Court (and appellate tribunals generally) have traditionally limited themselves to reviewing factual findings made by a lower court, and have not made factual determinations themselves.

[3] *See* n.35, *infra*; Drew Westen, *Why Attack Ads? Because They Work*, L.A. Times, Feb. 19, 2012 ("A well-crafted positive ad can 'stick' too, but there's nothing like a sinister portrayal of a greedy, self-centered villain, replete with grainy images and menacing music, to stir up our unconscious minds."); *see also* Morgan Little, *Negative Ads Increase Dramatically During 2012 Presidential Election*, L.A. Times, May 3, 2012 (seventy percent of political ads aired in the 2012 election cycle have been negative – up from only nine percent in 2008).

The ability to make and to credibly threaten large expenditures gives outside groups the opportunity to exert improper leverage over politicians running for office. Through backchannel communications, or simply a quiet phone call, candidates can be warned, for example, that failure to take the "right" position will be punished with a large expenditure against them.[4] "Killing an admiral" from time to time might be enough.[5] Alternatively, interest groups can gain improper influence by promising to support a political candidate with a large expenditure if the need arises. Before *Citizens United*, a threat of attack or pledge of support would mean a maximum $5,000 PAC contribution, or perhaps hosting a fundraiser for a legislator, with all contributions disclosed. Today, this could mean an unlimited independent expenditure, including an anonymous one, that could elect or defeat a candidate.

If the threat is successful or if the pledge of support turns out to be unnecessary, there will be no record of the *quid pro quo* : no public advertising, no disclosure, no trail of receipts, and no account statements for regulators, prosecutors and media outlets to track. The lack of disclosure thus makes ferreting

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[4] *See This American Life: Take the Money and Run for Office*, No. 461 (WBEZ radio broadcast Mar. 30, 2012) (transcript *available at* http://www.thisamericanlife.org/radio-archives/episode/461/transcript) (Norman Ornstein: "I've had this tale told to me by a number of lawmakers. You're sitting in your office and a lobbyist comes in and says, 'I'm working with Americans for a Better America. And I can't tell you who's funding them, but I can tell you they really, really want this amendment in the bill.' And who knows what they'll do? They've got more money than God.").

[5] *See* Voltaire, Candide, ch.23 (1759) ("In this country, it is good to kill an admiral from time to time, in order to encourage the others.").

out this *quid pro quo* corruption extremely difficult. Plenary review would afford the Court an opportunity to consider the implications of this phenomenon for its finding that independent expenditures do not corrupt.

A. Political Spending After *Citizens United* Demonstrates that Coordination and Disclosure Rules Do Not Impose a Meaningful Check on the System.

A premise of *Citizens United* was its finding that independent expenditures do not create a risk of corruption or the appearance of corruption. That premise rested on two critical assumptions: (i) that anti-coordination rules "substantially diminish[ ]" the "potential for abuse" of independent expenditures, 130 S. Ct. at 908 (quoting *Buckley*, 424 U.S. at 47); and (ii) that the Bipartisan Campaign Reform Act created a regime of "effective disclosure" that would "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Id.* at 916.

Political spending in the 2010 and 2012 election cycles has undermined both of these core assumptions.

1. Coordination Rules are Ineffective.[6]

In *Citizens United*, the Court assumed a strong and well-enforced prohibition on coordination between campaigns and "independent" advocates. As

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[6] *See* Fredreka Schouten, *Super PAC Limits Blur Ahead of Nov. 6*, USA Today, Mar. 1, 2012; Marian Wang, *Uncoordinated Coordination: Six Reasons Limits on Super PACs Are Barely Limits at All*, ProPublica, Nov. 21, 2011, http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all.

the Court saw it, "[t]he separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned." *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2826 (2011) (citing *Citizens United*, 130 S. Ct. at 908).

The Court did not anticipate how coordination rules operate – or fail to operate – with respect to the new breed of "independent expenditure-only committees," commonly known as super PACs. In effect the "separation between candidates and independent expenditure groups" that was an essential predicate to the *Citizens United* decision has been eliminated. Evidence from the current election cycle bears this out:

Candidate-Specific Super PACs. The ongoing presidential and congressional races are now heavily driven by a handful of super PACs, each founded and managed for the benefit of a single candidate.[7] Wealthy donors who have maxed out their contributions to the candidate are now using these candidate-specific super PACs as convenient proxies to make the functional equivalent of campaign contributions.[8]

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[7] Russ Choma, *Super PAC Spending Teeters at $100 Million Mark*, Center for Responsive Politics Open Secrets Blog, May 10, 2012, http://www.opensecrets.org/news/2012/05/super-pac-spending-teeters-at-100-million-mark.html ("The hard-fought Republican primary, which dragged out longer than many expected, attracted the bulk of the super PAC money. The five top outside spenders, all of them super PACs formed to support one of the GOP candidates, account for $86 million of this first $100 million spent.").

[8] *See* Schouten, *supra* n.6 (prominent campaign supporter was also single-largest donor to candidate's super PAC); Dave

Closely Connected Staff and Consultants. Many prominent candidate-specific super PACs are run by former high-level aides to the candidate,[9] and nothing prevents those affiliated with a super PAC from later taking a job with the candidate's campaign.[10] It is probably not a coincidence, then, that super PACs and the candidates they support also often use the same outside consultants and advisers.[11]

Coordinated Fundraising and Advertising. Campaign committees and super PACs openly coordinate on fundraising. Candidates appear at super PAC fundraising events and share their fundraising lists.[12] Super PACs are permitted to run ads that

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Levinthal, *2011 Sees Super PAC Explosion*, Politico, Oct. 6, 2011, http://www.politico.com/news/stories/ 1011/65310.html.

[9] For example, the President's super PAC, Priorities USA Action, is run by his former deputy press secretary, and Mitt Romney's super PAC was founded by his 2008 campaign general counsel. *See* Wang, *supra* n.6; *see also* Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 4, 9, http://www.campaign.legalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf.

[10] *See* Maggie Haberman, *Coordination Rules A One-Way Street,* Politico, May 2, 2012, http://www.politico.com/news/stories/0512/75834.html (top Republican strategist who advised American Crossroads joined Romney campaign as Senior Adviser).

[11] *See* Al Shaw, *et al.*, *A Tangled Web: Who's Making Money from All This Campaign Spending?*, ProPublica, http://www.propublica. org/special/a-tangled-web (last updated Mar. 21, 2012); *see, e.g.*, Schouten, *supra* n.6 (super PAC uses same polling and direct-mail consultant as campaign).

[12] *See, e.g.*, Schouten, *supra* n.6 (President Obama's campaign manager at a Priorities USA fundraiser); Wang, *supra* n.6 (Rep.

are "fully coordinated" with a candidate, feature an appearance from the candidate, and follow a script reviewed and approved by the candidate.[13] In some cases, super PACs have simply reused and repackaged material from the candidate's old advertisements.[14]

Strategic Timing. In light of their closely connected staff and fully coordinated fundraising efforts, it should come as little surprise that super PACs have been acting as successful surrogates for campaign committees in states where the candidate has made few appearances or spent little money on advertising.[15] The candidate and the super PAC need not

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Pelosi and Sen. Reid fundraising for super PACs; also Mitt Romney for Restore Our Future).

[13] Kim Geiger, *FEC Deadlocks on Question of Coordinated Advertising*, L.A. Times, Dec. 5, 2011, http://articles.latimes.com/2011/dec/05/news/la-pn-crossroads-fec-20111205; *see* American Crossroads, Request for FEC Advisory Opinion, No. 2011-23, at 3 (Oct. 28, 2011) (advertisements "would be fully coordinated with incumbent Members of Congress facing re-election in 2012 insofar as each Member would be consulted on the advertisement script and would then appear in the advertisement").

[14] American Crossroads, *supra* n.13, at 3 n.2 (advertisements "may include phrases or slogans that the featured [candidate] has previously used"); Schouten, *supra* n.6 (super PAC ran television commercial candidate aired in 2007 during previous campaign).

[15] *See* Jim Rutenberg & Nicholas Confessore, *A Wealthy Backer Likes the Odds on Santorum*, N.Y. Times, Feb. 8, 2012 (candidate-specific super PAC spent millions to win Minnesota for Santorum, when candidate had no money left to spend); Molly Redden, *Mitt Romney's Southern Strategy*, Salon, Mar. 28, 2012, http://www.salon.com/2012/03/28/mitt_romneys_southern_strategy (candidate-specific super PAC "consistently

communicate for spending to be coordinated in this way; news articles and shared consultants provide all the information a super PAC needs to direct the money to where it is needed most.[16]

In sum, super PACs *are* coordinating with campaigns, and they are using methods the Court did not contemplate in its *Citizens United* decision. Contrary to the Court's assumption, there is now little distinction in practice between a contribution to a candidate-specific super PAC and a direct contribution to the candidate's campaign, other than its being unlimited, and potentially concealed.[17]

2. Disclosure Rules Are Inadequate.

The second critical assumption of *Citizens United* was that unlimited independent expenditures would take place under the glare of complete and effective disclosure. That is plainly not the case today. Much of the outside money spent in the 2010 election came from groups that are not required to – and do not – disclose their donors.

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spent millions in Southern primaries" including in one state where candidate bought no television advertising).

[16] *See* Wang, *supra* n.6 (quoting public statements by campaign officials about spending strategy); Redden, *supra* n.15 (quoting former FEC counsel: "This is clearly not being done by people who have absolutely no idea what the candidate or campaign is doing").

[17] *Cf.* Norman Ornstein, *Effect of Citizens United Felt Two Years Later*, Roll Call, Jan. 18, 2012 (the mandatory non-coordination disclaimer at the end of a super PAC's advertisement is "nonsensical," and voters realize super PACs "are effectively arms of the campaigns," but "without any of the restrictions or timely disclosure requirements the candidates themselves face").

Certain types of political spending groups, organized under section 501(c) of the tax code, are not required to disclose their donors to the public, but only to the IRS on confidential grounds. These groups include so-called social welfare groups, which are permitted to engage in political advocacy so long as it is not the organization's primary purpose. *See* 26 U.S.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1(a)(2). Several "(c)(4)" entities have interpreted IRS rules to allow them to spend up to *49 percent* of their funds on express advocacy[18] – and one has evidently spent 87 percent of its funds on political ads.[19] When a (c)(4) organization spends money on political advocacy, its donors are not publicly disclosed.

Much of the outside money spent on electioneering communications in the post-*Citizens United* 2010 election came from (c)(4) organizations and other non-disclosing groups. These organizations spent so much money – $134 million – that by the end of the 2010 cycle, they accounted for 47 percent of all outside political spending.[20] In the 2006 election, by contrast, these groups spent $0.[21]

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[18] Letter to IRS from Campaign Legal Center, Sept. 28, 2011, at 1, http://www.campaignlegalcenter.org/attachments/Letter_to_the_IRS_from_Democracy_21_and_Campaign_Legal_Center_9_28_2011.pdf.

[19] Letter to IRS from Campaign Legal Center, Dec. 14, 2011, at 3, http://www.campaignlegalcenter.org/attachments/IRS_LETTER _12_14_2011.pdf.

[20] Spencer MacColl, *A Center for Responsive Politics Analysis of the Effects of Citizens United*, May 5, 2011, at 4, 5, *available at* http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

[21] *See* Richard L. Hasen, *The Numbers Don't Lie*, Slate, Mar. 9, 2012, http://www.slate.com/articles/news_and_politics/politics/

Super PACs, 501(c)(4) organizations and political campaigns are knitted into a fundraising web that allows unlimited, non-independent and anonymous (to the public) political donations for the benefit of a specific candidate. With respect to political campaigns, the disclosure issue is not limited to what would be characterized as larger donations. For instance, political campaigns are not required to disclose contributions that are $200 or less. Additionally, under IRS rules, (c)(4) groups are permitted to make independent expenditures in their own name, to donate money to super PACs, and to give to other (c)(4) entities. As a result, a person or company seeking to support or influence a candidate without public disclosure can donate to a (c)(4), which will in turn do one of three things: (1) spend the money on advocacy, (2) donate it to a super PAC to spend on advocacy, or (3) donate it to another (c)(4), which would then have the same set of options, behind an additional layer of "identity-laundering" for the donor.

Many of the most prominent super PACs have created affiliated (c)(4) entities to take advantage of the considerable sums of anonymous money they can raise.[22] In one instance, the (c)(4) had supplied the

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2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html.

[22] *See* Kim Barker, *et al.*, *With Spotlight on Super PACs, Nonprofits Escape Scrutiny*, ProPublica, Feb. 3, 2012, http://www.propublica.org/article/with-spotlight-on-super-pac-dollars-nonprofits-escape-scrutiny. Super PACs with 501(c)(4) affiliates include: Priorities USA Action (Priorities USA); American Crossroads (Crossroads GPS); Majority PAC (Patriot Majority USA); FreedomWorks for America (FreedomWorks, Inc.); American Bridge 21st Century (American Bridge 21st Century Foundation). Priorities USA Action and American

super PAC with almost half of its $3 million in funding.[23] Another group, American Crossroads, set up its (c)(4) affiliate, Crossroads GPS, precisely because "some donors didn't want to be disclosed."[24] Crossroads GPS spends 40 percent of its money on explicit, declared political activity.[25] Moreover, as part of its mandatory "non-political" spending, it gave several million dollars to a dozen groups that in turn spent

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Bridge 21st Century received $438,000 from their affiliated nonprofits last year. A Democratic-leaning super PAC, Citizens for Strength and Security, reported that almost all of its $72,000 came from a (c)(4) – also called Citizens for Strength and Security. The super PAC FreedomWorks for America reported that half of the contributions it received last year – $1.34 million – were "in kind" payments from its affiliate (c)(4), FreedomWorks, Inc.

[23] Robert Maguire & Viveca Novack, *The FreedomWorks Network: Many Connections, Little Disclosure*, Center for Responsive Politics, Open Secrets Blog, Mar. 16, 2012, http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html.

[24] Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, Politico, Dec. 13, 2010, http://www.politico.com/news/stories/1210/46355.html (quoting super PAC's political director); *see also* Vogel, *Both Sides Now in Dash for Political Cash*, Politico, Jun. 29, 2011, http://www.politico.com/news/stories/0811/60731.html (quoting Democratic strategist: "Many such donors [to (c)(4) organizations] 'feel more comfortable donating to groups that don't disclose'" because they do not want publicity or to be on fundraising lists).

[25] Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. Times, Oct. 17, 2010.

millions on independent expenditures and electioneering communications.[26]

Even excluding the (c)(4) organizations, many of the top donors to super PACs are themselves limited-liability corporations or otherwise obscure entities.[27] *Cf. McConnell*, 540 U.S. at 197 (federal disclosure laws intended to prevent confusion by groups "hiding behind dubious and misleading names"). Many have only a P.O. Box as an address; and several – including the single largest donor in 2010 and 2011 – have been discovered to be primarily pass-through entities for wealthy individuals.[28]

The coupling of 501(c) anonymity and corporate obscurity to super PAC fundraising and coordination has catalyzed an explosion of undisclosed outside spending, which this Court could not foresee when it suggested that disclosure rules are an "adequate" and "effective" means of serving the public's substantial information interest. 130 S. Ct. at 916; *cf. McConnell*, 540 U.S. at 197 (noting that plaintiffs "never satisfactorily answer[ed] the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public"). Where the spending is on negative attack ads, the substance of the ad might

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[26] Viveca Novack & Robert Maguire, *For Friends, Crossroads Helps With the Tab*, Center for Responsive Politics Open Secrets Blog, Apr. 18, 2012, http://www.opensecrets.org/news/2012/04/for-friends-crossroads-helps-with-t.html.

[27] *See* Demos & U.S. PIRG Education Fund, *Auctioning Democracy: The Rise of Super PACs and the 2012 Election*, Feb. 8, 2012, at 17, table 1, *available at* http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election.

[28] *See* N.Y. Times, *Who's Financing The Super PACs*, *at* http://www.nytimes.com/interactive/2012/01/31/us/politics/super-pac-donors.html (last updated May 7, 2012).

not even provide a hint of what interest is behind the expenditure.

B. Unlimited, Coordinated and Undisclosed Spending Creates a Strong Potential for *Quid Pro Quo* Corruption.

The unprecedented scale of new spending, often on negative attack ads, coupled with the failure of the disclosure and coordination rules, enhances the risk of corruption. Counting both independent expenditures and spending on electioneering communications,[29] outside spending on the 2010 election exceeded spending by political parties, $289 million to $184 million.[30] Of the $210 million spent on independent expenditures alone, two-thirds of that money came from groups that benefited from the removal of caps on corporate donations after *Citizens United*.[31]

For the 2012 election, outside spending exceeded $120 million as of May 14, with six months still to go.[32] That is double the amount spent by this date in the 2008 presidential election cycle. As the election nears, the pace of outside spending will significantly augment these already massive figures. Super PACs, which alone have spent over $100 million in

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[29] "Independent expenditures" fund express advocacy for or against a candidate, as opposed to "electioneering communications," which are advertisements that appear in the 30 days preceding a primary or 60 days preceding a general election and mention a candidate's name but do not expressly advocate for or against that candidate. These figures exclude spending by political parties.

[30] MacColl, *supra* n.20, at 11.

[31] *Id.* at 4.

[32] Statistics in this paragraph are taken from the Center for Responsive Politics Outside Spending Database, http://www.opensecrets.org/outside-spending/cycle_tots.php.

this election cycle, have another $100 million on hand to spend in the remaining months leading up to November – meaning that those groups can spend over half a million dollars *every day* ($570,000) until the election, without even raising another cent.

As for spending by 501(c)(4) nonprofit organizations, there is no way to predict how much they will spend on the 2012 election – because they disclose their finances after the election year – but it is estimated they will spend more than super PACs this election cycle.[33]

A well-heeled super PAC can now influence or threaten to influence a race with a single mammoth expenditure. The ongoing presidential primary season has shown this to be true on several occasions.[34] The dominating influence of super PACs is particularly significant for those in congressional races with

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[33] Dan Eggen, *Most Independent Ads for 2012 Election Are From Groups That Don't Disclose Donors*, Wash. Post, Apr. 24, 2012 ("The numbers signal a *shift* away from super PACs, which are required to disclose their donors" toward "big-spending nonprofits that do not have to identify their financial backers.").

[34] *See* Brody Mullins & Danny Yadron, *Gingrich Super PAC's Funding Runs Dry*, Wall Street Journal, Mar. 21, 2012 (candidate won South Carolina primary despite ranking fourth in Iowa "in part because [the Gingrich super PAC] spent nearly $1 million on TV ads for him in the final week, while his own campaign could muster only $337,000"); Rutenberg & Confessore, *supra* n.15 (candidate who "could not afford to pay for a single commercial" at the time won Minnesota primary owing to the "critical support" of a super PAC); *see also* Evan Mackinder, *Super PACS Cast Long Shadow Over 2012 Race*, Center for Responsive Politics Open Secrets Blog, Mar. 21, 2012, http://www.opensecrets.org/news/2012/03/super-pacs-continued-to-show.html (super PACs' earlier support for several failed candidates was "propping them up entirely").

smaller media markets, such as Montana's, and makes it all the easier for those seeking legislative favors and results to discreetly threaten such expenditures if Members of Congress do not accede to their demands.[35]

A promise or threat to a candidate that goes unseen or unheard by the public is a means of corruption that was not considered in *Citizens United.* This massive leverage goes beyond the mere "influence" this Court deemed inadequate to support the restrictions at issue in that case. *Cf. Caperton* v. *A.T. Massey Coal. Co.,* 556 U.S. 868, 884 (2009) ("there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign"). The Court in *Caperton* found that the remedy for such massive expenditures was recusal by the Judge – but there is no such remedy available for Members of Congress.

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The Court's opinion in *Citizens United* could not account for the particular risks and appearances of

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[35] *See, e.g., This American Life, supra* n.4 (super PAC's $680,000 expenditure paid for negative advertisement to be shown so frequently that average viewer was likely to see it 16 times per week; in same period, target candidate's support dropped six percentage points). As of March 5, 2012, 54 percent of money spent in the 2012 presidential election (over $35 million) was spent on negative attack ads. The Restore Our Future PAC supporting Mitt Romney spent 97 percent of its $31 million in spending on negative ads against Rick Santorum and Newt Gingrich. Dave Johnson, *Super PAC Hate-Spending*, Mar. 9, 2012. http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/03/where_super_pacs_are_spending_their_money_and_how_.html.

corruption, by expenditures or by threats and promises, associated with super PACs and (c)(4) entities. Put succinctly, the protective factors that the *Citizens United* Court invoked when it stated that independent expenditures present no risk of corruption have not materialized.

C. The Appearance of Corruption Created by Independent Expenditures is Strong.

In *Citizens United*, this Court held there could be no "appearance of corruption" associated with independent expenditures to the extent they secure only "access" and "influence," and are "not coordinated" with a candidate. 130 S. Ct. at 909-910. As shown above, these assumptions no longer hold; therefore, the Court's assessment of the potential for perceived corruption is worth reconsideration.

Americans believe that the current system of campaign finance is corrupt, and that *Citizens United*, thanks to the anonymous spending it unleashed, has made the problem worse. A recent study by the Pew Center found that 65 percent of registered voters who had heard of *Citizens United* said super PAC spending has had a negative effect on the 2012 presidential campaign.[36] There was no partisan divide on this question: 60 percent of Republicans, 63 percent of Democrats, and 67 percent of independents who had heard of the decision believe it has had a negative effect on the campaign.

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[36] Pew Research Center for People and the Press, *Super PACs Are Having A Negative Impact, Say Voters Aware of 'Citizens United' Ruling* (Jan. 17, 2012), http://www.people-press.org/files/legacy-pdf/1-17-12%20 Campaign%20Finance.pdf

Another recent study[37] found that 80 percent of voters think there is too much "big money" spent on political campaigns and elections and that campaign contributions and spending should be limited. A large majority – including 75 percent of independents – believe that big donors and secret money[38] undermine democracy, and 62 percent said they oppose the *Citizens United* decision.

Trust in public institutions is at an all-time low, in part because of the perceived influence of money in politics. When Americans believe the campaign finance system has been corrupted, they lose faith in their democracy. The appearance that large special interest donors, including corporations and labor organizations which have the ability to manipulate the campaign finance system, hold undue sway over elected officials tarnishes our American democracy. It can lead voters to disengage from healthy political engagement. And that, in turn, compounds the problem, increasing cynicism in a vicious cycle undermining representative democracy.

Poll results should not direct Court decisions. But these results show that the Court's assessment of perceived corruption was at odds with the perception held by most Americans. Only plenary review will provide the Court with the opportunity for full inquiry into the harms to American democracy caused by the appearance and threat of corruption.

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[37] Democracy Corps & Public Campaign Action Fund, *Two Years After Citizens United, Voters Fed Up with Money in Politics* (Jan. 19, 2012), http://www. democracycorps.com/wp-content/files/PCAF-memo-FINAL1.pdf.

[38] Secret money could include contributions to political campaigns that do not reach the amount threshold of current disclosure requirements.

The campaign finance system assumed by *Citizens United* is no longer a reality, if it ever was. The Court, if it grants the petition, should use this case to make clear that when legislatures build an appropriate record demonstrating the potential for corruption or the appearance thereof created by independent expenditures, they may enact appropriately tailored preventative legislation in response. The integrity of America's elections has long been a bulwark of our nation and a beacon to other nations, and it is a worthy exercise of this Court's attention to protect our elections from the manifest damage of its decision allowing the vast, unregulated expenditures that now darken our political landscape.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied or in the alternative granted for plenary review of the question presented.

Respectfully submitted,

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May 2012

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May 6, 2014

The Honorable Charles Schumer
Chairman
Committee on Rules and Administration
United States Senate
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules and Administration
United States Senate
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts:

On behalf of the American Bar Association (ABA), I write to commend you for holding the hearing entitled "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond" on April 30, 2014 and to request that this letter and its attachment be included in the hearing record.

The ABA has long been concerned with campaign finance and election issues and is a strong supporter of transparency in the political process. The overriding premise of these efforts has been to support candidate and citizen participation in the electoral process and increase public confidence through accountability and disclosure.

Most recently, we adopted policy supporting efforts to ensure consistent disclosure of political and campaign spending by entities making political expenditures, regardless of their tax status. The policy also urges Congress to require organizations not already required to do so by current law to disclose the amounts spent on electioneering communications and independent expenditures, as well as the sources of such funds. The full policy is attached for your review.

As you know, recent decisions by the Supreme Court in *Citizens United v. FEC* and *McCutcheon v. FEC* dismantled key components of our campaign finance framework, which will result in significant additional money pouring into the system and are bound to increase the public's concern over undue influence in governmental decision-making. In light of these developments, it will be critical to ensure that this additional money is not used in a way that circumvents contribution limits still in place and to ensure full and timely disclosure of all federal campaign contributions and expenditures. These actions will make our democracy more viable and strengthen our citizens' faith and trust in government.

Thank you for the opportunity to share our views. We look forward to working with the Committee on this and other important issues in the future.

Sincerely,

Thomas M. Susman

Attachment

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 11, 2013

RESOLUTION

RESOLVED, That the American Bar Association supports efforts to increase disclosure of political and campaign spending and urges Congress to require organizations that are not already required to do so by current law as interpreted and applied by the Federal Election Campaign Act to disclose (a) the source of funds used for making electioneering communications and independent expenditures as defined in federal campaign finance law, subject to such reasonable threshold limits as may be necessary to avoid infringing on any implicated Constitutional interests such as the right of free association, and (b) the amounts spent for such communications and expenditures, in public disclosure reports filed with the Federal Election Commission according to requirements under the Federal Election Campaign Act and regulations thereunder that are applied consistently without respect to the nature of the entity making the communication.

REPORT

The Supreme Court's landmark decision in *Citizens United v. Federal Election Commission*,[1] represents the most important campaign finance case in many years. The Court was presented with a non-profit corporation, partly funded by for-profit corporations, seeking to make what amounted to electioneering communications in violation of the Bipartisan Campaign Reform Act (BCRA) of 2002.[2] Invoking the First Amendment, the Court struck down several key provisions of BCRA including its ban on certain political spending by corporations and unions.

While *Citizens United* is rightly credited with fundamentally altering the campaign finance regime in this country, the Court left intact one key aspect of campaign finance regulation: the central role of disclosure. Indeed, the Court in *Citizens United* not only affirmed the constitutionality of broad disclosure requirements, it highlighted the existence of such disclosure as justification for its other holdings. But current campaign finance law – as interpreted by the Federal Election Commission (FEC) – falls far short of the disclosure practices assumed to exist by the Court. This is particularly true of the disclosure requirements applicable to 501(c)(4) non-profit corporations and some 527 political organizations. These contributions and expenditures represent an increasing portion of campaign spending, yet they remain largely hidden from public sight. This resolution addresses this gap; it does not concern the wisdom or constitutionality of direct regulation of campaign contributions and expenditures.

In focusing on the need for even-handed disclosure requirements, this resolution is of a piece with existing ABA policies.[3] Throughout the modern era of campaign finance regulation, the ABA has been an important and consistent voice in favor of thorough disclosure of campaign contributions and expenditures. The present resolution would simply apply those principles to entities that had not previously been engaged in political expenditures – but which collectively spent over $1 billion in the 2012 election cycle. Moreover, the thrust of the current resolution is not to advocate *more* disclosure per se, though that would of course be its effect. Rather, it urges *consistent* disclosure by entities making political expenditures, regardless of their tax status.

The *Citizens United* decision changed the role of money in political campaigns by opening the door to unlimited political spending by corporations and unions.[4] At the same time,

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[1] *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

[2] Pub. L. No. 107-155; 116 Stat. 81 (amending the Federal Election Campaign Act), codified at 2 U.S.C. § 431 *et seq.* BCRA is *also known as the McCain-Feingold Act.*

[3] The following ABA policies are relevant to and consistent with this resolution:

- August 1975 – Supports full and timely disclosure of campaign contributions and expenditures in excess of minimal amounts.
- August 1992 – Supports full, accurate, readily accessible, and timely disclosure of campaign contributions and expenditures.
- August 1998 – Urges that efforts be taken to ensure there is full disclosure of money spent in federal elections.
- July 2000 – Urges adoption by Congress and state and territorial legislatures of campaign finance reform legislation that strives to achieve, among other goals, full disclosure of all money raised and spent in federal, state, local, and territorial election campaigns.

[4] Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sep. 19, 2011, at A13, *available at* http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html.

eight Justices agreed that disclosure of the entities and people behind that spending was crucial to a well-functioning campaign finance system.[5] Indeed, not only did the Court uphold the disclosure requirements before it, its rationale for striking down prohibitions on spending *relied on* such requirements. As the Court stated: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[6] This emphasis is in keeping with a long series of campaign finance cases, including *Buckley v. Valeo*[7] *and McConnell v. FEC,*[8] which had also endorsed and upheld disclosure requirements, and on which Citizens United expressly relied.[9]

The Court's confidence in the transparency of political speech is, unfortunately, unwarranted. The disclosure regime instituted with the Bipartisan Campaign Reform Act has proven inadequate. It turns out to be relatively simple to remain anonymous while making political contributions or expenditures; the mechanisms of choice are 501(c)(4) non-profit corporations, 527 organizations, and so-called "super PACs." It is important to understand these entities and how they are used to skirt disclosure requirements.[10]

A 501(c)(4) entity is a non-profit corporation, operated "exclusively" for the promotion of social welfare.[11] Internal Revenue Service (IRS) regulations specify that: "An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."[12]

Although IRS regulations specifically exclude "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" from the category of activities that promote the social welfare,[13] a 501(c)(4) is allowed to engage in "some political activity, as long as that is not its primary activity."[14] While there is no clear test for determining when political activity becomes an organization's "primary activity,"

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[5] *Citizens United,* 130 S. Ct. at 914.

[6] *Id. See also id.* at 917 ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.").

[7] 424 U.S. 936 (1976).

[8] 540 U.S. 93 (2003).

[9] 130 S. Ct. at 913-14.

[10] Useful general discussions include Ellen P. Aprill, *Political Speech of Noncharitable Exempt Organizations after* Citizens United, 10 Election L. J. 363 (2011); Cory G. Kalanick, Note, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform,* 95 MINN. L. REV. 2254, 2261-62 (2011) [hereinafter Kalanick, *Blowing Up the Pipes*]; and Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing,* 10 Election L. J. 427 (2011).

[11] I.R.C. § 501(c)(4).

[12] Treas. Reg. § 1.501(c)(4).

[13] Treas. Reg. § 1.501(c)(4)(a)(2)(ii).

[14] *See* Rev. Rul. 81-95, 1981-1 C.B. 332 (interpreting I.R.C. § 501(c)(4) and Treas. Reg. § 1.501(c)(4)(a)(2)(ii) to allow 501(c)(4) organizations to engage in political campaign activities including financial assistance to candidates and in-kind contributions); IRS Website, Social Welfare Organizations, http://www.irs.gov/charities/nonprofits/-article/0,,id=96178,00.html.

the threshold is generally understood to be near 50% of total expenditures.[15] If an organization crosses that line, it will likely have to become a 527 entity and be subject to the rules of those organizations, described below.[16]

To the extent a 501(c)(4) engages in political campaign activities (taking care to avoid crossing the "primary activity" threshold), it is subject to some disclosure. These organizations must disclose political campaign activities on the annual 990 Form filed with the IRS, and this information is made public. However, contributions *to* a 501(c)(4) organization are not made public. Such an organization must report to the IRS contributions it receives of over $5,000, but that information does not become publicly available.[17]

The second important entity is the 527 organization. These tax-exempt "political organizations"[18] were originally designed to increase the transparency of political activity in the post-Watergate era. Since 2000, 527s have had to disclose to the IRS both contributions they receive and expenditures they make. These disclosures are extensive and can be found on the IRS web site. However, their value is significantly undercut by the fact that (a) the web site is not easily searchable and, more important, (b) the disclosure generally does not occur until *after* the relevant election.[19]

In the 2004 presidential cycle, several prominent 527s, including Swift Boat Veterans for Truth and America Coming Together, brought the 527 entity into the public consciousness. In response to the resulting pressure to classify 527s as "political committees" subject to regulation by the Federal Election Commission (FEC),[20] the Commission began reviewing these entities on a case-by-case basis.[21] The FEC decides if a 527 must register as a political committee based, in part, on a determination of whether the "major purpose" of the organization is to influence elections.[22] According to the FEC, "all political committees that register and file reports with the FEC are 527 organizations, but not all 527 organizations are required to file with the FEC."[23] The result is that some 527s fall under the FEC reporting regime, which is comparatively transparent and frequent, and some continue to fall under the IRS regime, which is neither. With the new, albeit limited, FEC involvement in 527 disclosure and the emergence of new funding mechanisms, pure 527 organizations appear to be falling out of favor.[24]

The final important entity is the super PAC. In brief, a super PAC is a 527 entity for tax purposes and a political organization for FEC purposes, subjecting it to FEC regulation. Super

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[15] B. Holly Schadler, *The Connection*, Alliance for Justice, 2006, at 11; Kalanick, *Blowing Up the Pipes*, *supra* note 10, at 2261-62.
[16] Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, The Dark Election of 2010 and Why Tax-Exempt Entities Should be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 79 (2010-2011) [hereinafter Torres-Spelliscy, *Hiding Behind the Tax Code*].
[17] *Id.* at 81.
[18] I.R.C. § 527.
[19] Torres-Spelliscy, *Hiding Behind the Tax Code*, *supra* note 16, at 82.
[20] In contrast to 527s being classified as "political organizations" for IRS purposes.
[21] Kalanick, *Blowing up the Pipes*, *supra* note 10, at 2254, 2256-61.
[22] Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. LEGIS. 471, 481-82, 503-6 (Summer 2008) (expressing frustration with the lack of clear guidance on which 527s must register with the FEC).
[23] FEC Website, Quick Answers to General Questions, http://www.fec.gov/ans/answers_general.shtml.
[24] Kalanick, *Blowing up the Pipes*, *supra* note 10, at 2260.

PACs emerged as a result of two key court decisions, *Citizens United* and the D.C. Circuit's decision in *SpeechNow.Org v. FEC*.[25] As stated above, *Citizens United* held that corporate independent expenditures on political speech were constitutionally protected. *SpeechNow*, applying the rationale of *Citizens United*, subsequently struck down contribution limits on organizations making independent expenditures.[26] The result of these rulings was the creation of Independent Expenditure PACs ("IE-PACS"), more commonly known as super PACs, which can accept unlimited corporate or union money for the purposes of making independent expenditures, but cannot funnel that money directly to federal candidates.

Super PACs are regulated by the FEC and are subject to the same reporting requirements as other PACs. This consists mainly of quarterly or monthly reports to the FEC with detailed information regarding contributions and disbursement totals, disbursement purposes, and donor information.[27] Individual independent expenditures must be reported more frequently, usually within 48 hours of the expenditure.[28]

In practice, a donor – be it a person, a corporation, or a union – wishing to remain anonymous can make a donation to a 501(c)(4), which can then give the money to a super PAC, which can then make an independent expenditure to influence a political campaign. The super PAC will disclose *its* donor, the non-profit, in its regular FEC filings, effectively masking the true source of the funds.

These arrangements exist across the political spectrum. For example, Karl Rove and Ed Gillespie founded American Crossroads, a super PAC, which is affiliated with the conservative Crossroads GPS, a 501(c)(4); former White House Deputy Press Secretary Bill Burton founded a super PAC, Priorities USA Action, which is affiliated with a 501(c)(4), the liberal Priorities USA.[29] Comedian Stephen Colbert, who has been mining campaign finance issues for television humor, exemplified and lampooned this structure when he founded a super PAC, "Americans for a Better Tomorrow, Tomorrow," and a 501(c)(4), "Anonymous Shell Corporation," with the latter's sole function being to funnel anonymous funds to the former.[30]

The upshot of these arrangements is that the donors to the non-profit are never publicly revealed, as long as the non-profit maintains its status as a 501(c)(4) and does not slip into 527 status by allowing political activity to become its "primary activity." However, the IRS will not audit an organization while its tax year is still open -- essentially, until the organization files all appropriate paperwork for that tax year. In effect, this allows for a major lag in any reporting, especially in the first year of an organization's existence.

For example, assume a hypothetical 501(c)(4) organization was formed in July 2010,

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[25] SpeechNow.Org v. Federal Election Commission, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).
[26] *Id.;* 2 U.S.C § 431(17) (defining "independent expenditure as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents").
[27] FEC Website, 2011 Reporting Dates, http://www.fec.gov/info/report_dates_2011.shtml#frequency.
[28] *Id.*
[29] Joshua Boak, *Enter the Era of Super PACs*, CAMPAIGNS & ELECTIONS, July/Aug 2011, at 33-4.
[30] Justin Sink, *Colbert Group Creates Shell Corporation to Lampoon Karl Rove's Groups*, THE HILL, Sep. 30, 2011, *available at* http://thehill.com/video/in-the-news/184755-colbert-creates-shell-corporation-to-lampoon-rove-money-laundering.

early enough to be involved in the 2010 midterm elections. By way of several easily obtained IRS filing extensions, the organization's first public disclosure would not be required until May 2012, with its first tax year remaining "open."[31] Once the tax year closed, the IRS would have to undertake an investigation and determine whether the organization failed the primary purpose test. By the time any investigation into the organization's purpose could be undertaken, its effect on the 2010 election would be long over and the organization itself could be dissolved.[32] In fact, it is not unreasonable to imagine a scenario where the organization's involvement in the *2012* election could have been complete before any meaningful action was taken by the IRS.

This Resolution recommends bringing disclosure into line with the ideal invoked by the Supreme Court in *Citizens United* by placing all political organizations and all political spending under the same disclosure regime, regardless of the type of organization or its tax status.[33] This can best be accomplished through two straightforward changes. First, "campaign expenditure" should be defined as any contribution, disbursement, or, importantly, transfer related to making an electioneering communication or independent expenditure. Second, any group making a campaign expenditure should be subject to the disclosure requirements that currently apply to PACs and other political committees.[34] Uniform definitions and disclosure requirements would greatly simplify the current hodgepodge of entities making political expenditures and the myriad rules that govern them. More important, these disclosure requirements would ensure actual, across-the-board transparency.

Consider the disclosures that would have occurred under this regime in the 2012 federal election cycle. All covered entities would have filed a mid-year report covering January through June 2011 on July 31, 2011, and a year-end report covering July through December on January 31, 2012.[35] Monthly filings would have commenced on February 20, 2012, with a report covering January, and would have continued through an October 20 report, which would have covered September 2012. Prior to the general election, entities would have been required to file a pre-election report on October 25, covering the first half of that month. Thirty days after the election, on December 6, 2012, a post-election report would have been due. Finally, on January 31, 2013, a year-end report would have been due.[36] Throughout the two-year cycle, any electioneering communications amounting to $10,000 in the aggregate[37] would have triggered an

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[31] That public disclosure would consist of IRS Form 990, which would not reveal any donor information.
[32] *Id.*
[33] The "DISCLOSE Act," passed by the House in 2010 and reintroduced in 2012 by Rep. Chris Van Hollen, is the closest that Congress has come to this approach. *See* H.R. 4010, The Democracy Is Strengthened by Casting Light on Spending in Elections Act, 112th Cong. (2012), *available at* http://vanhollen.house.gov/UploadedFiles/DISCLOSE_-Bill_Text_020912.pdf
[34] Currently, PACs (including super PACs) can chose to disclose on either a monthly or quarterly basis. Selecting quarterly reporting requires additional reports before and after primary, general, and special elections, which can be onerous if a PAC operates in multiple states. Most major super PACs operating in the 2012 cycle have selected monthly reporting. Federal Election Commission, Campaign Guide: Corporations and Labor Organizations (2007), *available at* http://www.fec.gov/pdf/colagui.pdf; *see supra* notes 27-28.
[35] FEC Website, 2011 Reporting Dates, http://www.fec.gov/info/report_dates_2011.shtml.
[36] FEC Website, 2012 Reporting Dates, http://www.fec.gov/info/report_dates_2012.shtml.
[37] 2 U.S.C. § 434(f)(3) (defining electioneering communication as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office is made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the

obligation to report within 24 hours.[38] Additionally, independent expenditures[39] of more than $10,000 would have to have been disclosed within 48 hours, and within 20 days of an election, independent expenditures of $1,000 or more would have to have been disclosed within 24 hours.[40]

These disclosure requirements are meaningful and enjoy wide, bipartisan support. There is no justification for applying them only to a portion of functionally indistinguishable expenditures or practically fungible entities.

This Resolution endorses uniform disclosure rules for all entities that spend on elections. It takes no position on, and would not affect the First Amendment holdings of, *Citizens United.* Corporate, union, and non-profit money could and would still to flow to political organizations; it would simply have be disclosed to the FEC and the public in timely and uniform fashion. This is precisely the world envisioned by the Court in *Citizens United*, one in which "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[41]

The resolution also does not take a view on whether, consistent with the First Amendment, Congress could mandate the disclosure of all individual contributions, regardless of size, to any sort of entity that engages in some amount of political activity. In deference to those who believe that potential freedom of association concerns may be implicated by such legislation,[42] the resolution recommends that disclosure requirements be "subject to such reasonable threshold limits as may be necessary to avoid infringing on any implicated Constitutional interests such as the right of free association."

Respectfully submitted,
James W. Conrad, Jr.
Chair, Section of Administrative Law and Regulatory Practice
February 2013

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candidate; and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate").

[38] FEC Website, 2012 Reporting Dates,http://www.fec.gov/info/report_dates_2012.shtml#ec.

[39] *See supra* note 26.

[40] FEC Website, 24 and 48 Hour Reports of Independent Expenditures for 2012, *available at* http://www.fec.gov/info/charts_ie_dates_2012.shtml.

[41] *Citizens United*, 130 S. Ct. at 916.

[42] *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that associational rights of members of nonprofit organization would be impermissibly infringed by state requiring disclosure of membership list in order to conduct business within the state).

Joint Statement of

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and

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Josiah H. Blackmore II/Shirley M. Nault Professor of Law
Capital University Law School

Submitted to the Committee on Rules and Administration
United States Senate
April 30, 2014

Mr. Chairman and members of the Committee, thank you for the opportunity to present our views on the hearing titled, "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond." We respectfully request that our statement be entered into the public record.

The recent Supreme Court decision in *McCutcheon v. Federal Election Commission*[1] struck down an aggregate limit on how much an individual could give to all federal political candidates and party committees in an election cycle. For this, the decision has actually been called the "worst decision since Dred Scott."[2] Yes, worse than *Buck v. Bell*,[3] or *Plessey v. Ferguson*.[4]

Yet, less than forty years ago, there were no limits at all on individual contributions to candidates, except for limited restrictions on government employees and contractors. The Committee should keep in mind that without limits on speech, voters elected FDR, Truman, Eisenhower, Kennedy, and Johnson as president. Was major legislation such as the Voting Rights Act, Medicare, and the Civil Rights Act the product of a corrupt system, given that individual contributions were not only unlimited in the aggregate, but unlimited to any one candidate? Of course not.

[1] 572 U.S. __, No. 12-536 (Apr. 2, 2014).
[2] Rebecca Shabad, "McCain predicts 'major scandal' on campaign finance," *The Hill*. Retrieved on April 28, 2014. Available at: http://thehill.com/blogs/ballot-box/campaign-committees/204228-sen-mccain-on-campaign-finance-rulings-i-predict-a-major (April 23, 2014). ("[McCain] said the two recent Supreme Court rulings on the issue — one released earlier this month and one from 2010 — were 'the worst since Dred Scott.'") (discussing *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that African-Americans, whether they were slaves or free, were not U.S. citizens)).
[3] 274 U.S. 200 (1927) (upholding a law providing for forced sterilization of "imbeciles").
[4] 163 U.S. 537 (1896) (upholding segregation laws).

Consider the role of this system that allowed unlimited contributions to candidates and its impact on the 1968 Democratic primary and the debate on the Vietnam War. In late November 1967, Minnesota Senator Eugene McCarthy decided to challenge President Lyndon Johnson for the Democratic nomination. At first, people thought McCarthy's campaign would be quixotic. But with no contribution limits, Senator McCarthy assembled a well-funded campaign from a small number of rich donors who shared his opposition to the Vietnam War. McCarthy concentrated on New Hampshire's primary, and the number one issue in his campaign was to end the war.

His rich backers gave the equivalent of almost $10 million in today's dollars to fund the campaign, an enormous amount at the time. As a result of his showing in New Hampshire, McCarthy forced President Johnson out of the race, a feat not duplicated since the enactment of contribution limits.

Attached is a copy of an article by *Washington Post* columnist Richard Cohen that describes what happened in the McCarthy campaign in more detail.

Today, at least a dozen states, including many of the least corrupt[5] and best managed[6] states in the nation, have no limits on individual contributions to candidates or parties. Seen in this light, the attention and the tone of response to *McCutcheon* is rather remarkable. Moreover, even before *McCutcheon,* the substantial majority of U.S. states, including several represented by members of this Committee, placed no aggregate limit on individual giving to political candidates and committees. Yet, this was so uncontroversial that even Americans who closely follow campaign finance would have been hard pressed to name any of these states. There is no evidence that states without aggregate limits are more poorly governed, suffer more political corruption, or that their citizens sense a greater "appearance of corruption," than any of their neighbors. In fact, the evidence seems to indicate that the states without aggregate limits have less corruption and better management.[7]

The Committee has expressed some interest in using this hearing to explore new disclosure requirements for spending on politics and public affairs, and with that in mind, it is worth noting that the *McCutcheon* ruling is disclosure's friend. By freeing donors to contribute more directly to candidates and party committees, one likely effect of *McCutcheon* will be to

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[5] Adriana Cordis and Jeff Milyo, "Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?" Mercatus Center at George Mason University. Retrieved on April 28, 2014. Available at: mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (April 2013); Matt Nese and Luke Wachob, "Do Lower Contribution Limits Decrease Public Corruption?," Center for Competitive Politics' Issue Analysis No. 5. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf (August 2013).

[6] Matt Nese and Luke Wachob, "Do Lower Contribution Limits Produce 'Good' Government?," Center for Competitive Politics' Issue Analysis No. 6. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (October 2013); Matt Nese, "Do Limits on Corporate and Union Giving to Candidates Lead to 'Good' Government?," Center for Competitive Politics' Issue Analysis 7. Retrieved on April 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf (November 2013).

[7] Matt Nese, "Aggregate and Proportional Limits in the States: Have they Reduced Corruption or Promoted Better Government?," Center for Competitive Politics' Issue Analysis No. 9. Retrieved on April 29, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/02/2014-04-24_Issue-Analysis-9_Aggregate-And-Proportional-Limits-In-The-States-Have-They-Reduced-Corruption-Or-Promoted-Better-Government.pdf (April 2014).

encourage donors to give directly to candidates and party committees, where their contributions are subject to the most rigorous compulsory disclosure rules, rather than to organizations that may have fewer disclosure requirements. So, *McCutcheon* is good for disclosure advocates.

The alleged disclosure problem itself, as we will outline below, is routinely overstated. Data from the Federal Election Commission and the Center for Responsive Politics show that just four percent of political expenditures in 2012 were financed by groups that did not itemize their donors. And in all cases, the name of the group making the expenditures was disclosed (at least if they were operating legally).

Any legislative response to *McCutcheon,* and new laws regulating the discussion of public affairs generally, must be grounded in a realistic understanding of what the law actually is; it must be based on a realistic assessment of the effects it has in practice; and it must take into account the actual costs and benefits of added compulsory disclosure, eschewing loaded terms like "dark money" that to do little to enlighten and much to obscure those costs and benefits.

McCutcheon v. FEC

I. Understanding the rationale behind the Court's plurality opinion in McCutcheon *is crucial to understanding the implications of the decision.*

McCutcheon invalidated the federal aggregate limit on contributions by individuals to candidate campaigns and political committees. In his controlling opinion, Chief Justice Roberts summarized: "we conclude that the aggregate limits on contributions...intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'"[8]

McCutcheon is just the most recent in a long line of cases holding that contribution limits implicate fundamental First Amendment interests.[9] When Congress first created substantial regulation of campaign finance in the 1970s, the unanimous Supreme Court in *Buckley v. Valeo* identified campaign contributions as a component of the "right to associate," and therefore determined that limits must be subject "to the closest scrutiny."[10] In *McCutcheon,* the Chief Justice simply noted that these "rights are important regardless whether the individual is, on the one hand, a 'lone pamphleteer[] or street corner orator[] in the Tom Paine mold,' or is, on the other, someone who spends 'substantial amounts of money in order to communicate [his] political ideas through sophisticated' means."[11]

Aggregate contribution limits are a substantial restraint on the rights of speech and association. The opinion explains: "An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a 'modest restraint' at all. The Government may no more restrict how many candidates or causes a donor may support than it

[8] *McCutcheon*, slip op. at 39-40 (Roberts, C.J. for the plurality) (quoting *.Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam)).
[9] *Id.* at 7 (Roberts, C.J. for the plurality); *see also Buckley*, 424 U.S. at 14.
[10] *Buckley*, 424 U.S.at 25 (1976) (citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)).
[11] *McCutcheon*, slip op. at 14-15 (Roberts, C.J. for the plurality) (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)) (brackets in *McCutcheon*).

may tell a newspaper how many candidates it may endorse."[12] The Chief Justice continues: "To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights."[13]

Let's take a hypothetical close to home. There are nine members from the Democratic Party, and one member who caucuses with the Democrats on the Senate Rules Committee: Senator Schumer from the Empire State (NY), Senator Feinstein from sunny California, Senator Durbin from Illinois (the Land of Lincoln), Senator Pryor from the Land of Opportunity and Hope (AR), Senator Tom Udall from the Land of Enchantment (NM), Senator Warner from the Commonwealth of Virginia, Senator Leahy from the Green Mountain State (VT), Senator Klobuchar from the Land of Ten Thousand Lakes (MN), Senator Angus King from the Pine Tree State (ME), and Senator Walsh from Big Sky Country (MT). A contributor may think all ten are doing a fantastic job on the Senate Rules Committee – overseeing elections and insuring the integrity of the Upper House. Therefore, this person may wish to give the maximum they can by law to those re-election campaigns.

But what if this contributor also likes Senator Mary Landrieu's work on energy issues? Why must this contributor choose supporting good governance of the Senate over energy? Giving to Senator Landrieu in the same manner as giving to Senator King will not corrupt either. Yet the law used to make such a contributor choose which was more important to our contributor. The Supreme Court in *McCutcheon* recognized the absurdity of this limitation and held that it could not withstand "the closest scrutiny."

Some have attempted to dismiss the First Amendment interests at stake by arguing that relatively few Americans can afford to contribute the legal maximum to more than a handful of candidates. Leaving aside that constitutional rights may not be abrogated simply because they have an immediate application to a minority of citizens, it seems fair to say that far more Americans have the financial wherewithal to make political contributions than own newspapers or broadcast outlets. Would any member of this committee support the hypothetical law suggested by the *McCutcheon* Court – a limit on the number of candidates a newspaper or broadcast station could endorse – on the grounds that very few Americans own newspapers or broadcast stations?

II. For those who worry about political contributions to 501(c) groups, the McCutcheon *decision will actually result in increased contributions to primarily political organizations including candidates and political parties.*

Those who have expressed concern about disclosure of political spending should be pleased with the *McCutcheon* decision. The likely effect of *McCutcheon* will be to place more money into the compulsory disclosure system. By allowing for more limited contributions to candidate campaigns and political parties, *McCutcheon* will direct money away from organizations with fewer disclosure obligations than those imposed on candidate committees and

[12] *Id.* at 15 (Roberts, C.J. for the plurality).
[13] *Id.* at 16 (Roberts, C.J. for the plurality) (citing *Davis v. Federal Election Comm'n*, 554 U. S. 724, 739 (2008)).

political parties.[14] While the *McCutcheon* Court acknowledged that "disclosure requirements burden speech," a proper disclosure regime is less burdensome than limits on contributions.[15] *McCutcheon's* effect will be to drive money previously going to independent spenders to campaigns and parties, where "modern technology" provides "massive quantities of information [that] can be accessed at the click of a mouse."[16]

Websites like OpenSecrets.org and FollowTheMoney.org amass the data from candidate contribution reports and make it searchable, and thereby easily accessible.[17] By pushing political spending back towards direct contributions, *McCutcheon* will encourage more disclosure as contributors give directly to candidates, parties, and PACs, rather than using alternative avenues such as 501(c) organizations.[18] America will know exactly who supports each of you, should you seek re-election.

III. Worries over campaign contributions in the absence of an aggregate limit are misguided given existing law and historical trends.

It is important to remember that the ban on corporate and union contributions to candidates remains in place after *McCutcheon*.[19] Likewise, the limits on how much a contributor may give to a PAC, candidate, or party committee remain in place.[20] Nor can someone create multiple PACs to serve as conduits for their political spending.[21] Anti-earmarking laws and regulations still have full effect.[22] The *McCutcheon* Court saw all of these as protections that made the aggregate limits obsolete.[23] Indeed, the Chief Justice agreed with Acting Assistant Attorney General Mythili Raman that we should "anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted."[24]

Before proclaiming the doom of American democracy, it must again be emphasized that historically the United States has placed no limits at all – aggregate or otherwise – on individual contributions to candidates and parties. Broad federal limits on individual contributions to candidates were not imposed until 1974.[25] The specific aggregate limits struck down in *McCutcheon* were a creation of *this* millennium.[26] A person born in the year those aggregate

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[14] As the Chief Justice explained, "disclosure of contributions minimizes the potential for abuse of the campaign finance system...by exposing large contributions and expenditures to the light of publicity." *McCutcheon*, slip op. at 35 (Roberts, C.J. for the plurality).
[15] *Id.* at 35-36.
[16] *Id.* at 36.
[17] *Id.*
[18] *See id.*
[19] 2 U.S.C. § 441b.
[20] 2 U.S.C. § 441a(a)(1)(C).
[21] 2 U.S.C. § 441a(a)(5); *see also* 11 C.F.R. § 100.5(g)(4).
[22] 2 U.S.C. § 441a(a)(8); *see also* 11 C.F.R. §§ 110.6(b)(1) (broadly defining earmarking) and 100.1(h) (regulating earmarking).
[23] *McCutcheon*, slip op. at 12-13 (Roberts, C.J. for the plurality).
[24] *McCutcheon*, slip op. at 26 n. 9 (Roberts, C.J. for the plurality) (quoting Statement of Mythili Raman, Hearing on Current Issues in Campaign Finance Law Enforcement before the Subcommittee on Crime and Terrorism of the Senate Committee on the Judiciary, 113th Cong., 1st Sess., 3 (2013)).
[25] Federal Election Campaign Act of 1974 Pub. L. 93-443 § 101, 88 Stat. 1263 (1974).
[26] Bipartisan Campaign Reform Act Pub. L. 107-155 § 307(b), 116 Stat. 93, 102-103 (2002) (codified at 2 U.S.C. § 441a(a)(3)).

contribution limits were enacted is not even old enough to drive a car.[27] Aggregate limits are a recent, radical addition to our election laws, and the Court found they could not be justified under the closest scrutiny.

IV. Contribution limits have lagged inflation and should be increased.

On an inflation-adjusted basis, current contribution limits to campaigns, parties, and PACs are substantially lower than the first caps on individual giving imposed in 1974. The Federal Election Campaign Act Amendments of 1974 limited what an individual could contribute to a candidate to $1,000 per election.[28] Using the Department of Labor's Bureau of Labor Statistics inflation calculator, $1,000 in 1974 is equal to $4,792.96 today.[29] Yet, today the individual base contribution limit sits at *barely half* (54 percent) its value in 1974 – just $2,600.[30] Likewise, in 1974, an individual could contribute $5000 to a PAC, and PACs could contribute $5,000 to a candidate.[31] Neither number has ever been adjusted for inflation. Were they adjusted for inflation, an individual could contribute $23,964.81 to a PAC, and a PAC could contribute that same amount to a political party.[32] Also unadjusted for inflation is the 1974 limit of $15,000 on PAC contributions to political parties. Adjusted for inflation, this number now ought to be $71,894.42.[33] In other words, at every level, the amount that may be contributed directly to a candidate or campaign is today substantially lower than the original limits imposed in 1974.[34] The substantial effective decline in the ability of individuals to contribute to parties and candidates has not alleviated either the reality or the appearance of corruption, but it undoubtedly has required officeholders and candidates to spend more time fundraising, and driven more money into channels with less onerous disclosure requirements. Limits on individual giving are, in fact, disclosure's enemy. Despite this substantial decline in the ability of a contributor to associate with a candidate, the *McCutcheon* Court upheld the base individual contribution limits.[35]

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[27] An earlier system of aggregate limits was first imposed in the 1974 FECA Amendments. That limit was $25,000 in total political contributions per year, but contributions made in connection with an election were considered made in the year of the election. Adjusted for inflation, $25,000 would have allowed annual contributions of $119,824 in 2014, roughly double the total cap imposed in the Bipartisan Campaign Reform Act of 2002, although some of that amount would have to go to party activities not directly in connection with an election.

[28] Federal Election Campaign Act of 1974 Pub. L. 93-443 § 101, 88 Stat. 1263 (1974).

[29] "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1000&year1=1974&year2=2014 (2014).

[30] 2 U.S.C. § 441a(a)(1)(A) (indexed for inflation per 11 C.F.R. § 110.5(b)(3)-(4) at Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, Federal Election Commission, 78 Fed. Reg. 8530, 8532 (Feb. 16, 2013)).

[31] Federal Election Campaign Act of 1974 § 101, 88 Stat. at 1263.

[32] "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5000&year1=1974&year2=2014 (2014).

[33] "CPI Inflation Calculator," Bureau of Labor Statistics. Retrieved on April 24, 2014. Available at: http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=15000&year1=1974&year2=2014 (2014).

[34] There is a scenario where the post-McCutcheon contribution limits increased over what was available in 1974. A joint fundraising committee made up of the three principle components of the Democratic Party – the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee – can now jointly raise $97,200. If we were under the 1974 limits, adjusted for inflation, it would be $95,859.23. That's a difference of $1,340.77. In the large sums spent on elections, $1,341 spread over three arms ($446.92) of the national party is hardly corrupting.

[35] *McCutcheon*, slip op. 4-5 (describing with approval the limits); slip op. at 37 (referring to the anticorruption interest of the base limits) (Roberts, C.J. for the plurality). At some point, excessively low contribution limits will invite litigation to strike those limits down. *See also Randall v. Sorrell*, 548 U.S. 230 (2006) (holding that Vermont's state limits were unconstitutionally low, in that they prevented candidates and parties from raising funds needed to effectively spread their messages). A Congress that seeks to preserve contribution limits in some form would do well to note the warning of *Randall v. Sorrell*.

Campaign Finance Disclosure and the Hyperbolic Rhetoric of "Dark Money"

I. An understanding of existing campaign finance disclosure regulations highlights an already over-regulated area of the law and downplays the need for additional disclosure.

In the wake of the *McCutcheon* decision, those who wish to further regulate political speech have renewed calls for even more mandatory disclosure, continuing a pattern established after the decisions of the United States Supreme Court in *Citizens United v. Federal Election Commission*,[36] and of the United States Court of Appeals in *SpeechNow.org v. Federal Election Commission*.[37] However, to assess these demands, it's crucial to examine current campaign finance disclosure regulations as well as the recent opinions of the High Court on the issue.

The claim by those demanding more regulation has been that the public lacks information on the sources of vast amounts of political independent spending. This concern, while serious if true, has been artificially ramped up by many mistaken comments in the media about "secret" contributions to campaigns, as well as a widely held, but mistaken belief that under *Citizens United*, corporations and unions may now contribute directly to candidate campaigns. In any case, information about political donors, it is believed, can help guard against officeholders becoming too compliant with the wishes of large spenders, and provide information that might be valuable to voters in deciding for whom to vote and how to evaluate political messages.

In particular, there have been concerns that non-profit organizations formed under Section 501(c)(4) of the Internal Revenue Code have been engaging in extensive political campaigns using "dark money." This issue, however, is not new. Express advocacy in favor of or against candidates was allowed for certain types of 501(c)(4) organizations even before *Citizens United*, as a result of the Supreme Court's ruling in *Federal Election Commission v. Massachusetts Citizens For Life ("MCFL")*.[38] That decision allowed qualified non-profit corporations to conduct express advocacy through independent expenditures. These groups were significant and growing before the *Citizens United* decision and included groups such as the League of Conservation Voters and NARAL.

In addition, even groups that did not qualify for the exemption pursuant to *MCFL* could and did run hard-hitting issue campaigns against candidates. For example, in 2000, the NAACP Voter Action Fund, a non-profit social welfare group organized under Section 501(c)(4) of the tax code, ran the following ad:

> *Renee Mullins (voice over):* I'm Renee Mullins, James Byrd's daughter. On June 7, 1998 in Texas my father was killed. He was beaten, chained, and then dragged miles to his death, all because he was black. So when Governor George W. Bush refused to support hate-crime legislation, it

[36] 558 U.S. 310 (2010) (allowing corporations and unions to make independent expenditures in political campaigns from general treasury funds).
[37] 599 F.3d 686 (en banc, 2010) (allowing independent expenditures to be made from pooled funds not subject to PAC contribution limits).
[38] 479 U.S. 238 (1986).

> was like my father was killed all over again. Call Governor George W. Bush and tell him to support hate-crime legislation. We won't be dragged away from our future.

This thirty-second TV spot, featuring graphic reenactment footage, began running on October 25, 2000, just a few days before the 2000 presidential election.[39]

This ad was perfectly legal to run at any time prior to 2003, with no donor disclosure, and remained legal to run under current disclosure laws more than 30 days before a primary or 60 days before a general election between 2003 and 2007. It probably also could have been run, with no donor disclosure, at any time after the Supreme Court's 2007 decision in *Wisconsin Right to Life v. Federal Election Commission*.[40] In short, political spending by 501(c) organizations is nothing new, and those organizations have never been required to disclose the names of their donors and members unless donors gave specifically to support a particular independent expenditure.

It should also be noted that neither the *Citizens United* nor *SpeechNow.org* decisions struck down any disclosure laws; nor has Congress or the FEC loosened any disclosure rules in place at the time those two decisions were issued in the spring of 2010. There has been no change in the laws governing disclosure of political spenders and contributors.

Despite heavy media focus in 2012 on "dark money," "secret money," and "undisclosed spending," in fact, the United States currently has more political disclosure than any time in its history. Candidates, political parties, PACs, and Super PACs disclose all of their donors beyond the most *de minimis* amounts. This disclosure includes the name of the group, individual, or other entity that is contributing, the date on which it occurred, and the amount given.[41] Indeed, these entities also report all of their expenditures.

Current federal law also requires reporting of all independent expenditures over $250, and of "electioneering communications" under 2 U.S.C. § 434(f). 501(c)(4) social welfare organizations, such as the National Rifle Association and the Sierra Club, must disclose donors who give money earmarked for political activity. All of this information is freely available on the FEC's website.

II. Current law requires disclosure of the spender on all campaign advertising.

Furthermore, all broadcast political ads (like, in fact, all broadcast ads, political or not) must include, within the ad, the name of the person or organization paying for the ad. Thus, it is something of a misnomer to speak of "undisclosed spending." Rather, more precisely, some ads are run with less information about the spender, and contributors to the spender, than some might think desirable. This recognition is important to understanding the scope of the issue and the importance of particular measures that seek to require more disclosure.

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[39] *See* Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

[40] 551 U.S. 449 (2007).

[41] *See* 2 U.S.C. §434(b) and (c).

According to the FEC, approximately $7.3 billion was spent on federal races in 2012. Approximately $2 billion, or less than 30 percent, was spent by "outside groups" (that is, citizens and organizations other than candidate campaign committees and national political parties).[42] According to figures from the Center for Responsive Politics, approximately $311 million was spent by organizations that did not disclose their donors.[43] That is just under 4.3 percent of the total. $311 million sounds like a lot of money – four percent of total spending on federal races doesn't sound like much money at all.

Moreover, that four percent tends to overstate the issue because many of the largest 501(c) spenders are well-known public groups. Only 28 organizations that did not publicly disclose all of their donors spent more than $1 million on all independent expenditures in 2012. Most of these were well-known entities, including the U.S. Chamber of Commerce, the Humane Society, the League of Conservation Voters, NARAL Pro-Choice America, the National Association of Realtors, the National Federation of Independent Business, the National Rifle Association, and Planned Parenthood. Several of these groups also spent substantial funds on issue ads or express advocacy under the *MCFL* exemption, even before *Citizens United*, suggesting that the growth in "undisclosed" spending is even less than many who favor more regulation lead the public to believe.

Even many spenders that are not historically well-known organizations on the list are quite familiar to anyone who remotely follows the news, such as Crossroads GPS and Americans for Prosperity. Indeed, many of these organizations' funders are well-known, even as the organizations themselves do not formally disclose their names. Does anyone on this Committee not know that Tom Steyer provided substantial funding to NextGen Climate Action, a 501(c)(4)? If not, a Google search of the organization's name will provide that information in a matter of seconds.[44]

Furthermore, data from the Center for Responsive Politics shows that the percentage of independent spending by organizations that do not disclose their donors appears to have declined substantially (by approximately 25 percent) in 2012 from 2010. This is not surprising. Because 501(c) organizations may not have political activity as their primary purpose, they must conduct their activities to stay within the IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is political activity faces the effective equivalent of an over 50 percent tax on his or her political donations by giving to a 501(c) organization rather than to a "Super PAC," which fully discloses its donors. This is because the group must primarily spend its funds on programs other than political activity, as defined in Section 527 of the tax code. As a result of this inefficiency, it is doubtful that spending by 501(c) organizations will increase

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[42] Jake Harper, "Total 2012 election spending: $7 Billion," Sunlight Foundation. Retrieved on April 28, 2014. Available at: http://sunlightfoundation.com/blog/2013/01/31/total-2012-election-spending-7-billion/ (January 31, 2013); Jonathan Salant, 2012 Elections Cost Will Hit $7 Billion, FEC Chair Weintraub Says," *Bloomberg*. Retrieved on April 28, 2014. Available at: http://go.bloomberg.com/political-capital/2013-01-31/fec-head-weintraub-says-2012-elections-cost-will-hit-7-billion/ (January 31, 2013).

[43] "Outside Spending by Disclosure, Excluding Party Committees," Center for Responsive Politics. Retrieved on April 29, 2014. Available at: http://www.opensecrets.org/outsidespending/disclosure.php.

[44] Nicholas Confessore, "Financier Plans Big Ad Campaign on Climate Change," *The New York Times*. Retrieved on April 29, 2014. Available at: http://www.nytimes.com/2014/02/18/us/politics/financier-plans-big-ad-campaign-on-environment.html?_r=0 (February 17, 2014).

substantially as a percentage of independent or total spending. Furthermore, if the group does not conduct its activities in a manner consistent with IRS regulations, it could possibly be reclassified as a Section 527 organization by the Agency and be forced to publically disclose its donors on nearly the same schedule as a political committee, except that the reports are on IRS Form 8872 and listed on the IRS website.

Lastly, it bears repeating that, contrary to claims by many, the Supreme Court's ruling in *Citizens United* did not change the prohibition on political activity by non-resident aliens and foreign corporations. Specifically, according to 2 U.S.C. § 441(e), any "partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country" is prohibited from contributing in elections. Indeed, despite the President's expressed fear that the decision would allow "foreign corporations"[45] to make expenditures in elections, not only did *Citizens United* specifically not address that longstanding prohibition, but the Supreme Court has summarily reaffirmed that ban since.[46]

III. According to Justice John Paul Stevens in McIntyre, *"[a]nonymity is a shield from the tyranny of the majority."*

The 1995 decision in the case *McIntyre v. Ohio Elections Commission,* where the U.S. Supreme Court upheld the claim of a right to anonymously publish and distribute pamphlets opposing a school tax that was on the ballot, illustrates how disclosure can impact First Amendment freedoms.[47] Justice John Paul Stevens wrote the majority opinion in *McIntyre*, including this statement: "Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular."[48]

This opinion explains several of the many benefits to free speech from anonymity:

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S., at 64. Great works of literature have frequently been produced by authors writing under assumed names. [footnote omitted] Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. [footnote omitted] Accordingly, an author's decision to

[45] President Barack Obama, "Remarks by the President in State of the Union Address," The White House, Office of the Press Secretary. Retrieved on April 28, 2014. Available at: http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address (January 27, 2010).
[46] *See Bluman v. Federal Election Commission,* 132 S. Ct. 1087 (2012).
[47] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).
[48] *Id.* at 357.

> remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.[49]
>
> The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.*, at 64. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. *Id.*, at 64-65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in Talley related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. [footnote omitted] This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.[50]

IV. Added disclosure rules will have significant costs and would often lead to junk disclosure.

Given that non-itemized donor expenditures are such a small part of the whole, why not require disclosure of that four percent of spending? The answer is that disclosure does impose costs, and such disclosure will also mislead the public. Any public policy finds its costs increasing and its benefits decreasing as it aims for 100 percent achievement of its goal. To take one example, some increase in spending on police, prisons, and courts is likely to reduce crime, but eliminating all crime – with police on every corner and prisons stuffed with petty offenders – is not worth the cost.

When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c) membership organizations, unions, and trade associations. As a result, if a group decides to make

[49] *Id.* at 341-342.
[50] *Id.* at 342-343.

political expenditures as a small part of the organization's multiple activities, many of its donors could potentially be made public, regardless of whether their donations were earmarked for a political expenditure. People give to membership organizations and trade associations not because they agree with everything the organization does, or particular political positions it takes, but because on balance they think it provides a voice for their views. To publicly identify contributing individuals with expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors, and misleads the public. It is "junk disclosure" – disclosure that serves little purpose other than to provide a basis for official or private harassment, and that may actually misinform the public.

There are also serious practical problems. As one of us has explained in an academic publication:

> Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a $100,000 dues payment to the National Business Chamber ("NBC") in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises $350,000 specifically for political activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers $1 million – the $350,000 it raised specifically for political activity, the $350,000 from the NBC, and another $300,000 from general dues – to the Committee for a Better State ("CBS"), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves $200,000 for its own direct spending, and then transfers $800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends $3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?
>
> What should be immediately obvious to any observer is that the question of "disclosure" is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme's initial payment to NBC?... By the time we reach Acme Industries, is the information useful – or even truthful? Would it be truthful to say that Acme Industries is "responsible" or "endorses" messages on a state ballot initiative made by the State Jobs Alliance far down the road?[51]

[51] Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257 (2012). Draft available at: http://www.ncsl.org/documents/summit/summit2013/online-resources/2013_smith_disclosure.pdf (March 26, 2013).

V. The Supreme Court minority's views on campaign finance law pose a significant threat to the First Amendment.

Having commented on the Supreme Court majority opinions in recent campaign finance cases, a few words are in order as regards the dissenting opinion in *Citizens United.* While this brief discussion only scratches the surface, it serves as a warning as to what might occur were the current minority view emerge as a majority view.

The primary dissent in *Citizens United*, authored by Justice John Paul Stevens, said it was "profoundly misguided"[52] to consider the cases under the First Amendment because corporations do not retain First Amendment rights and interests. This is remarkable in light of how the case came before the Court. Initially, the case was centered on a ban on speech by corporations, as part of the Bipartisan Campaign Reform Act (BCRA).[53] At the original oral argument, a hypothetical arose that asked whether one line of express advocacy in a book published by a corporation could trigger regulation and possible censorship as an electioneering communication.[54] When the answer from the United States government came back as "yes," the concerned Court ordered new briefing and argument.[55]

Even with that admission, after re-hearing, four members of the Court dissented from the judgment. It is important to note that they did not concur in the judgment on more narrow grounds, or on the basis of an as-applied exception on the particular facts of the case. Rather, four justices of the United States Supreme Court explicitly held that the federal government may ban the production, airing, and distribution of a documentary film about a major political figure during an election year, when a corporation is involved in the financing, production, or distribution of the film – even when the corporation is a non-profit organization. This is surely one of the most radical interpretations of the First Amendment ever endorsed by any Justice of the Court.

VI. The IRS Harassment Scandal and subsequent proposed rulemaking governing the permissible activities of 501(c)(4) organizations illustrates the dangers of calls for increased disclosure.

This concern over so-called "dark money" and push for increased disclosure requirements comes at a time when Americans' confidence in government has been rocked by information that the IRS systematically targeted groups based on their political beliefs. A number of Senators, including some on this Committee, specifically urged the IRS to investigate conservative non-profit groups.[56] Such pressure on the Agency appears to have been a major

[52] *Citizens United v. FEC*, 558 U.S. 310, 393-94 (2010) (Stevens, J. dissenting). ("All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided").
[53] Bipartisan Campaign Reform Act, Pub. L. 107-155 § 203, 116 Stat. 81, 91 (2002).
[54] Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 10 (2012).
[55] *Id.*
[56] On October 11, 2010, Senator Durbin writes the IRS, asking the Agency to "quickly examine the tax status of Crossroads GPS and other (c)(4) organizations that are directing millions of dollars into political advertising." (U.S. Senator Richard J. Durbin, "DURBIN URGES IRS TO INVESTIGATE SPENDING BY CROSSROADS GPS," Office of Senator Richard J. Durbin. Retrieved on April 29, 2014. Available at: http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=833d8f1e-bbdb-4a5b-93ec-706f0cb9cb99 (October 12, 2010).) Several months later, on February 16, 2012, Senators Schumer and Udall (NM), along with Senators Bennet, Franken, Merkley, Shaheen, and Whitehouse write the IRS, asking the Agency to investigate tax-

factor in creating the current IRS scandal, which will have longstanding repercussions for the Agency's reputation and the voluntary compliance of citizens with the tax system.

These demands of the IRS by members of Congress are reminiscent of the rejected "DISCLOSE Act," which would have mandated disclosure of donations not related to the election or defeat of political candidates. The bill was about politics and silence as much as "disclosure." As Chairman Schumer said when the first bill was introduced, "the deterrent effect [on citizens' speaking out] should not be underestimated."[57] It appears the ultimate aim of such proposals is to force trade associations and non-profits to publicly list all their members along with their dues and contributions. Such lists can be used by competing groups to poach members and, more ominously, to gin up boycotts and threats to the individuals and corporate members of the groups – indeed, this has already occurred. Further in the background lies the thinly veiled threat of official government retaliation.

VII. Disclosure information can result in the harassment of individuals by their political opponents and should be carefully balanced with the public's "right to know."

The purpose of disclosure is to allow citizens to monitor government, not to allow government to monitor citizens. We recognize that this distinction can dissolve in practice. For example, if we demand public disclosure of who gave money to a public official, in order to monitor that official, we will necessarily give the government the tools to monitor us. But as a first principle for thinking about what type of disclosure is proper, it provides a good starting point.

Indeed, the Supreme Court has recognized the careful balance between allowing citizens the tools to monitor the government and balancing that consideration with the realization this publicly available personal information can be used by individuals and organizations to threaten and intimidate those that they disagree with.

This evidence is seen particularly in the Court's decision in *NAACP v. Alabama*, in which the Court recognized that the government may not compel disclosure of a private organization's general membership or donor list.[58] In recognizing the sanctity of anonymous free speech and association, the Court asserted that "it is hardly a novel perception that compelled disclosure of

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exempt organizations' political activities. In an accompanying press release by Senator Bennet, he opines that "operations such as Mr. [Karl] Rove's [Crossroads GPS] should not be allowed to masquerade as charities." (U.S. Senator Michael Bennet, "Senators Call for IRS Investigations into Potential Abuse of Tax-Exempt Status by Groups Engaged in Campaign Activity," Office of Senator Michael F. Bennet. Retrieved on April 29, 2014. Available at: http://www.bennet.senate.gov/newsroom/press/release/senators-call-for-irs-investigations-into-potential-abuse-of-tax-exempt-status-by-groups-engaged-in-campaign-activity (February 16, 2012).) Nearly two years later, on February 13, 2014, echoing the prior calls of Democratic Senators before the IRS scandal revelations in May 2013, Senator Pryor publicly prods the IRS to regulate 501(c)(4) organizations more aggressively: "That whole 501(c)(3), 501(c)(4) [issue], those are IRS numbers. It is inherently an internal revenue matter. There are two things you don't want in political money, in the fundraising world and expenditure world. You don't want secret money, and you don't want unlimited money, and that's what we have now." (Alexander Bolton, "Vulnerable Dems want IRS to step up," *The Hill*. Retrieved on April 29, 2014. Available at: http://thehill.com/homenews/senate/198298-vulnerable-dems-want-irs-to-step-up (February 13, 2014).)

[57] Jess Bravin and Brody Mullins, "New Rules Proposed On Campaign Donors," *The Wall Street Journal*. Retrieved on April 29, 2014. Available at: http://online.wsj.com/article/SB10001424052748703382904575059941933737002.html (February 12, 2010).

[58] *NAACP v. Alabama*, 357 U.S. 449 (1958).

affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[59]

Much as the Supreme Court sought to protect those citizens who financially supported the cause of civil rights from retribution, donors and members of groups supporting unpopular candidates and causes still need protection today. Events in the state of California over the past few years lend credence to this phenomenon. Many supporters of Proposition 8 faced harassment from gay-rights activists, simply because these donors' information was made publicly available through government-mandated disclosure. Indeed, in Justice Thomas' opinion in *Citizens United*, he dissented in part, noting harassment issues stemming from the disclosure of political information. In his dissent, Justice Thomas made specific reference to the experience of Proposition 8 supporters: "Some opponents of Proposition 8 compiled this [disclosure] information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result."[60] Similarly, it is hardly impossible to imagine a scenario in 2014 in which donors to controversial candidates and causes that make independent expenditures – for or against another same-sex marriage initiative; for or against abortion rights; or even persons associated with others who have been publicly vilified, such as the Koch family, Sheldon Adelson, or George Soros, might be subjected to similar threats.

Indeed, very recently, Mozilla CEO Brendan Eich was ousted from his position due to a pressure campaign orchestrated by those who support same-sex marriage over a $1,000 donation by Eich to the campaign for California Proposition 8 in 2008. As Eich's longtime business partner and defender of the need for his resignation, Mozilla Executive Chairwoman Mitchell Baker, noted when discovering that he gave money to the Proposition 8 campaign: "That was shocking to me, because I never saw any kind of behavior or attitude from him that was not in line with Mozilla's values of inclusiveness."[61] Ultimately, Eich was forced to resign.[62]

Worse still, as the Eich example shows, little can be done once individual contributor information – a donor's full name, street address, occupation, and employer – is made public under government compulsion. It can immediately be used by non-governmental entities and individuals to harass, threaten, or financially harm a speaker or contributor to an unpopular cause. This problem is best addressed by limiting the opportunities for harassment by crafting reporting thresholds that capture just those donors who are truly contributing large sums to *political candidates,* and those who give to organizations whose *major purpose* is political advocacy – and not to organizations engaging in issue advocacy about a particular issue relevant to the voters, especially when that advocacy is but a part of the organization's overall mission.

Ultimately, the Court has made clear that this concern over harassment exists, whether the threats or intimidation come from the government or from private citizens,[63] who receive

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[59] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 462.
[60] *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).
[61] Conor Friedersdorf, "Mozilla's Gay-Marriage Litmus Test Violates Liberal Values," *The Atlantic*. Retrieved on April 28, 2014. Available at: http://www.theatlantic.com/politics/archive/2014/04/mozillas-gay-marriage-litmus-test-violates-liberal-values/360156/ (April 4, 2014).
[62] *Id.*
[63] *Brown v. Socialist Workers' '74 Campaign Comm.*, 458 U.S. 87 (1982).

their information because of the forced disclosure. In short, mandatory disclosure of political activity should require a strong justification and must be carefully tailored to address issues of public corruption and to provide information of particular importance to voters.

* * *

The *McCutcheon* ruling could not be clearer: "Campaign finance restrictions that pursue other objectives [than preventing *quid pro quo* corruption]... impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern."[64] In doing so, the Court relied upon a long line of cases going back to *Buckley* in 1976.

At the time of the *McCutcheon* ruling, 32 states (of all political persuasions) already recognized the soundness of the Court's reasoning by not imposing aggregate limits on the overall political giving of their residents. Nothing suggests that these 32 states were more poorly governed, or more prone to political corruption, or that their citizens perceived government to be more corrupt, than in the minority of states that did impose some type of aggregate caps. Even before the *McCutcheon* decision, Arizona raised existing state contribution limits on the amount individuals and PACs may give to candidate campaigns, and eliminated Arizona's aggregate limits on contributions from individuals and PACs to statewide and legislative candidates.[65]

The First Amendment grants Americans the right to speak about politics without fear of official retribution from the government or elected officials. Although the *McCutcheon* ruling had little to do with campaign finance disclosure regulations, any attempt by Members of this Committee and others outside of Congress to connect the Court's ruling with calls for increased disclosure should be strongly considered in light of the complex and extensive disclosure already required by the federal government. In consideration of the seriousness of the potential for harassment and threats stemming from personal information made public by compulsory government disclosure, members of this Committee should think twice before advocating policies that will further stifle civic engagement and subject citizens to political intimidation and harassment for exercising their First Amendment rights.

We hope that this Committee recognizes the sound reasoning of the Supreme Court in *McCutcheon* and has gained greater clarity about the overblown rhetoric of "dark money" in light of the our current, heavily regulated campaign finance disclosure regime. Thank you for considering our comments.

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[64] *Id.* at 3 (Roberts, C.J. for the plurality) (citing and quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. ___, No. 10-238 slip op. at 25 (2011)).

[65] Cristina Silva, "Brewer increases Arizona campaign finance limits" *Arizona Capitol Times*. Retrieved on April 28, 2014. Available at: http://azcapitoltimes.com/news/2013/04/12/jan-brewer-increases-arizona-campaign-finance-limits/ (April 12, 2013).

The Washington Post

A defense of big money in politics

By Richard Cohen, Published: January 16, 2012

Sheldon Adelson is supposedly a bad man. The gambling mogul gave $5 million to a Newt Gingrich-loving super PAC and this enabled Gingrich to maul Mitt Romney — a touch of opinion here — who had it coming anyway. Adelson is a good friend of Gingrich and a major player in Israeli politics. He owns a newspaper in Israel and supports politicians so far to the right I have to wonder if they are even Jewish. This is Sheldon Adelson, supposedly a bad man. But what about Howard Stein?

The late chairman of the Dreyfus Corp. was a wealthy man but, unlike Adelson, a liberal Democrat. Stein joined with some other rich men — including Martin Peretz, the one-time publisher of the New Republic; Stewart Mott, a GM heir; and Arnold Hiatt of Stride Rite Shoes — to provide about $1.5 million for Eugene McCarthy's 1968 challenge to Lyndon Johnson. Stein and his colleagues did not raise this money in itsy-bitsy donations but by chipping in large amounts themselves. Peretz told me he kicked in $30,000. That was a huge amount of money at the time.

That sort of donation would now be illegal — unless it was given to a super PAC that swore not to coordinate with the candidate. And until quite recently, even that would have been illegal — the limit being something like $2,400. Many people bemoan that the limit is no more, asserting that elections are now up for sale, as if this was something new. They point to the Adelson contribution and unload invective on the poor right-wing gambling tycoon. I understand, but I do not agree.

Back in 1967, a small group of men gave McCarthy the wherewithal to challenge a sitting president of the United States. The money enabled McCarthy to swiftly set up a New Hampshire operation and — lo and behold — he got 42 percent of the popular vote, an astounding figure. Johnson was rocked. Four days later, Robert F. Kennedy, who at first had declined to do what McCarthy did, jumped in himself. By the end of March 1968, Johnson was on TV, announcing he would not seek a second term.

My guess is that a lot of the people who decry what Adelson has done loved what Stein, Peretz and the others did. My guess is that they cheered Johnson's defeat because they loathed the Vietnam War and wanted it ended. My guess is that while they pooh-pooh the argument that money is speech, they cannot deny that when McCarthy talked — when he had the cash for TV time or to set up storefront headquarters — that was political speech at the highest decibel.

In the end, the 1968 campaign was won by Richard Nixon — and so was the next. Nixon was always awash in cash, huge donations from the scrupulous, the unscrupulous and the just plain weird. (Google W. Clement Stone to see what I mean.) Some of this money came from abroad and some of it funded the Watergate burglary and the cover-up. Too much money chased too

little morality. Reform was demanded and reform is what we got. It limited money and it limited speech.

History was changed by the sort of political donations that are now derided. Lyndon Johnson stepped down. The Democratic Party was ripped right up the middle. Bobby Kennedy joined the race (and was assassinated in June), and nothing — but nothing — was the same afterward. McCarthy's quixotic campaign became so real that Paul Newman came up to New Hampshire, and so did throngs of kids with long hair and incredible energy. I was there, a graduate student-cum-cub reporter, eating off the expense accounts of soon-to-be Washington Post colleagues (My God, what a life!). So when the Supreme Court says that money is speech and ought to be protected, I nod because I was in New Hampshire in 1968 and I know.

Sheldon Adelson is not my type of guy. I don't like his politics. But he has no less right to try his own hand at history than did that band of rich men who were convinced the war was a travesty-tragedy — and they were right. Since 1968, my views have changed on many matters. But my bottom line remains a fervent belief in the beauty and utility of free speech and of the widest exchange of ideas. I am comfortable with dirty politics. I fear living with less free speech.

The above article, "A defense of big money in politics," can be accessed at: http://www.washingtonpost.com/opinions/how-political-donations-changed-history/2012/01/16/gIQA6oH63P_story.html.

Submission for the Record

Fred Wertheimer, President, Democracy 21

Senate Rules Committee Hearing

Held on April 30, 2014

Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Elections and Beyond

I am Fred Wertheimer, President of Democracy 21.

Democracy 21 appreciates the opportunity to make a submission for the record in regard to the hearing held on April 30, 2014 by the Senate Rules Committee. I would also like to express our appreciation to Senator Angus King for arranging and conducting this important hearing.

I would like to focus this submission on the gaping disclosure loopholes in the campaign finance laws which resulted in more than $300 million in secret contributions being spent by outside groups in the 2012 federal elections.

Our organization has pursued multiple efforts to close these loopholes.

We have advocated for the DISCLOSE Act introduced in the in the House by Representative Chris Van Hollen and in the Senate in 2010 by Senator Charles Schumer and in the last Congress by Senator Sheldon Whitehouse.

We have represented Representative Van Hollen in a lawsuit against the FEC challenging flawed FEC regulations that gutted existing contribution disclosure requirements for outside groups making electioneering communications in federal elections. The lawsuit is currently pending in federal district court.

We have filed a petition at the IRS joined by the Campaign Legal Center, challenging flawed IRS regulations that have been used by groups to improperly claim section 501(c)(4) tax-exempt status in order to hide the donors financing their campaign activities. We also joined with Representative Van Hollen, along with other reform groups, to challenge the regulations in federal court. The lawsuit was withdrawn after the IRS announced it would undertake a rulemaking regarding these regulations. But our lawsuit will be refilled if the IRS does not issue new regulations to properly implement the law.

Democracy 21, joined by the Campaign Legal Center, has also filed complaints at the IRS against a number of groups supporting Republican, Democratic and Independent candidates. The complaints called on the IRS to deny or withdraw 501(c)(4) tax-exempt status for the groups on the grounds they are campaign organizations and not entitled to tax status as "social welfare" organizations.

For more than three decades, Republican and Democratic members of Congress alike held a consensus position that citizens have a right to know who is giving and spending money to influence their votes. But this bipartisan congressional consensus in favor of disclosing campaign finance activities ended following the *Citizens United* decision, when Republicans abandoned their previous support for campaign finance transparency.

In 2000, Congress enacted new disclosure requirements to close loopholes that resulted in a number of 527 groups not disclosing their campaign activities in federal elections. The House and Senate passed the legislation with overwhelming bipartisan votes. In the Senate, the vote was 92 to 6 and the vote in favor of the legislation by Senate Republicans was 48 to 6. Ten years later, however, not one Republican Senator voted to close the disclosure loopholes that existed for outside spending groups.

In 2010, the DISCLOSE Act sponsored by Representative Van Hollen passed the House. In the Senate, the Act sponsored by Senator Schumer received 59 votes, one vote short of breaking a filibuster and being enacted. The legislation received no Republican votes. In 2012, the DISCLOSE Act, sponsored in the Senate by Senator Sheldon Whitehouse received 53 votes but again fell short of the 60 votes needed to break a filibuster. Again no Republican Senator voted for the legislation.

Democracy 21 believes that it is essential to enact new disclosure laws to ensure that the American people receive timely campaign finance information about who is financing the expenditures made in federal elections. We continue to support the comprehensive DISCLOSE Act, which would require outside spending groups to disclose the donors financing their campaign expenditures. I would like to submit for the record a letter sent by reform groups to Senators in support of the DISCLOSE Act. [Submissions are enclosed below.]

We also support the Real Time Transparency Act recently introduced by Senator Angus King and the Senate Campaign Disclosure Parity Act introduced by Senator Jon Tester. These bills would provide for immediate disclosure of large campaign contributions and electronic disclosure of campaign finance reports filed by Senate candidates.

The Supreme Court by an 8 to 1 vote in the *Citizens United* case strongly supported the importance and constitutionality of disclosure requirements for outside groups making expenditures in federal elections. Nevertheless, opponents of campaign finance disclosure have made various inaccurate claims about the effort to enact new disclosure requirements.

I would like to submit for the record a Q and A prepared by Democracy 21 that responds to the inaccurate claims being made. I would also like to submit for the record an article that I prepared in response to the claims made by a spokesman for the Koch Brothers that they were entitled to remain anonymous in making contributions to influence federal elections and an article I prepared in response to a speech given by Senator McConnell in opposition to disclosure of the contributions used by groups to make expenditures in federal elections.

Again, I would like to thank the Committee for the opportunity to make this submission for the record and I would like to express our appreciation to Senator King for holding this hearing.

July 13, 2012

Dear Senator,

The 156 undersigned national, regional and local organizations support S. 3369, the DISCLOSE Act of 2012, sponsored by Senator Sheldon Whitehouse.

The legislation would provide the public with basic information about campaign expenditures made by outside groups that are influencing federal elections and the donors financing these expenditures. The legislation would also provide timely disclosure by Super PACs and require outside groups which make campaign expenditures to take responsibility for their campaign ads.

It is a cardinal rule of campaign finance laws that citizens are entitled to know the identities of the donors financing campaign expenditures to influence their votes, and the amounts they gave. This basic right to know has long been recognized by disclosure laws enacted by Congress and by Supreme Court decisions upholding the constitutionality of these laws.

In the *Citizens United* decision, the Supreme Court by an 8 to 1 vote upheld the constitutionality of disclosure requirements for outside groups making campaign expenditures. The Court stated:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Polls show citizens strongly support disclosure by outside spenders.

The DISCLOSE Act of 2012 only contains disclosure requirements and does not contain special exceptions for any groups. The legislation is effective, fair and constitutional and deserves the support of Senators. Congress should enact the bill and provide citizens with the information they are entitled to know about who is giving and spending money to influence their votes.

We urge you to vote for S. 3369 and to take all steps necessary for its

enactment.

Sincerely,

National Organizations

Alliance for a Just Society
Americans for Campaign Reform

Brennan Center for Justice at New York University School of Law
Campaign Legal Center
Center for Media and Democracy
Citizens for Responsibility and Ethics in Washington
Center for the Study of Democratic Societies
Citizen Works
Coalition for Accountability in Political Spending
Coffee Party USA
Common Cause
Consumer Watchdog
Corporate Ethics International/ Business Ethics Network
Credo Action Network
Democracy 21
Democracy for America
Dēmos
Earth Friends Conservation Fund
Free Speech for People
Global Democracy Project
Greenpeace
Harrington Investments, Inc.
Heartland Democracy
League of Women Voters
Main Street Alliance
MapLight
National People's Action
New Progressive Alliance
People for the American Way
Public Citizen
Rootstrikers
Sunlight Foundation
Trillium Asset Management, LLC
Union of Concerned Scientists
United Republic
Walden Asset Management, a division of Boston Trust
& Investment Management
Wolf-PAC
Working Families Party
Zevin Asset Management, LLC

Regional and Local Organizations

30th LD Democrats of Washington
Adamas Instrument Corporation
aGREATER.US
Alerms International the Abraham Company
Alliance for Progressive Values

American Indian Community Center, Spokane, Washington
American Voices Abroad Berlin
Andell Enterprises, Ltd.
Angel & Cowboy's Creations
Artivista Consulting
ASAP Handyman Service
Asheville Geothermal Inc.
Auburn Area Democratic Club
Aurora Recording
Aztlan Media Kollective
Back to Democracy
BitJazz Inc.
C P Technology
C. Wolfe Software Engineering
California Clean Money Campaign
Center for Family Farm Development
CEO Pipe Organs/Golden Ponds Farm
Chicago Media Watch
Coffee Party Savannah
Colorado Common Cause
Committee on the Affairs of the 2 Percent
Connecticut Common Cause
CORE (Citizens Organizing for Resources and Environment)
Documents International
Domini Social Investments
Eagle Yachts, Inc.
Earthhome.us
Eastern CT Pain Treatment Center
El Paso Grassroots
Emerald City Green Painting LLC
Financial Alternatives
GETpackaged productions
Greater Lafayette (IN) Rebuild the American Dream
Hanging Rock Animal Hospital, Inc
Health Education Network
Homeowners Against Deficient Dwellings
HomeShare Florida, Inc.
Humanists and Freethinkers of Cape Fear
Ideas, Ink.
Imago Dei
Iowa City Area NOW
Joan Butcher, M.D., LLC
Judith E. Anthony, M.A., counselor and therapist
Kansas City Criminal Justice Task Force
Kickapoo Peace Circle
Knox County IL Progressives

Latinos & Media Project
Laura M. Miranda Attorneys At Law PLLC
Lindsay Suter, Architects
Lora Schlesinger gallery
Louisiana Common Cause
Massachusetts Common Cause
Maule Website and Design
Michigan Campaign Finance Network
Michigan Common Cause
Mid-Peninsula American Dream Council
Military/Veterans Advocacy Group
Minnesota Common Cause
Mississippi Common Cause
MobilizeUs
Move to Amend Greater Chicago
NC Center for Voter Education
Nebraska Common Cause
Neverland Designs
New Mexico Common Cause
North Shore Move to Amend, MA
Northern Illinois Jobs with Justice
Occupy Berkshires
Occupy Des Moines
Ohio Citizen's Action Money & Politics Project
Oregon Common Cause
Oregon PeaceWorks
Pacific Patent Partners
Peace Action Montgomery
Pennsylvania Common Cause
Philly Neighborhood Networks
Pinellas NOW Florida
PLC Repair
Prema Music
Prestige Hauling, Inc.
Psychology Associates
R.U.F.F. -- Retirees Unite For the Future
Regional Solutions
ResearchWorks
Rhode Island Progressive Democrats of America
RK Photography
Rune's Furniture Store
Schumacher Financial Consulting
Share the Wealth Productions
Sheff Law Offices, P.C.
South Coast ESD Education Association
Southeast Kansas Chapter/National Organization for Women

Still Point Zen Center
Strictly Tango NYC
The Ave Project
The Hummer Group Inc.
The Professionals, insurance and financial advisers
The Writing and Editing Company
theCounselors.com
Therapists for Peace & Justice
Transformation Travel LLC
TunaFisch Fantasies: Art from the Heart
UBU Ministries
Vermont Common Cause
Washington Public Campaigns
We the People of Kansas
Wisconsin Common Cause
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Q and A on DISCLOSE Act of 2012 Introduced by Senator Sheldon Whitehouse

Q. Is it constitutional to require outside groups that make campaign-related expenditures to disclose their donors?

A. Yes. In *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the Supreme Court by an 8-1 majority upheld the provisions of federal law which require outside spending groups to disclose their expenditures on electioneering communications, including the donors funding these expenditures. Justice Kennedy, writing for the Court, noted that disclosure provisions "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." 130 S.Ct. at 914.

Citing its prior landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court in *Citizens United* said that disclosure laws serve the important governmental interest of "providing the electorate with information about the sources of election-related spending" in order to help citizens "make informed choices in the political marketplace." *Id.* The Court specifically noted that it had earlier upheld disclosure laws to address the problem that "independent groups were running election-related advertisements while hiding behind dubious and misleading names." *Id.*

The Court in *Citizens United* praised the fact that "modern technology" makes disclosure "more effective" because it is "rapid and informative." *Id.* at 916. The Court said, "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters . . . [D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.*

Q. Are disclosure requirements limited only to ads which contain express advocacy or the functional equivalent of express advocacy?

A. No. In *Citizens United*, the Supreme Court rejected precisely this argument. The Court upheld a disclosure requirement for a broadcast ad that did not contain express advocacy and was instead intended to publicize a documentary, where the ad had only a commercial, not political, intent. The Court said that "we reject Citizens United's contention that the disclosure

requirement must be limited to speech that is the functional equivalent of express advocacy." *Id.*

Q. Doesn't requiring disclosure of donors to groups that make campaign-related expenditures threaten unconstitutionally to chill donations to those groups?

A. No. The Supreme Court considered and rejected this argument in *Citizens United* as a basis for invalidating disclosure requirements in general. A disclosure requirement might be unconstitutional as applied to a specific organization but only if that organization could show "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed." *Citizens United,* 130 S.Ct. at 916. Absent such a showing by a specific organization, a disclosure requirement is not invalid because of a general and theoretical concern about chilling donations.

Furthermore, the legislation has a number of built-in protections for donors to an organization. A group can set up a separate bank account for its spending on campaign-related disbursements and use only these funds for such expenditures. Under these circumstances, only those donors of $10,000 or more to this separate account established to make campaign-related expenditures must be disclosed. All other donors to the organization would not be disclosed. In addition, *any* donor can restrict his or her donation to the organization from being used for campaign-related disbursements. If the group agrees to the restriction and segregates the money, the identity of the donor is not disclosed. By these measures, groups and donors can ensure that donors whose funds are not used for campaign-related expenditures are not subject to any disclosure.

Q. Doesn't the donor disclosure requirement mean that groups will have to disclose their membership lists in violation of the Supreme Court's ruling in the *NAACP* case?

A. No. First, the legislation requires disclosure only of donors who give $10,000 or more in a two-year election cycle to a group which engages in campaign-related spending. That will exclude the vast majority of donors to and members of most membership organizations, and require disclosure only of very large donors to such groups. Second, the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), rejected the argument that campaign finance disclosure was similar to the disclosure of membership lists that was struck down in the *NAACP* case. The Court said, "In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosure." Id. at 198. Absent a showing by a specific organization of "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed," campaign finance disclosure requirements are constitutional.

Q. Does the contribution disclosure requirement impose an unreasonable burden on groups which want to spend money on campaign-related ads?

A. No. First, a group is required to disclose only its donors of $10,000 or more over a two-year election cycle. For most membership organizations, this will require the reporting of only a relatively small number of donors. Second, any group that wants to limit the scope of its disclosure obligations can set up a separate account from which to make all of its campaign-related disbursements. If it does so, the group is required to disclose only the donors of $10,000 or more to that separate account, not all of the donors to the organization.

Q. Does the disclosure requirement violate the privacy rights of a donor to an organization that makes campaign-related expenditures?

A. No. Any donor to an organization is permitted by the legislation to "restrict" his or her donation from use for campaign-related expenditures. If the recipient organization accepts the restriction and segregates the money, the identity of the donor is not subject to disclosure. By this means, any donor concerned about privacy can take steps to ensure that his or her identity is not disclosed.

Q. Is the "electioneering communications" disclosure provision unconstitutionally overbroad in requiring disclosure of broadcast ads for the election year in the case of congressional races, and for the period from 120 days before the first primary through the general election in the case of presidential races?

A. No. The post-*Citizens United* experience shows that tax-exempt organizations and other groups are running broadcast ads to influence federal elections throughout the course of the election year, and even earlier, particularly in presidential elections. The calendar year of an election is an appropriate period to cover because broadcast ads to influence voters are run by outside groups throughout the period and campaigns are in full swing.

Even if the broadcast ads mentioning candidates also discuss issues, the ads run during this period can and will influence voters. Accordingly, citizens are entitled to know the identity of the groups spending money on those ads, and the donors funding the expenditures. The provisions do not restrict any campaign-related expenditures but just require that they be disclosed to the public. The Court in *Citizens United* in upholding the disclosure requirements noted that "[t] he Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U. S. 612, 625 (1954).

Justice Scalia wrote in a concurring opinion that upheld disclosure requirements in a case about petition signers for ballot measures:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously *(McIntyre)* and even

exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Q. Is the $10,000 contribution disclosure threshold too high in light of the $200 contribution disclosure requirement for candidates and PACs? Does that high threshold discriminate against business groups?

A. No. The $200 threshold for candidates and PACs reflects the fact that they are in the business of raising and spending campaign contributions. By definition, their "major purpose" is to influence elections. Groups covered by the DISCLOSE Act, such as "social welfare" organizations, labor groups and business trade associations have a major purpose *other than to influence elections*. When these groups make campaign-related expenditures, however, they should disclose those expenditures and the source of the funds being used to pay for them.

By requiring disclosure only of substantial donors to such groups, the $10,000 threshold balances the interests of non-campaign groups in privacy for their donors versus the public interest in knowing who is financing campaign-related expenditures. This does not discriminate for or against any particular kind of group, but rather provides citizens with important information about substantial donors who are financing campaign-related expenditures by groups that are not political organizations.

Q. Will the exemption for internal transfers among affiliated groups provide the opportunity to mask the actual donors of funds being spent on campaign activities and doesn't it discriminate in favor of unions?

A. No. This provision applies across the board and treats a labor organization and its affiliated groups the same as a business trade association and its affiliated groups. The provision eliminates the need to file a lot of unnecessary and meaningless disclosure reports about money moving back and forth between affiliates within an organization -- information that is irrelevant to the goals of the disclosure provisions. At the same time, it protects against a donor funneling money through an affiliate to an affiliated organization in order to mask the actual source of the funds spent by the affiliated organization for campaign-related ads. Thus, if a donor gives $50,000 to a state affiliate which transfers money to a national organization that then makes campaign expenditures, the legislation requires the national organization to disclose the identity of the $50,000 donor to the state organization and the amount given.

Q. Won't this law require a group to disclose a $1 million donor who is giving the money to a group in order to support the group's work on the protection of whales or on educating on the use of firearms, even if the donor has no interest in supporting any candidate?

A. No. Any donor can be exempt from any disclosure by an agreement with the recipient organization that the donor's contribution will not be used to make campaign-related expenditures. Alternatively the organization can establish a separate bank account from which it makes all of its campaign-related expenditures, and then raise money from donors who contribute directly to that account. In this circumstance, only donors to the bank account established for campaign-related expenditures will be disclosed. The bottom line is any organization can ensure that donors who do not want to have their money used for campaign-related expenditures are not disclosed.

Q. Does the legislation address the problem that Super PACs supporting 2012 presidential candidates did not disclose their donors until after the key nominating events in Iowa, New Hampshire, South Carolina and Florida had already occurred?

A. Yes. The problem arose because Super PACs, which are federally registered political committees, were able to use the FEC's current reporting requirements to delay reporting their donors for the entire second half of 2011 until the end of January, 2012. This legislation fixes this problem by requiring all outside spending groups, including Super PACs, to report their donors within 24 hours after each expenditure of more than $10,000 is made on campaign-related expenditures.

Q. Is it constitutional to require disclaimers to be part of ads?

A. Yes. In *Citizens United*, the Court by an 8-1 majority explicitly upheld a requirement that electioneering communications include disclaimers. Disclaimers, the Court said, "provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking." 130 S.Ct. at 915.

Q. Isn't it unfair to require that up to six seconds of any campaign-related TV ad run by an organization be used to list the organization's top five donors in the ad? Won't this hamper the ability to run the traditional 30 second TV ads?

A. No. Under the provision, the organization can run the list of top donors as a crawl at the bottom of the TV ad without taking any time away from the content of the actual ad.

Q. Isn't it unduly burdensome to require the head of an organization to appear in a campaign-related ad?

A. No. Candidates are required to appear in their campaign ads as an accountability measure to take responsibility for the content of their ads. Similarly, the head of an organization running a campaign-related ad should take public responsibility for his or her organization's ads. In the 2012 campaign, campaign-related ads by third party groups have been almost completely negative. The head of an organization should take responsibility and be accountable for campaign-related ads run by the organization.

A Response to the Koch Brothers Claim of Entitlement to Anonymous Political Giving

By: Fred Wertheimer

March 28, 2014

An online column by Tom Edsall on the *New York Times* website (March 18), entitled "In Defense of Anonymous Political Giving," presents the arguments made by the Koch brothers to justify keeping "anonymous" the untold millions of dollars they are giving to groups to spend on campaign ads and other political activities to influence federal elections.

In his column, Edsall cites a spokesman for the Koch brothers and their company on why anonymous political giving is constitutionally protected. According to the spokesman:

The rationale behind donor anonymity, which is a form of First Amendment speech, is to protect against the threat of retaliation when someone or some group takes a stand, espouses their point of view or articulates a position on issues that may (or may not) be popular with the general public or the political party in majority power. There are many precedents to this: the Federalist Papers were published under pseudonyms and financed anonymously, out of fear of retribution.

The spokesman for the Koch brothers cites two Supreme Court decisions, *NAACP v. Alabama* (1958), and *McIntyre v. Ohio* (1995), to support their claim for anonymous political giving.

The only problem is that the cases don't support the Koch brothers claim.

In reality, the Koch brothers have no constitutional basis and no policy basis to justify secretly injecting untold millions of dollars into federal elections. The Supreme Court and Congress have long recognized that voters have a basic right to know information about political money being given and spent to influence their votes.

Both of the Supreme Court cases cited by the Koch brothers' spokesman are irrelevant to the constitutional issue involved here -- whether it is constitutionally permissible to require disclosure of money given and spent to influence candidate elections. And the Koch brothers' spokesman ignores the directly relevant, and recent, Supreme Court cases which have upheld such disclosure laws.

The Edsall column says that disclosure "remains the losing position" in the courts.

In fact, this is backwards. Just the opposite is true.

For nearly 40 years, campaign finance disclosure requirements have been consistently upheld as constitutional by the Supreme Court -- starting with the Court's landmark Buckley decision in 1976 and continuing as recently as the Court's Citizens United decision in 2010.

In Buckley, the Supreme Court held that the federal campaign finance disclosure laws were constitutional because they provide "the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office."

The Court in Buckley also upheld the disclosure laws on the grounds that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."

In Citizens United, the Supreme Court, in an eight to 1one decision, upheld political giving and spending disclosure requirements for corporations, including nonprofit corporations, making independent expenditures. The Court said:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.

The Supreme Court noted in Citizens United that it had upheld disclosure laws in earlier cases to address the problem that "independent groups were running election-related advertisements while hiding behind dubious and misleading names."

Even though the Court upheld the disclosure law in Citizens United, however, citizens have not ended up with effective disclosure. Instead they have ended up with hundreds of millions of dollars in secret contributions being laundered into federal elections.

The disclosure problems we now have do not stem from constitutional issues but rather from flawed FEC and IRS regulations that were used by outside groups to spend more than $300 million in secret contributions in the 2012 federal elections.

The two Supreme Court cases cited by the Koch brothers' spokesman to justify anonymous political giving do not support his claim.

The first case, *NAACP v. Alabama*, involved an attempt by Alabama to subpoena the NAACP's membership lists at a time when the organization was fighting for civil rights and when its members were the targets of murders, violence and serious physical harassment.

The Supreme Court reviewed the circumstances facing the NAACP and held that the organization was entitled to anonymity for its members.

It is beyond ironic for the Koch brothers, who are among the richest people in the world, to try to claim moral equivalence for their anonymous giving of political money with the life and death threats faced by members of the NAACP during the civil rights battles of the 1950s.

The Supreme Court was fully aware of its NAACP decision in 1958 when it upheld disclosure requirements for political giving and spending in its Buckley decision in 1976. In fact, the Court

cited the NAACP case a number of times in its Buckley decision but did not find that the case undermined the constitutionality of the campaign finance disclosure requirements.

The Court said in Buckley that a group can seek an exemption from the campaign finance disclosure requirements if it can make a showing that disclosure would subject it to "threats, harassment, or reprisals." But the Court also made clear the exemption was exceedingly narrow.

The Court said that threats and harassment must create an actual -- not speculative -- burden on a group's freedom to associate in order to warrant exemption from disclosure laws.

In 2003, the Supreme Court in the McConnell case again rejected an analogy to its NAACP decision regarding campaign finance disclosure requirements.

The second case relied on by the spokesman for the Koch brothers is similarly irrelevant to the constitutionality of candidate-related disclosure requirements.

In *McIntyre v Ohio Elections Commission*, the Supreme Court held unconstitutional a requirement to disclose spending by an individual on some leaflets commenting on a bond referendum for local schools.

In striking down the disclosure requirement that applied to a referendum campaign, the Supreme Court explicitly distinguished the case from the kind of disclosure requirements for candidate-related spending that the Court upheld in the Buckley decision.

Moreover, the Supreme Court was fully aware of its McIntyre decision in 1995 when the Court upheld the constitutionality of candidate-related disclosure requirements in its Citizens United decision in 2010.

Justice Kennedy wrote in Citizens United that campaign finance disclosure requirements provide voters with the information they need to make "informed decisions and give proper weight to different speakers and messages."

The Koch brothers may each be worth $40 billion but their enormous wealth does not entitle them to any special treatment when it comes to the right of the American people to know about the political money being given and spent to influence federal elections.

Democracy 21 President Fred Wertheimer Refutes Senator McConnell's Misguided and Meritless Attack on Campaign Finance Disclosure in Speech Today at AEI

Senate Republican Leader Mitch McConnell today attempted to turn the world upside down in a speech he gave at AEI that attacked the very idea of campaign finance disclosure, which has been the cornerstone of campaign finance laws for many decades.

Senator McConnell conveniently forgets that secret campaign money was at the heart of the Watergate scandals that began 40 years ago on June 17, 1972 and were the worst political and campaign finance scandals of the 20th century.

In his speech, Senator McConnell describes campaign finance disclosure as an effort by the left and the Obama administration to stifle free speech.

Senator McConnell fails to mention in his speech that the Supreme Court in *Citizens United* by an 8 to 1 majority – including four of the five conservative Justices -- upheld as constitutional the campaign finance disclosure requirements for outside spending groups.

What is really going on here is that Senator McConnell is cloaking his partisan opposition to disclosure in the rhetoric of free speech.

Senator McConnell does not have a constitutional or policy leg to stand on.

Senator McConnell's speech today is about protecting the ability of groups, like the Chamber of Commerce and Crossroads GPS, to keep secret from the American people the identities of the donors who are financing their campaign expenditures.

The Supreme Court said in *Citizens United* that disclosure requirements are constitutional because they serve important governmental interests in "providing the electorate with information about the sources of election-related spending," in order to help citizens "make informed choices in the political marketplace."

The Court also said in *Citizens United* that it had earlier upheld disclosure laws to address the problem that "independent groups were running election-related advertisements, while hiding behind dubious and misleading names."

In his speech, Senator McConnell also ignores the powerful support for disclosure provided by Justice Scalia. In *Doe v. Reed (2010)*, Justice Scalia stated, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."

Senator McConnell, no doubt, sees a big partisan stake in protecting the ability of secret money to be laundered into federal elections. Outside spending groups supporting Republican

congressional candidates, such as the Chamber of Commerce and Crossroads GPS, currently have raised the bulk of secret contributions that are being spent in federal elections. These groups do not want to disclose to the American people the identities of the donors whose money they are spending on ads to influence the voters.

For example, Crossroads GPS has disclosed on its tax returns that there are 23 donors who have each given $1 million or more to finance their campaign activities. However, the identities of these donors have not been disclosed because Crossroads GPS claims status as a section 501(c)(4) group, even though its overriding purpose is to influence elections.

Senator McConnell's speech also serves the purpose of offering cover for his Senate Republican colleagues who are expected to have to vote next month on the DISCLOSE Act sponsored by Senator Sheldon Whitehouse.

Until 2010, there was consensus support among Democrats and Republicans alike regarding campaign finance disclosure, although not from Senator McConnell. That changed in 2010 following the *Citizens United* decision when outside spending groups started spending large amounts of money provided by secret donors to support Republican congressional candidates.

Senator McConnell's claim that secrecy in campaign finance activities is needed in order to protect against harassment is a bogus argument that has been repeatedly rejected by the Supreme Court, except in limited circumstances.

The Court has said that a disclosure provision would be unconstitutional as applied to a specific organization *only* if the organization could establish "a reasonable probability that the group's members could face threats, harassment, or reprisals if their names were disclosed."

In these circumstances, the Supreme Court has said that even where a specific group could show such a "reasonable probability" of harassment, the remedy would be to exempt that specific organization from disclosure; not to strike down the disclosure requirements for all groups.

The notion that groups may come under public scrutiny and criticism for their campaign activities has never been viewed by the Supreme Court as constituting the kind of "threats, harassment or reprisals" that would justify overturning campaign finance disclosure requirements.

Senator McConnell's protestations notwithstanding, the Supreme Court has rejected the argument that disclosure requirements stifle speech and the Court has repeatedly upheld such requirements as serving important governmental purposes in providing voters with information they have a right to know about those who are trying to influence their votes.

Dēmos

AN EQUAL SAY AND AN
EQUAL CHANCE FOR ALL

Testimony of Liz Kennedy, Counsel at Demos
Submitted to the United States Senate Committee on Rules and Administration
"Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond"
April 30, 2014

Chairman Schumer, Senator King, Ranking Member Roberts, and Members of the Committee, thank you for the opportunity to submit this testimony for this hearing on the harm of secret political spending, the impact of the Supreme Court's recent decision in *McCutcheon v. FEC*, and solutions to address the problem of improper influence of money in politics in America today.

Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Our current system of campaign finance undermines both of those goals. It privileges the voices of the already privileged, and maximizes the political power of those with the most economic power. And, despite the Supreme Court's consistent affirmation of the constitutionality of disclosure laws, there is a rising tide of dark money from hidden sources that raises fundamental questions about accountability and responsibility in our democracy. The Supreme Court's "grossly incorrect"[1] decision in McCutcheon will further increase the dominance of those who make the largest donations and engage in the most spending, in derogation of the fundamental principle of political equality.[2] After all, in a democracy the size of a citizen's wallet shouldn't determine the strength of her voice or her right to representation.

Secret political spending is a threat to democracy.

The need for transparency in political spending to inform voters and prevent corruption has been uncontroversial, nonpartisan, and widely recognized for decades. In *Citizens United v FEC* the Supreme Court relied on the assumption that the true sources of political spending would be disclosed to support its decision to allow unlimited corporate money into the political process. Justice Anthony Kennedy wrote that disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[3] Unfortunately, the disclosure rules that Justice Kennedy thought would ensure transparency and accountability for political spending are not in place, and government has failed thus far to respond to protect voters and prevent corruption.

Organizations that do not disclose their donors spent over $300 million in secret political spending to affect the 2012 elections.[4] This is more than twice as much as in the 2010 mid-term

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elections, the first after Citizens United, when secret political spending rose dramatically from its prior levels. Groups that didn't disclose the identities of their donors reported spending over $130 million dollars in the last mid-term cycle, meaning almost half of all of the outside spending in that election was unaccountable.[5] In our report, "Auctioning Democracy: The Rise of Super PACs and the 2012 election," Demos and U.S. PIRG found that secret spending spiked dramatically right before the 2010 election, a pattern we expect to see repeated this mid-term cycle.[6] It is ironic that a decision extolling and relying upon disclosure has led to a significant reduction in the transparency of overall political spending.

The practices that allow for the wide spread dispersal of secret political spending are akin to money laundering. Donors who want to hide their identities can give to tax-exempt groups such as 501(c)(4)s and 501(c)(6)s, and those groups can spend on elections or give to other groups to spend money on elections, all without the public knowing the true source of the financial support. While political action committees including Super PACs have to disclose their donors, there is no informational value in learning the anodyne names of dark money groups (e.g., "Americans for Freedom") because these groups are opaque themselves – i.e. the financial supporters of "Americans for Freedom" remain secret.

Currently, political non-profit groups masked as social welfare non-profits can accept unlimited contributions from donors and promise anonymity to their financial supporters. Their contributors can remain anonymous because FEC regulations improperly apply the statutory disclosure requirements that exist for outside groups. FEC regulations only require disclosure of the name of a contributor to a dark money group if that donor designates their contribution specifically "for the purpose of" political spending; if there is no designation there is no disclosure. This fails to meet the reality of political spending and contributions. Since very few contributors do earmark, the result has been a proliferation of dark money groups and an explosion in the amount of dark money being spent to influence elections and through them the future of the country.

Disclosure requirements are constitutional

The Supreme Court has repeatedly upheld the government's authority to require transparency of political spending because disclosure requirements serve several compelling interests. Disclosure of political spending serves voters' interests in knowing who is funding a political message and about a candidate's financial allegiances; protects against corruption which is more likely to occur in the absence of transparency and accountability; and prevents circumvention of contribution limits and other campaign finance laws by allowing for contributions and their source to be identified.[7]

In both Citizens United and McCutcheon, the Court relied on disclosure requirements as necessary for campaign finance regulation. In McCutcheon, Chief Justice Roberts wrote that "disclosure of contributions minimizes the potential for abuse of the campaign finance system."[8] In Citizens United, Justice Kennedy wrote:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can 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.' The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[9]

Voters need information in order to make educated decisions

In McCutcheon, Chief Justice Roberts opined that "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information,"[10] and noted that disclosure requirements are in part "justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending."[11] But the current disclosure regime is ineffective, and, without effective disclosure of the true sources of financial support for political spending, voters lack the tools to exercise informed judgment when evaluating the content of political messages.

Corporations can cloak their political spending by using conduit organizations to disguise their true identity and thus their true agendas. For example, the "Coalition- Americans Working for Real Change" was a business organization opposed to organized labor, and "Citizens for Better Medicare" was funded by the pharmaceutical industry."[12] When secret spending is directed through these conduits voters are denied the information they need "to make informed decisions and give proper weight to different speakers and messages."[13]

Transparency fights corruption and abuse

Voters also need to have a window into financial transactions between contributors and candidates to prevent corruption. Secret political spending breeds unaccountable political

favoritism, undermining the health of a representative democracy. Disclosure regulations can deter this corruption. The Supreme Court recognized in its seminal campaign finance case *Buckley v Valeo*, that "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that might be given in return."[14] In McCutcheon, the Chief Justice reiterated Buckley's conclusion that disclosure requirements also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[15]

While certain disclosure requirements are currently in place that cover direct contributions above a certain threshold to candidates, parties, and political action committees, there are many avenues for dark spending should people or entities seek to influence politics and policy without revealing their names. For example, foreign companies are currently prohibited from spending in U.S. elections. But absent effective disclosure requirements it is near impossible to monitor and determine if foreign money is being illegally used to fund political spending to influence federal elections.

Free speech does not mean freedom from response, criticism, or accountability for political spending

People and groups should not be allowed to engage in and yet conceal their political spending in order to avoid controversy. Those who choose to use their financial resources to influence elections should not be isolated from the legitimate scrutiny that such activities may receive. The First Amendment was never intended to prevent political actors from being held accountable for their actions in the political marketplace. As a federal judge explained in refusing to exempt the groups who supported the passage of Proposition 8 from California's disclosure laws:

> Plaintiff's exemption argument appears to be premised . . . on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. Just as contributors [] are free to speak in favor of the initiative, so are opponents free to express their disagreement through proper legal means.[16]

Even Justice Scalia, not overly fond of other campaign finance laws and provisions, wrote, in a Supreme Court decision upholding disclosure requirements, that:

> requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . .campaigns anonymously [] and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[17]

Government has a responsibility to act to ensure transparency for political spending

Huge, bi-partisan majorities of Americans support transparency for political spending. Eighty-one percent of Americans believe that corporations should only spend money on political campaigns if they disclose their spending immediately; this included 77 percent of Republicans and 91 percent of liberals. Eighty-six percent of Americans agree that prompt disclosure of political spending would help voters, customers, and shareholders hold companies accountably for political behavior; support for that statement ranged from 83 percent to 92 percent across all political subgroups.[18]

There are several opportunities for government to respond to the growing crisis of dark money in our democracy and protect the interests of voters in knowing who is behind political messages meant to influence their votes and elections, and the interests of citizens in seeing their government business conducted in an above board and accountable manner.

Congress should pass comprehensive disclosure legislation

The Citizens United Court relied upon transparency and accountability for political spending as a protection when it unleashed unlimited amounts of money to be spent to impact elections, so in 2010 Congress tried to fix our broken disclosure system with the DISCLOSE Act. Large majorities of both houses of Congress voted for it - it passed the House and received 59 votes in the Senate, but it failed to overcome a filibuster when no Republican would vote for cloture.[19] The DISCLOSE Act was reintroduced in 2012, and continues to be an important solution to achieve disclosure for outside spending. In addition, the "Real Time Transparency Act of 2014" would require 48-hour disclosure of campaign contributions of $1,000 or more to candidates, committees, and parties, including transfers from joint fundraising committees, which would help bring us a little closer to the Supreme Court's dream of prompt disclosure.[20]

Disclosure for political spending is supported by huge, bi-partisan majorities of Americans.[21] In the past it had bi-partisan support in Congress as well. In 2000, for example, when a disclosure loophole was allowing certain 527 groups to use secret political spending to influence federal elections, a Republican-controlled Congress closed the loophole; that

legislation passed with overwhelming majorities of 385 to 39 in the House and 92 to 6 in the Senate.[22] Comprehensive disclosure legislation remains a vitally important goal to ensure that voters receive the information that they need, and to prevent the corruption that hidden access and influence can engender.

The Securities and Exchange Commission should require disclosure of corporate political spending

Citizens United changed the game by suddenly allowing new corporate political spending into elections, but the rules haven't kept up with the current conditions. The Court assumed the new corporate political spending would be transparent – presumably as a result of federal law or regulation - and therefore subject to accountability, since "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."[23]

The SEC has the authority and the responsibility to require that publicly traded companies disclose their direct and indirect political spending. On the heels on Citizens United, a bipartisan committee of prominent corporate law professors filed a petition requesting that the SEC engage in this rulemaking.[24] This petition has received unprecedented support, including from six state treasurers acting as fiduciaries, founder and former CEO of Vanguard Jack Bogle, the Council of Institutional Investors, and a global coalition of investors managing more than $690 billion in assets.[25] Many Members of Congress have spoken out in favor of the rule.

It is entirely proper for the SEC to act to act here. The SEC already has two regulations that regulate campaign finance where it interacts with markets. In 1994 it moved to prevent pay to play in the municipal bond market with Rule G-37, after finding that contracts in the profitable municipal bond market were being awarded to investment companies that made contributions to the state and local officials making the contract decisions. And in 2010, the SEC issued Rule 206(5)4, which restricts campaign contributions from investment advisors to the public officials responsible for making investment decisions for public pension, in order to stop pay to play in the public pension fund market after several scandals. Significant similar concerns arise in the context of secret corporate political spending.

The Internal Revenue Service must stop the abuse of social welfare designations by political nonprofits

501(c)(4) "social welfare" organizations have become the primary vehicle for individuals and corporations that want to keep secret the donors financing their campaign expenditures.

501(c)(4)s were responsible for $256 million in secret political spending in the 2012 election – 85 percent of the $300 million of dark money spent that cycle (501(c)(6) trade associations spent another $55 million without disclosing their donors).[26] Though Section 501(c)(4) of the Internal Revenue Code provides tax exemption to "civic leagues of organizations not organized for profit but operated exclusively for the promotion of social welfare," the IRS current test only requires that in order to qualify for 501(c)(4) status, a group has to have the "primary purpose" of engaging in "social welfare" activities.

Even ignoring the conflict between "exclusively" and "primarily", if a group spends more than 49 percent on political activities, it shouldn't be eligible for 501(c)(4) status. But engaging in political spending supporting or opposing candidates does not qualify as "social welfare" activity – IRS regulations specify that "the promotion of social welfare does not include direct or indirect participation in political campaigns on behalf of or in opposition to a candidate for public office." So if a group wants to spend millions of dollars to support or oppose a candidate, it could still engage in that political spending but it should have to disclose its donors like any other political committee.

The IRS should be applauded for recognizing the need for guidance to clarify federal rules governing political activity by tax-exempt organizations. Currently, tax exempt organizations and regulators lack a clear definition of candidate related political activities or a clear threshold for how much political activity is permissible. While there are significant issues with the IRS's first attempt to promulgate new rules,[27] we look forward to continuing to work with the agency to meet its responsibilities to regulate tax-exempt organizations to make sure they aren't abusing their tax-exempt status to engage in political spending while shielding their donors from accountability and hiding crucial information from voters.

President Obama should issue an executive order requiring disclosure of political spending by government contractors

Disclosure of political spending is particularly important when it is by those who seek to do business with the government. Without transparency for political spending by those competing for government contracts, the public cannot detect if potential contractors are providing financial support to those in charge of the government's business decisions in order to increase the likelihood of receiving public contracts. Corruption in contracting can lead to sweetheart deals that benefit the recipient of the contract and the recipient of the political contributions at the expense of tax-payers.

In the face of legislative intransigence it is critically necessary and entirely appropriate that the executive exercise the full extent of its more limited authority by requiring disclosure

of political spending by those seeking to do business with the government. An executive order would close the loopholes that allow government contractors to spend political money with only private gratitude but without pubic accountability. Those seeking to spend money to influence elections and curry favor with elected officials must do so in the light of day.

McCutcheon v FEC will further increase the domination of politics and policy making by the elite donor class, silencing the majority of Americans and damaging our democracy

In addition to addressing disclosure, the Committee has invited testimony on the Court's recent decision in *McCutcheon v. FEC* and how it is likely to affect our electoral process.

With the Court's decision striking down aggregate contribution limits in McCutcheon, wealthy donors may now contribute more than $3.5 million to a single party's candidates and party committees (plus a virtually unlimited amount to supportive PACs).[28] Demos projects that this will result in more than $1 billion in additional campaign contributions through the 2020 election cycle.[29] The $123,200 limit was already twice the income of the average American household. Without an aggregate limit we estimate that in 2012 just 1,219 elite donors would have contributed nearly 50 percent more to candidates and parties than President Obama and Mitt Romney combined raised from more than 4 million small donors.[30]

This new de-regulatory attack on common sense rules for money in politics will shift the balance of power even further toward wealthy donors and away from ordinary citizens. In his dissent, Justice Stephen Breyer wrote that the McCutcheon "decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve."[31] We risk having our politics and public policy debates devolve into a disagreement between rich people, while the rest of Americans are relegated to the sidelines, their voices unable to be heard above those who can afford to buy million dollar megaphones.

Still in place, at least for now, are limits on the amount an individual may contribute to a particular federal candidate and party committee. A wealthy individual may contribute up to $2,600 per election ($5,200 per election cycle) to a federal candidate, $5,000 per calendar year to a political action committee (PAC) that supports federal candidates, $10,000 per calendar year to a state or local party committee, and $32,400 per calendar year to a national party committee.[32] But "joint fundraising committees" will allow members of Congress and party officials to solicit much larger checks from big money donors who can contribute to many candidates or parties at once.

In his opinion, Justice Roberts characterized the First Amendment as protecting only an individual's right to "speak" by spending as much he or she can. But the First Amendment promotes more than just self-expression—one of its primary functions is to promote the accountability and responsiveness of government officials to the public as a whole, the hallmarks of a healthy democracy.[33] Justice Breyer wrote in dissent that the "First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*. . . . Where enough money calls the tune, the general public will not be heard."[34]

After McCutcheon, even more big money will come from an even smaller number of elite donors. Our elected representatives will be even more dependent on – and thus responsive to - the donor class than ever before. This is largely because an elite "donor class" funds a substantial portion of campaigns. In the 2012 elections, for example, U.S. Senate candidates raised 64 percent of their funds in contributions of at least $1,000—from just 0.04 percent of the population.[35] This means that even the best-intentioned candidates often spend most of their time contacting a narrow set of wealthy donors and hearing about their concerns and priorities.[36]In describing the four to six hours of fundraising calls and events he's required to do per day, Connecticut Senator Chris Murphy noted that he wasn't calling anyone "who could not drop at least $1,000," who he estimated make at least $500,000 to $1 million per year. He acknowledged that this meant he was hearing far more about the concerns of the affluent than from people who worked in factories.[37]

Already, recent research confirms that the U.S. government responds differently to the preferences of the donor class, even when those preferences run counter to those of the general public.[38] When the views of the richest 10 percent differ from the rest of us, the 10 percent trumps the 90 percent.[39] This research also shows that the very wealthy have starkly different policy priorities than the general public, especially on economic issues.[40] Americans across the political spectrum believe that money in politics is the reason their representatives are more responsive to private interests with financial resources than to the public interest.[41]

The differing policy preferences of the wealthy as compared to the general public would not present a challenge to the democratic vision of a representative government if the active influence of the wealthy on public policy accorded with their numbers. But the degree to which a small cohort of Americans that contribute large sums to federal campaigns exerts a strong influence on the political process and public policy outcomes should be sobering to anyone concerned with the health of our democracy.

The Supreme Court has consistently cited the danger that interdependent relationships between elected officials and financial supporters pose to representative government. They upheld previous campaign finance laws because they understood that corruption of

government is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors."[42] The possibility that legislators will "decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder" is a more subtle form of corruption than straight *quid pro quo* transactions, but is "equally dispiriting."[43]

The current Roberts' majority has taken a dangerously deregulatory direction, and has struck down almost every campaign finance laws the Court has considered. A prior Supreme Court, in upholding the Bipartisan Campaign Reform Act, recognized that "[t]ake away Congress' authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic government."[44] Indeed, two thirds of Americans say they trust government less because big donors have more influence than regular voters; a quarter of Americans say they are less likely to vote because big donors have so much more influence over elected officials than average Americans.[45] A new poll has found that the percentage of young voters who say they will definitely vote in the upcoming elections just dropped precipitously; according to the polling director "there's an erosion of trust in the individuals and institutions that make government work - and now we see the lowest level of interest in any election we've measured since 2000."[46]

Already confidence in Congress is at all time lows, and an influx of more big money from special interest and elite donors will continue to undermine faith in our democracy.[47] Legitimacy is essential for a functioning democracy, and it rests on the belief by the people that they are fairly represented. But Americans know that financial supporters currently have an improper influence on our politics, and they understand that this is a corruption of democratic government.[48] Elected representatives have a duty to act with care and integrity in the interests of their constituents and the country as a whole, and not to favor the positions of their financial supporters.

<u>We can respond by empowering average Americans and reclaiming our democracy</u>

Though the Court has severely hampered our ability to protect our democratic politics and policy making there is much we can still do, in addition to ensuring transparency, to democratize the influence of money in politics. In response to McCutcheon, there are several campaign finance measures that could help fight corruption, such as banning or restricting joint fundraising committees, adopting strong anti-coordination rules and solicitation rules,

Invest in government so it responds to the people

To counter the influence of big money we need to encourage a lot more small donors to get involved by incentivizing representatives to reach out to them. The Fair Elections Now Act (S. 2023) and the Government By the People Act (H.R. 20) would provide a multiple matching fund on small contributions from a public fund. Candidates could raise substantial funds from their regular constituents, which will decrease their need to depend on big donors. This means candidates will spend more time hearing from average voters, rather than dialing for dollars from the elite donor class.

Investing in small donor democracy through public financing is the best policy we can currently enact to democratize the influence of money in politics, and has been shown to work successfully. It has worked well in New York City, where a successful matching funds system has led to candidates relying much more heavily on small donors and a more diverse donor pool.[49] Since Connecticut's system took effect in 2008 more people are running for office and contributing to campaigns, the influence of lobbyists has decreased, and elected representatives have responded to the public will by passing popular programs such as paid sick days and a higher minimum wage.[50]

Reclaim our democratic constitution

McCutcheon has been characterized by retired Supreme Court Justice John Paul Stevens as "grossly incorrect,"[51] but it is just the most recent case in which the Court has fundamentally misread the Constitution and used the First Amendment to remove common sense rules that are necessary to protect government from domination by the elite donor class. As noted by First Amendment scholar and former University of Chicago Law School dean Geoffrey Stone in a column entitled "the First Amendment doesn't protect the right to buy the American government:"

> That these five justices persist in invalidating these regulations under a perverse and unwarranted interpretation of the First Amendment is, to be blunt, a travesty. These decisions will come to be counted as among the worst decisions in the history of the Supreme Court. [52]

There is powerful, widespread disagreement with the Court's current approach, which has only grown since Citizens United; 150 rallies protesting the decision occurred in 41 states the day the McCutcheon decision was announced. We can work through the courts to

overcome the current misunderstanding of the relationship between political speech, money in politics, and the constitution. Even while following precedent, courts have criticized the Supreme Court's money in politics jurisprudence and suggested it is only a matter of time until it is changed. For example, leading Second Circuit Judge Guido Calabresi has written that "all is not well with this law" because:

> The ability to express one's feelings with all the intensity that one has—and to be heard—is a central element of the right to speak freely. It is, I believe, something that is so fundamental that sooner or later it is going to be recognized. Whether this will happen through a constitutional amendment or through changes in Supreme Court doctrine, I do not know. But it will happen. Rejection of it is as flawed as was the rejection of the concept of one-person-one-vote. And just as constitutional law eventually came to embrace that concept, so too will it come to accept the importance of the antidistortion interest in the law of campaign finance.[53]

Just this month in a decision striking New York's Super PAC contribution limits, Judge Paul A. Crotty of the Southern District of New York lamented the influence of big money in politics and wrote that voices of regular citizens "are too often drowned out by the few who have great resources."[54] Judge Nelson of the Montana Supreme Court felt the Citizens United decision dictated that Montana could no longer ban corporate political spending in its state elections, but wrote a scathing critique in which he characterized the Supreme Court's reasoning on campaign finance as "smoke and mirrors," saying further:

> To my knowledge, the First Amendment has never been interpreted to be absolute and gloriously isolated from other fundamental rights and values protected by the Constitution. Yet, *Citizens United* distorts the right to speech beyond recognition. Indeed, I am shocked that the Supreme Court did not balance the right to speech with the government's compelling interest in preserving the fundamental right to vote in elections.[55]

This won't be easy, but there are historical examples where the Court has recognized the fundamental error of past decisions and changed course, for example on racial segregation, marriage equality, and regulation of minimum wage and hour laws.

Finally, our founders provided the people with the tools to amend our governing document should our branches of government fail to correctly protect the interests of the

people. Popular anger over the Court's money in politics decisions and the domination of government by the elite donor class has led to a movement for a constitutional amendment. A strong amendment would overturn Buckley, McCutcheon, and Citizens United, and give government the authority to regulate money in politics appropriately. Hundreds of local governments and 16 states have passed resolutions calling on Congress to submit a constitutional amendment to the states for ratification. 36 Senators and 114 Representatives support a constitutional amendment so far in the 113th Congress.

Conclusion

McCutcheon is the latest case in which the Supreme Court misread the Constitution to strike basic protections against the dominance of concentrated wealth on public policy. In the long term we must reclaim our constitution as a tool for democratic self-government, so that we're able to regulate money in politics to serve the fundamental American values of political equality, accountable government, and fair representation for all regardless of wealth. And while the current Court strikes down many limits, we can build up a system that brings people in to the process by empowering small donors with public matching funds.

But in this moment, even if these Supreme Court decisions have damaged our ability to prevent big money and special interest donors from dominating the political discourse and silencing the rest of us, there is an urgent need to require that this political spending at least be transparent and accountable. If the voices of the wealthiest are those being heard by our government, at least the rest of us will know who our government is listening to if they're required to disclose their identities. Congress, the SEC, the IRS, the FEC, and President Obama should all take immediate action to bring an end to the scandal of secret political spending in the interests of voters and our free democratic society.

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[3] *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010).

[4] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014).

[5] PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF CITIZENS UNITED ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 10 (2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf.

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[7] *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).
[8] *McCutcheon*, 134 S. Ct. at 1459.
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[11] *Id.* at 1459 (quoting *Citizens United*, 588 U.S., at 367) (internal punctuation and citations omitted).
[12] *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 128, 197 (2003).
[13] *Citizens United*, 130 S. Ct. at 916.
[14] *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (*per curiam*)
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[21] Kennedy, *supra* note xvii, at 5.
[22] TESTIMONY OF FRED WERTHEIMER, PRESIDENT OF DEMOCRACY 21, BEFORE THE SENATE RULES COMMITTEE, ON THE DISCLOSE ACT OF 2012 5 (2012), http://www.democracy21.org/uploads/DISCLOSE_ACT_OF_2012_SENATE_RULES_COMMITTEE_TESTIMONY_3_26_12.pdf.
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May 7, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
U.S. Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Via email to record@rules.senate.gov

Re: Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond (Apr. 30, 2014)

Dear Senator King and Ranking Member Roberts:

Please accept Free Speech For People's attached written comments into the record for the Committee's April 30, 2014 hearing regarding campaign finance. As explained in detail within the comments, Free Speech For People believes that the Supreme Court's decisions in *Citizens United v. FEC* and *McCutcheon v. FEC* must be addressed through a constitutional amendment to overturn those rulings, and the 1976 *Buckley v. Valeo* ruling, to allow Congress and the states to regulate campaign spending.

Free Speech For People is a national nonpartisan organization founded in January 2010 on the day of the Supreme Court's *Citizens United* decision, and it has helped to catalyze and lead the growing grassroots movement to amend the Constitution to overturn *McCutcheon*, *Citizens United*, and *Buckley* and to restore republican democracy to the people.

Respectfully submitted,

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May 7, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
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Testimony of Ronald Fein, Free Speech For People

Campaign finance policy is a vexing problem. All efforts by Congress or state or local legislatures must balance a wide range of competing interests to develop a system that allows voters to have a fair chance of a slate of candidates that have not been pre-screened by wealthy donors or outside interests; candidates, whether wealthy or not, to run vigorous but fair races without becoming beholden to funders; elected officials to focus their time on legislation and constituent service, not fundraising; and parties, associations, and other groups of citizens to engage in the political process in a manner proportionate to their numbers and intensity of interest, not available funds. A legislature developing a campaign finance regulatory system must also anticipate that unforeseen loopholes will be exploited, and frequently refine the system to address changes in technology, political and social organization, and campaigns that render old assumptions obsolete. And of course, it must be politically feasible in today's often rancorous politics.

Developing campaign finance laws that address these challenges would be daunting for any legislature just given the constraints described above. But the task has been made far more difficult by a series of Supreme Court decisions—beginning with *Buckley v. Valeo*,[1] and continuing through April's *McCutcheon v. FEC*[2]—that impose artificial limits on how "we the people" choose to organize our political campaigns.

Worse yet, the Court has created an artificially cramped discussion by focusing entirely on the very small group of people and corporations that contribute and spend money in politics. By treating their money as worthy of constitutional protection, but essentially ignoring the far broader interests of voters in a fair political system in which candidates are not pre-screened by wealthy donors, the Court has forced the discussion into terms under which it is difficult, if not impossible, for common-sense campaign finance reforms to succeed.

The resulting system pleases very few, and frustrates elected officials, candidates, voters, small donors, and non-voting citizens and residents who must live under the system the Court has created. It even frustrates many wealthy individuals or

[1] 424 U.S. 1 (1976).
[2] 134 S. Ct. 1434 (2014).

corporations that would frankly prefer not to be political contributors and would welcome collectively-imposed reforms that would limit their ability to spend in politics, and therefore give them an excuse to decline solicitations.[3]

Many worthy proposals have been offered to address the campaign finance problem within the confines of the limits that the Supreme Court has imposed, and Free Speech For People endorses such efforts. But to address directly the problem and the threat it poses to our democracy, we must revisit the central assumptions that have guided the Court since 1976—that the paramount interests to be considered are those of donors, rather than voters; that money is, or deserves the same protections as, speech; and that the *only* basis on which the American people can seek to stem the flow of money into the political system is "corruption" (and in the Court's even narrower current interpretation, only "*quid pro quo*" corruption).

Instead, we need to return to the following core principles:

One person, one vote. More than fifty years ago, the Supreme Court declared that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[4] Few dispute this principle today. But our present system of campaign finance, in which a small number of wealthy donors have far greater influence on most politicians than the vast majority of ordinary Americans, subverts this principle. To be sure, at an official voting station, a captain of industry has the same vote as any other citizen. But in the period *before* Election Day—and, in today's era of "permanent campaigns," it is *always* before the next Election Day—wealthy donors (many of whom are not even constituents) exert far greater influence than ordinary voters.

Money is not speech. Money *amplifies* speech. Consider the difference between a person delivering a short speech on a street corner; delivering that short speech to a camera phone and posting it on YouTube; and delivering that same speech to a professional camera crew and paying for it to blanket TV for weeks. The difference between these is not speech; the speech is the same. Rather, the difference is how much money is available to *amplify* that speech. And just as the Supreme Court long ago held that society can limit the volume of sound trucks on the public streets,[5] it does not abridge anyone's freedom of speech to place limits (without discrimination) on how "loudly" they can drown out all other voices.

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[3] Indeed, the 1907 Tillman Act, which banned corporate political contributions in federal elections, was welcomed by corporate leaders for just this reason: it ended an era of extensive political solicitation of corporate contributions. *See* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1131-38 (2002).
[4] *Gray v. Sanders*, 372 U.S. 368, 381 (1963).
[5] *Kovacs v. Cooper*, 336 U.S. 77 (1949).

Corporations are not people. Corporations are artificial legal entities, created by the state, and they are not entitled to the same rights as people. As Chief Justice Marshall wrote in 1819:

> 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 its creation confers upon it, either expressly, or as incidental to its very existence. . . . But this being does not share in the civil government of the country, unless that be the purpose for which it was created.[6]

Corporations are not citizens, let alone voters, and they are not identical to the actual people (employees and shareholders) who are associated with them. There is no reason to allow them to exert influence in our elections, any more than we allow foreign nationals to exert influence in our elections.[7]

To restore these principles and our democracy, Free Speech For People supports a constitutional amendment to overturn *Buckley*, *Citizens United*, and *McCutcheon*, and clarify that the American people, through their representatives in Congress and the states, can devise a campaign finance system that could include limits on political campaign spending and contributions from people and corporations. Justice Stevens proposed such a bill in his testimony. We have endorsed Senator Udall's amendment bill, S.J. Res. 19, and applaud Senator Schumer's announcement that the Senate will hold a floor vote this year on that bill.

Notably, these amendment bills do not commit Congress or the states to any *particular* campaign finance reform scheme—they simply clear away the obstructions that the Supreme Court has set in the path. Once an amendment has passed, then Congress (and each state) may begin the difficult but important work of negotiating, drafting, and revising campaign finance legislation. Surely there will be difficult political compromises involved. And wealthy donors and corporate leaders will be allowed to voice their views in that process, just as they can today. The difference will be that, once the difficult work of passing bipartisan campaign finance legislation has been completed, displeased donors will not be able to seek a second bite of the apple from an activist court.

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[6] *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).
[7] *Bluman v. Fed. Election Comm'n*, 132 S. Ct. 1087 (2012).

May 1, 2014

Mr. Jeff Johnson, Clerk
Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Johnson,

Please find the enclosed statement from Fund for the Republic in reference to the Senate Rules Committee's April 30, 2014 hearing, "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond." I ask that you ensure these documents are included in the public record.

Thank you,

Nick Penniman
Executive Director
Fund for the Republic

11 Dupont Circle NW | Suite 350 | Washington, D.C. 20036 | www.fundfortherepublic.org

Statement from Nick Penniman Regarding the Senate Rules Committee Hearing
Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance will Affect the 2014 Elections and Beyond

On behalf of Fund for the Republic (FFR), a nonprofit grantmaking organization dedicated to reducing the influence of money in politics, I want to express my gratitude to Senator King for convening this hearing on such an important issue, especially given the Supreme Court's recent decision in *McCutcheon v. FEC*. Much like the *Citizens United* ruling in 2010, *McCutcheon* has sparked an important discussion about the health of our democracy and has gotten people across the political spectrum thinking about how we can repair a system that most Americans agree is fundamentally broken.

Now our shared challenge is to find common ground on an issue that has been viewed solely along party lines for the last several years. Our elected officials must face the fact that more than four-fifths of the electorate, regardless of party affiliation, believe campaign contributions and expenditures should be publicly disclosed.[1]

In his testimony before the Committee on April 30, FFR advisor and former Republican FEC Chairman Trevor Potter quoted conservative justices Roberts and Scalia, who both argue that disclosure has important and positive effects on voters and democracy as a whole. Senator Ted Cruz seems to have adopted a similar viewpoint, calling for immediate disclosure in his statement before the Committee to help empower individual citizens. I can only hope this is an indication of a new status quo—where congressional leaders, regardless of party, can not only acknowledge that their constituents want disclosure, but also stand up to the wealthy donors, who are the *true* beneficiaries of a cloaked system.

However, disclosure on its own will not stave off the corrupting influence of money in our political system. Justice Stevens said as much when he argued for a constitutional amendment that would "impose reasonable limits on the amount of money that candidates for public office or their supporters may spend on election campaigns." As Senator Cruz himself pointed out, under the current system, lawmakers must maintain such an intense focus on fundraising that they're completely unable to focus on the job they were elected to do: represent their constituents and solve the real problems of the American people.

A December 2012 poll by Greenberg Quinlan Rosner, which asked respondents to name the two factors that have the most influence on how members of Congress vote, showed that *both* Democrats and Republicans think political donors, special interests and lobbyists have the most influence over our nation's leaders, and their own conscience and views of their constituents matter the least. Any effort to curb corruption and restore confidence in our uniquely American form of government will require consideration of a number of solutions, including limits on expenditures, lobbying reforms, reducing conflicts of interest for members of Congress and finding new ways to finance campaigns that enhance the power of small donors. Only then can we pass common-sense solutions that will balance power in our democracy among all people, not just those who can

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[1] According to a survey conducted by Clarus Research Group from June 21-25, 2012 on behalf of Common Good

afford to give the maximum amount to as many candidates as they like. The American people agree. We urge our elected officials to act accordingly.

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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E-MAIL: WASHINGTONBUREAU@NAACPNET.ORG · WEB ADDRESS WWW.NAACP.ORG

April 29, 2014

The Honorable Charles Schumer
Chairman
Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

The Honorable Pat Roberrts
Ranking Minority Member
Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

RE: "HOW UNDISCLOSED MONEY AND POST-MCCUTCHEON CAMPAIGN FINANCE WILL AFFECT 2014 AND BEYOND" / HEARING SCHEDULED FOR 4-30-2014

Dear Chairman Schumer and Ranking Member Roberts:

On behalf of the NAACP, our nation's oldest, largest and most widely-recognized grassroots-based civil rights organization, I am writing to express our association's thoughts on campaign financing in a post-McCutcheon world. Put frankly, the U.S. Supreme Court's decision in *McCutcheon v. FEC* will lead to the domination of our political system and our government by the wealthiest among us, who can now increase their ability to influence politicians, politics, which issues are debated, and how those issues are resolved. Losers will be the rest of us, who can no longer afford to express our voice and our preferences through the political process, and who risk being alienated even further.

As we all know, on April, 2, 2014, the United States Supreme Court issued a decision in *McCutcheon vs. FEC* in which a narrow 5-4 majority struck down the limit on the total amount that one wealthy donor is permitted to contribute to all federal candidates, parties, and political action committees (PACs) combined. In fact, an individual can now donate up to $3.5 million to an individual campaign, political party, or political organization, instead of the prior cap of $123,200. The former "aggregate contribution limit" of $123,200 over a two-year election cycle was in fact more than twice the average income for an American household.

The influence of money in politics is ever increasing, informing who stands for office, who wins, and, most critically, the eventual public policy Congress enacts. Big money is the main reason Congress is increasingly out of step with the interests of everyday Americans, particularly on issues of economic insecurity, and particularly with racial and ethnic minorities and low-income Americans.

In order to offer a balance to misguided court decisions such as *McCutcheon v. FEC* and to restore some sanity to politics, the NAACP supports legislation such as the *Government By the People Act* (HR 20) and the *Fair Elections Now Act* (S 2023) which would boost the influence of small donors and help millions more Americans, rather than just a few big donors, play a central role in determining who runs for Congress, who wins elections, and what issues make it onto the agenda in Washington. Both the *Government By the People Act* and the *Fair Elections Now Act are* carefully crafted to withstand constitutional scrutiny, and would establish a competitive alternative to our big-money dominated campaign finance system. The NAACP also supports constitutional remedies to restore the authority of Congress and the states to effectively regulate the amount of money that candidates for public office and others may spend in election campaigns.

In short, the NAACP supports actions to empower our communities to have a voice in their government, electing better representatives, enacting better policy, and achieving a better, more representative democracy.

The McCutcheon decision is another blow to our ability to defend our democratic government from further domination by the wealthiest among us, who can now increase their ability to influence politicians, politics, which issues are debated, and how those issues are resolved. Conversely, it will have the impact of further drowning out the voices of ordinary Americans, who cannot afford to donate $3.5 million.

Thank you for taking the concerns of the NAACP into account. I welcome your questions or comments, and I can be reached at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director, NAACP Washington Bureau &
Senior Vice President for Policy and Advocacy

cc: Members,
Senate Committee on Rules and Administration

PUBLIC CAMPAIGN
OF, BY, AND FOR THE PEOPLE.

April 30, 2014

The Honorable Charles E. Schumer
Chairman
Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

The Honorable Pat Roberts
Ranking Member
Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Roberts,

Public Campaign is pleased that the Senate Committee on Rules and Administration is holding today's hearing to discuss "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond." I respectfully request that this letter and the accompanying documents be included in the hearing record.

Public Campaign is a non-profit, non-partisan organization dedicated to sweeping reform that aims to dramatically reduce the role of big special interest money in American politics.

Respectfully Submitted,

Nick Nyhart
President and CEO

1133 19th Street NW, 9th Floor | Washington, D.C. 20036 | Tel 202-640-5600 Fax: 202-640-5601 | info@publicampaign.org
www.publicampaign.org

TESTIMONY FILE FOR THE HEARING RECORD OF THE SENATE COMMITTEE ON RULES AND ADMINISTRATION

STATEMENT OF
NICK NYHART, PRESIDENT AND CEO, PUBLIC CAMPAIGN,
FOR THE HEARING RECORD OF

SENATE COMMITTEE ON RULES AND ADMINISTRATION HEARING ON "DOLLARS AND SENSE: HOW UNDISCLOSED MONEY AND POST-MCCUTCHEON CAMPAIGN FINANCE WILL AFFECT 2014 AND BEYOND"

April 30, 2014

Senator King, Chairman Schumer, Ranking Member Roberts, and distinguished members of the committee.

Thank you for the opportunity to submit testimony today on an issue of extraordinary importance to the American public and the health of our democracy. In *McCutcheon v. Federal Election Commission (FEC)*, the Supreme Court struck another blow to our campaign finance system by invalidating the long-standing limits on aggregate contributions. By striking down these limits, the court has continued down the path of *Citizens United* by placing our elections more squarely in the hands of an elite few, and further isolating everyday Americans from the political process.

Already, party fundraisers are taking advantage of the decision. One joint fundraising committee will allow one donor to write a $98,800 check to be distributed to various candidates.[1] Another party committee will allow a $97,200 check to be written.[2]

People that can make donations that large—more than most families make in a year—aren't like everyday Americans and they further skew our political system toward the wealthy. In the 2012 election, the list of people who got close to, met, or exceeded the "aggregate limit" included 67 billionaires. A quarter work on Wall Street, and they live in some of the wealthiest neighborhoods in America.[3]

What the Roberts Court has left us with is a campaign funding system that will make it harder for the voices of everyday Americans to compete with the megaphones of mega donors. *McCutcheon* was about more than just legal principle and precedent, it was about power. In striking down the aggregate limits, the court sided with the money over the many. In this and other decisions it has essentially created a new right – one that was

[1] Huffington Post, "Republicans Launch Second Post-McCutcheon Supercommittee To Tap Megadonors," April 23, 2014.
[2] Washington Post, "Republicans set up first "max-PACs" in wake of McCutcheon decision," April 22, 2013.
[3] Public Campaign, "Country Club Politics," October 2013.

never imagined by our founders or contemplated in the constitution – to engage in the functional equivalent of bribery.

It's a system with very real consequences for a representative democracy. According to a new study by Professors Martin Gilens of Princeton and Benjamin Page of Northwestern, U.S. government policies reflect the desires of the wealthy and special interest groups more than the average citizen. The professors noted, "not only do ordinary citizens not have uniquely substantial power over policy decisions; they have little or no independent influence on policy at all."[4]

These findings are echoed in the numerous recent polls that show voters ranking themselves last in consideration – below contributors, political parties, and lobbyists – when Congressional lawmakers decide how to vote.[5] Although the study paints a bleak picture of a democracy fraught with growing inequality tied to political fundraising reliant on America's wealthiest, there is hope.

Dr. Gilens believes this trend of policy outcomes tied to the whims of the wealthy is reversible and that "meaningful campaign finance reform is the single, most promising avenue" to change the system.[6] So while the court has chosen plutocracy over democracy, Congress can respond by putting into place a small donor based citizen funded elections system, and shining a light on dark money. This solution would end the dependence on big money and put power back into the hands of millions of American citizens. It is for these reasons that we support the bicameral effort on small donor driven elections represented by S. 2023, the Fair Elections Now Act, introduced by Senator Dick Durbin, and H.R. 20, the Government By the People Act, introduced by Congressmen John Sarbanes.

The Fair Elections Now Act would help restore confidence in the Congressional election process by providing qualified candidates for Congress with grants, matching funds, and media vouchers which would amplify the voices of small donors, and replace the need to rely on the wealthy and special interests to fund campaigns. In exchange, participating candidates would agree to fund their campaigns by donations limited to $150. The bill would also establish a "My Voice Tax Credit" to encourage individuals to make small donations to fund campaigns.

Congress can enact these legislative solutions today, and they would save our democratic system from being captured by private wealth. They would shift the paradigm so that candidates can turn to "we the people" to fund campaigns and not a small pool of wealthy donors. We applaud Senator King for chairing this hearing and his sentiment that "it's far past time we shine a bright light on the dark money dominating campaigns." We also know that disclosure alone will not be able to stem the tide of unfettered wealth pouring

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[4] Martin Gilens and Benjamin Page, "Testing theories of American politics: elites, interest groups, and average citizens," April 9, 2014.
[5] Public Campaign Action Fund, "Voters say members of Congress listen to donors more than constituents or their own conscience," December 17, 2013.
[6] The Agenda on Sirius XM, April 18, 2014.

into our system, and urge the Senate to consider additional reform proposals to put elections back in the hands of everyday Americans.

It is possible to improve our system, but we must do it together. Although our highest court has fundamentally undermined our representative democracy, we can act. We can restore faith in the system of government that our founders intended, where the average voter and not the deepest pocket donors set the agenda. Together we can empower everyday Americans, revive confidence in our government, and create a system that's truly of, by, and for the people.

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

April 30, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
U.S. Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Sen. King and Ranking Member:

Public Citizen is pleased that the Senate Committee on Rules & Administration is holding a hearing on April 30, 2014, to examine the influence of undisclosed money on elections in the wake of the Supreme Court's 2014 *McCutcheon v. Federal Election Commission* decision. Please accept these written comments discussing the damage to our elections caused by the *McCutcheon* decision and the Court's earlier decision, *Citizens United v. Federal Election Commission* (2010), two sweeping court rulings that set the stage for today's loss of reasonable limits and disclosure of money in politics.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen played an important role in the Supreme Court proceedings in both the *Citizens United* and *McCutcheon* decisions as amicus curiae on behalf of congressional leaders.

Respectfully Submitted,

Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen
215 Pennsylvania Avenue SE
Washington, D.C. 20003
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April 30, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
U.S. Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Testimony of Craig Holman, Public Citizen[1]

"Dark Money" and the McCutcheon Decision: Harms and Potential Remedies

A sharply divided U.S. Supreme Court once again struck down regulations on money in politics on April 2, 2014, when five justices ruled that the long-standing "aggregate contribution limits" of the Federal Election Campaign Act of 1971 (FECA) are now unconstitutional on First Amendment grounds. *McCutcheon v. Federal Election Commission*, 572 U.S. __ (2014).

Prior to the *McCutcheon* decision, an individual could contribute up to a total of $123,200 per election cycle to all federal candidates and committees combined, with sub-limits of $48,600 to all candidates and $74,600 to all political committees and parties. This meant that a wealthy donor could give a maximum individual contribution to 9 candidates and seven political committees.

Aggregate contribution limits were originally established in the 1974 amendments to FECA in response to the Watergate scandals that involved allegations of laundered campaign funds, illegal corporate contributions, "bought" ambassadorships by wealthy individuals and secret campaign cash. The aggregate contribution limits were upheld by the Supreme Court in the 1976 *Buckley v. Valeo* decision[2].

In 2014, the Roberts Court overruled these holdings, reversing some 40 years of established campaign finance law. The *McCutcheon* decision expands the rights only of a handful of millionaires and billionaires capable of making campaign contributions in excess of $123,200. While the ruling on its face may not be as sweeping as the *Citizens United* decision, it has the potential of being more dangerous. Citing itself as precedent, the majority of the Roberts Court changed the legal standard for upholding campaign finance laws, holding that the interest in preventing "corruption or the appearance of corruption," which had previously included using money to buy unfair influence over or access to public officials, could support only laws aimed at what the Court perceives as a genuine risk of *quid pro quo* corruption.

The Court, however, has repeatedly upheld campaign-finance disclosure laws, most recently and notably in *Citizens United* itself. Reflecting the Justices' lack of experience in real-world campaigns, the Roberts Court in *Citizens United* naively assumed that in the Internet age there is

[1] Craig Holman, Ph.D., Government Affairs Lobbyist, Public Citizen, Washington, D.C.
[2] Buckley v. Valeo, 424 U.S. 1 (1976).

full disclosure of money in politics, reaffirmed the public's right to know, and even partly justified lifting campaign finance regulations on the grounds of transparency.

In *Citizens United*, Justice Kennedy wrote for the majority:

> "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can 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."[3]

In *McCutcheon*, Justice Roberts reiterated the Court's confidence in disclosure:

> "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information... Today, given the Internet, disclosure offers much more robust protections against corruption... Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time Buckley, or even McConnell, was decided."[4]

But Kennedy and Roberts are gravely mistaken about the real world of campaign finance disclosure. Transparency of money in politics today is sorely lacking. Because of weak enforcement policies at the Federal Election Commission, and excessive ambiguity in the tax laws, many corporations and wealthy special interests have been able to spend record-breaking sums on campaign ads and conceal their identities. Donors can easily sidestep disclosure by funneling money through nonprofit organizations – and they do. Well over $300 million was spent in "dark money" in just the 2012 federal elections from anonymous sources.

There are significant steps Congress and regulatory agencies can take to address the dark money plague and rein in some of the damage caused by the *Citizens United* and *McCutcheon* decisions. Options for congressional responses to the decisions fall into three general categories: transparency, regulation and constitutional change. Since these two Court rulings are substantively distinct, appropriate congressional responses vary for each decision.

Responses that Congress can and should pursue that specifically target *McCutcheon* include:

- Turn the imaginary Internet disclosure systems envisioned by Kennedy and Roberts into reality by passing the "Real Time Transparency Act of 2014," which would require 48-hour disclosure of campaign contributions to candidates, parties and committees, as well as transfers from joint fundraising committees.

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[3] Citizens United, 588 U.S. at 370.
[4] McCutcheon, 572 U.S. _ at 24.

- Ban or restrict "joint fundraising committees," which under *McCutcheon* are likely to become the preferred fundraising vehicle for major donors and the greatest potential source of corruption.
- Strengthen the ban on direct candidate solicitations of contributions in excess of candidate limits and extend the ban to include prohibiting candidate appearances (and appearances by representatives of candidate committees) at any fundraising event in which contributions in excess of candidate limits are being solicited. This would apply to both super PACs and joint fundraising committees.
- Press for constitutional change to reverse *McCutcheon*.

Broader congressional responses that would address both the *Citizens United* and *McCutcheon* decisions include:

- Encourage the Securities and Exchange Commission (SEC) to adopt rules mandating disclosure of corporate political spending by publicly-held companies, and the Internal Revenue Service (IRS) to move ahead with rulemaking that would clearly define political intervention by nonprofit organizations and enforce the current law prohibiting 501(c)(4) nonprofit organizations from making more than de minimis political expenditures.
- Approve legislation that would enhance transparency of money in politics, such as the Bright Lines Project legislative proposal that clearly defines political intervention for nonprofit organizations so as to reduce the discretion of the IRS in such evaluations; the Shareholder Protection Act; and the DISCLOSE Act.
- Empower citizens through effective presidential and congressional public financing systems that offset spending by outside groups and incentivize small dollar donations.
- Submit to the states for ratification a constitutional amendment that clarifies for the Supreme Court what the First Amendment really means.

Fading Disclosure and the Dramatic Rise in Outside Campaign Spending

Fading disclosure of the sources of electioneering funds has plagued nearly all federal and state elections in the United States at an alarming rate since the U.S. Supreme Court's *Citizens United v. Federal Election Commission* decision. The problem may well grow worse in a post-*McCutcheon* world. This was not the intent of the Court.

The *Citizens United* decision marked a radical break by the Roberts Court from long-standing American political tradition and court precedents. On January 21, 2010, the Supreme Court unleashed a flood of corporate money into federal, state, judicial and local elections by announcing that, contrary to long-standing political tradition, corporations have a constitutional right to spend unlimited amounts of money to promote the election or defeat candidates.

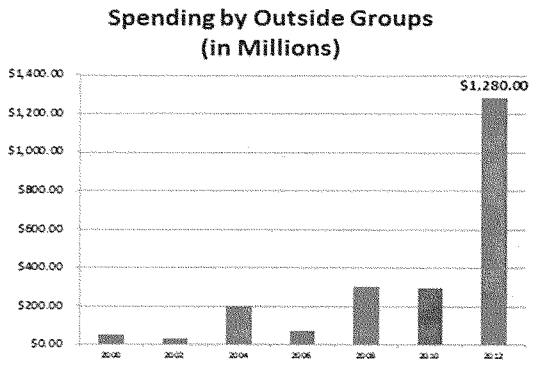
The Roberts Court explicitly overruled two existing Supreme Court decisions. In the 1990 *Austin v. Michigan Chamber of Commerce* decision,[5] the Court previously held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. The 2003 *McConnell v. Federal*

[5] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

Election Commission decision[6] applied that principle to uphold the federal Bipartisan Campaign Reform Act's restrictions on "electioneering communications," that is, its ban on corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. *Citizens United* overruled *Austin* and *McConnell*. The *Citizens United* decision also effectively negated parts of the same Court's 2007 ruling in *Federal Election Commission v. Wisconsin Right to Life.*[7]

By overruling these decisions, the Roberts Court opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

Immediately after *Citizens United*, outside spending in federal elections increased 427 percent in the 2010 elections over the previous 2006 congressional elections, and increased another four-fold in the 2012 presidential election cycle.[8]



But the Roberts Court never intended disclosure to be one of its victims. Even as the court struck down the limitation on corporate-funded campaign expenditures in the *Citizens United* opinion, the Roberts Court upheld the constitutionality of BCRA's disclosure requirements relating to the funders of electioneering communications.

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[6] McConnell v. Federal Election Commission, 540 U.S. 93 (2003).
[7] Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449 (2007).
[8] Data on outside spending in federal elections provided by the Center for Responsive Politics, analyzed by Public Citizen.

In addition, Justice Kennedy, who wrote the majority opinion, appeared to rely on the existence of strict disclosure laws as a rationale for lifting the ban on corporate-funded campaign expenditures.

> "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[9]

Such disclosure, Kennedy wrote, would enable citizens to "see whether elected officials are 'in the pocket' of so-called moneyed interests."[10]

However, contrary to the Supreme Court's promise that voters would be able to "give proper weight to different speakers and messages," voters were left completely in the dark about who funded about half the messages that were blasted into their living rooms in the elections following *Citizens United.*

At the federal level, the initial fading of campaign finance disclosure began from an errant rulemaking by the Federal Election Commission. In response to the 2007 *Wisconsin Right to Life* decision, the FEC revised the disclosure rule by exempting groups that made electioneering communications from disclosing contributors' identities except in special cases in which donors specifically earmarked money for that purpose.[11] A similar earmarking requirement for disclosure has also been applied to independent expenditures.

Because few donors are apt to attach such specific instructions to their contributions, the effect has been to gut the disclosure requirement enshrined in BCRA – despite the fact that the federal statute calls for full donor disclosure.

According to an analysis by Public Citizen,[12] among groups broadcasting electioneering communications in federal elections, nearly 100 percent disclosed their funders in the 2004 and 2006 election cycles (the first two election cycles after BCRA created this category of campaign ads). In the 2008 elections, the first after *Wisconsin Right to Life*, the share of groups disclosing their funders plummeted to less than 50 percent. In 2010, barely a third of electioneering communications groups disclosed their funders.

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[9] Citizens United, 588 U.S. at 370 (internal citations omitted).
[10] Id.
[11] 11 C.F.R. §104.20(c)(9).
[12] Taylor Lincoln and Craig Holman, 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

Disclosure by Groups Making Electioneering Communications, 2004-2010

Year	# of Groups Reporting ECs	# of Groups Reporting the Donors Funding ECs	Pct. of Groups Reporting the Donors Funding ECs
2004	47	46	97.9
2006	31	30	96.8
2008	79	39	49.3
2010	53	18	34.0

Source: Public Citizen's analysis of Federal Election Commission data.

Among groups making independent expenditures (expenditures expressly intended to influence elections) in federal elections, disclosure of donors fell from 90 percent in 2004 and 97 percent in 2006 to only 70 percent in 2010.

Disclosure Among Top 30 Groups Making Independent Expenditures, 2004-2010

Year	Groups Disclosing Funders	Groups Not Disclosing Funders	Pct. Of Groups Reporting the Donors funding IEs
2004	26	3	89.7
2006	29	1	96.7
2008	25	5	83.3
2010	21	9	70.0

Source: Public Citizen's analysis of data from the Federal Election Commission and the Center for Responsive Politics

Combining the loss of donor disclosure behind electioneering communications with the loss of donor disclosure behind independent expenditures, the sources of only about half the funds spent by outside groups in the 2010 federal elections were disclosed to the public. There was a modest up-tick in donor disclosure in the 2012 elections, due almost entirely to the new prevalence of "super PACs," which are registered political committees subject to federal disclosure laws. According to the Center for Responsive Politics, 24 percent of outside spending groups provided no donor disclosure, another 24 percent provided partial disclosure, and only about 52 percent of outside spending groups provided full disclosure of their funding sources.[13] But the total amount of "dark money" in the 2012 elections – at least $310 million – exceeded the amount of undisclosed money in any previous election.[14]

The problem of dark money is likely to worsen under the *McCutcheon* decision. Candidates, parties and committees are expected to create a plethora of joint fundraising committees under the direction of congressional and party leaders, who will then collect huge contributions and

[13] Center for Responsive Politics, analysis of disclosure of donors by outside spending groups in the 2012 federal elections, available at: http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D

[14] Center for Responsive Politics, at: https://www.opensecrets.org/outsidespending/disclosure.php

distribute the funds. These transfers are supposed to be transparent, but the actual sources of the funds can be difficult to trace and monitor, and these disclosures tend to be slow in coming.

How *McCutcheon* Changes the Political Landscape

By a 5-to-4 ruling on April 2, 2014, the U.S. Supreme Court struck down the aggregate contribution limit of $123,200 that any individual may make to all federal candidates, committees and parties combined in an election cycle, but left intact—so far—the "base limits" on contributions to each candidate ($2,600 per election), political action committees ($5,000 per calendar year), state parties for federal elections ($10,000 per calendar year) and national party committee ($32,400 per calendar year). The plurality opinion written by Chief Justice John Roberts was supported by a concurring opinion from Justice Clarence Thomas who wrote that he would go further and reverse the 1976 *Buckley v. Valeo* decision in its entirety, invalidating all contribution limits.

The Roberts opinion noted that Congress may regulate campaign contributions to protect against corruption, but then changed the established definition of corruption that had been used previously into a very narrow *quid pro quo* definition of corruption. Citing its earlier *Citizens United* decision, the court said that making contributions in order to buy "[i]ngratiation and access … are not corruption." Instead, government "must instead target what we have called *quid pro quo* corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money."[15] Aggregate contribution limits, argued Roberts, impermissibly attempt to curtail an overly broad concept of corruption involving favoritism and undue influence, as well as indirectly preventing circumvention of the base limits, rather than preventing direct *quid pro quo* exchanges.

The dissenting opinion, written by Justice Stephen Breyer, accused the court majority of creating a huge new loophole in campaign finance law, contradicting historic court precedents, and ignoring concerns about declining public confidence in the political process. Treating corruption as only "an act akin to bribery" is "inconsistent with the Court's prior case law." Such a narrow definition of corruption "is virtually impossible to reconcile with this Court's decision in McConnell, upholding the Bipartisan Campaign Reform Act of 2002 (BCRA)."[16]

Breyer concluded:

> "In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions….
>
> "Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a

[15] McCutcheon, Roberts opinion, 572 U.S. __ at 2-3.
[16] McCutcheon, Breyer's dissent, 572 U.S. __ at 4.

> democratic order in which collective speech matters.... Where enough money calls the tune, the general public will not be heard."[17]

An analysis by Public Citizen shows exactly how much wealthy individuals may drown out the voices of the general public. In a post-*McCutcheon* world, a wealthy donor may contribute up to $3.6 million in an election cycle to the candidates and committees of a single party, and up to $5.9 million if officeholder leadership PACs are included in the calculation.[18]

In addition to drowning out the voices of the general public in the political process, the *McCutcheon* decision dangerously raises the specter of actual corruption. It would be quite a bit of tedious work for a wealthy donor to hand out separate checks to hundreds of candidates, but that is not how campaign fundraising tends to work in the real world. Fundraising for groups of candidates and party committees is done through a single "joint fundraising committee," usually run by a congressional leader or party boss. The person heading a joint fundraising committee receives a single large check from a wealthy donor and then doles the money out to participating candidates and party committees in accordance to the base limits.

Joint fundraising committees originally were envisioned as useful fundraising tools in which a couple of candidates joined resources to stage an affordable fundraising event. Joint fundraising committees were few in number and generally accounted for modest donations. But they quickly grew in number and significance since the presidential elections of 2000. Presidential candidates began making extensive use of joint fundraising committees to collect checks from wealthy donors by joining their campaign committees with state and federal party committees, the latter of which already had high base limits of $25,000 or more depending on the year. By the 2012 presidential election, presidential joint fundraising committees, such as the Obama Victory Fund, could receive checks as large as $75,800 from a single donor – the maximum amount allowed under the aggregate contribution limits of that year –which was then disbursed to the presidential campaign and party committees dedicated to support the presidential campaign.

Presidential joint fundraising committees became so prolific and capable of raising massive amounts of funds from wealthy donors that they rendered the presidential public financing program an insignificant, if not irrelevant, source of presidential campaign funds. The newly destructive nature of joint fundraising committees in presidential elections prompted legislative proposals to restrict such fundraising committees to candidates only, excluding party committees.[19]

Congressional leaders and party bosses took note of the massive campaign funds that could be raised through joint fundraising committees and followed suit. The number of presidential and

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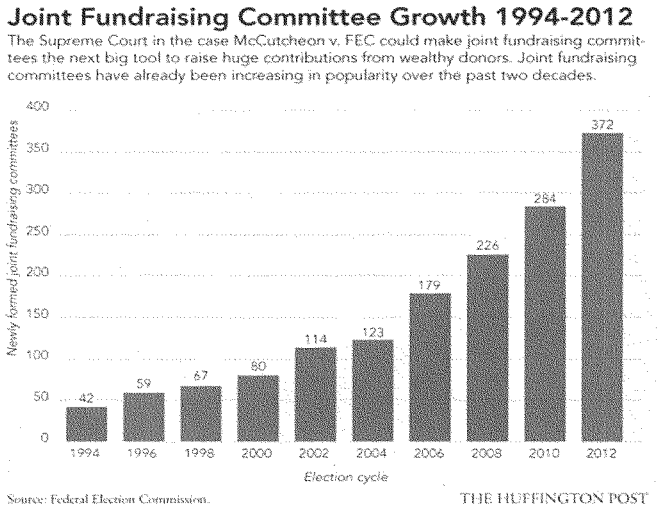
[17] Id, at 4-6.

[18] Adam Crowther, Beware of a Naïve Perspective (Part 1 of 2), Public Citizen (Jan. 7, 2014) at 7, available at: http://www.citizen.org/mccutcheon-campaign-finance-analysis-report

[19] For legislation restricting the size of joint fundraising committees to cover only candidates and exclude party committees, see for example, "Empowering Citizens Act" (H.R. 270), sponsored by Rep. David Price, 113th Congress.

congressional joint fundraising committees rose from 80 in 2000 to 372 in 2012. (*See* below "Joint Fundraising Committee Growth, 1994-2012."[20])



Following the *McCutcheon* decision, joint fundraising committees are expected to explode in number and significance for financing all federal campaigns. Without aggregate contribution limits, the sky's the limit for these entities, which will be run by a congressional leader or party boss. A wealthy individual who seeks to curry favor with the Speaker of the House or Senate Majority Leader now has a legal avenue to hand over a single multi-million dollar check to that officeholder.

To make matters worse, transfers between candidates and parties will make evasion of even the base limits very likely. While joint fundraising committees are required under FEC regulations to create a distribution formula for divvying up their largess among participating candidates and party committees,[21] the recipient candidates and party committees are not so bound. They may make large and, in the case of candidates to parties, unlimited transfers of those funds. As a result, candidates in noncompetitive elections may participate in a joint fundraising committee, receive an allocated contribution through the committee from a donor who maxed out to the national party committees, and then transfer those funds directly to the national party committees, indirectly but legally sidestepping the base limits for that donor.

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[20] Paul Blumenthal, "McCutcheon v. FEC's Other Threat: Case Could Super-Size Fundraising Committees," *Huffington Post* (Oct. 7, 2013).
[21] FEC rules governing the operations of joint fundraising committee are at 11 CFR 102.17.

A Public Citizen analysis found that in the post-*McCutcheon* world of no aggregate limits, joint fundraising committees could readily enable candidates to transfer more than $74 million to the national party committees combined. Each donor to a joint fundraising committee would effectively be contributing more than $1.8 million to party committees, or more than 24 times the legal base limit.[22]

Just a few weeks after the *McCutcheon* decision, Republican leaders have already established three new joint fundraising committees: the Republican Victory Fund, a joint fundraising agreement among the Republican National Committee (RNC), National Republican Senate Committee (NRSC), and National Republican Congressional Committee (NRCC); and the 2014 Senators Classic Committee, a joint fundraising effort linking 19 Republican senate candidates; and a joint fundraising committee established under the direction of House Majority Leader Eric Cantor.

Democratic party and congressional leaders will soon be following in the footsteps of their Republican counterparts. House Minority Leader Nancy Pelosi declared that Democrats are "not going to unilaterally disarm," even as they objected to the *McCutcheon* decision.[23]

The post-*McCutcheon* world of no aggregate limits will produce a huge infusion of new money into politics, but coming from a very small number of donors. Of 310 million Americans nationwide, only 0.4 percent of Americans made contributions in the 2012 elections of $200 or more. Among this small pool, a mere 646 people maxed out at the overall aggregate limit to both candidates and committees in the 2012 election.[24] The *McCutcheon* decision has instilled a new right for only those people who can afford to give even more.

The *McCutcheon* decision may not immediately be as sweeping in scope as the Citizens United decision, but it is another devastating blow to reasonable limits on money in politics and it may portends the death of what remains of laws restricting campaign contributions. Joint fundraising committees under the direct control of presidential candidates, congressional leaders and party bosses are likely to proliferate and dominate campaign fundraising, providing a small number of wealthy donors the means to endear themselves with political leaders. Though the Supreme Court in both *Citizens United* and *McCutcheon* preserved the constitutionality of disclosure of money in elections, and even spoke of disclosure as the counterpoint to the expected changes to the system caused by the decisions, an effective disclosure regime does not currently exist.

Three Powerful Ways to Respond to *McCutcheon*

Three general categories of policy options to rein in the damage caused by *McCutcheon* as well as *Citizens United* are available to Congress. These include *enhanced transparency*, *regulation of campaign fundraising*, and a *constitutional amendment* and political pressure on the Supreme Court to reverse its campaign finance decisions.

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[22] Adam Crowther, Beware of a Naïve Perspective (Part 2 of 2), Public Citizen (Jan. 14, 2014).
[23] Shane Goldmacher, "Are Democrats Repeating their Post-Citizens United Mistake?" *National Journal* (April 22, 2014).
[24] Center for Responsive Politics, McCutcheon's Multiplying Effect, available at: http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why.html

The *McCutcheon* decision primarily affects hard money in elections, and so direct hard money remedies are discussed first in each of the three policy categories. The *Citizens United* decision has a broader reach on both hard money of regulated entities and soft money of outside groups, but remedies to this ruling will help rein in the damage of *McCutcheon*, and so these are also discussed.

1. **Enhance Transparency.** In both the *McCutcheon* and *Citizens United* decisions the court stood firmly behind the constitutionality of disclosure requirements. Yet, the institutional framework for an effective transparency regime is not currently in place. Transparency of money in politics can be achieved through either legislative or regulatory actions, and Congress is in a position to influence both.

   - **Real Time Transparency Act of 2014.** The Court correctly understands part of the disclosure equation: in this era of the Internet, there is no excuse for not having full and instant transparency of money in politics, accessible to everyone at the click of a mouse. In fact, candidates and outside electioneering groups are required under current law to file electronic disclosure reports of their financial activity within 48 hours or 24 hours of each significant expenditure in the last few weeks of an election. Electronic filing and disclosure software are already developed by the FEC and federal candidates and electioneering groups generally know how to use these programs. With these easy-to-use electronic programs, instant electronic filing requirements pose little extra burden on campaign entities.

     Now that the *McCutcheon* decision is going to result in vast new sums of hard money flowing into campaigns, especially through joint fundraising committees, it has become more important than ever to require instant disclosure of significant contributions and transfers of funds by candidates, parties and committees. The "Real Time Transparency Act of 2014" – S. 2207 sponsored by Sen. Angus King (I-Maine) and H.R. 4442 by Rep. Beto O'Rourke (D-Texas) – does precisely that.

   - **SEC Petition for Transparency Rulemaking**. On August 3, 2011, several law professors submitted a petition for rulemaking to the Securities Exchange Commission (SEC) requesting that the agency promulgate rules to require publicly-held corporations to disclose their political spending to the public and shareholders. (Petition File No. 4-637) The petition has received a record-breaking 750,000 public comments in support. Transparency of corporate money in elections would go a long way toward mitigating the damage caused by *Citizens United*. The SEC, like the IRS, is heavily influenced by cues from Congress on whether to proceed. Members of Congress should weigh in and encourage the agency to address the issue by placing it on their next regulatory flexibility agenda.

   - **Bright Lines Project.** On November 29, 2014, the Treasury Department issued a Notice of Proposed Rulemaking (NPRM) to clarify the definition of political intervention for 501(c)(4) social welfare organizations. In the wake of thousands of comments, Treasury is debating revising the proposal. For more than four years, a coalition of tax lawyers and

nonprofit organizations led by Public Citizen, known as the Bright Lines Project, have developed extensive recommendations to clarify the definition of political intervention that would both encourage civic engagement by nonprofits and yet protect against abuse. (The recommendations are available at: http://www.brightlinesproject.org/.) Members of Congress again should weigh in, urging the agency to proceed with rulemaking, expand the rulemaking to cover all nonprofit organizations along the guidance offered by the Bright Lines Project, and set limits on the quantity of permissible political intervention.

- **Transparency Legislative Remedies**. The disclosure regulations under consideration by the SEC and the IRS also have legislative vehicles for achieving the same transparency results. Members of Congress should join as cosponsors and help promote the "Shareholder Protection Act" (S. 824), sponsored by Sen. Robert Menendez (D-NJ). The recommendations of the Bright Lines Project should also be introduced as a legislative vehicle, complete with hearings that would publicize the problems of abuse of the tax code by electioneering nonprofit groups and the IRS, and the solutions that are available. Congress should consider legislation to explicitly extend the existing limit on permissible electioneering activity by 501(c)(4) groups to other tax exempt entities to distinguish a genuine nonprofit organizations from Section 527 political organization subject to disclosure. And, of course, the DISCLOSE Act must remain a priority of Congress, a measure that would achieve full transparency of corporate and nonprofit political donations and expenditures in one swoop.

2. **Regulation of Campaign Fundraising**. Both *McCutcheon* and *Citizens United* have fundamentally transformed the nature of campaign fundraising, the former by allowing wealthy donors to cut huge and potentially corrupting checks to congressional leaders and party bosses, and the latter by allowing the flow of corporate and union treasury funds into elections. The changed nature of campaign fundraising calls for Congress to make significant changes in the law.

   - **Ban or Restrict Joint Fundraising Committees**. Joint fundraising committees are authorized by statute[25] and subject to FEC regulations.[26] Prohibiting or restricting joint fundraising activities will likely require legislation, though the operations of such committees could be subject to further FEC regulations. Joint fundraising committees could be banned altogether, limited in size to a small number of participating committees, restricted in the amounts of funds that could be transferred to candidates, or even defined as a single PAC subject to contribution limits applicable to its donors ($5,000 per year). The idea of restricting joint fundraising committees to just candidates, as has been proposed in recent legislation, pre-dates the *McCutcheon* decision and would not achieve a useful purpose in the post-*McCutcheon* world where such committees could receive checks up to $3.6 million from a single donor.

     There is no certainty in how the Roberts Court would treat legislative restrictions on joint fundraising committees. However, Roberts specifically stated in *McCutcheon*'s plurality opinion that restrictions on transfers of funds involving joint fundraising committees, or

[25] 2 U.S.C. 432(e)(3)(A)(ii), and 2 U.S.C. 441a(a)(5)(A).
[26] 11C.F.R. 102.17.

limits on the size of joint fundraising committees, may be appropriate legislative responses.

Roberts wrote: "One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Such a solution would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees)."[27]

- **Extend the Ban on Direct Candidate Solicitations of Excessive Contributions.** Currently, officeholders and candidates are prohibited from soliciting contributions in excess of FECA limits, though they may make appearances at such "soft money" fundraising events according to FEC regulations. Legislation should be introduced that prohibits any officeholder or candidate from soliciting contributions in excess of the maximum that could be given to that candidate in an election cycle, or, if that limit proves politically unworkable, that amount plus the maximum that could be given to a single national party committee in that cycle. This restriction should be expanded to also include prohibiting an officeholder or candidate from even making an appearance at any fundraiser in which contributions in excess of these limits are being solicited.

- **Consolidate the Limits to Party Committees.** An unwieldy aspect of the current campaign finance law is that donors are allowed to make multiple contributions to a political party through several committees of the same party. The contribution limit to a national political party committee is set at $32,400 per year, but an individual may give that maximum amount each to the national committee of the party, the senate campaign committee of the party and the congressional campaign committee of the party – and then another $10,000 to the federal campaign accounts of each of the 50 state parties. Congress should establish one single contribution limit for all committees combined of a political party. Treating party committees as a single entity for the purposes of contribution limits would go a long way toward reining in the damage caused by lifting aggregate contribution limits under *McCutcheon.*

- **Establish Public Financing of Congressional and Presidential Campaigns.** A strong public financing program for campaigns could address many of the problems posed by *McCutcheon* and *Citizens United.* The "Fair Elections Now Act" (S. 2023) sponsored by Sen. Richard Durbin (D-IL), or the "Government By the People Act" (H.R. 20) sponsored by Rep. John Sarbanes (D-Md.), would incentivize small dollar donations, provide candidates with substantial public funds to offset special interest money, and set the framework for voluntary agreements by participating candidates to accept only small contributions from donors and reject joint fundraising activities.

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[27] McCutcheon, Roberts opinion, at 34.

3. **Sway Court Opinion through a Constitutional Amendment or Dissent.** It is important to keep in mind that neither *McCutcheon* nor *Citizens United* are decisions written in stone. First of all, both decisions were made by a sharply and narrowly divided Court. One change of vote could reverse these decisions. Secondly, if the Court is not inclined to change its vote or composition anytime soon, a constitutional amendment over-rides the Court.

   - **Constitutional Amendment.** A constitutional amendment reversing *McCutcheon* and *Citizens United* would completely rein in the damage to campaign finance regulations done by the Roberts Court. Public Citizen does not take amending the Constitution lightly, but there have been times in American history when amendments were needed and achieved. Since 1789, 35 amendments had been submitted to the states by Congress and 27 of these amendments were ratified.

     The movement for a constitutional amendment to reverse *Citizens United* and now *McCutcheon* has gained incredible momentum. Hundreds of local governments and 16 states have passed resolutions calling upon Congress to submit a constitutional amendment to the states for ratification granting Congress the authority to regulate money in politics. Public opinion is overwhelmingly in support of reversing the *Citizens United* decision (and no doubt the *McCutcheon* decision as well, once polling is conducted on this ruling), with poll after poll showing vast majorities of Americans – Democrats, Republicans and Independents alike – supporting regulating money in politics and expressing dismay at the campaign finance decisions of the Roberts Court.

     McCutcheon is fueling this drive. Several thousand people took coordinated action in protest of the McCutcheon decision the same day it was issued in 150 rallies held across 41 states. Pictures of these rallies are available at: https://www.flickr.com/search/?q=%23mccutcheonrapidresponse

     So far, 36 Senators and 114 Representatives have signed onto a constitutional amendment to overturn *Citizens United* and *McCutcheon* in the 113th Congress.

   - **Disagreement.** The five Justices of the Roberts Court that have invalidated campaign finance laws appear increasingly isolated from public opinion that overwhelmingly supports reasonable campaign finance laws. As the disagreement of the four Justices in the minority and many other respected jurists throughout the nation indicates, the view of the Court's current majority is hardly the only, or the most plausible, reading of our Constitution and the precedents of past Courts. Disagreement with the Court's views is entirely legitimate and, in these circumstances, called for. In an unusually frank opinion, for example, a U.S. district court judge in New York struck down the state's contribution limits for a super political action committee (PAC) while noting that he disagrees strongly with the Supreme Court rulings requiring him to do so.[28] The U.S. Supreme Court faced a similar challenge from the Montana Supreme Court, which upheld that state's ban on corporate spending in Montana elections despite the *Citizens United*

[28] New York Progress and Protection PAC v. Walsh, S.D.N.Y., No. 13-6769, 4/24/14.

decision (which the U.S. Supreme Court by the same 5-to-4 vote struck down).[29] Montana's challenge was supported by 22 states and the District of Columbia.

Legislation is expected to be introduced in the U.S. House of Representatives reinstating the aggregate contribution limits, in defiance of *McCutcheon*. The Senate should consider a similar response, or at a minimum a resolution expressing disagreement with the Court's decision. Justices on the Supreme Court read newspapers and follow political events, and on occasion are susceptible to a change of mind. Alternatively, such continuing expression of legitimate disagreement with the Court's decision could influence future appointments to the Court.

Conclusion: Several Options for a *McCutcheon* Response are Available

Congress must move swiftly and decisively to mitigate the damage to our democratic system of governance posed by the *Citizens United* and *McCutcheon* decisions. A number of targeted options are available for a congressional response to *McCutcheon*, and several broader options are available for responding to both *Citizens United* and *McCutcheon*.

Targeted *McCutcheon* responses include instant on-line disclosure of large campaign contributions and transfers proposed in the "Real Time Transparency Act of 2014"; banning or restricting joint fundraising committees; extending the ban on candidate solicitations of excessive contributions to apply to joint fundraising committees as well as super PACs; creating a single contribution limit for all party committees combined; and challenging the Court majority on its campaign finance jurisprudence. Broader responses that would address both *Citizens United* and *McCutcheon* include enhancing disclosure of all money in politics through legislation and regulatory actions; promoting the Bright Lines Project for defining political intervention by nonprofit organizations; establishing public financing of campaigns; and pursuing a constitutional amendment to clarify for the Supreme Court what the First Amendment really means.

Public Citizen encourages Congress to pursue all appropriate options.

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[29] American Tradition Partnership v. Bullock, 132 S.Ct. 2490 (2012).

Senator Sheldon Whitehouse
Statement for the Record
Hearing: "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond"
Senate Committee on Rules and Administration
April 30, 2014

Senator King, Chairman Schumer, and Ranking Member Roberts, thank you for convening this hearing on the Supreme Court's recent decision in *McCutcheon v. FEC* and the epidemic of dark money in politics. You have assembled an outstanding group of expert witnesses to provide invaluable insight into the current state of campaign finance law and the need for reform. I am especially grateful for the presence and testimony of Justice Stevens, whose persuasive dissent in *Citizens United v. FEC* may one day pave the way for the restoration of reasonable limitations on election spending.

In the meantime, the Supreme Court's decision in *McCutcheon* represents a continuation of the conservative justices' efforts to dismantle our country's campaign finance laws and eliminate all checks against excessive and potentially corrupt influence. By striking down limits on how much an individual can give to all candidates and party committees in an election cycle, the Court once again chose to privilege wealthy and powerful interests while ignoring precedent and public consensus on the corrupting nature of money in politics.

The decision represents a continuation of the disastrous course set by the Court's decision in *Citizens United* to allow unlimited corporate independent expenditures. As Justice Stevens wrote in dissent, the *Citizens United* decision represented "a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."

McCutcheon compounded the damage done by *Citizens United* by extending *Citizens United*'s holding that Congress can only regulate campaign finance to address *quid pro quo* corruption to the realm of direct contributions to candidates and parties. This cramped and woefully insufficient definition of corruption shows a Court dramatically out of touch with the realities of electoral politics.

The reliance on *Citizens United* is particularly troubling given that the years since that decision have shown it to be based on fundamentally flawed assumptions. As Sen. John McCain and I pointed out to the Court in an *amicus* brief filed in *American Tradition Partnership v. Bullock*, *Citizens United* was premised on false assertions: among them, that "independent expenditures" would be truly independent, and that there would be full disclosure of political spending.

With regard to independent expenditures, the Court in *Citizens United* assumed that anti-coordination rules "substantially dimish[]" the "potential for abuse" of independent expenditures. This claim has been proved resoundingly false by the use of candidate-specific PACs operated for the benefit of a single candidate, and by the formation of Super PACs run by close associates

of candidates, which openly coordinate many aspects of their fundraising and advertising with the candidates.

The Court's claims regarding disclosure have proven similarly false. The majority claimed that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." Yet as Sen. McCain and I noted in our *amicus* brief, "super PACs, 501(c)(4) organizations and political campaigns are knitted into a fundraising web that allows unlimited, non-independent and anonymous (to the public) political donations for the benefit of a specific candidate." In the 2012 election cycle, independent expenditures from undisclosed sources topped $310 million – a dramatic increase from the corresponding figure of $69 million in 2008, the most recent previous presidential election cycle. When money cannot be traced, politicians cannot be held accountable and individual voters lack necessary information to fully and effectively participate in our democracy.

This failure of disclosure is due in large part to vague and permissive Treasury and IRS rules regarding political spending by 501(c)(4) social welfare organizations. The vast majority of 501(c)(4) groups are legitimate organizations that operate to promote social welfare. However, public documents point to the inescapable conclusion that some groups are abusing that status to evade campaign finance disclosure laws.

In some cases, these groups have gone as far as to claim on IRS forms that they were not spending money on political activity, while at the same time reporting millions of dollars in election spending to the Federal Election Commission, a subject covered at length during a Crime and Terrorism subcommittee hearing that I chaired last year. As discussed at that hearing, making a material false statement to a federal agency is a crime, and yet there has been no evidence that any such false statements have ever been referred for investigation.

There has been much discussion of the IRS scandal surrounding groups being singled out for scrutiny based on words in their names suggesting that they were politically active. This scrutiny was clearly inappropriate. Yet the failure to enforce limitations on political spending, or even statutes prohibiting false statements about such spending, represents a greater scandal.

I commend Treasury and the IRS for proposing new rules to clarify the limitations on spending by 501(c)(4) groups, and would urge them to follow through on the rules in the face of loud but baseless allegations that they are attacking free speech or targeting groups based on their political affiliations. As I and fifteen other Senators wrote to the IRS in connection with the Notice of Proposed Rulemaking, "[n]ew IRS regulations must put an end to the use of 501(c)(4) status as a means of evading campaign finance disclosure requirements. In particular, the new rules must make clear that it is impermissible for political operatives to create what are for all practical purposes PACs, obtain 501(c)(4) status for those PACs, and then spend essentially unlimited money to influence elections without disclosing their donors, as is now common practice."

While IRS action would help to address the problem, it would not be sufficient. Since *Citizens United*, I and many others have supported passage of disclosure legislation such as the DISCLOSE Act, which would require organizations spending large sums on elections to disclose

their largest donors. This legislation would help ensure that billionaire donors and multi-national corporations (including foreign donors and corporations) cannot pour unlimited money into elections while using legal loopholes to evade campaign finance disclosure requirements. A leading expert and witness at this hearing, Republican former FEC Chairman Trevor Potter, called the Act "appropriately targeted, narrowly tailored, clearly constitutional and desperately needed."

Once again, I thank the Rules Committee for holding this important hearing, and I will continue to work with reform advocates inside and outside of the Senate to repair our campaign finance system.

April 30, 2014

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Honorable Senator Angus King
Senate Committee on Rules and Administration
305 Russell Senate Office Building
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Re: Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond Hearing

Dear Senator King,

Thank you for holding today's hearing on dark money in American elections. While this problem started before *Citizens United v. FEC*, this case has certainly accelerated the problem of political money from unnamed sources.

I am also encouraged that you will focus not just on the problem of dark money, but also on its solutions. There can be both Legislative and Executive Branch solutions to the problem of dark money.

Congress

There are a few solutions to undisclosed money in politics that Congress could address. 1. Congress needs to mandate that money that is spent on political advertisements in federal elections is fully disclosed regardless of the tax status of the entity doing the spending. 2. Congress needs to clarify what a barred "foreign" source money is in the corporate context. It is clear that federal law still bars foreign *individuals* from spending in elections. What is far from clear is how federal law should treat corporations that are controlled by a foreign national. 3. In this post-*Citizens United* environment, Congress should change federal securities laws to empower shareholders with more disclosure of where and why corporations are spending in politics as well as give shareholders the ability to consent to corporate political spending.

STETSON LAW

Executive Branch
Federal agencies have overlapping jurisdiction over political spending and transparency should be increased across the board. The FCC has shown leadership in placing the political files of broadcasters on-line for the first time. But other agencies need to provide better public disclosures to the public. For example, the IRS needs to ensure that those entities which act as 527s are disclosing their underlying donors. The FEC needs to ensure that those who spend in federal elections above minimum thresholds are disclosed. And the SEC should expand reporting by publicly traded companies to include political spending.

For more information about dark money, please see the attached law review article: "Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics."

Thank you again for tackling this important topic. And please let me know if I can provide you or the Committee any additional information.

Sincerely,

Ciara Torres-Spelliscy, Esq.

CONNECTICUT PUBLIC INTEREST LAW JOURNAL

VOLUME 12 FALL-WINTER 2012 NUMBER 2

Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics

CIARA TORRES-SPELLISCY[†]

"There cannot be honest markets without honest publicity."
--U.S. House of Representatives Report, 1934.[1]

INTRODUCTION

Dante placed corrupt politicians in the Eighth Circle of Hell.[2] Centuries later, and an ocean away, loathing of political corruption still provides a formidable framework for thinking about abuses of power. For the past three years, a fear of political corruption has been a leitmotif in the scholarship about the 2010 Supreme Court case *Citizens United v. Federal Election Commission*, which allows corporations to purchase an unlimited supply of political ads in American elections.[3] In its simplest form, the

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[1] SEC v. Tex. Gulf Sulphur Co., 401 F. 2d 833, 858 (2d Cir. 1968) (quoting H.R. REP. NO. 1383, 73d Cong., (2d Sess. 1934)).

[2] DANTE ALIGHIERI, THE DIVINE COMEDY INFERNO, Canto XXII (written between 1308 and 1321) (published in 1555).

[3] Matthew A. Melone, Citizens United *and Corporate Political Speech: Did the Supreme Court Enhance Political Discourse or Invite Corruption?*, 60 DEPAUL L. REV. 29, 98 (2010) (concluding that Citizens United "will usher in a new era of corporate political dominance"); Monica Youn, *Small-Donor Public Financing in the Post-*Citizen United *Era*, 44 J. MARSHALL L. REV. 619, 631 (2010-2011) ("Independent political spending, of the type that has been unleashed by *Citizens United*, can also create substantial risks of corruption."); Ronald Dworkin, *The Decision That Threatens*

argument is that corporations will have the ability to corrupt democratically elected politicians in the United States.[4] In recent legal scholarship, less time has been dedicated to the potential corruption of the capital markets that could be generated by corporate political spending.[5] This piece analyzes one aspect of this relatively unexplored territory: how a lack of transparency may impact capital markets. This article argues that the Securities and Exchange Commission ("SEC" or the "Commission") should act to bring greater disclosure to this opaque area of the law in order to mitigate some of the deleterious effects of the *Citizens United* decision.

The 2012 federal election in the United States was the most expensive in history with a price tag of over $7 billion.[6] Now that the election is over, what the biggest campaign spenders want from elected officials in return for their largess remains unclear. Because of flaws in campaign finance disclosure, how much of this $7 billion was funded by publicly-traded corporations is also unknown.[7]

The Supreme Court did a grave disservice to shareholders of publicly-traded companies when *Citizens United*[8] held that corporations have the

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Democracy, N.Y. REV. OF BOOKS (May 13, 2010), http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/ ("It will sharply increase the opportunity of corporations to tempt or intimidate congressmen facing reelection campaigns."); *see also* Dylan Ratigan, *They Keep Stealing--Why Keep Paying?*, HUFFINGTON POST (June 24, 2010, 12:04 PM), http://www.huffingtonpost.com/dylan-ratigan/who-pays_b_624149.html ("The dire straits of the middle class of America has made it near impossible for our politicians to keep up the pretense that our current government truly works for the 'people'. . . . Couple this with recent protections handed by the Supreme Court to corporations to directly influence elections and it can make things seem hopeless for those not on Wall Street or their chosen politicians.").

[4] Tom Udall, *Policy Essay: Amend the Constitution To Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 Yale L. & Pol'y Rev. 235, 246 (Fall 2010) ("the Supreme Court has opened the floodgates to vast new risks of corruption.").

[5] Marvin Ammori, *Corruption Economy*, BOSTON REVIEW, September/October 2010, *available at* http://bostonreview.net/BR35.5/AMMORI.PHP ("*Citizens United* does the same, though in a slightly different way. By laundering protection of the status quo through corporate expenditures, *Citizens United* acts as a Lochneresque bulwark against redistribution of economic power from the established giants to upstarts and consumers, no matter the costs of a corruption economy."); Anne Tucker, *Rational Coercion:* Citizens United *and a Modern Day Prisoner's Dilemma*, 27 GA. ST. U. L. REV. 1105, 1127-32 (2011) (applying a game-theory prisoner's dilemma, and concluding that "*Citizens United* has established an environment that exacerbates the pressure on corporations to participate politically through independent expenditures.").

[6] Jake Harper, *Total 2012 Election Spending: $7 Billion*, SUNLIGHT FOUNDATION, Jan. 31 2013, http://reporting.sunlightfoundation.com/2013/total-2012-election-spending-7-billion/.

[7] Recognizing this transparency problem, the America Bar Association (ABA) recently voted to urge better campaign finance disclosure. Debra Cassen Weiss, *Resolution Seeks Disclosure of Secret Campaign Donations Made through Nonprofits and Super PACs*, ABA JOURNAL, Feb. 11, 2013, http://www.abajournal.com/news/article/resolution_seeks_disclosure_of_secret_campaign_donations_made_through_/.

[8] For a discussion of the shareholder rights implicated by *Citizens United*, *see* Lucian Bebchuk & Robert Jackson, Jr., *Corporate Political Speech: Who Decides?* 124 HARV. L. REV. 83, 84 (2010) (arguing for rules that "mandate detailed and robust disclosure to shareholders of the amounts and beneficiaries of a corporation's political spending, whether made directly by the company or indirectly

right to spend unlimited corporate treasury funds in American elections.[9] Whereas previous Supreme Courts protected shareholders by keeping corporate resources out of partisan politics,[10] the *Citizens United* Court has unleashed corporate political spending into a regulatory environment rife with loopholes.[11] In short, the tax code, and corporate, securities, and campaign finance laws interact in ways that enable publicly-traded corporations in the United States to legally mask their political spending, thereby thwarting accountability to customers, shareholders, and potential investors.[12] Indeed, in the 2012 federal election, approximately $315 million in campaign expenditures originated from untraceable, anonymous sources.[13]

Moreover, the fact that investors cannot be sure if a company is paying for anonymous political spending raises valid corporate governance

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through intermediaries."); CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 21 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550990 (arguing for shareholder disclosure and consent); Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the* Segregated *Fund Cases*, 3 ELECTION L. J. 361 (2004) (arguing "treasury funds reflect the economically motivated decisions of investors or members who do not necessarily approve of the political expenditures, while segregated funds - such as a political action committee (PAC) - raise and spend money from knowing, voluntary political contributors."); Letter from John C. Bogle, President, Bogle Financial Markets Research Ctr. to Elizabeth Murphy, Sec'y, U.S. Sec. & Exch. Comm'n. (Jan. 17, 2012), *available at* http://www.sec.gov/comments/4-637/4637-22.pdf ("I urge the Commission to stand back for a moment from the issue of full disclosure of corporate contributions to decide whether corporate shareholders should not first decide whether a corporation should make any political contribution whatsoever without the approval of its shareholders.").

[9] Citizens United v. FEC, 558 U.S. 310 (2010).

[10] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 674 n. 5, 675 (1990) (Brennan, J. concurring), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010) ("We have long recognized the importance of state corporate law in 'protect[ing] the shareholders' of corporations chartered within the State..." and "shareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object."); FEC v. Mass. Citizens for Life, 479 U.S. 238, 258 (1986) ("The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas."); Pipefitters Local 562 v. United States, 407 U.S. 385, 415 n.28 (1972) ("We are of the opinion that Congress intended to insure against officers proceeding in such matters without obtaining the consent of shareholders by forbidding all such [political] expenditures."); United States v. Cong. of Indus. Org., 335 U.S. 106, 113 (1948) (explaining Taft-Hartley was motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.").

[11] George Zornick, *Big Business: Undo the Damage of 'Citizens United'*, THE NATION (Sept. 28, 2011, 12:17 PM), http:// www.thenation.com/blog/163685/big-business-undo-damage-citizens-united ("Corporate resources that might be better spent investing in an enterprise or otherwise building shareholder value would then be diverted to political activities.").

[12] *See generally* Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J. L. & POL'Y 59 (2011).

[13] Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, at 5 (2013), http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf ("For the 2012 election cycle, 31% of all reported outside spending was 'secret spending,' coming from organizations that are not required to disclose the original source of their funds").

concerns. Growing empirical evidence that corporate political spending is bad for firms and endangers shareholder value should trouble investors.[14] Without uniform disclosures across public firms, investors cannot rationally judge which firms are effectively using the nonmarket strategy of corporate political spending.

In 2011, seeking to rectify the lack of transparency that currently prevails in corporate political spending, ten corporate law professors[15] urged the SEC to promulgate a new rule requiring transparency to reveal post-*Citizens United* corporate political spending.[16] Hereinafter, this Petition will be referred to as "Petition File No. 4-637" or simply the "Petition." At this time, a record-breaking 480,000 public comments have been filed in support of the Petition.[17] The SEC has indicated that it plans a rulemaking on this topic in 2013.[18] This rulemaking would be grounded in language from the Supreme Court in *Citizens United*, where Justice Kennedy wrote: "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in

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[14] Comment of Dr. Michael Hadani on Sec. Exch. Comm'n File 4-637m http://www.sec.gov/comments/4-637/4-637.shtml for the Comment; Michael Hadani & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investments*, STRATEGIC MANAGEMENT JOURNAL (article first published online July 13 2012), http://onlinelibrary.wiley.com/doi/10.1002/smj.2006/abstract; Michael Hadani, *Institutional Ownership Monitoring and Corporate Political Activity: Governance Implications*, J. OF BUS. RES. (2011); John Coates C. IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9(4) JOURNAL OF EMPIRICAL LEGAL STUDIES 657–696 (Dec. 2012), http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2012.01265.x/abstract; Remarks of John Coates, *Can Shareholders Save Democracy*, Accountability After *Citizens United* Symposium (Apr. 29, 2011), http://www.brennancenter.org/sites/default/files/events/Accoutability%20After%20Citizens%20United%20program.pdf; Rajesh Aggarwal, Felix Meschke & Tracy Wang, *Corporate Political Donations: Investment or Agency?*, 14(1) BUSINESS AND POLITICS, Article 3 (2012).

[15] The ten are Professors Lucian A. Bebchuk, Bernard S. Black, John C. Coffee, Jr., James D. Cox, Ronald J. Gilson, Jeffrey N. Gordon, Henry Hansmann, Robert J. Jackson, Jr., Donald C. Langevoort, and Hillary Sale. *See* Letter from Comm. on Disclosure of Corporate Political Spending Petition for Rulemaking, to Elizabeth Murphy, Sec'y, U.S. Sec. & Exch. Comm'n. (Aug. 3, 2011), *available at* http://www.sec.gov/rules/petitions/2011/petn4-637.pdf.

[16] *Id.* For the contrary view, *see* Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 HASTINGS BUS. L.J. 103 (Winter 2012).

[17] SEC, *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities File No. 4-637*, http://www.sec.gov/comments/4-637/4-637.shtml (last visited Mar. 22, 2013).

[18] *Unified, Regulatory Agenda and Regulatory Plan* OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET (Dec. 21, 2012), http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=3235-AL36; Matea Gold, *Advocates Cheer SEC Consideration of Corporate Disclosure Rule*, L.A. TIMES (Jan. 8, 2013, 7:28 AM), http://www.latimes.com/news/politics/la-pn-sec-campaign-spending-disclosure-20130108,0,55217.story.

making profits."[19] Without SEC mandated disclosure, the type of accountability Justice Kennedy envisioned would be impossible.

At first blush, the SEC's regulation of money in politics may seem to fall outside of its jurisdiction, but this perspective is mistaken because it ignores three previous times when the SEC stepped in to curb pay to play: (1) in the municipal bond market in 1994; (2) in the public pension fund market in 2010; and (3) in investigating questionable political payments post-Watergate from 1974 to 1977. The result of the first two interventions led to new Commission rules and the third intervention resulted in the Foreign Corrupt Practices Act (a federal statute).[20]

In thinking through the role the SEC might play in today's regulatory environment, reviewing what the Commission has done before in the area of anti-pay-to-play regulations should be quite instructive. "Anti-pay-to-play" regulations attempt to prevent corrupt deals where an entity outside of the government pays campaign expenses or other gratuities in order to get a government benefit that would otherwise be awarded on the basis of merit.

When these three previous SEC interventions into the role of money in politics are examined, a principled model emerges for when the Commission's regulatory intervention is appropriate. The principled model, hereinafter known as the "Money in Politics Model," has the following characteristics: there must be (1) a potential for market inefficiencies; (2) a problem that will not self-correct through normal market forces; (3) a lack of transparency; (4) a material amount of aggregated money at stake; and (5) a high probability for corruption of the government.

The Money in Politics Model would not require the SEC to intervene to reveal every secret hidden within a public company. For example, typical trade secrets and the terms of confidential settlements should remain secret. The SEC should only be able to intervene where the money involved in the aggregate tops millions of dollars. The SEC should also reserve regulatory intervention for instances when there is a deleterious impact on the market, such that normal market discipline is thwarted in a way that is unlikely to stop on its own. Further, this model is only implicated where corruption of democratically elected officials is a real possibility.

This article will not re-canvass the larger academic debate of whether the SEC should ever impose mandatory disclosure on issuers.[21] That

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[19] Citizens United, 130 S. Ct. at 916, 558 U.S. at ___.

[20] The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA").

[21] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1200-07 (1999) (arguing in favor of stronger mandatory SEC

debate will continue in academic circles for the foreseeable future. Realistically, in light of the economic meltdown that the United States experienced in 2008, more, not less, market regulation appears likely moving forward.

Does post-*Citizens United* corporate political spending fit the SEC's Money in Politics Model, thus meriting the SEC's intervention? This article will argue that the Model fits and that the SEC should act to adopt a new rule requiring transparency for corporate political spending from listed companies.

The SEC is not new to the inherent conflicts of interest between business and government, especially when elected officials have the ability to make private contractors in the financial services industry rich through commissions and fees. The risk of corruption is intrinsic in such a situation. Here corruption is best captured by the definition as "the misuse of public ... office for direct or indirect personal gain."[22] What is new as

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disclosure rules in order to increase corporate social transparency); Trig R. Smith, *The S.E.C. and Regulation of Foreign Private Issuers: Another Missed Opportunity at Meaningful Regulatory Change*, 26 BROOK. J. INT'L L. 765 (2000) (arguing that although the rationale behind and effectiveness of mandatory disclosure rules is unclear, the SEC should use foreign securities issuers as a group on which to experiment with mandatory disclosure rule reform); Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 819 (2006) (arguing further that mandatory disclosure provides more benefits to investors because it "create[s] more useful public information than was ever the case under previous voluntary systems," that it "provides [investors] with roughly the same information they would bargain for if they were rational," and that it "reduces search and information processing costs for investors by requiring cheap, readily available, standardized, and relatively reliable disclosure of information"); Jesse M. Fried, *Firms Gone Dark*, 76 U. CHI. L. REV. 135, 150, 152 (2009) (noting that "that public investors' wealth increased substantially when firms were forced to enter the mandatory disclosure system," yet acknowledging this "does not prove that prior disclosure had been suboptimal"; arguing further that "the failure of. . . most gone-dark firms [firms that exit the mandatory SEC disclosure regime] to provide any information to their public investors" and the market's sharply negative reaction to going-dark announcements do cast further doubt on the claim that insiders generally can be counted on to voluntarily provide the firm-optimal level of disclosure); Edward Rock, *Securities Regulation as Lobster Trap: A Credible Commitment Theory of Mandatory Disclosure*, 23 CARDOZO L. REV. 675, 686 (2002) (arguing that "[t]he existing SEC disclosure system can be understood as a mechanism for solving these contracting problems: . . . [f]irst, as has been recognized, it serves a standardization function, both with regard to form and quantity of disclosure, thereby aiding in the comprehension and comparison of different investment options. . . . Second, it provides a mechanism for the adjustment of reporting obligations over time. . . . Third, it provides a credible and specialized enforcement mechanism, which warrants both the comprehensiveness and quality of the information disclosed"). *But see* Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings*, 1999 COLUM. BUS. L. REV. 1, 5-6 (1999) (arguing that "[f]or many firms — and investors — the costs of one-size mandatory disclosure are unwarranted and often unwanted" and in addition, that "U.S. issuers have increasingly shunned public offerings in favor of private offerings to avoid the costs of mandatory disclosure and heightened liability"); Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 759-60 (2007) (arguing that the role of the SEC in disclosure rule making should be limited because "economic research and related legal scholarship suggest that there is less need for the SEC to protect investors than exists in the case of normal consumer protection, where advertising enjoys full status as commercial speech").

[22] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), MANAGING PUBLIC EXPENDITURE: A REFERENCE BOOK FOR TRANSITION COUNTRIES 25 (Richard Allen & Richard Tomassi, eds., 2001).

of January 2010, thanks to *Citizens United,* is the potential for every publicly-traded company to try to influence the government not just through traditional lobbying, but also through campaign expenditures.[23] This new post-*Citizens United* reality merits a new SEC intervention to reveal the campaign activities of public companies.

In Part I, this article will offer a brief overview of the SEC's regulatory authority as well as defining key terms. In Part II, this article will explore how the SEC got involved in regulating pay to play in the municipal bond market as well as the D.C. Circuit Court's approvals of this intervention. Part III will discuss how the SEC became engaged in regulating pay to play in the public pension fund market. In Part IV, this article will focus on how the SEC discovered off-the-books corporate political funds in its post-Watergate investigations and how that led to the Commission's advocacy in favor of legislation that became the Foreign Corrupt Practices Act. Part V will explain how post-*Citizens United* corporate political spending shares many of the same characteristics of the Money in Politics Model which justifies the SEC's regulatory intervention. Finally, Part VI will argue that the courts are likely to uphold a new SEC rule requiring disclosure of corporate political spending since the Supreme Court has already upheld both mandatory SEC disclosure for public companies under the 1933 and 1934 Securities Acts, in addition to campaign finance disclosure, in particular.

[23] Citizens United, 558 U.S. 310.

I. BACKGROUND EXPLANATION OF THE SEC'S REGULATORY ROLE

A. Why the SEC Can Regulate at All

To understand the SEC's historical role in regulating certain aspects of money in politics, first one must appreciate why the SEC exists at all. The motivation behind the United States federal securities laws was a desire to not repeat either the stock market crash of 1929 or the Great Depression that followed it.[24] John Kenneth Galbraith explained, "[t]he fact was that American enterprise in the [nineteen] twenties had opened its hospitable arms to an exceptional number of promoters, grafters, swindlers, impostors, and frauds. This, in the long history of such activities, was a kind of flood tide of corporate larceny."[25] In short, the SEC regulates disclosure in the sale of securities because actors in the securities market of the 1920s proved that they were incapable of self-regulation.

The Securities Act of 1933 (the "1933 Act") and Securities and Exchange Act of 1934 (the "1934 Act") were federal efforts built on the shoulders of state blue sky laws, which regulated the sales of securities within each state: "These statutes were popularly known as blue sky laws after the complaint of one state legislator that some securities swindlers were so barefaced that they 'would sell building lots in the blue sky.'"[26] The trouble with the blue sky laws is that they could not capture interstate fraudsters. All a grifter had to do to avoid legal consequences was sell worthless securities from a neighboring state.[27] Congress created the SEC to regulate interstate sales of securities so that fraudulent securities could not be peddled across state lines.

To support the need for transparency of political spending, campaign finance advocates have frequently relied on Justice Brandeis's quote, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants...." In fact, the quote appears in *Buckley v. Valeo* as a justification for campaign finance disclosure laws.[28] However, the original context for the quote was Mr. Brandeis's concern about the capital markets. As Professor Cynthia Williams reminds us:

> Brandeis proposed disclosure as a remedy for ... excessive

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[24] Steve Thel, *The Original Conception of Section 10(b) of the Securities and Exchange Act*, 42 STAN. L. REV. 385, 407 (Jan. 1990) ("Securities legislation has historically been the product of calamity.").

[25] JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929, 178 (2009).

[26] Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 20 (Fall 1983).

[27] *Id.* at 54.

[28] Buckley v. Valeo, 424 U.S. 1, 67 n.80 (1976) (quoting L. Brandeis, OTHER PEOPLE'S MONEY 62) (Nat'l Home Library Found. ed. 1933).

> underwriter commissions, because he thought "if each investor knew the extent to which the security he buys from the banker is diluted by excessive underwritings, commissions and profits, there would be a strike of capital against these unjust exactions[.]"[29]

In his book, *Other People's Money and How the Bankers Use It*, Brandeis likened needed securities disclosures to nutritional labeling on food:

> But the disclosure must be real. And it must be a disclosure to the investor. It will not suffice to require merely the filing of a statement of facts with the Commissioner of Corporations or with a score of other officials, federal and state. That would be almost as ineffective as if the Pure Food Law required a manufacturer merely to deposit with the Department a statement of ingredients, instead of requiring the label to tell the story...[30]

Consequently, Brandeis suggested that disclosures appear in bold print on each offering so that the end user could see the warning: "[K]nowledge of the facts must be actually brought home to the investor, ... by requiring the facts to be stated in good, large type in every notice, circular, letter and advertisement inviting the investor to purchase."[31]

Following Brandeis's recommendations,[32] American securities laws nearly start and end with disclosure under the 1933 and 1934 Acts.[33] Congress has stepped in throughout the years to bolster the original 1933 and 1934 Acts with additional disclosure requirements.[34] Consequently, "[d]isclosure obligations also exist pursuant to various provisions of the

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[29] Williams, *supra* note 21, *at* 1214-15 (quoting Louis Brandeis).

[30] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT, 104 (2009). More recently, Professor Justin Levitt has suggested a "Democracy Facts" disclaimer on political ads that looks like the "Nutritional Facts" label on food. Justin Levitt, *Confronting the Impact of* Citizens United, 29 Yale L. & Pol'y Rev. 217, 227 (2010).

[31] BRANDEIS, *supra* note 30, at 104.

[32] Thel, *supra* note 24, at 405.

[33] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 727-28 (1975) ("During the early days of the New Deal, Congress enacted two landmark statutes regulating securities. The 1933 Act was described as an Act 'to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.' The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. s 78a et seq. (1934 Act), was described as an Act 'to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.'").

[34] Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 9 (1985) (the point of the Williams Act was to make "disclosure, rather than court imposed principles of 'fairness' or 'artificiality,'... the preferred method of market regulation."); Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir. 1980) (per curiam) (the "very purpose" of the Williams Act was "informed decision making by shareholders.").

federal securities laws governing particular transactions."[35]

Although the securities laws are eighty years old, they have remained remarkably stable over time.[36] Disclosure and antifraud provisions have always had an intertwined and complimentary co-existence in the securities laws.[37] In sum, the federal securities laws represent a stark break with the previous laissez faire approach to securities sales nationwide, which preceded the 1929 stock market crash.[38]

B. Defining Pay to Play

If sunlight is the best disinfectant, as Brandeis suggested, the need for public disclosure is particularly acute in the arena of political contributions and expenditures by government contractors to stave off "pay-to-play" schemes. While the nomenclature varies from federal agency to agency and from state to state, contribution restrictions that apply to lobbyists, government contractors, or highly regulated industries are often known as "pay-to-play" regulations. They are referred to as "'pay-to-play' regulations, because they seek to prevent corrupt deals whereby contributors 'pay' officials for the opportunity to 'play' with the government."[39]

While the federal government has regulated pay to play in various ways, including the Hatch Act,[40] there is no uniformity in pay-to-play regulations in the fifty states.[41] Some states have no pay-to-play regulations at all. Fourteen states regulate contributions by lobbyists to

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[35] Dennis J. Block, Nancy E. Barton, & Alan E. Garfield, *Affirmative Duty to Disclose Material Information Concerning Issuer's Financial Condition and Business Plans*, 40 BUS. LAW. 1243, n.8 (Aug. 1985) ("Section 5, 7, and 10 of the Securities Act of 1933, 15 U.S.C. §§ 77e, 77g and 77j, require extensive disclosures in connection with a public offering of securities; § 14(c) of the 1934 Act, 15 U.S.C. §§ 78n(c), requires disclosure in connection with the solicitation of proxies; and §§ 13(d), 13(e), 14(d), 14(e) and 14(f) of the 1934 Act, 15 U.S.C. §§ 78m(d), 78m(e), 78n(d) 78n(e), and 78n(f), require disclosure in connection with stock accumulation programs and tender offers.").

[36] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669. 669 (May 1984) ("The securities laws, however, have retained not only their support but also their structure. They had and still have two basic components: a prohibition against fraud, and requirements of disclosure when securities are issued and periodically thereafter.").

[37] Milton H. Cohen, *"Truth in Securities" Revisted*, 79 HARV. L. REV 1340, 1352 (May 1966); *see also* Stroud v. Grace, 606 A.2d 75, 86-87 (Del. 1992) ("Delaware, like Congress, has recognized that proxy voters generally do not attend shareholder meetings. We require proxy voters to have all material information reasonably available before casting their votes. Thus, proxy materials insure that directors do not use their "special knowledge" to their own advantage "and to the detriment of the stockholders.") (internal citations omitted).

[38] *Id.* at 166.

[39] BRENNAN CENTER FOR JUSTICE, WRITING REFORM : A GUIDE TO DRAFTING STATE & LOCAL CAMPAIGN FINANCE LAWS, at III-25 (Torres-Spelliscy Ed. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729827.

[40] The Hatch Act, 5 U.S.C. §§ 7321-7326.

[41] Mike Zolandz, John R. Feore, III & Meredith Irvin, *State Pay-to-Play Laws Analysis of State Pay-to-Play Restrictions on Contractors* (Dec. 1, 2011), http://www.snrdenton.com/pdf/State_Pay_to_Play_Laws.pdf.

legislators and/or executive offices during the legislative session to prevent corruption, while a few states ban contributions from lobbyists to certain officeholders or candidates year-round.[42] Furthermore, seventeen states regulate contributions from potential state contractors to political candidates.[43]

Since private parties are strictly forbidden under most bribery laws from actually giving anything of value to a member of the government in exchange for an official act,[44] the problem of pay to play has evolved into a system of winks and nods and campaign contributions.[45] A potential contractor, who wants to be considered for a future deal, donates campaign contributions to the key government official, who has either decision making power or influence over the contracting process. This is particularly pernicious in the no-bid contract context where government is allowed to simply grant a contract without competition. These questionable political contributions and expenditures are pose a risk of corruption when political decision makers control the allocation of significant amounts of public dollars, as they do in the municipal bond market. The SEC has stepped in to regulate this market to prevent pay to play.

B. The Municipal Bond Market

The burgeoning municipal bond market includes both state and locally issued bonds.[46] The size of the municipal bond market is vast. States and their political subdivisions raise money for public works by borrowing it on the national capital markets.[47] American cities and towns have used bonds to finance their capital improvements, such as public water systems and transportation projects as early as the 1800s.[48] As SEC economists

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[42] National Council on State Legislatures, *Limits on Campaign Contributions During the Legislative Session* (Dec. 6, 2011), http://www.ncsl.org/legislatures-elections/elections/limits-on-contributions-during-session.aspx (an additional 15 states ban all contributions during the legislative session for all donors).

[43] Zolandz, Feore, & Irvin, *supra* note 41.

[44] 18 U.S.C. § 1346 (2012); 18 U.S.C. § 201(b)(1)(2012); 18 § U.S.C. 201(c)(1)(A) (2012).

[45] David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 435 (2010) ("The phrase 'pay-to-play' comes from the widespread practice in the 1980s of law firms and investment banks lavishly supporting politicians who were in a position to give these firms a piece of the lucrative municipal bond business.").

[46] Gajan Retnasaba, *Do Campaign Contributions and Lobbying Corrupt? Evidence from Public Finance*, 2 J. L. ECON. & POL'Y 145, 153 (2006).

[47] *Id.* ("municipal bonds are debt instruments whereby the issuer, a state or municipal entity, raises money by selling investors the right to receive some greater sum of money in the future.").

[48] David M. Cutler & Grant Miller, *Water, Water Everywhere: Municipal Finance and Water Supply in American Cities*, (NBER 19 WORKING PAPER NO. W11096, 2005), http://ssrn.com/abstract=657621 ("Although the precise date of the first municipal bond issuance in the United States is unknown, there were very few in the early nineteenth century. New York City issued its first securities around 1812, and bonds to support the construction of the Croton Aqueduct were

explained, "[m]unicipal securities are debt obligations issued by over 50,000 units of state and local governments such as cities, counties, and special authorities or districts. Well over one million different municipal securities are outstanding..."[49]

While the municipal bond market was comparatively small after World War II, comprising less than $20 billion of municipal debt in 1945, the market has continued to mushroom over the past sixty-eight years.[50] In 1995, there was $1.3 trillion in outstanding municipal debt.[51] Economists at the Federal Reserve estimated the municipal bond market at $1.9 trillion in 2005.[52] In 2012, the municipal bond market had an estimated value of $3.7 trillion.[53] Michael Lewis summed up the state of play for *Vanity Fair*, "[f]rom 2002 to 2008, the states had piled up debts right alongside their citizens': their level of indebtedness, as a group, had almost doubled, and state spending had grown by two-thirds."[54]

The market for underwriting municipal bonds is competitive with large commissions at stake for the investment bank that wins the contract. These large commissions, the highest of which are earned in negotiated deals, can create perverse incentives to engage in pay-to-play abuses.[55] As detailed in

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issued in 1837 and 1838."). David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 523 (1999) (noting that "The railroad companies maneuvered themselves to lay claim to public funds by exerting political pressure to secure the bond issues and then seeking to immunize their ill-gotten gains from public correction by relying on the constitutional protection afforded private contracts").

[49] Lawrence E. Harris & Michael S. Piwowar, *Secondary Trading Costs in the Municipal Bond Market*, USC FBE FINANCE SEMINAR, at 3 (May 18, 2004), http://www.usc.edu/schools/business/FBE/seminars/papers/F_8-27-04_HARRISTradingCost.pdf.

[50] SECURITIES AND EXCHANGE COMMISSION, *The State of the Municipal Securities Market* (2012), http://www.sec.gov/spotlight/municipalsecurities.shtml.

[51] John Chalmers, *Default Risk Cannot Explain the Muni Puzzle: Evidence from Municipal Bonds That Are Secured by U.S. Treasury Obligations*, 11 THE REVIEW OF FINANCIAL STUDIES 281, 283 (1998), http://darkwing.uoregon.edu/~finance/MuniDefaultRisk.pdf.

[52] Junbo Wang, Chunchi Wu & Frank Zhang, *Liquidity, Default, Taxes and Yields on Municipal Bonds*, FEDERAL RESERVE BOARD FINANCE AND ECONOMICS DISCUSSION SERIES DIVISIONS OF RESEARCH & STATISTICS AND MONETARY AFFAIRS, 1 (July 8, 2005), http://www.federalreserve.gov/pubs/feds/2005/200535/200535pap.pdf; *see also* Harris & Piwowar, *supra* note 49 (estimating the municipal bond market in 2004 at $1.9 trillion).

[53] *US Municipal Securities Holder*, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, http://www.sifma.org/research/statistics.aspx (last visited Sept. 27, 2012); Michelle Kaske & William Selway, *Fed Agrees With Citi on $3.7 Trillion Estimate*, BLOOMBERG (Dec. 8, 2011, 3:44 PM), http://www.bloomberg.com/news/2011-12-08/u-s-municipal-bond-market-28-larger-than-estimated-federal-reserve-says.html; William Selway, *U.S. Municipal Bond Market Shrinks as States, Cities Cut Debt*, BLOOMBERG (June 7, 2012, 12:04 PM), http://www.bloomberg.com/news/2012-06-07/u-s-municipal-bond-market-shrinks-as-states-cities-cut-debt.html (reporting that the municipal bond market shrank to $3.73 trillion, down by $11.3 billion); *see also Flow of Funds Accounts of the U.S.*, FEDERAL RESERVE BOARD, Table L.211 (Third Quarter 2012), *available at* http://www.federalreserve.gov/releases/z1/Current/z1.pdf (finding $3.74 trillion of municipal securities outstanding at the end of the fourth quarter of 2011.).

[54] Michael Lewis, *California* and *Bust*, VANITY FAIR (Nov. 2011), http://www.vanityfair.com/business/features/2011/11/michael-lewis-201111.

[55] *Municipal Bonds*, KIPLINGER, http://www.kiplinger.com/basics/archives/2007/08/bonds8.html (last visited Sept. 27, 2012) (stating that the average sales commission for municipal bonds is 4.5

the chart below, most municipal bond deals are negotiated deals.

Municipal Bond Issuance By Sales Type (by volume, in percent)[56]

Year	Competitive	Negotiated	Private Placement	Total
1996	25.4	72.6	2.0	100.0
1997	21.7	75.4	3.0	100.0
1998	22.8	75.1	2.1	100.0
1999	23.2	73.2	3.6	100.0
2000	24.2	72.7	3.1	100.0
2001	21.9	77.0	1.1	100.0
2002	20.1	79.2	0.8	100.0
2003	19.8	79.2	1.0	100.0
2004	19.1	80.1	0.8	100.0
2005	18.6	80.9	0.4	100.0
2006	18.0	80.9	1.1	100.0
2007	17.0	81.9	1.1	100.0
2008	13.6	85.3	1.1	100.0
2009	14.2	85.2	0.7	100.0
2010	16.9	82.5	0.6	100.0
2011	20.2	76.6	3.2	100.0

The underwriting fees in the early 1990s were also particularly large since they were not negotiated as arms-length transactions because of pay to play.[57] As former Counsel to the SEC Jon B. Jordan explains:

> [I]n the municipal securities industry ... dealers and underwriters use political contributions to the campaigns of

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percent); Alan Walter Steiss, *Local Government Finance: Capital Facilities Planning and Debt Administration*, http://www-personal.umich.edu/~steiss/page68.html (last visited Sept. 27, 2012) (stating that the average profit for underwriters of municipal bonds is between 0.25 and 2 percent); *What You Should Know: Bonds and Bond Funds*, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION http://www.investinginbonds.com/learnmore.asp?catid=3&id=43 (last visited Sept. 27, 2012) (stating that the average municipal-bond-sales commission is 1 to 5 percent).

[56] Lori Raineri, Mark Robbins, Bill Simonsen & Keith Weaver, *Underwriting, Brokerage, and Risk in Municipal Bond Sales*, (Working Paper) (Aug. 3, 2012), http://www.brandeis.edu/global/pdfs/centers/munifinance/12%20-%20raineri%20et%20al%20brokers%20and%20underwriters.pdf (original data from Securities Industry and Financial Markets Association (SIFMA), *US Municipal Issuance Bid*, http://www.sifma.org/research/statistics.aspx).

[57] Kevin Opp, Comment, *Ending Pay-To-Play in the Municipal Securities Business: MSRB Rule G-37 Ten Years Later*, 76 U. COLO. L. REV. 243, 244 (2005) ("Investment banks contract with state and local governments to sell the debt in the form of bonds. If investment banks collected even 0.75% of that in fees, investment banks received $3.39 billion in 2003.").

> elected officials in order to solicit municipal bond business for their firms. These contributions are specifically directed to the campaigns of elected officials who will in turn favor those firms that contributed to them when it is time to select dealers for municipal bond work.[58]

Similarly, Gajan Retnasaba frames the municipal bond pay-to-play problem this way: "[i]n the public finance industry, a temptation for corruption was created by having governmental officials make highly subjective decisions regarding lucrative contracts. This created incentives for competitors to attempt to influence these officials by offering them private benefits in the form of political contributions."[59]

Economists Alexander W. Butler, Larry Fauver, and Sandra Mortal found the problem of pay-to-play was particularly pronounced from 1990 to 1993 when "[underwriters'] campaign contributions could cause distortions in at least two different ways. First, they could change the allocation of contracts to underwriters with political connections. Second, and more directly, campaign contributions might generate a *quid pro quo* in the form of higher fees for underwriting services."[60] These economists found that underwriters were able to extract larger fees in negotiated deals, as opposed to competitive deals, with municipal bond issuers by donating political campaign contributions to politicians who control the issuance of bonds:

> [W]hen underwriting firms routinely made political campaign contributions to win underwriting business from the state, gross spreads were significantly higher, but only for negotiated bid deals, i.e., those deals that can be allocated on the basis of political favoritism. The effect is statistically significant and economically large—it ranges from 11.8 to 13.8 basis points, depending on the specification. ... In contrast, competitive deals, which offer no room for favoritism, have fees that are only negligibly higher (and generally not statistically significant). This result continues to hold when controlling for underwriter fixed effects. We interpret these higher fees as the quid pro quo for political campaign contributions.[61]

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[58] Jon B. Jordan, *The Regulation of "Pay-To-Play" and the Influence of Political Contributions in the Municipal Securities Industry*, 1999 COLUM. BUS. L. REV. 489, 493 (1999).

[59] Retnasaba, *supra* note 46, at 181.

[60] Alexander W. Butler, Larry Fauver & Sandra Mortal, *Corruption, Political Connections, and Municipal Finance*, 22 THE REVIEW OF FINANCIAL STUDIES 2873, 2890 (2009) (citation omitted).

[61] *Id.* at 2876.

These results have been replicated in other economic studies.[62]

Charles Anderson, who retired as manager of tax-exempt bond field operations for the Internal Revenue Service, summed up the problem for the *New York Times*, "[i]t's rare to sell a Senate seat, but it's not rare to sell a bond deal... Pay-to-play in the municipal bond market is epidemic."[63]

II. The SEC's Regulation of Pay to Play for Municipal Bonds

A. Arthur Levitt's Call to Arms on Pay to Play

The SEC under President Clinton made addressing pay-to-play in the municipal bond market a top priority.[64] When the SEC turned its attention in 1993 to the municipal bond market, private investors held over $850 billion in municipal securities.[65]

What brought the SEC into this regulatory space was the foresight of then-SEC Chair Arthur Levitt Jr.[66] Mr. Levitt was troubled by the fact that the municipal bond market was not functioning as a normal market.[67] Rather, the award of lucrative underwriting contracts seemed to flow not necessarily to the best talent, but rather to the most politically connected.[68] In particular, municipal bond underwriting business seemed to go to those investment banks that had given generously to mayoral and gubernatorial election campaigns.[69]

Many of the underwriters are themselves publicly traded companies.[70]

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[62] David Rakowski & Saiying Deng, *Geography and Local (Dis)Advantage: Evidence from Muni Bond Funds* 30 (November 16, 2010) (working paper), *available at* http://ssrn.com/abstract=1571380 ("In general, fund managers earn a premium on raw returns when investing in [municipal bonds in] states with more corruption"); *see also* Retnasaba, *supra* note 46.

[63] Mary Williams Walsh, *Nationwide Inquiry on Bids for Municipal Bonds*, N.Y. TIMES, Jan. 9, 2009, at A1, *available at* http://www.nytimes.com/2009/01/09/business/09insure.html?_r=pagewanted=print (quoting Charles Anderson).

[64] Leslie Wayne, *Cleaning Up Municipal Markets*, N.Y. TIMES, Jun. 3, 1998, http://www.nytimes.com/1998/06/03/business/clean-up-municipal-markets.html?pagewanted=print ("[T]he S.E.C.'s chairman, Arthur Levitt Jr., declared cleaning up the municipal markets his 'No. 1' priority....[in 1994]").

[65] Jordan, *supra* note 58, at 495.

[66] Ethan Yale & Brian Galle, *Muni Bonds and the Commerce Clause After* United Haulers, 115 TAX NOTES 1037 n.4 (2007) ("'municipal bond' ... denote[s] all bonds eligible for preferential treatment by federal or state tax laws, whether issued by states or their political subdivisions.").

[67] Of course no market works perfectly in the real world, as there are asymmetries of information and inherent problems of moral hazard or adverse selection. Here a "normal market" is meant to capture a market where goods and services compete on the basis of quality and price.

[68] Order Approving Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Political Contributions and Prohibitions on Municipal Securities Business, Securities Exchange Act Release No. 34-33868, 56 SEC Docket 1045 (Apr. 7, 1994) [hereinafter Order].

[69] Sharon Walsh, *SEC's Levitt is Called Biased in Bond Probes; Denver, Orange County Urge Recusal*, WASH. POST, Nov. 23, 1995, at B13 (quoting Levitt).

[70] Philip Mattera, *Overview of Major Players*, PUBLIC BONDS (June 2004), http://www.publicbonds.org/major_players/players_over.htm (listing the top ten municipal bond

The secretive use of corporate money to gain advantage through the government presents a potential fraud on the market problem where investors cannot judge the true value of an investment. Investors are frustrated because they cannot tell which companies are making profits from sustainable, arms-length transactions and which are profiting due to pay-to-play corruption, which could abruptly end if discovered by law enforcement or the press.

Cataloging the many harms of corruption is beyond the scope of this piece.[71] Corruption damages both the government and the private sector as resources are allocated, not for their most productive use, but rather for the benefit of the select few who can gain an advantage from corrupt deals. Pay to play in the municipal bond market is not a victimless practice because it can steer government contracts not to the most efficient business partner, but rather to the best connected.

This, in turn, can cost the government more than if a contract was awarded on a competitive and lowest cost basis.[72] As one author articulated: "pay to play harms the public. Taxpayers and investors are harmed ...[because it] cheats taxpayers out of the quality of services taxpayers would receive if pay to play conduct were not involved....[and costs are passed on to] federal, state or local government[s]."[73]

Instead of starting with a SEC regulation, Chair Levitt encouraged Wall Street firms to take themselves out of the pay-to-play game.[74] In October of 1993, at the encouragement of Frank G. Zarb, the Chair of the National Association of Securities Dealers (NASD),[75] seventeen firms agreed to stop giving campaign contributions.[76] By the end of 1993, over

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underwriters in 2003 as Bank of America, Bear Stearns, Citigroup, Goldman Sachs, J. P. Morgan, Lehman Brothers, Merrill Lynch, Morgan Stanley, RBC Dain Rauscher, and UBS).

[71] Robert S. Mueller, III, Dir., FBI, Address at the City Club of San Diego, YOUTUBE (May 11, 2006), http://www.youtube.com/watch?v=D-Wnmy6DwIA ("Public corruption is a betrayal of the public's sacred trust. It erodes public confidence and undermines the strength of our democracy. Unchecked, it threatens our government and our way of life.").

[72] Thomas J. Gradel, Dick Simpson & Andris Zimelis, *The Depth of Corruption in Illinois: Anti-Corruption*, Report No. 2, at 2, May 13, 2009, http://www.uic.edu/depts/pols/ChicagoPolitics/Anti-corruptionReportNumber2.pdf ("we now believe that the cost of corruption, or "corruption tax," for the Chicago and Illinois taxpayer is at least $500 million a year.").

[73] Brian C. Buescher, *ABA Model Rule 7.6: the ABA Pleases the SEC, but Does Not Solve Pay to Play*, 14 GEO. J. LEGAL ETHICS 139, 142 (Fall 2000); Alan Vinegrad, *Government Corruption and Civil Rico: Providing Compensation for Intangible Losses*, 58 N.Y.U. L. REV. 1530, 1572 (Dec. 1983).

[74] *Fireside Chat on Pay to Play* (SEC Historical Society Webcast Apr. 28, 2011), http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/programs/sechistorical_042811_transcript.pdf (David Clapp stating "So then [Arthur Levitt] went in sort of a different way, instead of just getting behind the MSRB, what he wound up doing was putting together a group of major dealers, investment banking dealers who became known as the 'Group of 17...'").

[75] Jordan, *supra* note 58, at 496.

[76] Jonathan Fuerbringer, *17 Big Underwriters Bar Campaign Gifts Aimed at Bond Sales*, N.Y. TIMES (Oct. 19, 1993), http://www.nytimes.com/1993/10/19/business/17-big-underwriters-bar-campaign-gifts-aimed-at-bond-sales.html?ref=arthurjrlevitt ("The firms that endorsed the ban include Merrill Lynch & Company; Goldman, Sachs & Company; Lehman Brothers; CS First Boston; Smith

fifty firms had joined the voluntary ban.[77] Shortly thereafter, Levitt urged the MSRB, the self-regulating organization (SRO) that has been authorized by Congress to make rules for the municipal bond market,[78] to promulgate rules to make the ban mandatory.[79] The Board did just that with Rule G-37 (a.k.a. the Political Contributions and Prohibitions on Municipal Securities Business Rule). The SEC approved this rule[80] explaining that "[u]nlike general campaign financing restrictions, ... which...combat unspecified forms of undue influence and political corruption, [these] conflict of interest provisions, ...are tied to a contributor's business relationship with governmental entities and are intended to prevent fraud and manipulation."[81]

MSRB Rule G-37[82] (and its companion Rule G-38[83]) curtailed how much money could be given to a candidate for an office that controlled the sale of municipal bonds in an attempt to blunt the pay-to-play culture that had taken hold in this bond market.[84] Looking back on the sordid practices

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Barney Shearson, and Bear, Stearns & Company. The firms had been expected to adopt this policy since the industry trade group, the Public Securities Association, called for a moratorium on Oct. 5. Most big firms had endorsed that moratorium.").

[77] Jordan, *supra* note 58, at 497-98.

[78] *See* 15 U.S.C. § 78o (2006). The MSRB was created in 1975 in response to the fraudulent sale of New York City municipal bonds and the near financial collapse of the city. Ann Judith Gellis, *Municipal Securities Market: Same Problems - No Solutions*, 21 DEL. J. CORP. L. 427, 430-35 (1996).

[79] Jordan, *supra* note 58, at 498. The MSRB has continued its leadership in battling pay to play practices. As this article is being written pursuant to the Dodd-Frank Act, the Board has a proposed rule which would expand the pay to play restrictions in the industry. Key aspects of the proposed rule G-42 include the following: "a municipal advisor from engaging in 'municipal advisory business' with a municipal entity for compensation for a period of time beginning on the date of a non-de minimis political contribution to an 'official of the municipal entity' and ending two years after all municipal advisory business with the municipal entity has been terminated...[and] would prohibit municipal advisors and municipal advisor professionals from soliciting contributions, or coordinating contributions, to officials of municipal entities with which the municipal advisor is engaging or seeking to engage in municipal advisory business or from which the municipal advisor is soliciting third-party business..." MUNICIPAL SECURITIES RULEMAKING BOARD, MSRB DRAFT MUNICIPAL ADVISOR PAY TO PLAY RULE 5-6 (2011), *available at* http://www.msrb.org/Home/News-and-Events/~/media/Files/Training-Events/Outreach/MSRB-Draft-Rule-G-42.ashx; Rules and Regulations, Investment Advisers Act of 1940, 17 C.F.R. § 275.206(4)-5 (2012); Political Contributions by Certain Investment Advisers: Ban on Third- Party Solicitation; Extension of Compliance Date, 77 Fed. Reg. 35,263 (June 8, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-06-13/pdf/2012-14440.pdf.

[80] Self-Regulatory Organization; Municipal Securities Rulemaking Board, 59 Fed. Reg. 17,621 (Apr. 7, 1994).

[81] *Id.* at 17,628.

[82] *Id.* at 17,621; *Id.* at 17,625.

[83] David Clapp explained the genesis of Rule G-38: "G-38 came about because by this time we found out that people were circumventing G-37 basically through the use of outside consultants, paid consultants. ... It basically was to prevent everybody from using these consultants, to deter that and to detect attempts by dealers to avoid restrictions placed on them by G-37..." *Fireside Chat on Pay to Play*, *supra* note 74 (quoting Mr. Clapp). This paper will not discuss Rule G-38 further.

[84] *See, e.g.*, Blount v. SEC, 61 F.3d 938, 944-48 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making certain campaign contributions to politicians who award government underwriting contracts).

that motivated Rule G-37, David Clapp, a retired partner with Goldman Sachs & Co. and the 1994 Chair of the MSRB, reminisced in 2011:

> [W]ining and dining and a few other requests for money here and there... grew into a very big deal with people asking for firms or individual municipal finance professionals or their bosses to buy tables at these events costing from $25 to $50,000 and on occasion more. I have myself experienced someone sitting across the table from me saying that she would need a [sic.] $50,000 from me for a candidate who was running for office and I said I wasn't able to do that and she said, "Well, then I have to be very frank with you. You are not going to do any business with this particular client."[85]

Mr. Clapp's experiences in the municipal bond market were more typical than atypical.[86]

Rule G-37 fits the SEC's Money in Politics Model for the following reasons: (1) there were market inefficiencies in the early 1990s of underwriting contracts being awarded to banks that had given campaign contributions to state and municipal officials; (2) the efficiencies were unlikely to self-correct as the participating elected politicians needed more campaign cash for each succeeding election, while bankers competing to be underwriters wanted increasingly lucrative municipal bond deals; (3) the reasons why any given underwriting contract was granted was not transparent for outsiders; (4) millions in underwriting fees were at stake in the municipal bond market; and (5) corruption of the municipal bond contracting process occurred as states paid premium fees for services that would have cost less if the contracts had been awarded in a competitive bidding, but for the pay to play in the selection process for underwriters.

B. How the Courts Judge Pay-to-Play Regulations

The fact that the SEC and the MSRB regulate various aspects of pay to play is not the end of the legal inquiry, but rather the beginning. Given that pay-to-play regulation implicates cherished rights such as freedom of speech and of association, the judiciary may stop such regulations if they go beyond constitutional limits. American courts usually allow reasonable limits on contributions to prevent corruption, or the appearance of corruption, including proportional pay-to-play regulations.

Pay-to-play restrictions are heavily litigated on constitutional grounds.

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[85] *Fireside Chat on Pay to Play*, *supra* note 74 (quoting Mr. Clapp).

[86] Nicholas Reade Everett, Note, *Kicking Back Corruption in the Public Fund Advisory Selection Process: The SEC's Proposed Rule to Curtail Pay-to-Play Practices by Investment Advisers*, 29 REV. BANKING & FIN. L. 557, 560-65 (discussing the details of pay to play scandals).

Courts consider the scope of the pay-to-play restriction to ensure that the regulation is properly tailored to be neither overbroad nor under-inclusive. Courts have upheld many restrictions on contributions on lobbyists, state contractors, and regulated industries.[87] Courts have sustained pay-to-play restrictions after examining their factual basis and determining that they were carefully designed to further important government interests.[88]

C. The Blount *Decision*

The courts have been generally hospitable to reasonable pay-to-play regulations, including the SEC's regulation of pay to play. In *Blount v. SEC*, the D.C. Circuit upheld the SEC's anti-pay-to-play Rule G-37 that prevented brokers and dealers from soliciting or coordinating contributions to officials of any municipal issuer with whom the broker or dealer is engaging or seeking to engage in municipal securities business.[89] The Supreme Court did not grant certiorari, so the D.C. Circuit Court's ruling is the final word on the matter.

In upholding the constitutionality of Rule G-37, the D.C. Circuit Court explained political contributions have both positive and negative aspects—being one part free speech and one part bribery.

> Contributions . . . may communicate support for a candidate and his ideas, but they may also be used as the cover for what is much like a bribe: a payment that accrues to the private advantage of the official and is intended to induce him to exercise his discretion in the donor's favor, potentially at the

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[87] *See, e.g.*, Casino Ass'n of La. v. State, 820 So. 2d 494, 509–10 (La. 2002) (upholding ban on contributions from riverboat and land-based casinos to all candidates and all PACs that support or oppose a candidate); State v. Alaska Civil Liberties Union, 978 P.2d 597, 619–20 (Alaska 1999) (upholding a restriction on lobbyists' giving contributions to candidates outside of their own district); Gwinn v. State Ethics Comm'n, 426 S.E.2d 890, 892–93 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); Soto v. State, 565 A.2d 1088, 1097–99 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees to any candidate or political committee); Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61, 66–69 (Ill. 1976) (upholding ban on contributions from members of liquor industry to any candidate or political party).

[88] *See, e.g.*, Inst. of Gov'tl. Advoc. v. Fair Polit. Prac. Comm'n, 164 F. Supp. 1183, 1189 (E.D.Cal. 2001). Courts considering pay-to-play bans have applied varying levels of constitutional scrutiny in analyzing the statutes. This is an issue we will need to address in our brief. Some have held that the government must show that the ban furthers a "compelling" interest, *see, e.g.*, *Gwinn*, 426 S.E.2d at 892, while others have held that it must show an "important" or "substantial" interest, *see, e.g.*, *Inst. of Gov'tl. Advoc.*, 164 F. Supp. at 1194; *Casino Ass'n of La.*, 820 So. 2d 504. Similarly, some have held that the statute must be "narrowly tailored" to further the government interest, *see, e.g. Inst. of Gov'tl. Advoc.*, 164 F. Supp. at 1194; *Gwinn*, 426 S.E.2d at 892, while others have held that the statute must be "closely drawn," or something similar, to further the interest, *see, e.g. Casino Ass'n of La.*, 820 So. 2d at 504.

[89] Blount v. SEC, 61 F.3d 938, 944-949 (D.C. Cir. 1995).

expense of the polity he serves.[90]

The Court went on to explain that the parallel between the government's interest in defending the integrity of the market and of the political system: "here the effort is to safeguard a commercial marketplace. ... In every case where a *quid* in the electoral process is being exchanged for a *quo* in a particular market where the government deals, the corruption in the market is simply the flipside of the electoral corruption."[91]

In *Blount*, the SEC claimed that Rule G-37 was justified by the need to "(1) protect[ ] investors in municipal bonds from fraud and (2) protect[ ] underwriters of municipal bonds from unfair, corrupt market practices."[92] The D.C. Circuit Court found these reasons to be both substantial and compelling.[93] Indeed the Court found the conflict of interest between underwriters who are political donors to local politicians with influence over hiring underwriters patently obvious.

> [U]nderwriters' campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity. Petitioner himself remarked on national radio that "most likely [state and local officials] are gonna call somebody who has been a political contributor" and, at least in close cases, award contracts to "friends" who have contributed.[94]

The Court also found the link between ending pay to play and promoting a free market to be manifest as well, noting "the link between eliminating pay-to-play practices and the Commission's goals of 'perfecting the mechanism of a free and open market' and promoting 'just and equitable principles of trade' is self-evident."[95]

The Court also explained why pay-to-play arrangements in the municipal bond market were unlikely to be self-correcting:

> Moreover, there appears to be a collective action problem tending to make the misallocation of resources persist. As beneficiaries of the practice, politicians vying for state or local office may be reluctant to stop it legislatively; some, of course, may seek to exploit their rivals' cozy relation with

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[90] *Id.* at 942.
[91] *Id.* at 943.
[92] *Id.* at 944.
[93] *Id.* (thereby, sidestepping the thorny question of what level of scrutiny to apply).
[94] *Id.* at 944-45 (citing *Morning Edition* (National Public Radio, June 1, 1994), *available in* LEXIS, News Library, Transcript No. 1358-9).
[95] *Blount*, 61 F.3d at 945.

> bond dealers as a campaign issue, but if they refuse to enter into similar relations, their campaigns will be financially handicapped. Bond dealers are in a still worse position to initiate reform: individual firms that decline to pay will have less chance to play, and may even be the object of explicit boycott if they do.[96]

The Court concluded that the SEC/MSRB was not required to show actual corruption before promulgating a prophylactic rule. As the Court wrote: "no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic."[97] Thus, the D.C. Circuit Court considered many aspects of the Money in Politics Model in its constitutional analysis of Rule G-37.

Rule G-37 also contained a solicitation ban, which was upheld by the Court as well. The D.C. Circuit noted that while "[s]olicitation of campaign funds... is close to the core of protected speech, as it is 'characteristically intertwined' with both information and advocacy and essential to the continued flow of both[,]" nevertheless the Court upheld the solicitation restriction in part because "[the underwriter] is barred from soliciting contributions [from the issuer] only during the time that it is engaged in or seeking business with the issuer associated with the donee."[98]

Rule G-37 required not only a restriction on contributions and solicitations of contributions, but also basic disclosures.[99] Former SEC attorney Jordan reminds us, "[c]ertain disclosure and record-keeping requirements were enacted together with Rule G-37 to 'facilitate enforcement of Rule G-37's "pay-to-play" restrictions and, independently, to function as a public disclosure mechanism to enhance the integrity of, and public confidence in, municipal securities underwritings.'"[100]

Most of the *Blount* decision focused on whether Rule G-37 violated the First Amendment and found decisively that it did not, since it was narrowly tailored to promote a compelling state interest. In a coda to the

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[96] *Id.* at 945-46.

[97] *Id.* at 945.

[98] *Id.* at 941, 947.

[99] Municipal Securities Rulemaking Board, Form G–37 (2010), *available at* http://www.msrb.org/Rules-and-Interpretations/~/media/Files/Forms/FormG-37.ashx; Exchange Act Release No. 34-33868, 56 SEC Docket 1006, 1045 (April 7, 1994) ("rule G–37 will require dealers to disclose to the MSRB on Form G–37 certain information about political contributions, as well as other summary information, to facilitate public scrutiny of political contributions in the context of the municipal securities business of a dealer. Contributions to be reported include those to officials of issuers and political parties of states and political subdivisions made by the dealer, any municipal finance professional, any executive officer, and any PAC controlled by the dealer or by any municipal finance professional. Only contributions over $250 by municipal finance professionals and executive officers are required to be disclosed.").

[100] Jordan, *supra* note 58, at 507.

decision, the Court briefly disposed of the claim that Rule G-37 violated the Tenth Amendment by intruding on the prerogative of the states to regulate state elections.

> [P]etitioner claims that Rule G-37 is an effort to regulate state election campaigns and, as such, usurps the states' power to control their own elections. This contention is meritless. Rule G-37 neither compels the states to regulate private parties, as the Tenth Amendment prohibits, nor regulates the states directly ... Blount points to no theory of the Tenth Amendment or the commerce clause under which Congress is disabled from regulating private persons in their conduct of interstate trade in municipal securities, so we need not proceed further...[101]

The *Blount* case indicates that the D.C. Circuit supports the SEC's ability to regulate in the anti-pay-to-play area.

Economic analysis by Mr. Retnasaba indicated that Rule G-37 was effective in limiting pay to play. He found that:

> As would be expected in the presence of corruption, the use of negotiated bonds dropped suddenly following the banning of campaign contributions. Results imply that about one-third of municipal bond issuers (measured by value) acted corruptly, willing to switch from their natural reference for a competitive issue to a negotiated issue in order to gain the opportunity to realize a private gain in the form of campaign contributions...[102]

He went on to estimate that the MSRB's pay-to-play rule had saved municipalities significant money that would have been overpaid to underwriters, concluding that:

> The results suggest that prohibition of campaign contributions was effective in reducing a large portion of the corruption in the industry. A rough estimate suggests that the enacting of Rule G-37 by reducing corruption, saved municipalities $500 million in real interest costs for bonds sold in the first year it was enacted alone.[103]

In the end, Rule G-37 was a constitutional and efficient way for the SEC to protect the municipal bond market from pernicious pay-to-play schemes.

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[101] *Blount*, 61 F.3d at 949 (internal citations omitted).
[102] Retnasaba, *supra* note 46, at 159-60.
[103] *Id.*

III. SEC'S REGULATION OF PAY TO PLAY IN PUBLIC PENSIONS

By the time Arthur Levitt left the Commission in 2001,[104] he was equally concerned by the behavior he saw when investment advisers sought lucrative fees from investing money from public pension funds.[105] As Levitt explained in 1999, "[j]ust as the 'culture of pay-to-play' came to corrupt the municipal securities market, pay-to-play has tainted the management of public [pension] funds."[106] He started, but did not complete, an investment adviser rule for public pensions.[107] The Bush Administration failed to take up the rulemaking, but President Obama's SEC revived it.[108] After a raft of embarrassing public pension scandals left several elected officials in jail,[109] the SEC promulgated Rule 206(4)-5 in 2010 to keep investment advisers from being major campaign donors to those politicians who control public pension funds.[110]

Like the municipal bond market, public pension funds are also a huge revenue source.[111] In 2011, the estimated size of the public pension fund

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[104] Reuters, *S.E.C. Is Set To Restrict Pension Firms*, N.Y. TIMES (Mar. 31, 1999) ("Arthur Levitt, chairman of the S.E.C., said that his staff had uncovered possible wrongdoing in at least 17 states that offer public pensions to tens of thousands of bus drivers, firefighters and other workers.").

[105] *Remarks by Arthur Levitt, Jr., New York Private Equity Conference; New York, NY*, at 5 ("With the escalating costs of political campaigns....the enormous sums of money to be invested...and the prospect of huge payoffs for private equity firms, hedge funds, and their agents if they are able to attract even a sliver of this capital...we have created a situation in which workers' retirement savings are being used for private gain.").

[106] Arthur Levitt, *In the Best Interests of Beneficiaries: Trust and Public Funds* (Mar. 30, 1999), http://www.sec.gov/news/speech/speecharchive/1999/spch263.htm.

[107] S.E.C., Release No. 1812, Release No. IA - 1812, 70 S.E.C. Docket 611, 1999 WL 566490, 17 CFR Part 275, *Political Contributions by Certain Investment Advisers*, Proposed Rule, File No. S7-19-99, Aug. 4, 1999.

[108] SEC, Political Contributions by Certain Investment Advisers; Proposed Rule, 17 CFR Part 275, 74(151) Federal Register 39840, 39841 (Aug. 7, 2009), http://www.sec.gov/rules/proposed/2009/ia-2910fr.pdf ("Pay to play practices undermine the fairness of the selection process when advisers seeking to do business with the governments of States and municipalities make political contributions to elected officials or candidates, hoping to influence the selection process. In other cases, political contributions may be solicited from advisers, or it is simply understood that only contributors will be considered for selection. Contributions, in this circumstance, may not always guarantee an award of business to the contributor, but the failure to contribute will guarantee that another is selected.").

[109] Jose Martinez & Kenneth Lovett, *Disgraced Former Controller Alan Hevesi Gets up to 4 Years in Jail for Pension Fund Scandal*, NEW YORK DAILY NEWS, Apr. 15, 2011, http://articles.nydailynews.com/2011-04-15/local/29452968_1_hank-morris-assemblyman-andrew-hevesi-pension-fund; Mike Allen, *Treasurer's Downfall in Kickback Scheme Shakes Connecticut Political Establishment*, N.Y. TIMES, Oct. 25, 1999, http://www.nytimes.com/1999/10/25/nyregion/treasurer-s-downfall-kickback-scheme-shakes-connecticut-political-establishment.html?pagewanted=all&src=pm ("Mr. Silvester ... now faces up to six years in prison.").

[110] *See* Political Contributions by Certain Investment Advisors, 17 Fed. Reg. 41,018 (July 14, 2010) (codified at 17 C.F.R. § 275.206(4)-5).

[111] Mary Williams Walsh, *Political Money Said to Sway Pension Investments*, N.Y. TIMES (Feb. 10, 2004) ("Nationwide, about 2,600 state and local pension plans hold some $2.1 trillion for more than 20 million teachers, firefighters, garbage collectors, judges and other public employees and retirees. (The figures do not include federal workers.").

market was $4.6 trillion.[112] According to the U.S. Census Bureau, "[i]n 2010, the largest share of all state government cash and security holdings was in public-employee retirement trust funds, [a.k.a. public pensions] which accounted for 64.3 percent of state government cash and investments at $2.1 trillion."[113] Given the size of the market, adviser fees paid by public pension funds generate lucrative business for investment banks.[114]

Explaining why this investment adviser rule was needed for public pensions, Andrew J. Donohue, then-Director of the SEC's Division of Investment Management, explained, "[p]ay-to-play serves the interests of advisers to public pension plans rather than the interests of the millions of pension plan beneficiaries who rely on their advice. The rule we are proposing today would help ensure that advisory contracts are awarded on professional competence, not political influence."[115]

SEC Rule 206(4)-5 prevents investment advisers from exchanging large contributions for the ability to manage a public pension fund's investments.[116] Professor Richard Hasen summarizes the rule thusly:

> Under the rule: (1) an investment adviser may not provide investment advisory services for compensation to a government entity within two years after making a contribution to an official of the government entity it seeks to advise; (2) investment advisers may not pay third parties, known as placement agents, to solicit government entities for business on the adviser's behalf unless the placement agent is also subject to these restrictions; (3) investment advisers may

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[112] Towers Watson, *Global Pension Asset Study 2012*, http://www.towerswatson.com/assets/pdf/6267/Global-Pensions-Asset-Study-2012.pdf (January 2012) (total pensions in the U.S. have $16.1 trillion in assets and 29% of those U.S. pensions are public for a total of $4.6 trillion in U.S. public pensions).

[113] Jeffrey L. Barnett & Phillip M. Vidal, *State and Local Government Finances Summary: 2010*, at 4 (Sept. 2012), http://www2.census.gov/govs/estimate/summary_report.pdf.

[114] Jeff Hooke & Michael Tasselmyer, *Wall Street Fees and The Maryland Public Pension Fund*, Maryland Public Policy Institute & Maryland Tax Education Foundation, 2, July 25, 2012 ("The 50 systems had total assets of over $2 trillion. In 2011, they spent over $7.8 billion in Wall Street fees..."); *id.* at 1 (average fees were 0.409 nationwide); Robert Reed & Brett Chase, *Sticker Shock: Lofty Fees, Low Returns*, http://www.bettergov.org/sticker_shock_lofty_fees_low_returns/ (Apr. 18, 2012) (reporting that a $30 billion pension fund paid $1.3 billion in investment advisor fees); Mike Alberti, *Private Consultants Rake in Public Pension Fund Fees*, http://www.remappingdebate.org/map-data-tool/private-consultants-rake-public-pension-fund-fees (Apr. 4, 2012) (reporting that, in fiscal year 2011, California Public Employees' Retirement System paid financial advisers $48.7 million, 1/3 the amount it paid its own employees).

[115] Curtis C. Verschoor, *We Need to Stop Pay-to-Play Corruption*, STRATEGIC FIN. 14, 16, Sept. 2009, http://www.imanet.org/PDFs/Public/SF/2009_09/09_09_ethics.pdf.

[116] For a good summary of the details of the new Rule, *see* Covington & Burling LLP, *Summary of the SEC's Pay-To-Play Rule 206(4)-5* (2010), http://www.cov.com/files/Uploads/Documents/Summary%20of%20the%20SEC's%20Pay%20to%20Play%20Rule.pdf.

> not solicit or coordinate contributions to the government entity the adviser is seeking to provide services to, or payments to political parties of the state or locality in which the adviser seeks to or provides services; and (4) investment advisers may not circumvent the rule by doing anything indirectly which, if done directly, would result in a violation of the rule. Finally, probably in an effort to assuage First Amendment concerns, the rule allows covered investment advisers to contribute up to $350 per election to officials for whom the adviser is entitled to vote, or up to $150 to officials for whom the adviser is not entitled to vote.[117]

In other words, just like the municipal bond dealers regulated by Rule G-37, under Rule 206(4)-5, the "investment adviser rule," the investor advisers can choose to be big fundraisers for municipal and state candidates, or they can advise public pension funds, but they cannot do both simultaneously.[118]

One motivation for the SEC's investment adviser rule was the downfall of the Connecticut Treasurer Paul Silvester.[119] As Professor Hasen recounts, "[i]n 1999, Connecticut's state treasurer pled guilty to racketeering charges. He later admitted in court to collecting campaign contributions in exchange for 'placing $500 million in state pension investments with certain equity funds.'"[120] California has had similar scandals.[121]

Also prominent in the minds of regulators was the downfall of New York Comptroller Alan Hevesi.[122] Then-New York Attorney General Andrew

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[117] Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 251-52 (2012) (internal citations omitted).

[118] Following the SEC's lead, the Commodity Futures Trading Commission (CFTC) issued its own pay-to-play rules in 2012 imposing business conduct standards (BCS) on swap dealers (SDs) and major swap participants (MSPs). *See* Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012).

[119] Sec. Exch. Comm'n v. Paul J. Silvester et al., Litigation Release No. 16759, 73 SEC Docket 1255 (Oct. 10, 2000) (reporting a pay-to-play scheme involving Connecticut state pensions funds and alleging violations of Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act); *see also* SEC v. William A. DiBella et al., Litigation Release No. 20498 (Mar. 14, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20498.htm; 2007 U.S. Dist. LEXIS 73850 (D. Conn., May 8, 2007), *aff'd* 587 F.3d 553 (2d Cir. 2009) (DiBella was fined for his role in the Treasurer Silvester scandal).

[120] Richard L. Hasen, *Lobbying, Rent Seeking and the Constitution*, 64 STAN. L. REV. 191, 252 (Jan. 2012).

[121] Marc Lifsher & Stuart Pfeifer, *Report of the CalPERS Special Review*, republished in the L.A. TIMES, March 14, 2011, http://documents.latimes.com/calpers-special-review/ ("In a scathing report, a former chief executive of the California public employee pension fund was accused of pressuring subordinates to invest billions of dollars of pension money with politically connected firms.").

[122] Times Topic Profile: Alan G. Hevesi, http://topics.nytimes.com/top/reference/timestopics/people/h/alan_g_hevesi/index.html.

Cuomo's "investigation into pay-to-play allegations ... in the New York State Comptroller's office...was capped off when Hevesi pleaded guilty to accepting almost $1 million in kickbacks. In exchange for the kickbacks, Hevesi admitted, he approved $250 million in pension funds investments with a California private equity firm."[123] Hevesi's and his associates' kickback scheme involved hundreds of investment firms.[124]

In November 2012, Hevesi was paroled from jail after serving nineteen months of his four year sentence.[125] Hevesi's elaborate gambit was not just a fraud on the political system. It was also a fraud on the market – as investors could have been misled into presuming that investment advisers were being picked because of their acumen and skill instead of their political connections.[126]

Not surprisingly given the backdrop of the Hevesi scandal, Michael Bloomberg, the Mayor of New York City, was supportive of the new 2010 SEC investment adviser rule. As he explained in a letter to the Commission, pay to play in choosing investment advisers for the city's public pension system could cost every New York City tax payer:

> When lucrative investment contracts are awarded to those who pay to play, public pension funds may end up receiving substandard services and higher fees, resulting in lower earnings. Because the City is legally obligated to make up any short fall in the pension system assets to ensure full payment of pension benefits, pay to play practices can potentially harm all New Yorkers.[127]

Both New York City and New York State stand to gain from the protection of Rule 206(4)-5 as fees are more likely to be competitively priced and therefore likely lower for taxpayers footing the bill of public pensions.

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[123] Bruce Carton, *The SEC's Newest Targets? Muni-Bonds and Pension Funds*, Securities Docket (Nov. 11, 2010, 4:47 pm), http://www.securitiesdocket.com/2010/11/11/the-sec%E2%80%99s-newest-targets-muni-bonds-and-pension-funds/.

[124] Danny Hakim & Mary Williams Walsh, *In State Pension Inquiry, a Scandal Snowballs*, N.Y. TIMES, Apr. 18, 2009, at A1; Sec. Exch. Comm'n v. Henry Morris, et al., Litigation Release No. 21036, 2009 WL 1309715 (May12, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21036.htm (reporting action brought for alleged fraudulent scheme involving New York State's largest pension fund, the Common Retirement Fund (the "CRF") in violation of Section 10(b) of the Securities Exchange Act, Rule 10b-5, and Sections 206(1) and 206(2) of the Investment Advisers Act).

[125] James King Thu, *Alan Hevesi Paroled; Told to Avoid Criminals. Return to New York Politics Officially Illegal*, VILLAGE VOICE (Nov. 15 2012 at 1:04 PM), http://blogs.villagevoice.com/runninscared/2012/11/alan_hevesi_par.php.

[126] *See also* Arthur Allen & Donna Dudney, *Does the Quality of Financial Advice Affect Prices?*, 45 THE FINANCIAL REVIEW 387, 412 (2010) ("It is also possible that cronyism or corruption results in the selection of lower-quality advisors.").

[127] Letter from Michael R. Bloomberg, Mayor of N.Y., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Sept. 9, 2009), *available at* http://www.sec.gov/comments/s7-18-09/s71809-87.pdf.

Of course, not everyone embraced the need for a new SEC rule. The Investment Counsel Association of America tried to stop the SEC from promulgating the investment adviser rule in 2000 by issuing a highly critical report.[128] In the end, the Commission brushed aside criticism and forged ahead to unanimously embrace the new rule.

At the time that the Commission's adopted Rule 206(4)-5 in 2010, Chair Mary Schapiro made the following statement articulating the justification for the rule:

> An unspoken, but entrenched and well-understood practice, pay to play can also favor large advisers over smaller competitors, reward political connections rather than management skill, and — as a number of recent enforcement cases have shown — pave the way to outright fraud and corruption.... Pay to play practices are corrupt and corrupting. They run counter to the fiduciary principles by which funds held in trust should be managed. They harm beneficiaries, municipalities and honest advisers. And they breed criminal behavior.[129]

The Commission recognized that campaign spending could have a distorting impact, and it rightly chose to act to safeguard the integrity of the market from this tempting conflict of interest.[130] Rule 206(4)-5 fits into the SEC's Money in Politics Model for intervention because: (1) the market inefficiency allocated investment adviser contracts to those who had participated in pay to play exchanges with state and municipal officials in charge of investing vast public pension trust funds; (2) the problem was unlikely to self-correct as state and municipal officials involved in the pay-to-play process would continue to rely on campaign contributions to win re-election and investments advisors would continue to covet contracts to manage public pension trust funds; (3) this market for investment advisers lacked transparency as investors could not tell which investment advisers were successful as a result of pay to play versus investment acumen; (4) millions of dollars in commissions were at stake for investing $4.6 trillion in public pensions nationwide; and (5) corruption of the government was evident by the jailing of at least two public officials in New York and Connecticut for participation in the pay to play schemes.

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[128] Investment Counsel Association of America, *Pay-to-Play and the Investment Advisory Profession* (2000), http://www.sec.gov/rules/other/f4-433/tittswo2.htm.

[129] Mary L. Schapiro, *Speech by SEC Chairman: Opening Statement at the SEC Open Meeting* (June 30, 2010), http://www.sec.gov/news/speech/2010/spch063010mls.htm.

[130] Press Release, SEC, *SEC Adopts New Measures to Curtail Pay to Play Practices by Investment Advisers* (June 30, 2010), http://www.sec.gov/news/press/2010/2010-116.htm.

IV. LESSON FROM THE SEC'S POST-WATERGATE INVESTIGATION

Forty years ago, in the aftermath of Watergate, the SEC took a leadership role in investigating domestic and foreign political contributions.[131] Watergate investigations by the U.S. Senate and the Special Prosecutor revealed illegal contributions from public companies. One company that was a focus of the Watergate investigations was Gulf Oil.[132] Money that Gulf Oil gave to President Nixon's Committee to Reelect the President was part of a larger slush fund[133] to pay for political contributions around the world.[134] The SEC stepped in to investigate whether any securities laws had been broken, first by companies flagged in the Watergate investigation and then more broadly by listed companies.[135]

SEC Commissioner A.A. Sommer, Jr. painted a gruesome picture of the corporate political spending in the decades leading up to the 1970s revealed by the SEC's post-Watergate investigation. The quote below from Sommer illustrates the magnitude of the deception the SEC uncovered among hundreds of top American public companies at the time:

> [W]e have indeed lost our innocence; we have in a sense known sin and been repelled by its face.... Among the most distressing of disclosures has been the revelation that many large corporations have engaged in a variety of misdeeds ... to an extent never imagined.... [T]he pattern of illegal political contributions extended back many years.... [T]hese contributions were carefully planned, artfully concealed and

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[131] JOHN T. NOONAN, JR., BRIBES 674 (1984) ("Approximately 500 corporations came forward to confess to the canonical offense of making unreported, questionable payments overseas.").

[132] *Id.* at 637 ("Because corrupt practices were a crime, because they had, therefore, to be hidden on a corporation's books, a corporation committing them had to engage in fictitious accounting and fraud under the securities laws. The interest of the SEC in accurate accounting created for it an interest in discouraging corruption and illegal political payments. It was the SEC's suit that had finally flushed out Gulf's system of illegal disbursements.")

[133] *Id.* at 641 ("Slush fund was term designating money to be dishonorably employed.").

[134] Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16(1) Chapman L. Rev. 71, 92 (Spring 2012) ("Mr. Wild gave a grand total of $100,000146 and pleaded guilty of violating the federal election laws for his donation of corporate funds to CREEP. Later investigations revealed that the $100,000 was only the tip of the iceberg, and that $5.4 million returned to Gulf Oil from foreign countries in off-book transactions. This money was used for political contributions, gifts, and related expenses.") (internal citations omitted).

[135] REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES SUBMITTED TO THE SENATE BANKING, HOUSING AND URBAN AFFAIRS COMMITTEE 36 (May 12, 1976), *available at* http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1976_0512_SECQuestionable.pdf; at nearly the same time that the SEC was looking into foreign payments because of Watergate, the Chair of United Brands Corporation, Eli Black committed suicide by jumping off the Pan Am building in New York City on Feb. 3, 1975 prompting the SEC to investigate his company. It found that $1,250,000 had been paid to Honduras to lessen a tax on bananas. *See* NOONAN, *supra* note 131, at 656.

> in no sense the fruit of illicit pressures. The means of tucking the money away for future distribution were often carefully developed, with clear assignments of responsibilities and well-developed techniques for the bestowal of the favors. The most distressing aspect of all this -- more distressing, if possible, than the realization that many corporations had deliberately, knowingly, wittingly, and as the result of command from the highest levels, flaunted the American election laws – was the discovery that frequently these payments were made out of substantial pools of money that had been sucked out of the corporate accountability process and squirreled away in the accounts of overseas agents, Swiss bank accounts, Bahamian subsidiaries, and in various other places where the use of the money would be free of the questions of nosey auditors, responsible directors, and scrupulous underlings. These systems were characterized by such interesting phenomena as the transportation in suitcases of vast sums of money in one hundred dollar bills by top executives. False or misleading entries were made in the books of corporations to conceal the true purposes for which the money was used.... [I]t was the executive suite itself which was engaged in deceit, cunning and deviousness worthy of the most fabled political boss or fixer.[136]

Commissioner Sommer's dismay is nearly palpable in this quote.

The SEC Commissioners put their revulsion to work in urging Congress to tighten the rules on internal accounting and the rules for the use of corporate funds for donations to foreign officials. The SEC reported to Congress on its findings from its post-Watergate investigation which concluded that:

Foreign political contributions were reported by 20 percent of new registrants, but many of these contributions were allegedly legal. In most instances, the payments had nonetheless been inaccurately reflected in company books and records....We have found millions of dollars of corporate funds placed in hidden accounts and expended entirely at the discretion of corporate executives who caused or permitted the payments to be inaccurately recorded on corporate books....What we do see in all of these cases, on the basis of our two-year effort, is the sobering fact that this Country's system of protection for investors, developed over the past 40

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[136] A. A. Sommer, Jr., *Crisis and the Corporate Community*, Midwest Securities Commissioners Association Conference, Aspen, Colorado, July 21, 1975, http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/papers/1970/1975_0721_Sommer_CrisisT.pdf.

years, and which includes corporate self-regulation with independent auditors, outside directors and counsel, and which is ultimately enforced by the Securities and Exchange Commission, has been seriously frustrated.[137]

In light of these post-Watergate revelations of gross corporate misconduct, with respect to political expenditures here and abroad, SEC Commissioners in the 1970s touted the need for better reporting from companies. For example, Commissioner Sommer addressing the American Institute of Certified Public Accountants in 1974 told the group:

> [I]nvestors are ...rational people who try to make rational choices about where to invest their money. To make a rational choice in any matter, information is essential – and the possibility of a rational choice is enhanced if that information has certain characteristics. Investors must have information that is sufficient, timely, reliable and fairly presented.[138]

Contemporaneously, SEC Chair Ray Garrett Jr. said: "[T]he aggregate capital resources of our economy will best be employed if the allocation is left to the ... investors. But this can only be true ... when these investors know what they are choosing and rejecting."[139] In other words, for market discipline to work, transparency in the market is essential.

President Ford announced a task force to look into the questionable foreign payments by U.S. corporations on June 14, 1976. In the announcement, President Ford expressed his support for legislation:

> [W]hich would require reporting and disclosure of payments by U.S.-controlled corporations made with the intent of influencing, directly or indirectly, the conduct of foreign government officials...[and] legislation proposed by the Securities and Exchange Commission to make it unlawful (a) for any person to falsify any book, record or account made, or required to be made, for any accounting purpose; and (b) for any person to make a materially false or misleading statement

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[137] Roderick M. Hills, Statement, *Statement of the Honorable Roderick M. Hills Chairman, Security and Exchange Commission, before the Subcommittee on Consumer Protection and Finance of the House of Representatives Committee on Interstate and Foreign Commerce* (Washington D.C. Sep. 21, 1976), copy of transcript at www.sechistorical.org/collection/papers/1970/1976_0921_HillsStatementT.pdf.

[138] A.A. Sommer Jr., Address, *The Four Musts of Financial Reporting*, (Washington D.C. Jan. 8, 1974), *available at* www.sechistorical.org/collection/papers/1970/1974_0108_SommerAICPA.pdf.

[139] Ray Garrett Jr., Address, *Improving Disclosure for Investors*, at 2-4 (Denver, Colo. Dec. 12, 1974), *available at* www.sechistorical.org/collection/papers/1970/1974_1212_GarrettImprovingT.pdf.

to an accountant in connection with any examination or audit.[140]

As a result of the SEC's post-Watergate investigations, Congress enacted the Foreign Corrupt Practices Act (FCPA),[141] which has a books and records reporting requirement as one of its centerpieces to ensure that foreign bribes are not offered or concealed from investors.[142]

The SEC's post-Watergate intervention demonstrates the salience of the Money in Politics Model because: (1) market discipline was thwarted by hundreds of public companies concealing their off-the-books political funds for use domestically and abroad; (2) this problem was not self-correcting as it had existed for decades in many public companies, that apparently concluded that the only way to stay in business was to continue to make questionable payments and political contributions whether legal or not; (3) these corporate political slush funds were concealed from the investing public; (4) millions of corporate dollars flowed through these slush funds; and (5) corruption of the government was evidenced by the resignation of President Nixon and other heads of state abroad who abdicated after investigations showed that American companies had bribed them.[143]

V. THE PETITION FOR A POST-*CITIZENS UNITED* SEC RULE

Inspired by the Supreme Court's 2010 *Citizens United* decision, ten law professors in the fall of 2011 petitioned the SEC asking for a new rule on transparency of corporate political spending (Petition File No. 4-637). This Petition has brought an unprecedented level of public support.[144]

The idea behind the Petition was not original. A dozen years before, in 1999, Professor Cynthia Williams suggested that the SEC should expand social responsibility reporting for public companies. Among the categories

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[140] Gerald Ford, *Statement Announcing New Initiatives for the Task Force on Questionable Corporate Payments Abroad*, 1976 Pub. Papers 593, www.sechistorical.org/collection/papers/1970/1976_0614_PresidentQuestionableT.pdf.

[141] NOONAN, *supra* note 131, at 680 ("One aspect of the FCPA was absolutely unique. Its prohibitions applied only to payments intended to influence a country other than the United States... For the first time, a country made it criminal to corrupt officials of another country.").

[142] 15 U.S.C. § 78m (2010).

[143] Laura E. Longobardi, *Reviewing the Situation: What is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 433 (1987) (The discovery of payments by Lockheed to the Prime Minister of Japan, for example, forced his resignation ... Reports that Lockheed had paid Prince Bernhardt of the Netherlands $1 million compelled him to relinquish his official functions. Finally, reputed payments by Lockheed, Exxon, Mobil, Gulf and other corporations to the Italian Government caused the Italian President to resign..."); NOONAN, *supra* note 131, at 663 ("governments around the world had been told by American senators in the most public of forums, a Senate hearing, that they had been bribed.").

[144] SEC, *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities* [File No. 4-637], http://www.sec.gov/comments/4-637/4-637.shtml (last visited Nov. 28, 2012).

of reporting Prof. Williams suggested were "information on domestic and international political contributions"[145] including "(i) Support of candidates ... (ii) Direct contributions to political parties ... (iii) Support for ballot initiatives ... [And] statewide or federal lobbying efforts [as well as] lobbying efforts of any trade associations to which the company belongs ...."[146] The inability of shareholders or the investing public to monitor this political behavior makes it difficult for them to hold managers accountable for this spending. University of Pennsylvania Professor Jill Fisch suggested seven years ago, that modification of securities' disclosure is in order:

> It may also be desirable to incorporate political activity into the disclosure requirements applicable to publicly-traded companies under the federal securities laws. In addition to enabling shareholders to monitor the activities of a corporation's officers and directors, and thereby to police against possible waste or self-dealing, such disclosure would integrate information on political activity with a firm's reporting on the business operations to which the firm's political participation relates.[147]

Just one day after *Citizens United* was decided in January of 2010, a lone shareholder of AT&T stock asked the SEC to promulgate a new transparency rule on corporate political spending.[148] Regardless of who thought of it first, the idea is a good one. Post-*Citizens United*, the SEC should adopt a rule for transparency of political spending by public corporations.[149]

*A. Post-*Citizens United *Political Spending Raises Corporate Governance Issues*

One of the reasons listed companies should disclose their political spending to investors is so that investors may judge the efficacy of this nonmarket strategy for themselves. There is cause for investors to be concerned in light of recent scholarship by economists showing a negative

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[145] Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1310-11 (April 1999).

[146] *Id.* at 1299.

[147] Jill Fisch, *How Do Corporations Play Politics? The Fedex Story*, 58 VANDERBILT L. REV. 1495, 1565 (2005).

[148] James Evan Dallas, *Sec. Exch. Comm'n Petition No. 4-593* (Jan. 22, 2010) (seeking a "Rulemaking in Reaction to *Citizens United*").

[149] A new SEC rule may be in the works. *See* Matea Gold, *Advocates Cheer SEC Consideration of Corporate Disclosure Rule*, L.A. TIMES, Jan. 8, 2013, http://www.latimes.com/news/politics/la-pn-sec-campaign-spending-disclosure-20130108,0,55217.story; Office of Information and Regulatory Affairs, *Office of Management and Budget Unified, Regulatory Agenda and Regulatory Plan*, Dec. 21, 2012, http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=3235-AL36.

relation between corporate political activity and shareholder value. For example, economist Dr. Michael Hadani reported to the SEC, after analyzing an eleven year sample of 1,110 small-, mid-, and large-cap S&P firms, "the regression analysis reveals that PAC expenditures and cumulative PAC expenditures have a statistically significant negative affect on firms' market value, both when examining their year to year PAC expenditures and also when examining their cumulative, 11 years, PAC expenditures."[150] In a soon to be published piece, Professor Hadani with co-author Professor Douglas Schuler, found:

> Although many believe that companies' political activities improve their bottom line, empirical studies have not consistently borne this out. We investigate ... a set of 943 S&P 1500 firms between 1998 to 2008. We find that firms' political investments are negatively associated with market performance and cumulative political investments worsen both market and accounting performance.[151]

Professors Hadani's and Schuler's findings are consistent with Professor John Coates' recent studies.[152] In examining the S&P 500, Professor Coates found that:

- CPA [Corporate Political Activity] correlates negatively with two different measures of shareholder power, which are themselves uncorrelated—ownership concentration and greater shareholder rights—and CPA correlates positively with measures of managerial agency costs— greater use by CEOs of corporate jets.
- CPA correlates positively with the significant fraction (11 percent) of large firm CEOs who gain post-CEO political office. ...
- CPA correlates negatively with measures of corporate value—industry-adjusted Tobin's *Q*—and that relationship, too, is weakest (or even positive) in heavily regulated or government-dependent industries, and is stronger in other industries, even after controlling for other factors in various ways, including with firm fixed effects. ....
- Firms that were politically active in 2008 experienced an average 8 percent lower increase in their industry-relative shareholder value

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[150] Comment of Dr. Michael Hadani, *supra* note 14.

[151] Hadani & Schuler, supra note 14.

[152] Hadani, *Institutional Ownership Monitoring, supra* note 14. ; Remarks of John Coates, *Can Shareholders Save Democracy, supra* note 14; John C. Coates IV, *Corporate Governance and Corporate Political Activity: What Effect Will* Citizens United *Have on Shareholder Wealth?*, HARVARD'S JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS, Sept. 2010 ("together with the likelihood that unobservable political activity is even more harmful to shareholder interests imply that laws that replace the shareholder protections removed by citizens united would be valuable to shareholders."); Aggarwal, Meschke & Wang, *supra* note 14.

> from their crisis-era lows when compared to firms that were politically inactive in 2008, consistent with *Citizens United* inducing an increase in unobservable political activity by previously politically active firms, with a significant attendant drag on shareholder value. [153]

Professors Aggarwal, Mischke and Wang correspondingly found, in an economic examination of 12,105 firms, that "[t]here are important differences between [politically active] donating and non-donating firms. The key difference for our purposes is that the mean excess future return for soft money and 527 Committee donating firms is 2.8% while for non-donating firms, it is 3.6%."[154] These economists concluded that corporate political spending was indicative of firms with agency problems between shareholders and managers. These empirical findings indicate that investors have more than a prurient interest in knowing the scope of corporate political spending: rather, they have a financial interest in accountability so that they can protect their investments.[155] Increased transparency of corporate political spending would reduce monitoring costs for shareholders while increasing market efficiency.[156]

B. Corporate Political Spending in the United States Lacks Transparency

The 2010 midterm federal election showed the scale of undisclosed political spending.[157] Studies have shown that between one third and one half of the independent spending in 2010 was from unnamed sources.[158]

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[153] Coates, *Corporate Politics, Governance, and Value Before and After* Citizens United, *supra* note 14, at 688.

[154] Aggarwal, Meschke & Wang, *supra* note 14; *see also* Jeffrey M. Drope & Wendy L. Hansen, *Futility and Free Riding: Corporate Political Participation and Taxation Rates in the United States*, 10 Bus. & Pol., no. 3, art. 2, at 17 (2009) (finding "Contrary perhaps to popular belief, or at least anecdotal illustration, we find after controlling for firm size and industry-level tax rates, among other controls, that there is no discernible effect of political spending on firm-level taxation...").

[155] There are also contrary economic studies which find that corporate political activity profits certain firms. Brian Kelleher Richter, (working paper)*'Good' and 'Evil': The Relationship Between Corporate Social Responsibility and Corporate Political Activity*, University of Western Ontario, June 24, 2011; Michael J. Cooper, Huseyin Gulen, Alexei V. Ovtchinnikov, (working paper), *Corporate Contributions and Stock Returns*, Sept. 26, 2008.

[156] *See* Comment of Dr. Susan Holmberg on Sec. Exch. Comm'n Petition File No. 4-637 at 8 ("The expected benefits of mandatory disclosure of corporate political spending would be substantial. Disclosure would help to mitigate the moral hazard problems inherent in CPA [corporate political activity] by diminishing the monitoring costs for shareholders, allowing them to make more informed investment decisions.").

[157] Comm. for Econ. Dev., *Hidden Money: The Need for Transparency*, in POLITICAL FINANCE 1 (2011), http:// www.ced.org/images/content/events/moneyinpolitics/2011/hiddenmoney.pdf (reporting that the Campaign Finance Institute estimated that organized groups may have spent $564 million on federal elections in 2010 while only disclosing $300 million).

[158] Bill De Blasio, Citizens United *and the 2010 Midterm Elections*, 3 (Public Advocate for the City of New York Dec. 2010), http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf (finding

Initial data from the 2012 federal election cycle gathered by Demos and U.S. Public Interest Research Group shows there was over $300 million in dark money spent.[159]

Money can get from a publicly-traded corporation into the political system without detection in the following way:

- First, the SEC currently requires no reporting of political spending. This enables a publicly-traded company to give a donation to a politically active nonprofit (usually organized under the Internal Revenue Code §§ 501(c)(4) or 501(c)(6))[160] without reporting this donation to the Commission.[161]
- Second, the politically active nonprofit, such as a § 501(c)(6) trade association, purchases a political ad supporting a federal candidate. This nonprofit will report these corporate donations to the Internal Revenue Service ("IRS"), but not to the public.[162]
- Third, the nonprofit reports to the Federal Election Commission ("FEC") that it has purchased a political ad. The FEC only requires the nonprofit to report earmarked donations.[163] If the publicly-traded corporation did not

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36% of outside spending in the 2010 federal election was funded by secret sources); Congress Watch, *12 Months After: The Effects of* Citizens United *on Elections and the Integrity of the Legislative Process*, 12 (Public Citizen Jan. 2011), http://www.citizen.org/documents/Citizens-United-20110113.pdf (finding "[g]roups that did not provide any information about their sources of money collectively spent $135.6 million, 46.1 percent of the total spent by outside groups during the election cycle.").

[159] "Dark money" is money that cannot be traced to its original source because it has been spent through an intermediary. Bowie & Lioz, *supra* note 13, at 5..

[160] 26 U.S.C. § 501(c)(4); § 501(c)(6).

[161] The SEC requires no disclosure of corporate political spending. Bebchuk et al, Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf ("Because the Commission's current rules do not require public companies to give shareholders detailed information on corporate spending on politics, shareholders cannot play the role the Court described.").

[162] L. PAIGE WHITAKER, ERIKA K. LUNDER, KATE M. MANUEL, JACK MASKELL, & MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41096, LEGISLATIVE OPTIONS AFTER *CITIZENS UNITED V.* FEC: CONSTITUTIONAL AND LEGAL ISSUES 6 n.41 (2010), http://www.fas.org/sgp/crs/misc/R41096.pdf ("Under the Internal Revenue Code, § 501(c) organizations that file an annual information return (Form 990) are generally required to disclose significant donors (typically those who give at least $5000 during the year) to the Internal Revenue Service (IRS). 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). No identifying information of donors to § 501(c) organizations is subject to public disclosure under the tax laws except in the case of private foundations (which are a type of § 501(c)(3) organization). IRC § 6104(b), (d).").

[163] According to the instructions for FEC Form 9, "[i]f you are a corporation, labor organization or Qualified Nonprofit Corporation making communications permissible under [11 C.F.R.] 114.15 and you received no donations made specifically for the purpose of funding electioneering communications, enter '0' (zero)." Fed. Election Comm'n, Instructions for Preparing FEC Form 9 (24 Hour Notice of Disbursements for Electioneering Communications) 4 (undated), http://www.fec.gov/pdf/forms/fecfrm9i.pdf; *see also* Fed. Election Comm'n, FEC Form 5 Report of

> "earmark" the donation, which nearly no sophisticated donor would, then the role of the corporation will never be revealed to the public.

The investing public can see that the nonprofit bought a political ad, but they cannot discern the role of the publicly-traded company in underwriting the purchase. As Peter Stone at the Center for Public Integrity reported on the eve of the 2010 midterm election, "[m]any corporations seem inclined to give to groups that are allowed by tax laws to keep their donations anonymous."[164] This theme was repeated on a larger scale in the 2012 election as Eliza Newlin Carney reported for *Congressional Quarterly*, "[w]hatever the moniker, secret money is playing an ever-larger role in the 2012 election."[165] The amount of dark money in politics more than doubled between 2010 and 2012.[166]

C. The Need for Better Disclosure from the SEC

One reasons that the Commission needs to act is because its sister agencies have failed to provide transparency of corporate money in politics for investors. For example, the Federal Election Commission ("FEC") could take the lead on requiring corporate political disclosures, but it is not.[167] As Former Chair of the FEC Trevor Potter explained in the *Washington Post*'s editorial page: "Things are so bad at the FEC that the commissioners have deadlocked three times in the past year over whether to even accept public comments about changing the inadequate disclosure regulations."[168]

The FEC has failed to promulgate any post-*Citizens United* disclosure rules. In June 2011, FEC Commissioner Weintraub lamented:

> [H]ere we sit, almost eighteen months after *Citizens United* was announced, mired in gridlock over whether certain

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Independent Expenditures Made and Contributions Received to be Used by Persons (Other than Political Committees) including Qualified Nonprofit Corporations (2009), http://www.fec.gov/pdf/forms/fecfrm5.pdf.

[164] Peter Stone, *Campaign Cash: The Independent Fundraising Gold Rush Since 'Citizens United' Ruling* (Ctr. for Public Integrity Oct. 4, 2010), http://www.publicintegrity.org/articles/entry/2462/.

[165] Eliza Newlin Carney, *Politicking Under Cover*, CQ WEEKLY (Sept. 15, 2012 – 1:12 p.m.), http://public.cq.com/docs/weeklyreport/weeklyreport-000004152999.html.

[166] Paul Blumenthal, *'Dark Money' In 2012 Election Tops $400 Million, 10 Candidates Outspent By Groups With Undisclosed Donors*, HUFFINGTON POST, Nov. 2, 2012, http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html ("The amount spent by 'dark money' groups and reported to the FEC is already more than twice as much as was spent in 2010.").

[167] Torres-Spelliscy, *Hiding Behind the Tax Code*, *supra* note 12.

[168] Trevor Potter, *How the FEC Can Stop the Tidal Wave of Secret Political Cash*, WASH. POST (Nov. 16, 2012), http://www.washingtonpost.com/opinions/how-the-fec-can-stop-the-tidal-wave-of-secret-political-cash/2012/11/16/966c48cc-2dae-11e2-89d4-040c9330702a_story_2.html.

> aspects of the case may be addressed in the rulemaking, over whether the Commission is willing to hear from the public on a part of the case that my colleagues would prefer to pretend is not there. Regrettably, we cannot even agree on whether certain questions may be posed, let alone reach the stage to consider the substance of any final rule. Disclosure, which I have always considered one of the core missions of the FEC, has become, like the villain in a children's novel, the topic that may not be named.[169]

The third anniversary of *Citizens United* came and went without clear disclosure rules from the FEC.

Meanwhile at the state level, there is not a single unified system for reporting money that is spent in state or local elections.[170] States have their own disclosure laws which are regulated by each state's election officials.[171] A few states like Minnesota have strong laws capturing the wide range of disclosures.[172] Many states, including large states like New York, have gaping disclosure loopholes which allow corporations to spend in their elections without disclosure.[173] States also differ in their zest for enforcing the disclosure laws already on the books.[174] If corporations are spending in states with lackluster or unenforced disclosure laws, then investors have no way of discovering this spending, no matter how much

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[169] Fed. Election Comm'n, *Statement of Commissioner Ellen L. Weintraub on the Draft Notices of Proposed Rulemakings on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, June 17, 2011, http://fec.gov/members/weintraub/nprm/statement20110617.pdf.

[170] For a 50 state overview *see* Robert Stern, *Sunlight State by State After* Citizens United, CORPORATE REFORM COALITION (June 2012), http://www.citizen.org/documents/sunlight-state-by-state-report.pdf.

[171] Kristen De Pena, *Ignoring State Disclosure Laws: Campaign Finance Trends* (Sept. 28, 2011), http://sunshinestandard.org/ignoring-state-%E2%80%9Cdisclosure%E2%80%9D-laws-campaign-finance-trends.

[172] This Minnesota law is likely to be revised in light of a ruling by the Eighth Circuit Court of Appeals. *See* Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 877 (8th Cir. 2012) ("Because Minnesota has not advanced any relevant correlation between its identified interests and ongoing reporting requirements, we conclude Minnesota's requirement that all associations make independent expenditures through an independent expenditure political fund, *see* Minn. Stat. § 10A.12, subdiv. 1a, is most likely unconstitutional.").

[173] Ciara Torres-Spelliscy, *Transparent Elections After* Citizens United (Brennan Center 2011), http://ssrn.com/abstract=1776482.

[174] Matea Gold & Chris Megerian, *States Crack Down on Campaigning Nonprofits, State Regulators Increase Pressure on Advocacy Groups Active in the Election to Disclose Their Donors. There Is No Such Effort on the Federal Level*, L.A. TIMES, Nov. 26, 2012, http://articles.latimes.com/2012/nov/26/nation/la-na-state-disclosure-20121126 ("California's Fair Political Practices Commission forced an Arizona-based group to reveal the source of $11 million it gave for two ballot initiative campaigns." Also "The legal wrangling between [Montana] state officials and ATP [American Tradition Partnership] is ongoing, but has already pulled back the curtain on the group's contributors.").

they may try.[175] Furthermore, the duty to disclose to the state under election laws often falls on candidates, political parties, and PACs, not donor corporations.

Another potential source of transparency is the IRS which requires public disclosures from certain political organizations.[176] IRS disclosure is strong as far as it goes; the IRS requires transparency for 527s, but the IRS is statutorily barred from revealing money flowing through other nonprofits into the political sphere such as 501(c)(4)s and 501(c)(6)s.[177]

The Federal Communications Commission ("FCC") is one more potential source of disclosure.[178] In March of 2011, the Media Access Project petitioned the FCC, asking for on-ad disclaimers of the sources of broadcast political ads and online access to the political file.[179] On April 27, the Federal Communications Commission (FCC) voted to place certain broadcasters' political files online.[180] The new FCC rule applies to the top four TV networks and in the top fifty media markets and it phases in over time.[181] Its biggest limitation is that the new rule only covers broadcast ads, leaving other media, like corporate sponsored campaign mailers, without the same transparency.[182]

The SEC is the best positioned of any federal agency to attain full disclosure of political spending from publicly traded companies.[183] First,

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[175] Linda King, *Indecent Disclosure Public Access to Independent Expenditure Information at the State Level* 4 (National Institute on Money in State Politics Aug. 1, 2007), https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1.

[176] IRS, *Filing Requirements* (Jan. 7, 2011), http://www.irs.gov/charities/political/article/0,,id=96355,00.html.

[177] 26 U.S.C.A. § 501.

[178] Electioneering communications are reported to the FCC. *See* FCC, *Electioneering Communications Database* (ECD) (2009), http://gullfoss2.fcc.gov/ecd/; *see generally* Lili Levi, *Plan B For Campaign-Finance Reform: Can The FCC Help Save American Politics After* Citizens United*?*, 61 CATH. U. L. REV. 97 (Winter 2011).

[179] Press Release, Media Access Project, *Media Access Project to FCC: Mandate Disclosure of Political Broadcast Sponsors* (Mar. 22, 2011), http://www.mediaaccess.org/2011/03/media-access-project-to-fcc-mandate-disclosure-of-political-broadcast-sponsors/; Press Release, Media Access Project, *Media Access Project Says that FCC Media Report Lacks Meaningful Recommendations* (Jun. 9, 2011), http://www.mediaaccess.org/2011/06/media-access-project-says-that-fcc-media-report-lacks-meaningful-recommendations/.

[180] FEC, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations Final Rule*, 47 CFR Part 73, MM Docket No. 00-168; MM Docket No. 00-44 (2012).

[181] Martha T. Moore, *FCC Political Ad Database Reveals Little*, USA TODAY (Aug. 3, 2012), http://content.usatoday.com/communities/onpolitics/post/2012/08/fcc-political-ad-database-reveals-little/1.

[182] Ciara Torres-Spelliscy, *FCC Brings Sunlight to Elections, But the SEC Needs to Help, Too*, HUFFINGTON POST, Apr. 27, 2012, http://www.huffingtonpost.com/ciara-torresspelliscy/fcc-brings-sunlight-to-el_b_1459319.html.

[183] The SEC should act in part because the average publicly-traded corporation has not agreed to voluntarily disclose. *See* PAUL DENICOLA, BRUCE F. FREED, STEPHAN C. PASSANTINO, & KARL J. SANDSTROM, HANDBOOK ON CORPORATE POLITICAL ACTIVITY, EMERGING CORPORATE GOVERNANCE ISSUES 6 (Conference Board 2010) (noting that disclosure by for-profit corporations is still not the norm finding "as of October 2010, seventy-six major American corporations, including half

the Commission has clear regulatory authority to require disclosure from reporting companies.[184] Furthermore, it would be more efficacious to capture this spending at the source, instead of vainly attempting to catch it after it has gone out of the corporation and passed through intermediaries, such as opaque trade associations or other nonprofits.[185] Transparency of corporate political spending will empower the investing public to navigate the new post-*Citizens United* terrain with facts instead of speculation.[186]

C. The United States Is 46 Years Behind the United Kingdom on Disclosure

The United States is forty-six years behind the United Kingdom, which has required disclosure of corporate political spending since the 1960s.[187] Investors in U.S.-listed companies need a one stop shop to see all corporate political spending in an easy to search place on the SEC's webpage.

The U.K.'s experience can serve as an example when designing a new system for the United States. The U.K.'s Companies Act of 1967 imposed a duty on companies to declare political donations in the company's annual report over £50, which was subsequently increased to £200 in 1980.[188] However, this information was not systematically reported or aggregated in a single location.[189] In the 1990s, the lack of readily accessible data led the U.K. press to complain about the lack of transparency around party financing, including reports of millions of pounds of contributions from unnamed sources.[190]

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of the S&P 100, had adopted codes of political disclosure. However, a similar shift toward political disclosure has not yet taken place outside of the S&P 100."); Heidi Welsh & Robin Young, *How Companies Influence Elections - Political Campaign Spending Patterns and Oversight at America's Largest Companies* 18 (Oct. 14, 2010), http://ssrn.com/abstract=1692739. ("Fully 83 percent of the [S&P 500] index does not report on its political spending.").

[184] Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (prohibiting the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors"); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988) ("This Court 'repeatedly has described the "fundamental purpose" of the [Exchange] Act [of 1934] as implementing a "philosophy of full disclosure."'" (quoting Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477-78 (1977) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)))).

[185] BRUCE F. FREED & JAMIE CARROLL, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING 1-2 (2006), http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932.

[186] *See* Comment of Dr. Michael Hadani on SEC petition File No. 4-637.

[187] Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U. OF SAN FRANCISCO L. REV. 479 (Spring 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1853706.

[188] Committee on Standards in Public Life, Fifth Report § 6.24 (vol. 1 1998), http://www.public-standards.org.uk/Library/OurWork/5thInquiry_FullReport.pdf.

[189] *Id.* at § 6.25 ("there is no central record of the companies that give political donations. That information is held in the reports of over one million registered UK companies.").

[190] Rosie Waterhouse, *Source of Pounds 15m in Donations to Tory Party Not Disclosed*, THE INDEPENDENT, (June 16, 1993) (reporting "The source of more than [ ] 15 [million pounds] in

In 2000, under the Political Parties, Elections and Referendums Act, the United Kingdom adopted amendments to its Companies Act, which improved reporting requirements for corporate political contributions.[191] The Act covers political advertisements in addition to direct donations to candidates or parties.[192] Under the Companies Act, if a publicly-traded company made a political donation of over £2,000, then the directors' annual report to the shareholders must include the donation's recipient and amount.[193] The Companies Act covers political spending by a U.K. company in elections for public office in the United Kingdom and in any European Union (EU) member state.[194] After the 2000 amendments, companies have given detailed accounts of how they spent political money in their annual reports to investors down to the pound.[195] In the United Kingdom, the directors' report is equivalent to a company's annual report on Form 10-K to the SEC in the United States, and £2,000 is roughly equal to $3,000 at current exchange rates.[196] The U.K.'s disclosure threshold of a few thousand dollars is a good example for future U.S. action to follow.[197]

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donations to the Conservative Party made before the 1992 general election remains a mystery despite an exhaustive search of the accounts of 5,000 companies to see if they declared political donations last year.").

[191] Political Parties, Elections and Referendums Act at §§ 139–140, & sched. 19, http://www.legislation.gov.uk/ukpga/2000/41/pdfs/ukpga_20000041_en.pdf; *see also* Explanatory Notes to Political Parties, Elections and Referendums Act (2000), c. 41, http://www.opsi.gov.uk/ACTS/acts2000/en/ukpgaen_20000041_en_1. The Companies Act was amended again in 2006. Companies Act at c. 46, *see also* Companies Act 2006 Regulatory Assessment (2007), http://www.berr.gov.uk/files/file29937.pdf. In addition, directors are jointly and severally liable for any unauthorized political expenditures plus interest. *Id.* at § 369.

[192] Companies House, *Companies Act* (Oct. 1 2008), http://www.companieshouse.gov.uk/companiesAct/implementations/oct2008.shtml ("A company must also be authorised by its members before it incurs expenditure in respect of political activities such as advertising, promotion or otherwise supporting a political party, political organisation [o]r an independent candidate in an election.").

[193] Political Parties, Elections and Referendums Act, at § 140; *see also* ELECTORAL COMMISSION, GUIDANCE TO COMPANIES: POLITICAL DONATIONS AND LENDING (2007), http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0014/13703/Companies-Guidance-Final1_27776-20443__E__N__S__W__.pdf.

[194] Freshfields Bruckhaus Deringer LLP, *The 2011 AGM Hot Topics*, 21 (Dec. 2010), http://www.freshfields.com/publications/pdfs/2010/dec10/29290.pdf (British law firm Freshfields reports, "From 1 October 2008, the scope of statutory control was extended to donations to, and expenditure on, independent candidates at any election to public office in the UK or any EU member state—previous rules applied only to support for political parties and organizations.").

[195] *See* for example, British American Tobacco, *Annual Report*, 64 (2010).

[196] The original reporting threshold in the 2000 law was £200. Political Parties, Elections and Referendums Act 2000, at § 140. The amount was later raised to £2,000 in 2007 under secondary legislation, the British equivalent of American implementing regulations. *See* DEPARTMENT FOR BUSINESS ENTERPRISE & REGULATORY REFORM, GOVERNMENT RESPONSE TO CONSULTATION ON THE COMPANIES ACT 2006 – ACCOUNTING AND REPORTING REGULATIONS (2007), http://www.berr.gov.uk/files/file40480.doc.

[197] I caution the SEC against adopting disclosure thresholds that are too low. Courts across the country have routinely invalidated disclosure laws that capture tiny expenditures. *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 29 (1st Cir. 1993) (striking down a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as $1, a practice

D. Shareholders Need a New Rule is Because of Flaws in Current Disclosure

As explained above, while the idea for a political transparency rule is not a new one, the urgency for the rule has increased with the advent of post-*Citizens United* corporate political spending in federal elections and in an additional twenty-three states.[198] The need for the SEC to act on Petition No. 4-637 now is clear. Present campaign finance disclosure rules often hide the original source of funds from both investors and voters. In 2010, Nell Minow, an expert in corporate governance gave the Diane Sanger Memorial Lecture, addressing the impact of *Citizens United*. Ms. Minow urged:

> If investors are going to be able to send some kind of a market reaction to this political speech by corporations, we have to have better disclosure. We are currently facing a situation where some companies are taking public positions in favor of one thing and then finally money to intermediary groups to oppose it. We can't have that any more. So, we need better disclosure about the contributions and other kinds of political speech pay, that is paid out.[199]

Shareholders are already clamoring for more disclosure of political expenditures.[200] Fortune 500 companies don't have to read the writing on the wall; they can read the shareholder proposals in their proxies demanding more transparency.[201] In its 2012 Guidance, the Institutional

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known as "first dollar disclosure"); *see also* Canyon Ferry Rd. Baptist Church v. Unsworth, 556 F.3d 1021, 1033 (9th Cir. 2009) (holding disclosure statute unconstitutional as applied to a one-time in-kind *de minimis* expenditure in a ballot measure context and stating "the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level").

[198] National Conference of State Legislatures, *Life After* Citizens United (Jan. 4, 2011) http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx (listing 23 states impacted by Citizens United).

[199] Nell Minow, *Diane Sanger Memorial Lecture*, Mar. 17, 2010, http://c0403731.cdn.cloudfiles.rackspacecloud.com/collection/programs/sechistorical-podcast-031710-transcript.pdf.

[200] SEC, *Bank of America No Action Letter*, Feb. 29, 2012, http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/trilliumassetstephen022912-14a8.pdf (allowing shareholders at Bank of American to file a shareholder proposal regarding the company's political spending); SEC, *Home Depot No Action Letter*, Mar. 25, 2011, http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf (allowing shareholders at Home Depot to file a shareholder proposal regarding the company's political spending).

[201] Sustainable Investments Institute (Si2), *FACT SHEET: Corporate Political Spending Shareholder Resolutions, 2010-2012, available at* http://www.sec.gov/comments/4-637/4637-1149.pdf ("Investors filed 282 shareholder resolutions about corporate political spending from 2010 to 2012. These proposals accounted for 41 percent of all votes on social and environmental issues in 2012. ... The vast majority (79 percent) asked companies to disclose more about spending before and after elections.").

Shareholder Services (ISS) suggested institutional investors vote in favor of resolutions requesting political spending disclosure.[202] In 2013, proxy adviser Lewis Glass & Co issued a report, which urged better disclosure of corporate political activity.[203] Many public companies are already voluntarily disclosing.[204] Comparing these voluntary disclosure "apples to apples" is nearly impossible since each company is disclosing a different set of data.

Because of the lack of transparency explained herein, determining the exact amount of money from public companies in American elections is currently impossible. Most corporate political spending is likely being hidden in plain sight in politically active trade associations. Nonetheless, some publicly-traded corporations spent money in the 2012 federal election through various Super PACs under their Doing Business As ("DBA") names. According to the Center for Responsive Politics, Chevron (ticker CVX) gave $2.5 million to the Congressional Leadership Fund Super PAC. Clayton Williams Energy (ticker CWEI) gave $1 million to American Crossroads Super PAC. Chesapeake Energy (ticker CHK) gave $250,000 to the Make Us Great Again Super PAC. Scotts Miracle Gro (ticker SMG) gave $200,000 to Restore our Future Super PAC. CONSOL Energy (ticker CNX) and Hallador Energy (ticker HNRG) each gave $150,000 to Restore our Future Super PAC. Pilot Corp (Ticker 7846 on the Tokyo Nikkei) gave $100,000 to the American Crossroads Super PAC.[205] Public companies have also made additional contributions to state elections through 527s like the Republican Governors Association and the Democratic Governors Association.[206] This peek into

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[202] ISS, 2012 U.S. Proxy Voting Summary Guidelines, at 64 (Jan. 31, 2012), http://www.issgovernance.com/files/2012USSummaryGuidelines1312012.pdf.

[203] Courteney Keatinge & David Eaton, *Political Contributions: A Glass Lewis Issue Report 2012*, GLASS LEWIS & CO (2013), http://www.glasslewis.com/blog/glass-lewis-publishes-political-contributions-a-glass-lewis-issue-report/.

[204] Press Release, Center for Political Accountability, *Corporate Disclosure Expands as Political Spending Surges, New CPA-Zicklin Index Reveals* (Sept. 25, 2012), http://politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/6906 ("almost 60 percent of companies in the top echelons of the S&P 500 are now disclosing some political spending information..."); Robert Ludke, *Is It Worth It? Political Spending and Corporate Governance*, BUSINESS ETHICS MAGAZINE (Nov. 17, 2012), http://business-ethics.com/2012/11/17/10419-is-it-worth-it-political-spending-and-corporate-governance/ ("it is imperative that companies take a much more proactive and transparent approach to the governance of their political giving.").

[205] Center for Responsive Politics, *2012 Top Donors to Outside Spending Groups*, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=O&superonly=S.

[206] Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under* Buckley's *Major Purpose Test?*, 15 NYU J. of Legislation & Public Policy 485, 489-90 (Spring 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988603 (finding "IRS reporting reveals that much of the money filling the coffers of the Governors Associations is actually corporate in origin. A majority of the corporate contributions (over 65%) comes from publicly traded corporations..."); *see also* Paul Abowd, *Million-Dollar Donation in Indiana Race May Skirt Limits on Corporate Giving*, CENTER FOR PUBLIC INTEGRITY CONSIDER THE SOURCE (July 26, 20126:00 am),

the spending of public companies shows that millions of dollars have been spent on elections in this past cycle.

F. Without Disclosure, There is a Catch-22 for Investors Trying to Evaluate the Utility of Corporate Political Activity

Even those academics who have been critical about the role of the SEC in requiring mandatory disclosures admit that some disclosures are needed to create an efficient market for securities. Frank Easterbrook and Daniel Fischel once wrote:

> [F]raud reduces allocative efficiency. So too does any deficiency of information. Accurate information is necessary to ensure that money moves to those who can use it most effectively and that investors make optimal choices about the contents of their portfolios. A world with fraud, or without adequate truthful information, is a world with too little investment, and in the wrong things to boot.[207]

Not unlike the obfuscation revealed post-Watergate by the SEC's investigations within Fortune 500 companies, at present, there is an agency problem within corporations because shareholders cannot monitor how corporate managers are spending corporate assets on political causes.[208] This is troubling because there is not a perfect symmetry between the interests of shareholders and managers vis à vis political spending. As Columbia Professor John Coffee Jr. put it, when it comes to corporate political spending, "managerial and shareholder interests are not well aligned."[209]

Ultimately, the opaque environment of corporate political spending is

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http://www.publicintegrity.org/2012/07/26/10229/million-dollar-donation-indiana-race-may-skirt-limits-corporate-giving ("The RGA's 527 raised $16.7 million since April, nearly twice as much as its Democratic counterpart. Fifty-seven percent of that money came from corporate treasuries and corporate PACs, according to a Center for Public Integrity analysis of IRS records."); John Dunbarel & Alexandra Duszake, *D.C.-Based Governors' Associations Provide Back Door for Corporate Donors Organization Raises Millions from Energy Interests*, CENTER FOR PUBLIC INTEGRITY (Oct. 18, 2012 6:00 am) ("Companies with an interest in the development of the natural gas industry in the state, including Chesapeake, gave at least $4 million in corporate treasury funds to the RGA in the 2009-2010 election, according to a Center for Public Integrity analysis of CRP data. Among them were Exxon Mobil ($704,900), CONSOL Energy ($338,200), Encana ([$]151,400), the American Natural Gas Alliance ($101,000) and two natural gas-consuming electrical utilities.").

[207] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669. 673 (May 1984).

[208] Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 at 4 (2011) ("In the CPA [corporate political activity] context, there is considerable potential for personal advantages to corporate executives, particularly prestige, a future political career, and star power (Hart 2004) or to help political allies (Aggarwal et al. 2011).").

[209] John C. Coffee, Jr., *Testimony Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services, United States House of Representatives* (Mar. 11, 2010).

an open invitation for incumbent politicians to try to extract spending from unwilling corporations. While it is true that *Citizens United* only empowered independent spending at the federal level, the temptation by incumbents to coordinate surreptitiously with large spenders may be powerful. This risk was realized during the Watergate scandal.[210]

Corporate political spending could be a wasteful brand of rent-seeking. As Professor Richard Hasen suggests:

> [M]inimizing rent-seeking therefore may be a necessary component of an effort to improve U.S. economic productivity and decrease the deficit. Unchecked rent-seeking may retard long-term economic growth. In their look back at the Gilded Age in the United States, Glasser et al. suggest that an earlier round of regulation to curb rent-seeking was necessary to sustain U.S. economic growth.[211]

Getting to the truth of the matter of whether this is a waste of money or a sound investment is nearly impossible when such a significant chunk of money in election is untraceable. According to Demos and U.S. PIRG's study, 31% of the money spent independently in the 2012 election was untraceable, totaling nearly $315 million.[212]

Fitting Petition File No. 4-637 *a priori* into the Money in Politics Model is more difficult because the public is in the dark about the true scope of post-*Citizens United* corporate political spending. The new rule contemplated by Petition No. 4-637 arguably would fit the SEC's Money in Politics Model for the following reasons: (1) the potential for market inefficiencies as government policy at the state and federal level could be skewed to the benefit of those public companies that spend in elections. The winners in this system could be the generous political spenders, instead of the most efficient market participants; (2) the problem of the lack of transparency is not going to self-correct. If truthful disclosure of

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[210] *Trevor Potter's Keynote Address at Conference Board's Symposium on Corporate Political Spending*, CLC Blog, Oct. 21, 2011, http://www.clcblog.org/index.php?option=com_content&view=article&id=437%3Atrevor-potters-keynote-address-at-conference-boards-symposium-on-corporate-political-spending-10-21-11 ("It is usually forgotten now how many major corporations were found to have violated the law: ITT, American Airlines, Braniff, Ashland Oil, Goodyear Tire & Rubber, Gulf, Philips, Greyhound – those were just a few of the well-known corporations caught up in the Watergate campaign financing scandal: 31 executives ended up being charged with criminal campaign violations, and many plead guilty."); STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 435 (1990) (listing corporations as breaking the campaign finance laws during Nixon's administration including, among others, 3M, Carnation Company and the American Ship Building Company).

[211] Richard L. Hasen, *Lobbying, Rent Seeking and the Constitution*, 64 STAN. L. REV. 191, 232 (Jan. 2012)

[212] Bowie & Lioz, *supra* note 13, at 5.; *see also* Paul Blumenthal, *'Dark Money' In 2012 Election Tops $400 Million, 10 Candidates Outspent By Groups With Undisclosed Donors*, HUFFINGTON POST (Nov. 2, 2012 1:36 pm) (finding $412 million was dark money in the 2012 federal election).

political spending were the norm, the use of disclosure loopholes would be the exception instead of the rule; (3) there is an utter lack of transparency about which companies are spending what on which political campaign because of the many loopholes in the regulations at the FEC, FCC, IRS and SEC; (4) Super PAC disclosures and certain 527 disclosures demonstrate that millions of dollars from corporate treasuries are being spent on politics already. Less clear is what exactly the size of the upside (if there is any upside) is for public corporations; and (5) the corruption of the government is not manifest yet. Clearly, the risk of governmental corruption is real. Historically, weak-willed politicians have been influenced by money.[213] Post-*Citizens United*, companies are spending hundreds of thousands of dollars at a time.[214] This seems like a recipe for governmental officials to favor their benefactors with governmental rewards.

H. Scope of a New Rule

The new SEC rule should be expansive in its definition of political spending. The federal and state governments have long been able to require disclosures, not only of contributions to candidates, political parties, and PACs, but also of money purchasing political ads that expressly advocate the election or defeat of a candidate.[215] In 2003, the Supreme Court expanded the government's disclosure power to cover electioneering communications—broadcast ads which mention a candidate

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[213] *Ex-Congressman Begins Prison Sentence Cunningham Sentenced to 8 Years, 4 Months in Prison in Corruption Case*, ASSOCIATED PRESS (Mar. 4, 2006 5:07:14 PM ET), http://www.msnbc.msn.com/id/11655893/ns/us_news-crime_and_courts/t/ex-congressman-begins-prison-sentence/ ("Former Rep. Randy 'Duke' Cunningham began his first day in prison after being sentenced to eight years and four months for taking $2.4 million in homes, yachts and other bribes in a corruption scheme unmatched in the annals of Congress.); Bruce Alpert, *William Jefferson Reports to Texas Prison to Begin 13-year Sentence*, TIMES-PICAYUNE (May 4, 2012 at 12:40 PM), http://www.nola.com/politics/index.ssf/2012/05/william_jefferson_reports_to.html ("Federal prosecutors said [ex-Congressman] Jefferson collected $470,000 in funds sent to businesses controlled by his family, with the potential to make millions if the business deals he championed succeeded. The case is most infamous for the $90,000 FBI agents found in the freezer of his Washington D.C. home by FBI agents during a search conducted in August, 2005.... The money was most of the $100,000 in cash that a government informant had handed him ..."); Susan Schmidt & James V. Grimaldi, *Ney Sentenced to 30 Months in Prison for Abramoff Deals*, WASH. POST (Jan. 20, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/19/AR2007011900162.html ("The gifts [Congressman] Ney accepted from [corrupt lobbyist] Abramoff included a golfing trip to Scotland and other travel that prosecutors valued at more than $170,000. In return, Ney sought to insert four amendments to benefit Abramoff's clients into a 2002 election reform bill. Ney also admitted helping another Abramoff client win a multimillion-dollar contract to provide wireless communication services to the U.S. Capitol.").

[214] Charles Riley, *Oops! Aetna Discloses Political Donations*, CNN MONEY (June 15, 2012: 6:37 PM ET), http://money.cnn.com/2012/06/14/news/economy/aetna-political-contributions/index.htm ("Documents obtained and distributed by Citizens for Responsibility and Ethics in Washington show that Aetna made a $3 million donation to the American Action Network and a $4.05 million donation to the U.S. Chamber of Commerce in 2011.").

[215] Torres-Spelliscy, *Transparent Elections After* Citizens United, *supra* note 173.

directly before an election and are targeted to that candidate's electorate.[216] The new rule should cover political contributions, independent expenditures, and electioneering communications.

The new SEC rule should cover corporate spending in local, state, and federal campaigns so that investors get a complete picture of where the company is spending money. While federal races garner the most attention from the press and hold the potential for the most expensive media buys, many companies are focused on narrow regional or even local political fights.[217] A rule that only covered federal spending would miss the corporate money flowing into state races, including increasingly costly state judicial races.[218]

The new Commission disclosure rules should cover not just corporate money for candidate elections, but rather, any item that appears before an American voter on a ballot including ballot initiatives. Ever since the Supreme Court's *Bellotti* case in 1978, corporations have had the right to spend on ballot measures. In a recent Colorado ballot measure election, a group called 'Littleton Neighbors Voting No' spent $170,000 to defeat a zoning restriction that would have prevented a new Wal-Mart. As it turned out, Wal-Mart, and not a grassroots groups, exclusively funded 'Littleton Neighbors.'[219] In addition, the nonprofit pharmaceutical trade association known as PhRMA has funded 311 ballot measures in the past eleven years in California.[220]

The new rule would have a significant loophole in it if it left out contributions from companies to 527s, 501(c)(4)s and 501(c)(6)s.[221] Corporate contributions to trade associations and other nonprofit organizations are one way that companies hide their role in politics. The use of opaque nonprofits thwarts transparency of money from for-profit

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[216] McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

[217] LIAM ARBETMAN ET AL., THE LIFE OF THE PARTY: HARD FACTS ON SOFT MONEY IN NEW YORK STATE 1 (Common Cause/New York 2006), *available at* http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/SOFT_MONEY_REPORT.PDF (finding between 1999 and 2006, corporations and other business entities gave over thirty-two million dollars to New York State political parties' Housekeeping Accounts).

[218] Committee for Economic Development, *Partial Justice: The Peril of Judicial Elections*, (2011), http://www.ced.org/images/content/events/moneyinpolitics/2011/38751_partialjustice.pdf; Adam Skaggs, *Buying Justice: The Impact of* Citizens United *on Judicial Elections* 2 (Brennan Center 2010).

[219] Def.'s Response Br. to Pls.' Mot. for Summary Judgment, Sampson v. Coffman, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

[220] Coulter Jones & Elizabeth Titus, State's Top 100 Political Donors Contribute $1.25 Billion, CALIFORNIA WATCH, June 4, 2012.

[221] Nonprofits do not enjoy a blanket privilege of anonymity. *See* Nat'l Ass'n of Mfrs v. Taylor, 582 F.3d 1, 22 (D.C. Cir. 2009) (upholding disclosure as applied to a trade association and holding that the fear of association with controversial speech is insufficient and does not rise to levels of harm in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (finding association led to economic reprisal, physical coercion, and other hostility toward members)).

corporations.[222]

There should be specificity about which candidate or ballot initiative is being supported by the corporation and in what amount. Disclosures should list the candidate supported and the amount spent in favor of that candidate, both directly and indirectly, through nonprofit intermediaries.[223] Only a rule that covers all political spending will end the asymmetry of information among managers and investors.

Periodic updating is also in order as political spending ebbs and flows along with the election cycle. As Professor Milton Cohen explained about securities disclosure more generally, "for the purposes of the continuing trading markets, the value of the original disclosures under the 1934 Act will gradually diminish to the vanishing point unless stale information is constantly replaced by fresh."[224]

The information reportable under the rule should be aggregated on the SEC's webpage in a sortable and downloadable format for easy public access.[225] It is not enough to have companies merely report to their particular shareholders, as in the United Kingdom;[226] for true clarity, the data across companies needs to be accessible in a single public repository.

Finally, the SEC needs to include an enforcement mechanism to make the new transparency rule meaningful. Clearly one of the reasons the Rules G-37 and 206(4)-5 have a high compliance rate is that the SEC enforces these rules.

Compliance with a new political transparency rule would likely have a low cost. Companies are already required to keep track of lobbying and political expenses in order to file accurate tax returns since these expenses are not tax deductible.[227] As Dr. Susan Holmberg explained in her public comment on Petition File No. 4-637: "So long as the reporting categories chosen by the SEC ... mirror the categories that the IRS [uses in] ... § 162(e), the cost of compliance may be as little as the hours it would require an employee to copy and paste data from an internal file into a public

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[222] Torres-Spelliscy, *Hiding Behind the Tax Code*, *supra* note 12; *see also* Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sept. 19, 2011, http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html?_r=1&hp.

[223] FREED & CARROLL, *supra* note 185 at 1-2.

[224] Milton H. Cohen, *"Truth in Securities" Revisted*, 79 HARV. L. REV 1340, 1356 (May 1966).

[225] Sunlight Foundation Blog, *Bringing Sunlight to Campaign Contributions*, Feb. 2, 2010, ("All information should be online, searchable, sortable, downloadable and machine-readable.").

[226] Aileen Walker, Parliament and Constitution Centre, House of Commons Library, *The Political Parties, Elections and Referendums Bill –Donations*, 30 (Jan. 7, 2000), http://www.parliament.uk/commons/lib/research/rp2000/rp00-002.pdf ("The Companies Act 1967 imposed a duty on companies to declare in the directors' report any political donations above a certain limit. ... There is no central record of such donations...").

[227] Richard L. Hasen, *Lobbying, Rent Seeking and the Constitution*, 64 STAN. L. REV. 191, 203 (Jan. 2012) ("in 1993, Congress repealed the deduction as to certain lobbying expenses, including for 'influencing legislation.'"); 26 I.R.C. § 6113.

one."[228]

VI. THE SUPREME COURT SUPPORTS TRANSPARENCY

A. Disclosure under the Securities Laws

Once the SEC promulgates a new disclosure rule, precedent should be in the Commission's favor since the judiciary can uphold such a rule drawing on two separate lines of cases: (1) those upholding transparency under the securities laws and (2) those upholding it under the campaign finance laws. The Supreme Court supports disclosure in both securities law, to inform investors, and in campaign finance law, to inform voters. The Supreme Court has focused on disclosure as the *telos* of the Securities Exchange Act of 1934.[229] In *Santa Fe Industries*, the Supreme Court held:

> Section 10(b)'s general prohibition of practices deemed by the SEC to be "manipulative" in this technical sense of artificially affecting market activity or in order to mislead investors is fully consistent with the fundamental purpose of the 1934 Act "to substitute a philosophy of full disclosure for the philosophy of caveat emptor." Indeed, nondisclosure is usually essential to the success of a manipulative scheme.[230]

The *Santa Fe* Court went on to state: "the Court repeatedly has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute."[231]

Section 14(a) of the Securities Exchange Act of 1934 empowers the SEC to require proxy disclosure[232] "as necessary or appropriate in the public interest or for the protection of investors."[233] As the Supreme Court

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[228] Comment of Dr. Susan Holmberg on SEC Petition File No. 4-637 at 7 (2011), http://www.sec.gov/comments/4-637/4637-12.pdf.

[229] Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 6-7 (1985) (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 476-77 (1977), quoting Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972), quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)) ("fundamental purpose of the . . . Act 'to substitute a philosophy of full disclosure for the philosophy of caveat emptor.").

[230] Santa Fe Indust. v. Green, 430 U.S. 462, 476-77 (1977) (internal citations omitted).

[231] Id. at 477-78 (internal citations omitted); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 528 n.6 (1974) (Douglas, J., Brennan, J., White, J. & Marshall, J., dissenting) ("Requirements promulgated under the 1934 Act require disclosure to security holders of corporate action which may affect them. Extensive annual reports must be filed with the SEC including, inter alia, financial figures, changes in the conduct of business, the acquisition or disposition of assets, increases or decreases in outstanding securities, and even the importance to the business of trademarks held. *See* 17 CFR ss 240.13a-1, 249.310; 3 CCH Fed.Sec.L.Rep. 31,101 et seq. (Form 10-K).").

[232] A "proxy" is a mailing sent to shareholder prior to the annual meeting that contains required disclosures as well as ballots for voting on key matters of corporate governance.

[233] Exchange Act § 14(a), 15 U.S.C. § 78n.

explained in *Capital Gains Research Bureau:*

> [A] fundamental purpose, common to these [securities] statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry. As we recently said in a related context, 'It requires but little appreciation...of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry.[234]

As the Supreme Court stated in the *Zandford* case, "[a]mong Congress' objectives in passing the [1934] Act was 'to insure honest securities markets and thereby promote investor confidence' after the market crash of 1929."[235]

In 1995, the Court repeated this stance with respect to the pro-disclosure purpose of the 1933 Act:

> The primary innovation of the 1933 Act was the creation of federal duties-for the most part, registration and disclosure obligations-in connection with public offerings. [T]he 1933 Act "was designed to provide investors with full disclosure of material information concerning public offerings..." [And] "[t]he 1933 Act is a far narrower statute [than the Securities Exchange Act of 1934 (1934 Act) chiefly concerned with disclosure and fraud in connection with offerings of securities-primarily, as here, initial distributions of newly issued stock from corporate issuers"[236]

B. Disclosure under the Campaign Finance Laws

Previous Supreme Court Justices recognized the risk of corruption presented by corporate and union spending. For example, Justice

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[234] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

[235] SEC v. Zandford, 535 U.S. 813, 819 (2002); The Supreme Court referred to the 1933 Act: "The primary innovation of the 1933 Act was the creation of federal duties--for the most part, registration and disclosure obligations—in connection with public offerings." Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 571 (1995).

[236] Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 571-72 (1995) (internal citations omitted); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 760 n.4 (Powell, J., Stewart, J., & Marshall, J. concurring) (1975) ("The stated purpose of the 1933 Act was '(t)o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce . . ..' *See* preamble to Act, 48 Stat. 74. The evil addressed was the tendency of the seller to exaggerate, to 'puff,' and sometimes fraudulently to overstate the prospects and earning capabilities of the issuing corporation. The decade of the 1920's was marked by financings in which the buying public was oversold, and often misled, by the buoyant optimism of issuers and underwriters.").

Frankfurter wrote for the majority in *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers:*

> One of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.[237]

This clarity of thought has been abandoned in more recent cases like *Citizens United* which evidences no fear for the use of concentrated economic power in political campaigns. Nonetheless, even in *Citizens United,* the Supreme Court has remained steadfast in its belief that transparency is needed in campaign finance.[238]

In the United States, campaign finance reforms typically come on the heels of political scandals, and many of the biggest U.S. political scandals have at their heart a corporate controversy.[239] The Supreme Court and many lower courts have repeatedly upheld the constitutionality of disclosure of money in politics, recognizing the state's interest in preventing corruption and fraud.

Starting with *Burroughs v. United States* in 1934, the Supreme Court upheld the reporting requirements imposed by the Federal Corrupt Practices Act of 1925—a response to the Teapot Dome scandal.[240] In

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[237] United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers, 352 U.S. 567, 576 (1957) (Frankfurter, J. (quoting 65 Cong. Rec. 9507–08 (1924)).

[238] Justice Clarence Thomas is the lone Justice who does not share this belief.

[239] The 1907 Tillman Act, which bans contributions from corporations to federal candidates, followed after the public discovered in 1905 that insurance companies had given vast sums of money to the Republican Party using policy holder money, including for the 1904 re-election of Theodore Roosevelt. *See* Adam Winkler, *'Other People's Money': Corporations, Agency Costs, and Campaign Finance Law*, 92 GEORGETOWN L. J. 871, 893–94 (June 2004); *see also id.* at 914–15 (one insurance executive involved in the 1905 scandal was charged with grand larceny, but the New York courts threw out the criminal charges). Following the Teapot Dome scandal, a pay-to-play scheme where oil companies gave payoffs to federal officials in exchange for oil leases, the Federal Corrupt Practices Act of 1925 expanded the federal disclosure requirements. 43 Stat. 1070. The Watergate investigations revealed that oil companies among others were giving large, illegal and secretive contributions to Nixon's Committee to Re-Elect the President (CREEP). LAWRENCE M. SALINGER, ENCYCLOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME, Vol. 2, 584 (2005); MARSHALL BARRON CLINARD & PETER C. YEAGER, CORPORATE CRIME 158–159 (2006) (listing secret political contributions from oil companies including over $1 million from Gulf Oil); MICHAEL A. GENOVESE, THE WATERGATE CRISIS 23 (1999) (listing illegal corporate campaign donors); George Lardner Jr., *Watergate Tapes Online: A Listener's Guide* (2010) (dairy industry as illegal donors).

[240] 3 Stat. 1070.

upholding this law, the Court emphasized that disclosure of campaign spending serves crucial anti-corruption interests: the U.S. government "undoubtedly ...possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."[241]

Over the past four decades, the Supreme Court has recognized a number of state interests in disclosure of money in politics including *Buckley v. Valeo*'s voter information interest, anti-corruption interest, and anti-circumvention interest, *Caperton v. Massey*'s due process interest in judicial elections, and *Doe v. Reed*'s interest in ballot measure integrity.[242]

There is language in the *Citizens United* opinion which gives the government the ability to protect shareholders. As Justice Kennedy wrote for the *Citizens United* eight-person majority:[243]

> Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative...[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.[244]

The language of the *Citizens United* opinion makes clear that shareholders have the right to hold corporations accountable for their political spending. Such accountability is impossible unless shareholders know in the first place which companies are involved in political spending and which are not.

Post-*Citizens United*, lower courts have also embraced the constitutionality of disclosure of money in politics. For example, one federal district court noted that after *Citizens United*, "[i]n essence, corporations are free to speak, but should do so openly."[245] The First Circuit upheld disclosure laws in both Maine and Rhode Island.[246]

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[241] Burroughs v. United States, 290 U.S. 534, 545 (1934).

[242] Buckley v. Valeo, 424 U.S. 1 (1976); Caperton v. A.T. Massey Coal Co., 129 S.Ct. 2252 (2009); Doe v. Reed, 130 S. Ct. 2811 (2010). On remand, the district court in *Doe* reaffirmed the state's interest in disclosure in an as-applied challenge based on alleged risk of harassment. *See* Doe v. Reed, 823 F.Supp.2d 1195, 1212 (D. W. Washington 2011), http://electionlawblog.org/wp-content/uploads/doevreed-summary-judgment.pdf ("The facts before the Court in this case, however, do not rise to the level of demonstrating that a reasonable probability of threats, harassment, or reprisals exists...").

[243] Eight Justices voted in favor of campaign finance disclosure and disclaimers in both 2010's *Citizens United* and in 2003's *McConnell*. The *Citizens United* decision had a five to four majority on the question of overturning the federal ban on corporate political expenditures.

[244] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

[245] Yamada v. Kuramoto, 2010 WL 4603936, at *1 (D. Haw. Oct. 29, 2010) (not reported).

[246] National Organization for Marriage v. Daluz, 654 F. 3d 115 (1st Cir. 2011) ("As with Maine's law, the disclosures required by the [Rhode Island] provision here impose no great burden on the exercise of election-related speech. All that is required is the completion of a one-page form, which can be filled out and submitted to the Board online. This relatively small imposition serves [a] recognizedly important government interest...").

Meanwhile, in *SpeechNow*, the D.C. Circuit held there were strong governmental interests in requiring disclosure of who had made contributions to independent expenditure political committees, including corporate donors. As the D.C. Circuit wrote:

> [T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures. Further, requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals.[247]

The Supreme Court denied SpeechNow's petition for certiorari, thereby leaving the D.C. Circuit's endorsement of disclosure intact.[248] The American judiciary has embraced disclosure across the board in securities and campaign finance laws. This allows legislatures and executive agencies breathing room to craft reasonable disclosure requirements.

CONCLUSION

The attention generated by *Citizens United* has sparked calls for the SEC to take a new step in regulating campaign finance by requiring across the board disclosure of political spending by registered issuers.[249] In one aspect, this new rule would be far broader in scope than previous Rule G-37 and Rule 206(4)-5 because it would go outside of the four corners of either the municipal bond market or public pension funds, and rather would apply to the entire universe of publicly-traded stocks. On the other hand, the new rule as contemplated by Petition File No. 4-637 would be more modest than the two previous rules which impose either adherence to a low contribution limit or secession of trading for a two year cooling off period after large contributions. The new rule would be more modest because it would only require disclosure, but would lack any monetary limits on corporate political spending. A transparency-only rule, like the previous anti-pay to play rules, shares the similar goal of ensuring the integrity of the market. The closest analog to Petition File No. 4-637 is the SEC's post-Watergate intervention when hidden and questionable political

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[247] SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 698 (D.C. Cir. 2010).

[248] Keating v. Fed. Election Comm'n, 131 S. Ct. 553 (2010).

[249] Bebchuk et al, Committee on Disclosure of Corporate Political Spending Petition for Rulemaking at Securities and Exchange Commission (Aug. 3, 2011), http://www.sec.gov/rules/petitions/2011/petn4-637.pdf ("Because the Commission's current rules do not require public companies to give shareholders detailed information on corporate spending on politics, shareholders cannot play the role the Court described.").

spending practices were revealed in hundreds of America's largest publicly traded companies.

Perched high in Dante's Paradise were just leaders and truth seekers.[250] Centuries later and an ocean away, we still strive for justice and truth in our politics and in our markets, yet self-interest frequently pulls both spheres into the dark where mischief and illegality thrives. Once again, self-regulation is unlikely to produce ideal results. Some sensible regulations are necessary. The SEC is uniquely positioned to act as the guardian of the integrity of America's capital markets and to protect current shareholders and potential investors.[251] The Commission should require that publicly-traded corporations disclose all political expenditures so that shareholders have a full and complete picture of how much corporate money is being placed into the political sphere.

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[250] DANTE ALIGHIERI, THE DIVINE COMEDY PARADISE, Canto XVII & XVIII (written between 1308 and 1321) (published in 1555).

[251] SEC, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation* (Oct. 24, 2011) ("The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.").

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Statement for the Record
Lisa Rosenberg, Government Affairs Consultant
The Sunlight Foundation

Senate Committee on Rules and Administration
Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond

April 30, 2014

Mr. Chairman, Senator Schumer, Senator Roberts, members of the Committee, thank you for the opportunity to submit a statement for the record on behalf of the Sunlight Foundation. The Sunlight Foundation is a nonpartisan nonprofit that advocates for open government globally and uses technology to make government more accountable to all. We do so by creating tools, open data, policy recommendations, journalism and grant opportunities to dramatically expand access to vital government information to create accountability of our public officials. Our vision is to use technology to enable more complete, equitable and effective democratic participation. Our overarching goal is to achieve changes in the law to require real-time, online transparency for all government information, with a special focus on the political money flow, those who are trying to influence government and how government responds.

Given that mission, we have a strong interest in ensuring that the Supreme Court's call for robust disclosure of money in politics is satisfied, despite the many ways the Court has undone other pillars of our campaign finance laws. Unfortunately, despite the Court's reliance on transparency to cleanse massive political contributions from their corruption influence, today's laws are a far cry from the robust disclosure regime the Court seems to believe is in place. Congress must act to, at a minimum, uphold transparency—the last remaining pillar of our campaign finance system.

The Sunlight Foundation endorses three proposals that would increase transparency: the Real Time Transparency Act, S. 2207 and H.R. 4442, would create a robust, real-time disclosure regime for large hard money contributions; the DISCLOSE Act would provide for disclosure of dark money contributions that are laundered through fraudulent social welfare organizations; and lobbying reform would ensure that the lobbying activities of the wealthiest interests making large hard money or dark money contributions are disclosed. While none of these legislative initiatives would undo the damage wrought by the Court, all are important to deter corruption and inform voters.

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Large "Hard Money" Contributions Must be Disclosed within 48 Hours

The Supreme Court's most recent assault to our campaign finance system came earlier this year, when the Court's decision in *McCutcheon v. Federal Election Commission (FEC)* opened the door for a handful of wealthy individuals to give millions of dollars directly to the candidates and parties. The Court overturned years of jurisprudence deciding that the only type of corruption that exists is *quid pro quo* corruption, nothing short of buying votes for bags of cash. This Court naively believes that there is no corruption or appearance of corruption when candidates solicit five- and six-figure contributions and donors receive—at a minimum—the ear of elected officials in exchange for their generosity. With that narrow framework as its starting point, the Court lifted the overall limit (currently $123,200) on the amount individuals may gave to all candidates, PACs and parties. Thanks to the activist Roberts Court, a single individual can now contribute more than $3.5 million to a single party's candidates and committees in a two-year period. A donor more interested in buying access and influence than partisanship could give $7.25 million to the candidates and committees of both major parties.

By lifting the overall limits, the Court hands wealthy donors with a megaphone, simultaneously silencing everyone who doesn't have the means to buy access and influence with a large check. In other words, this Court disregards the First Amendment rights of every US citizen except the tiniest handful of the super-rich—the 1% of the 1%. There is one way, however, to return a degree of power back to the citizens of the United States: Inform citizens of large contributions to candidates, parties and committees in real time. Knowledge is power, and disclosure is the last remaining constitutional tool that can be employed to empower citizens.

The Real Time Transparency Act would mandate disclosure of all contributions of $1,000 or more to parties, candidates and political committees within 48 hours. It merely extends the current 48-hour notice rule in the Federal Election Campaign Act that applies to $1,000 contributions in the last 20 days prior to an election to provide for year-round disclosures. It would also mandate that Senate candidates electronically file their disclosure reports. The importance of immediate disclosure is not limited to the weeks before an election. It is necessary year-round to inform voters and let them determine whether and how they will react to large contributions.

As the McCutcheon Court noted, "disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part justified based on a governmental interest in providing the electorate with information about the sources of election-related spending. They may also deter actual corruption and avoid

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the appearance of corruption by exposing large contributions and expenditures to the light of publicity." (Emphasis added. Internal citations and quotations omitted.)

The Roberts' Court is mistaken—or disingenuous—if it believes that today's campaign finance disclosure system is up to the task of exposing large contributions to the public in a timely manner. While the Court justifies lifting the caps on contributions in part because "reports and databases are available on the FEC's Web site almost immediately after they are filed" it conveniently ignores the fact that current reporting schedules delay disclosure by as much as three months—even more for Senate candidates who do not have to file their campaign finance reports electronically with the FEC.

The Real Time Transparency Act would be an important step towards providing citizens with information in a timely manner, so that they can decide whether and how to respond to a huge contribution given to their elected representative or candidate for federal office.

Dark Money Contributions Must be Disclosed

Four years ago, the Supreme Court first showed its willingness to undo laws designed to prevent corruption or the appearance of corruption in our political process, shattering a 100-year old precedent and dismissing the lessons of Watergate. In *Citizens United v. FEC*, the Court decided that unlimited contributions from corporations and wealthy individuals would not have a corrupting influence on our political system as long as they were independent from the candidates' campaigns.

We now know the results of that disastrous decision: the influx of over a billion dollars of unlimited, often dark money into the 2012 elections; the creation of a cottage industry of money launderers disguised as nonprofits in order to hide the contributions of wealthy individuals; an easy route for foreign money to slip into the U.S. political process; messages shaped by donors instead of candidates; and a disclosure system wholly incapable of making any of the secret money transparent.

To inform the public and deter corruption in a manner consistent with the Court's own findings, Congress must enact the DISCLOSE Act to create a disclosure regime that reflects the new reality of expanded independent spending. Specifically, the bill's robust reporting requirements for super PACs, corporations, unions and nonprofit organizations that make independent expenditures and electioneering communications will begin to address many of the problems wrought by Citizens United: It will shine a light on dark money; it will provide an enforcement mechanism to ensure that no foreign money is influencing our political process; it will allow citizens to determine the

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credibility of campaign ads based on the messenger as well as the message; and it will arm citizens with information about campaign funding before they go to the polls, in real time and online.

Lobbying Activities Must be Disclosed

Perhaps the most damaging result of both Citizens United and McCutcheon is that the decision will provide a powerful tool—unlimited sums of money—that increase the ability of stealth lobbyists to purchase access and influence without any disclosure. Under current law, no disclosure is required of influencers if they spend less than 20% of their time lobbying on behalf of any one client. Under the Court's new campaign finance regime, an elected official may solicit $500,000 or $1,000,000 from a single individual, giving that individual the opportunity to ask for help on his or her pet issue. Or, a stealth lobbyist can hint that a large, negative dark money ad buy may be in a politician's future if the politician does not do the lobbyists' bidding. If the individual doing the asking falls under the 20% loophole, there will be no disclosure, and no way for the public to determine whether access and influence is being purchased. Institutionalizing a class of secret wealthy power brokers will never create vigorous debate that is required of a well-functioning democracy. The Lobbying Disclosure Enhancement Act (H.R. 2339, 112th Congress) would enhance lobbying disclosure, but Congress has so far opposed efforts to close the 20% loophole. However, because of the dramatically and lasting influence wealthy donors have on public policy, the public is entitled to have stealth lobbying activities brought to light.

Conclusion

Because of the Roberts' Court, average citizens have literally lost their voice in our political system to a handful of super wealthy special interests and individuals. While the Court may not be concerned about silencing the majority of citizens of this country, it has at least upheld citizens' right to be informed, stating, "the First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." Real-time disclosure of hard money, disclosure of dark money and disclosure of lobbying are important and minimally intrusive ways to inform the public ensure accountability where free speech and the functioning of our democracy intersect.

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April 29, 2014

To the Distinguished Members of the Senate Rules Committee,

On behalf of the Wesleyan Media Project, please include this letter and attached testimony in the hearing record for the Senate Rules Committee Hearing entitled "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond" (Apr 30 2014 10:00 AM, Senate Hart Office Building - Room SH-216).

Sincerely,

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Written Testimony on Interest Group Advertising

Submitted to the Senate Rules Committee Hearing
April 30, 2014

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To the Distinguished Members of the Senate Rules Committee:

As the directors of the Wesleyan Media Project and academics, we have 40 years of collective experience examining trends in and influence of political advertising. As such, we are pleased to provide this written testimony to the Senate Committee on Rules and Administration on behalf of ourselves and the broader scholarly community to attest to what is known about the scope and influence of interest group activity and how disclosure matters.

The Wesleyan Media Project is a nonpartisan research unit, not an advocacy organization. However, we believe that accountability and governmental responsiveness are fundamental to democracy. We also believe that current regulations provide insufficient transparency to the public in real-time and that our data allow a better understanding of the impacts of ad sponsor disclosure.

Therefore, we are committed to providing and promoting greater transparency[1] in U.S. elections, which we typically do through real-time press releases on the sponsors, content and tone of political advertising throughout election season. Beyond our real-time press work, we conduct and contribute to scholarly research on the scope and influence of interest group activity in elections, and it is in that dual capacity that we would like to provide further information on what is known about the volume and scope of interest group activity and how disclosure in particular affects interest group influence.

As will come as no surprise, interest group involvement in U.S. elections has grown over the last few years. Table 1 displays the interest group totals for federal election advertising in 2011 and 2012. Groups overall accounted for nearly 30 percent of all airings in federal elections, with dark money advertising comprising nearly half (47 percent) of that total. Dark money constituted the majority of the interest groups ads in both U.S. House (52 percent) and U.S. Senate races (62 percent).

Table 1: Interest Groups Ads in Federal Elections from 2011-2012

Race	Sponsor	Disclosure	Total Ads	Percent of All Ads	Percent of Group Ads
President	Candidate/party		926,707	64.92%	
	Group	None	189,830	13.30%	37.91%
		Some	159,139	11.15%	31.78%
		Full	151,726	10.63%	30.30%
	Total		1,427,402		
Senate	Candidate/party		677,985	71.42%	
	Group	None	168,250	17.72%	62.01%
		Some	39,587	4.17%	14.59%
		Full	63,495	6.69%	23.40%
	Total		949,317		
House	Candidate/party		586,573	81.23%	
	Group	None	70,261	9.73%	51.84%
		Some	42,971	5.95%	31.71%
		Full	22,290	3.09%	16.45%
	Total		722,095		
Overall	Group	None	428,341	13.82%	47.20%
		Some	241,697	7.80%	26.63%
		Full	237,511	7.66%	26.17%

Table from Ridout, Franz and Fowler 2013; WMP analysis of Kantar Media/CMAG data. Note: "Full" disclosure indicates that the group is either a PAC or a 527. No disclosure means the group is either a non-profit 501c4 or a business or trade group. "Some" disclosure means the group has multiple organizational forms, some full and some non-disclosure. In this latter case it is unclear in the data which organizational form funded the ad. Source on degree of disclosure is the Center for Responsive Politics.

[1] Because we believe donor disclosure is important, we are pleased to provide a complete list of the foundations and institutions which have made the Wesleyan Media Project's work possible since 2010. We are especially grateful to the John S. and James L. Knight Foundation and Wesleyan University for ongoing support, and we thank Rockefeller Brothers Fund, Sunlight Foundation, Bowdoin College and Washington State University for their past support. Our ad tracking data come from Kantar Media/CMAG, and we are partnering with the Center for Responsive Politics to provide greater information on interest groups. The views expressed in this written testimony are ours, not necessarily those of our funders or partner organizations.

Table 2 shows interest group involvement in post-Labor Day advertising in both House and Senate races over the last twelve years. In U.S. House races, interest group involvement grew to nearly 18 percent of all airings in 2012 from a low of 1.5 percent in 2004, higher than even the pre-McCain-Feingold levels of 16 percent in 2000. The pattern in U.S. Senate races has been a relatively steady growth to nearly 23 percent of all airings in 2012.

Table 2: Group and Party Ads in Congressional Elections, 2000-2012

	Percent sponsored by...			
	Groups		**Parties***	
	House	*Senate*	*House*	*Senate*
2000	16.12%	5.74%	24.92%	25.35%
2002	6.46%	4.83%	31.03%	31.78%
2004	1.49%	4.55%	29.17%	23.50%
2006	3.73%	4.24%	33.92%	23.33%
2008	5.73%	13.35%	23.85%	30.50%
2010	13.45%	14.50%	24.10%	17.75%
2012	17.78%	22.55%	27.66%	19.48%

*Party ads combine independent and coordinated airings.
Table from Fowler, Franz and Ridout 2014. Source: Wisconsin Advertising Project and Wesleyan Media Project analyses of Kantar Media/CMAG data. All ads aired post 8/31 in each year. Before 2008, only top 75 or 100 markets are included.

In addition, evidence suggests that the types of groups involved in elections is shifting in response to the more relaxed campaign finance atmosphere. Figure 1 displays a typology of interest groups on two dimensions – whether a group concentrates primarily on a single issue and whether it purports to have a membership base. As shown in the figure, over the last three election cycles, we have seen a growth in multi-issue, non-membership groups (e.g., groups like Crossroads GPS and Majority PAC) at the expense of multi-issue membership groups like the Chamber of Commerce. What is especially important about this shift is how it connects to voter knowledge about the types of groups in question (e.g., voters typically know much more about the latter compared to the former, which we'll provide evidence to substantiate below).

Figure 1. Involvement of Interest Groups in U.S. Senate Races by Type, 2008-2012

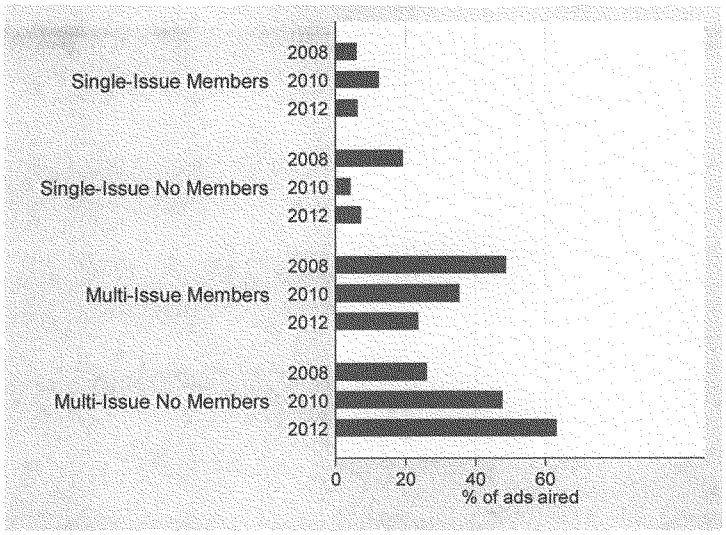

Figure from Franz, Fowler and Ridout 2013. Source: Wisconsin Advertising Project and Wesleyan Media Project analyses of Kantar Media/CMAG data.

In spite of *McCutcheon*'s removal of the aggregate caps on direct contributions, it is unclear whether the growth in interest group advertising will be curbed. While interest group advertising is more expensive than candidate ads that qualify for lowest unit rate cost,[2] there are several incentives for funds to continue to be funneled through interest groups. First, a growing literature has shown interest group advertising to be more effective than ads sponsored by candidates. This is in part because groups are seen as less self-interested than candidates and therefore are rated as more credible,[3] but also because the interest group shields the attacking candidate from the backlash that often occurs from criticizing their opponent.[4] While most of this evidence comes from experiments where respondents are randomly assigned to be shown identical ads where the only difference is the attributed sponsor, survey evidence from 2012 also indicates that interest group airings were rated by viewers as more effective.[5]

An even smaller (but growing) literature has investigated how interest group effectiveness is conditioned by disclosure and voter knowledge of the group itself. Evidence suggests that advertising by "unknown" groups – those with generic names who typically do not disclose their donors – tends to work better than ads from "known" groups (e.g., Planned Parenthood or the NRA)

[2] Fowler and Ridout. 2012.
[3] Garramone and Smith 1984; Garramone 1985; Groenendyk and Valentino 2002; Johnson, Dunaway and Weber 2011; Weber, Dunaway and Johnson 2012; Ridout, Franz and Fowler 2013.
[4] Garramone and Smith 1984; Garramone 1985; Shen and Wu 2002; Brooks and Murov 2012; Dowling and Wichowsky 2014.
[5] Fowler, Franz and Ridout. 2013.

for whom voters can use known cues about a group's motives to discount their message.[6] Perhaps even more disturbing than the notion that "unknown" groups would be most effective is the fact that the vast majority of American citizens had not heard of some of the largest interest group advertisers active in the 2012 elections. Table 3 displays the proportion of Americans who claim to have heard "a lot," "some" or "not to have heard" of some of the largest interest group advertisers. (The data are from a survey fielded in the immediate aftermath of the 2012 election.) As shown in the table, an overwhelming majority (62 percent) of Americans had not heard of Crossroads GPS despite the fact that the group had aired over 180,000 ads in federal races.

Table 3: Voter Knowledge of Interest Groups

Group	Heard "A Lot" About	Heard "Some" About	Haven't Heard of...	Ads Aired	Disclosure
Crossroads GPS	12.64%	25.78%	61.58%	181,185	None
Restore Our Future, Inc.	12.75%	26.14%	61.11%	117,707	Full
American Crossroads	17.81%	27.77%	54.42%	96,868	Some
Priorities USA Action	7.82%	16.27%	75.91%	65,823	Full
Americans for Prosperity	17.29%	35.21%	47.49%	60,930	None
U.S. Chamber of Commerce	33.50%	44.17%	22.33%	52,560	None
American Future Fund	3.40%	16.60%	80.00%	16,773	None
League of Conservation Voters	11.03%	33.46%	55.51%	9,212	None
Service Employees Int'l Union	20.38%	22.01%	57.61%	8,673	Full
Concerned Women for Amer.	10.74%	30.21%	59.05%	5,355	None
Planned Parenthood	55.01%	34.71%	10.28%	3,159	None
Sierra Club	25.81%	37.84%	36.34%	892	Some
MoveOn.org	34.13%	25.44%	40.43%	328	Some
National Rifle Association	51.88%	34.50%	13.63%	0	Full
Total				619,465	
% of all group ads in 2012				68.26%	

Table from Ridout, Franz and Fowler 2013.
Source: Wesleyan Media Project commissioned survey of 799 nationally representative respondents fielded 11/1-11/14/12 by YouGov; Ads aired come from Wesleyan Media Project analysis of Kantar Media/CMAG data; disclosure information from the Center for Responsive Politics.

Perhaps the silver lining in the literature on disclosure is that although interest group advertising has largely been shown to work better than candidate advertising, disclosure of donors (either through advertising or increased media attention) appears to curb – at least somewhat – the influence of unknown groups.[7] More research is needed given the very limited number of studies that examine the influence of disclosure, but on the whole, evidence suggests that shedding light on the donors to interest groups can limit – at least somewhat – the effectiveness of group attacks. In short, donor transparency and disclosure helps to ensure that candidates are on a more equal playing field with interest groups when it comes to advertising.

[6] Weber, Dunaway and Johnson 2012; Brooks and Murov 2012; Ridout, Franz and Fowler 2013.
[7] Dowling and Wichowsky 2013; Ridout, Franz and Fowler 2013.

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Questions for the Record
Ann M. Ravel
Former Chair, California Fair Political Practices Commission

Committee on Rules and Administration
United States Senate

"Dollars and Sense: How Undisclosed Money and Post-*McCutcheon* Campaign Finance Will Affect the 2014 Election and Beyond"

April 30, 2014

Questions Posed by Senator Angus S. King, Jr.

1. **Why are disclosure laws so important for our political system and to voters?**

Response:

Disclosure of the sources of political spending helps voters make informed decisions consistent with their own views and interests. Voters benefit from cues to help them decide how to vote, such as a candidate's political party, or whether there is a particular cause, industry, or other interest supporting her. As Chair of the California Fair Political Practices Commission (FPPC), I saw that people across the political spectrum believed strongly in the importance of getting information about the political process. In response to the FPPC's investigation of dark money in the 2012 election, people wanted to know who was behind the large contributions intended to influence the election so that they could make informed voting decisions.

Not only does disclosure provide vital information to voters, it also promotes accountability among political actors. As the Supreme Court has recognized, requiring disclosure deters those who would use money for improper purposes either before or after the election. Disclosure is also an essential means of gathering the data necessary to ensure compliance with other campaign finance rules, including those prohibiting foreign contributions.

Finally, transparency leads to enhanced public confidence and participation in the political and electoral process. Studies have shown that if people understand politics, there is increased trust and confidence in political institutions. By contrast, the lack of information leads to apathy and alienation. Thus, providing people with information not only assists them in voting, it tends to increase their interest in issues, which is likely to lead to greater civic engagement.

2. **How does the lack of disclosure affect the trust people have for their government?**

Response:

Undisclosed "dark" money in the political system not only increases the risk of corruption and undermines the ability to ferret out corruption, it also contributes to public

distrust and disassociation from government. The most recent Pew Research Center study shows that only 19% of Americans trust the federal government. For perspective, that's much worse than the 36% who trusted the federal government following President Richard Nixon's resignation after Watergate.

Dark money often is injected into the political process through networks of nonprofits using a variety of tactics to avoid disclosure laws and allow donors to cloak their identities from public view. Entities frequently operate across state lines and easily transfer or swap funds to sidestep disclosure. They emerge, spend money, and then disappear or change names, making it difficult to ensure compliance with disclosure rules.

These tactics can make it difficult to determine if contributions are legal, including whether or not they are from foreign sources. They also leave voters in the dark about which interests may be attempting to influence their votes, leading to distrust and a decline in confidence in the political process.

3. What initiatives do you see at the state level that can improve transparency and increase disclosure?

Response:

Recognizing the impact dark money networks with national reach are able to have on state and local elections, state and local election oversight officials are beginning to share information to improve disclosure. For example, as Chair of the FPPC, I worked with a non-partisan group of state and municipal elections oversight officials from across the country to promote transparency in campaign finance. Together, we founded the States' Unified Network (SUN) Center, which works to make state and local campaign finance disclosure information available nationally, and to share proposed legislation and regulations on campaign finance disclosure.

The SUN Center also serves as a forum for state and local officials to informally discuss matters relating to disclosure. This initiative and others like it seek to increase public confidence in the political process by increasing transparency.

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