S. Hrg. 112–770

COMPILATION OF HEARINGS AND MARKUPS

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BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST AND SECOND SESSIONS

FEBRUARY 17, 2011; MARCH 1, 2011; MAY 11, 2011; JUNE 29, 2011;
MARCH 29, 2012; AND APRIL 25, 2012

COMPILATION OF HEARINGS AND MARKUPS
One Hundred Twelfth Congress

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ORGANIZATIONAL MEETING

THURSDAY, FEBRUARY 17, 2011

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

The Committee met, pursuant to notice, at 3:33 p.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Inouye, Nelson, Pryor, Udall, Warner, Leahy, Alexander, Cochran, Shelby, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Staff Director; Jason Abel, Chief Counsel; Adam Ambrogi, Administrative and Legislative Counsel; Carole Blessington, Assistant to the Staff Director; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Abbie Platt, Republican Professional Staff; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF SENATOR SCHUMER

Chairman SCHUMER. The Rules Committee will come to order. Good afternoon, and I would like to welcome my colleagues to the first Rules Committee meeting of the 112th Congress, and the first thing I want to say is how much I look forward to working with our new Ranking Member, Senator Alexander. He has been a great member of this Committee, and as you know, he and I spent a lot of time with our two Leaders, Reid and McConnell, trying to figure out rules changes, and he was always smart and gracious and willing to try and work together. And I know we will be able to do that on many issues as we move forward.

On the Republican side, we have two additional new members. First we have Senator Blunt of Missouri, who is here; and then we have the two new kids on the block: Senator Leahy and Senator Shelby, who probably have at least 60 years of seniority in the Senate together, but they are seated—they wanted to remember what it was like to sit at the very end, and here they are. But I have been sitting at the other end of Senator Leahy's Judiciary Committee for a long time, and if I can be half as good a Chairman as he is, I will be happy.

Each of our new members, of course, brings a wealth of experience, and I look forward to their participation on the Committee.

This year, we have a number of important issues to consider: Senate administration, oversight of legislative and executive branch agencies, legislation, Presidential nominations, and the Senate rules and procedures. And as I mentioned, Senator Alexander and I have already worked closely together on the changes to the Senate rules and procedures that were adopted last month. We are continuing to work with the Homeland Security and Governmental Affairs Committee on reducing the number of Presidential appointments that require confirmation, and other members of the Committee, especially Senator Udall, who is here, played key roles in these efforts as well, so we thank him for his many efforts.

Senator Alexander and I will work with other members, and we will try to be as bipartisan or nonpartisan as possible, depending on the time, on issues of interest to you. As Senator Udall can tell you, the whole push for rules changes began when he early on last year came over and said, "Why don't we have some hearings?" And the rest is, as they say, history. So that is an open invitation to any member of this Committee on either side. If there are particular issues you are interested in working on, having hearings about, please do not be shy. Let us know.

So now I want to turn this over to my friend and the new Ranking Member of this Committee, Senator Alexander, for opening remarks, and then anyone else who wishes to make some remarks, feel free, and maybe particularly this Committee being so novel, we welcome the junior members making remarks even on their first day.

Senator Alexander?

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you. Thanks, Chuck. This is a real honor for me to not just be on the Committee but to be the Ranking Member. In many ways, this is the most important Committee in the Senate because it has a particular responsibility for preserving the Senate as an institution—an institution that deals with the most important issues facing our country and does so in a way that preserves minority rights. And so I take that seriously, and that is the reason I asked to be on the Committee to begin with.

Second, I appreciate the chance to work with Chuck Schumer. We have had a busy beginning because of the good work that Senator Udall and others did in raising some questions about the operation of the Senate. We had a good debate after good hearings here. And I think while they did not get everything they proposed, which is usual in the Senate, they created an environment in which we made some real progress in not just changing Senate rules but changing Senate behavior, at least to begin with.

So we are off to a good beginning. They have made a real contribution, and we are in the midst of some important changes.

I look forward to the legislation that we all worked on together to strengthen the Senate in two ways. One was to make it easier for any President to staff his or her administration. President Kennedy I think had 250 Presidential appointments. President Obama has nearly 1,500 confirmed appointments, which is too many. And, second, there is the phenomenon of innocent until nominated, the

idea that we take otherwise respectable Americans and the President invites them to serve in his administration, and they get drawn through a gauntlet of confusing forms that turns them into a criminal by the time they are confirmed or not confirmed.

So we are working on both problems with the support of both Leaders and the support of a lot of people, and working on it with Chuck has been a real good experience because he is direct, hard-working, and, I have found, pleasant to work with.

Finally, I want to welcome——

Chairman SCHUMER. Surprise, surprise, surprise.

Senator ALEXANDER. No, no, no. About all I need to know is where you are, and it is never hard to find that out from you.

[Laughter.]

Senator ALEXANDER. I would say that our newest members must be the most experienced new members of the Committee in the Senate, maybe in Senate history, I mean, Senator Shelby and Senator Leahy to begin with, and Senator Blunt is no rookie. He has been the whip of the House of Representatives, one of most accomplished new members of the Senate that has come here in a long, long time.

So I am delighted to be on the Committee. I look forward to working with Chuck. We have got some important issues to finish.

I would just say, Chuck, that we hope to get the legislation we are working on up and going when we come back from recess and move it through the Senate and have something to be proud of.

Chairman SCHUMER. Great. Well, thank you, Senator Alexander, and I do truly look forward to working with you.

Does anyone else want to make an opening statement? We have nine. We are waiting for Senator Durbin who is evidently on his way. Very nice of him to come. Oh, Senator Inouye is here, our great leader. So we have ten.

Why don't we go forward? And then anyone who wants to make an opening statement can do so afterwards, unless our new members would like to say something, since among them they probably have over 100 years of legislative experience. Wouldn't you say? Each of you has been in office at least 30 years, in elected office.

[Informal discussion followed before continuing the Organizational Meeting business.]

Senator LEAHY. Thirty-seven, but Senator Inouye has been here longer.

Chairman SCHUMER. These are our new members, Mr. Chairman, that young fellow down there and this young guy right here.

Please, Senator Shelby.

Senator SHELBY. Mr. Chairman, I do not need a chair today to sit in, but if I do, can I come straight to the Chairman on that request?

Chairman SCHUMER. Absolutely. I have served under not Senator Blunt, but I have been a member when Senator Leahy has been Chairman, and still is, of the Judiciary Committee, and a member of Banking when Senator Shelby was Chairman. So I know they know both ends of the game.

Senator CHAMBLISS. Mr. Chairman?

Chairman SCHUMER. Senator Chambliss.

Senator CHAMBLISS. Can I get some more office space?

[Laughter.]

Senator BLUNT. Mr. Chairman, can I get any office space?

[Laughter.]

Chairman SCHUMER. I think we are about finished.

By the way, one of the things we did is we sped up the procedure, and—are we finished yet. Are we finished picking offices?

Ms. BORDEWICH. No.

Chairman SCHUMER. Who are we up to?

Ms. BORDEWICH. We do not say who or what number.

Chairman SCHUMER. What number?

Ms. BORDEWICH. We are over half done. We are in the 60s.

Chairman SCHUMER. We are in the 60s. We are much more than half done, so we should finish in about a month. It used to take until August. For you young members, you may not remember that. One day you guys will get a hideaway.

Senator NELSON. Well, are hideaways next? Are we going to start bumping in hideaways next?

Chairman SCHUMER. Hideaways and extra space come next.

Senator LEAHY. Mr. Chairman? Mr. Chairman, it is a lot better than it used to be. When I first came here 37 years ago, I was the junior-most member of the Senate. I was number 99. There had been a tied race in New Hampshire, and they finally did the race over again, literally.

Chairman SCHUMER. That is right.

Senator LEAHY. And myself and the next most junior person had rooms in the basement of the Russell Building. Mine had been a recording studio, so I had that kind of fiberboard with the holes all through it. After about 15 minutes, you were going like this. So I spent a lot of time walking outdoors.

Chairman SCHUMER. Well, you are in a little better shape now than you were then, Mr. Chairman.

Senator LEAHY. I am.

Chairman SCHUMER. Senator Shelby?

Senator SHELBY. Mr. Chairman, the hideaways, when do we go through those?

Chairman SCHUMER. As soon as we finish the offices. So I would say in about a month.

Senator SHELBY. Thank you.

Chairman SCHUMER. And there are lots of—what number in seniority are you, Dick?

Senator SHELBY. In the whole Senate?

Chairman SCHUMER. Yes. That is how hideaways work.

Senator SHELBY. Maybe 15.

Chairman SCHUMER. No, you are higher than that.

Senator SHELBY. Well, I do not know. I might be lower.

Chairman SCHUMER. Oh, Senator Blunt, you will get a hideaway as well because everyone gets one now with the Visitor Center.

Okay. Why don't we get started?

Senator BLUNT. Mr. Chairman, I am guessing that my hideaway, like my current office, will not have a window.

Chairman SCHUMER. Even my hideaway does not have a window yet. It is all done by strict seniority. Being Chairman of Rules entitles you to not much, but glad to be here.

[Here Committee Members resumed Organizational Meeting business.]

Why don't we begin our agenda? It is adoption of the Committee Rules of Procedure and then the approval of an original resolution which will fund the Rules Committee during the 112th Congress. The Rules of Procedure are the same as the last Congress.

The second item on the agenda is the approval of the budget. As many members are aware, the Rules Committee sent a letter to Committee Chairmen and Ranking Members regarding their budgets for the 112th Congress. The letter included guidance from the leadership on the amount of funds that would be available for each committee, and I am pleased to report that our resolution, the Rules Committee resolution, is within these guidelines. I am also pleased to inform the Committee that all other committees will be reporting resolutions that are within the leadership guidelines, so we have had great cooperation among both the Chairs and the Ranking Members of all the committees.

So according to the Committee's Rules of Procedure, we need ten members to report legislation. We have them. So we can have a voice vote on the motions unless there is a request for a roll call. So at this time, a quorum is present. Is there any further debate on the two agenda items—the proposed Rules of Procedure or the Rules Committee budget for the next 2 years?

Senator INOUYE. Move to adopt.

Senator ALEXANDER. Second.

Chairman SCHUMER. We have a motion and a second to adopt. Without objection, the Rules of Procedure are adopted.

The second question is on the adoption of the original resolution authorizing expenditures for the Rules Committee for the 112th. All in favor say aye?

[A chorus of ayes.]

Chairman SCHUMER. All opposed, nay?

[No response.]

Chairman SCHUMER. The ayes have it. Without objection, the original resolution is reported.

So, with that, I thank you for your attendance.

[Whereupon, at 3:45 p.m., the Committee was adjourned.]

EXECUTIVE SESSION ON OMNIBUS BUDGET FOR SENATE COMMITTEES

TUESDAY, MARCH 1, 2011

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

The committee met, pursuant to notice, at 10:10 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Feinstein, Durbin, Nelson, Udall, Warner, Leahy, Alexander, Cochran, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Chief of Staff; Jason Abel, Chief Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Jeff Johnson, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican Professional Staff.

Chairman SCHUMER. The Rules Committee will come to order. The Committee is meeting today to consider an original resolution, the Omnibus Committee Funding Resolution, which will authorize expenditures by Senate Committees for 112th Congress.

I am pleased to report all the Committees reported funding for resolutions within the guidelines. The total authorization for individual Committees is $242,710,872, down from $256,702,618. So it has dropped over $10 million.

Under the joint leadership letter of February 3 which restored special reserves to their historic purpose, Committees are no longer guaranteed access to special reserves on request.

Since we have a quorum, is there any further debate on the original resolution authorizing expenditures by the Committee of the Senate for the 112th Congress?

Senator ALEXANDER. Mr. Chairman, I move its adoption.

Chairman SCHUMER. Any objection?

[No response.]

Chairman SCHUMER. All those in favor say aye.

[A chorus of ayes.]

Chairman SCHUMER. Opposed nay.

[No response.]

Chairman SCHUMER. The ayes have it. Without objection, the original resolution is ordered reported. Since there is no further business, first let me thank all the members for their very, very conscientious service and on-time arrival, and the hearing is now adjourned.

[Whereupon, at 10:12 a.m., the Executive Session adjourned.]

EXECUTIVE BUSINESS MEETING

WEDNESDAY, MAY 11, 2011

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

The committee met, pursuant to notice, at 2:16 p.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Inouye, Feinstein, Durbin, Pryor, Udall, Warner, Leahy, Alexander, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Staff Director; Jason Abel, Chief Counsel; Carole Blessington, Assistant to the Staff Director; Josh Brekenfeld, Professional Staff; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Jeff Johnson, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Lindsey Ward, Republican Professional Staff; and Trish Kent, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. We expect two members on their way and Senator Shelby is across the hall and is ready to come in, so I thought we would just do the business and then we could just vote as soon as they come, if that is okay with everybody. Okay. Then thank you all for coming. Everyone rearranged their schedules, so we very much appreciate—Senator Alexander and I appreciate people coming.

We are going to be very quick. I am going to now submit all my statements in the record and ask anyone else to submit their statements in the record.

[Submitted for the Record]

We are going to try to get three things done today quickly. The first is the nomination of William Boarman to be Public Printer. The second is S. Res. 116, to expedite the confirmation process. This is the bill that Senator Alexander has championed and shepherded through to remove some 400 people from the confirmation rolls. And the third is a bill by Senator Levin to direct the Architect of the Capitol to create and install battery recharging stations for electric cars that Senator Alexander and I have both cosponsered. So we are going to have three separate votes, voice votes, hopefully, on those, and as soon as ten people are here, we will do that.

Senator LEAHY. Mr. Chairman?

Chairman SCHUMER. The Senator from Vermont.

Senator LEAHY. Mr. Chairman, I have had the opportunity to chair two authorizing committees, Agriculture and Judiciary, and I think what Senator Alexander and you and others have done in wanting to cut down the number of people who should not even be in the confirmation process—they are not lifetime, they really serve

at the pleasure of the President—I strongly endorse what you have done. I think it is a great move forward.

Chairman SCHUMER. Thank you, Senator Leahy.

Senator Warner?

Senator WARNER. And I actually just wanted to raise the same point. As someone who does not have the experience of Senator Leahy but sometimes kind of question all of the time and effort spent on what seem to be relatively minor nominations, the fact that Senator Alexander has taken the lead and worked with you to cut down that process, I think, makes more effective government and I commend you both.

Chairman SCHUMER. Thank you, Senator.

We have ten, so without further ado, maybe we can vote. Do you want to say something more?

Senator ALEXANDER. No. Why don't we vote.

Chairman SCHUMER. Statements will be in the record. He shows his wisdom as a legislator.

Is there any further debate on the nomination of William J. Boarman, of Maryland, to be Public Printer?

[No response.]

Chairman SCHUMER. Seeing none, the question is on reporting the nomination favorably to the Senate. Unless there is a request for a roll call, this will be a voice vote. All those in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. Opposed, nay.

[No response.]

Chairman SCHUMER. The ayes have it. The nomination is ordered reported to the Senate with the recommendation the nominee be confirmed.

Second is S. Res. 116, nominations. Unless there is a request for a roll call vote, this will be a voice vote. Is there any further debate on reporting S. Res. 116, to provide for expedited Senate consideration of certain nominations subject to advise and consent?

[No response.]

Chairman SCHUMER. Seeing none, the question is on reporting S. Res. 116 favorably to the Senate. All those in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. Opposed, nay.

[No response.]

Chairman SCHUMER. The ayes have it. S. Res. 116 is ordered reported to the Senate.

Finally, we have S. 739. Unless there is a request for a roll call vote, this will be a voice vote. Is there any further debate on S. 739, a bill to authorize the Architect of the Capitol to establish battery charging stations for privately owned vehicles in parking areas under the jurisdiction of the Senate at no net cost to the Federal Government?

[No response.]

Chairman SCHUMER. Seeing none, the question is on reporting S. 739 favorably to the Senate. All those in favor, say aye.

[Chorus of ayes.]

Chairman SCHUMER. Opposed, nay.

[No response.]

Chairman SCHUMER. The ayes have it. S. 739 is ordered reported to the Senate.

The record will remain open for any statements that people may wish to make, and I want to thank everybody for coming. Before I adjourn the meeting, I am going to call on Senator Alexander.

Senator ALEXANDER. Mr. Chairman, I want to thank you and the members for rearranging schedules. The confirmation bill is a good bill for the Senate, and Senator Schumer and I are going to meet with the White House Director of Personnel and encourage them to clean up and make more orderly the executive branch nominations process so we have less of the "innocent until nominated" phenomenon.

The electric vehicle bill is a good start as a pilot program to do our part to take what I think is the best step forward in reducing our use of oil. It's a small step, but also a big step, at no cost to the taxpayers.

Thank you very much.

Chairman SCHUMER. Any other comments?

Senator FEINSTEIN. Mr. Chairman?

Chairman SCHUMER. The Senator from California.

Senator FEINSTEIN. If I might, it is my understanding that this is Josh Brekenfeld' s first bill that has come out of Committee. He has served me as staff. He has served this committee as staff. So I thought it might be nice just to say, well done, Josh. Much of the best.

Chairman SCHUMER. Thank you, Senator Feinstein, and Josh has done an incredible job in every way in a professional sense. In the Rules Committee, we are staffed by career civil servants who just serve the body, and the body would not work without people like Josh, so I want to add my thanks to you, Josh. Thanks for your service.

Any other comments? If not, then we are adjourned.

[Whereupon, at 2:22 p.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

STATEMENT OF CHAIRMAN CHARLES E. SCHUMER—RULES COMMITTEE EXECUTIVE BUSINESS MEETING—MAY 11, 2011

WILLIAM J. BOARMAN TO BE PUBLIC PRINTER

The Rules Committee shall come to order. Good morning.

I would like to welcome everyone, including our Ranking Member, Senator Alexander, (and my fellow Rules Committee colleagues present here today).

The agenda includes both executive and legislative business—consideration of the nomination of William (Bill) Boarman for the position of Public Printer and consideration of S. 739 and S. Res. 116.

Our first order of business is the Public Printer nomination.

The Government Printing Office was created by "The Printing Act" in 1860 for the production and distribution of information products and services for all three branches of the federal government.

GPO publishes the Nation's most important government information products, including the Congressional Record and Federal Register, in electronic format for widespread digital access by the public, and in printed form. It also produces and maintains FdSys ("FED–SIS"), an enormous website and database that is the sole source of official government documents.

Nearly 60 percent of the printing the GPO manages for the Federal Government is procured through private sector vendors across the country. On a daily basis, the agency manages between 600 and 1,000 print-related projects a day through a long-standing partnership with America's printing industry.

Mr. Boarman has a distinguished career in management and has mastery of the field of publishing, including employment at GPO in the 1970's. He already is working hard to modernize the process of making information available to the general public in digital as well as printed form.

Last Congress, the Rules Committee held a hearing on Mr. Boarman's nomination on May 25, 2010, and a markup on July 20, 2010, where he was reported out of Committee by voice vote. The nomination was placed on the Executive Calendar.

Mr. Boarman currently serves as Public Printer, following his appointment on December 29, 2010, by President Obama. On January 26, 2011, the President nominated him for Senate confirmation to a full term.

When we have ten Members present, we can have a voice vote to report this nominee out of committee, unless there is a request for a roll call vote.

OPENING STATEMENT OF SENATOR CHARLES E. SCHUMER

MARKUP OF S. RES. 116

MAY 11, 2011

We will now move to S. Res. 116, a bipartisan resolution which will create a standing order that will expedite the Senate confirmation process for over 250 nominations. I'd like to thank my friend, Ranking Member Alexander, for his work on this bipartisan effort.

This resolution is one result of the six filibuster hearings that this committee held last year, and a byproduct of the reform deal that was struck at the beginning of this Congress. These hearings were suggested by Senator Udall, who has been a true leader on this subject, and I look forward to working with him on these issues in the future.

In January, Majority Leader Reid and Republican Leader McConnell announced a bipartisan working group to streamline the confirmation process as part of our overall effort to reform Senate rules and procedures related to the filibuster.

Since that time, in conjunction with the Leaders, Senators Alexander, Lieberman, Collins and I have been working closely in a true bipartisan effort to improve how the Senate deals with executive nominations. Our mandate was limited in scope, but the effect will be felt throughout our government.

S. Res. 116 as it currently stands will establish by standing order a new Senate procedure to streamline the confirmation process for part-time positions on certain boards and commissions. A majority of these boards require political balance. We are doing this—rather than eliminating Senate consideration in its entirety—in order to ensure that these politically-balanced boards remain bipartisan.

The expedited process for this class of "privileged nominations" will allow uncontested nominations to avoid the full committee process. Each step of the process will be recorded on new sections of the Executive Calendar. Upon request by

any Senator, such a nomination may go through the regular committee confirmation process.

However, the presumption is that these non-controversial part-time positions usually will be approved by unanimous consent, and not be held up as part of other battles.

S. Res. 116 works in tandem with S. 679, which was reported out by the Homeland Security and Governmental Affairs Committee last month. That bill eliminates Senate confirmation altogether for 204 Presidential appointments.

After their markup, we received a letter from Senators Lieberman and Collins asking us to consider "whether it would be appropriate" to consider chief financial officer positions in our resolution, not wishing to speak for Senator Alexander and myself during their markup. Their opinion was that they were "not yet persuaded" that these positions need to remain Senate confirmable.

We think that consideration of this issue is best left for the entire Senate, and in a way that does not weaken our efforts.

I'd now like to ask Ranking Member Alexander if he has any opening statement he'd like to give.

OPENING STATEMENT OF SENATOR CHARLES E. SCHUMER

MARKUP OF S. 739

MAY 11, 2011

We will now move to S. 739, a bill which authorizes the Architect of the Capitol (AOC), at no cost to the Federal government, to create and install electric vehicle recharging stations in Senate parking facilities.

This bill was drafted with bipartisan support. Senator Alexander and I join Senators Kerry, Murkowski, Bingaman, Merkley and Stabenow in supporting this bill sponsored by Senator Levin.

It bears repeating: This bill creates a program that will not cost the Federal government one dime. S. 739 funds the installation and maintenance of the charging stations by billing the individuals who use the plug-in stations.

S. 739 works on a simple premise: the more people who drive electric cars on campus, the more plug-in stations the AOC will install. S–739 insures that the demand for plug-in stations will match the number of dues paying participants who fund the program.

This bill is needed as more and more people decide to buy electric cars. Currently, the Architect does not have the authority to install plug-in stations on the Capitol campus. This bill fixes that problem in a smart, cost effective manner.

SENATE RULES COMMITTEE

OPENING STATEMENT

SENATOR TOM UDALL

MAY 11, 2011

Mr. Chairman,

I began calling for reform of the Senate rules in January 2010. Since then, many things have happened that have advanced that goal, but we are still a long way from real, substantive reform.

I appreciate the chairman's willingness to work on this issue and devote a substantial amount of the committee's time to the hearings we held last year. We discussed many ideas on how to make the Senate a more functional and deliberative body—including those proposed by Senators Wyden, Bennet, and Harkin.

What became clear in those hearings, and from the dysfunction that we witnessed on the Senate floor, is that the Senate is a broken institution.

In the last Congress, because of rampant and growing obstruction, not a single appropriations bill was passed. There wasn't a budget bill. Only one authorization bill was approved—and that was only at the very last minute. More than 400 bills on a variety of important issues were sent over from the House. Not a single one was acted upon. Key judicial nominations and executive appointments continue to languish.

These issues cannot be fixed with minor reforms—they require us to make real changes in how the Senate conducts its business. We attempted to make these

changes in January, but were unable to pass the most substantive reforms. However, as part of that process we did get an agreement to continue working on the problem. Part of that agreement included removing about one-third of Executive nominees from needing Senate confirmation. What came out of that effort was two pieces of legislation—S. 679, the statutory piece of nomination reform that removes about two hundred nominees from confirmation, and S. Res. 116, which is the subject of today's meeting.

While I appreciate the effort to draft these pieces of legislation, I do not believe they go far enough to reform the Senate and ultimately do not address the real problems in this body. S. 679 removes many nominees from needing Senate confirmation, but those exempted are primarily congressional affairs and public information officer positions in Executive branch agencies. Senate Resolution 116 provides an expedited confirmation procedure for many part-time board positions. While I believe this was a sincere attempt to help address Senate gridlock, these nominations are rarely the reason for obstruction in the Senate. Instead of trying to fix a problem that doesn't exist, we should focus on the real issues that prevent this body from doing the work that is expected of us.

I had hoped that last year's Rules Committee hearings were the first step in making some real reforms to the Senate as an institution. Those hearings were not about what nominees should require Senate confirmation, but the more fundamental issue of how the Senate confirms nominees and passes legislation. We took a good look at our rules—how they incentivize obstructionism . . . how they inhibit, rather than promote debate . . . and how they prevent bipartisan cooperation.

But the next step should have been to implement common sense reforms to meet these challenges—reforms that will restore the uniquely deliberative nature of this body, while also allowing it to function more efficiently. I don't think S. 679 and S. Res. 116 are the answer to the problems we identified in last year's hearings.

Senate Resolution 10, the reform package that I introduced in January, along with Senators Harkin, Merkley, and twenty-three other cosponsors, was our attempt at addressing the institutional dysfunction that has infested the Senate over the past few decades. It contained five reforms that should have garnered broad, bipartisan support. Unfortunately, enough Senators were not willing to give up a little of their own individual power in order to make this a better institution for the country.

The first two provisions in our resolution addressed the debate on motions to proceed and secret holds. These are not new issues. Making the motion to proceed nondebatable, or limiting debate on such a motion, has had bipartisan support for decades and is often mentioned as a way to end the abuse of holds.

I was privileged to be here for Senator Byrd's final Rules Committee hearing, where he stated:

"I have proposed a variety of improvements to Senate Rules to achieve a more sensible balance allowing the majority to function while still protecting minority rights. For example, I have supported eliminating debate on the motion to proceed to a matter . . . or limiting debate to a reasonable time on such motions."

In January 1979, Senator Byrd—then Majority Leader—took to the Senate Floor and said that unlimited debate on a motion to proceed, "makes the majority leader and the majority party the subject of the minority, subject to the control and the will of the minority."

Despite the moderate change that Senator Byrd proposed—limiting debate on a motion to proceed to thirty minutes—it did not have the necessary votes to overcome a filibuster.

Efforts to reform the motion to proceed have continued since. In 1984, a bi-partisan "Study Group on Senate Practices and Procedures" recommended placing a two-hour limit on debate of a motion to proceed. That recommendation was ignored.

In 1993, Congress convened the Joint Committee on the Organization of Congress. The Committee was a bipartisan, bicameral attempt to look at Congress and determine how it can be a better institution.

Senator Pete Domenici, my immediate predecessor, was the co-vice chairman of the committee. Senator Domenici stated at a hearing before the Joint Committee, "If we abolish [the debatable motion to proceed], we have gone a long way to diffusing the validity of holds."

But here we are again today—more than thirty years after Senator Byrd tried to make a reform that members of both parties have agreed is necessary—and it still has not been implemented.

The third provision in our resolution was included based on the comments of Republicans at last year's Rules Committee hearings. Each time Democrats complained about filibusters on motions to proceed, Republicans responded that it was their only recourse because the Majority Leader fills the amendment tree and pre-

vents them from offering amendments. Our resolution provided a simple solution—it guarantees the minority the right to offer amendments.

The fourth provision of our resolution addressed the abuse of the filibuster. Senator Merkley worked extensively with the Parliamentarian and CRS to devise a rule that would make the filibuster real again. The concept is simple—if a senator wants to prevent the rest of the Senate from ending debate on a bill or nominee, he or she must actually continue to debate.

Finally, our resolution reduced the post-cloture time on nominations from thirty hours to two. Post cloture time is meant for debating and voting on amendments—something that is not possible on nominations. Instead, the minority now requires the Senate use this time simply to prevent it from moving on to other business.

Our resolution was an attempt to make actual debate a more common occurrence. It would bring our legislative process into the light, and hopefully, it would help restore the Senate's role as the "world's greatest deliberative body."

I planned to offer amendments to S. Res. 116 that would have included some of the provisions from our January resolution. I believe these amendments would have improved the resolution and made it a much stronger reform package. I have withdrawn these amendments in order to expedite the committee process, but have every intention of offering them when we consider the bill on the floor.

I also wanted to offer an amendment to address a concern raised by Senator Portman in the Homeland Security markup for S. 679. That amendment would have preserved the Senate-confirmed status of the chief financial officers within our nation's major federal departments and agencies, including the major branches of the military. CFOs are responsible for some of the least glamorous but most important work necessary to ensure taxpayer dollars are well-spent. By law, these departmental CFOs oversee all financial management activities relating to all programs and operations of their agency.

At the Homeland Security & Government Affairs Committee mark-up last month, Senator Portman offered an amendment to S. 679 that would have retained the requirement of Senate confirmation for these positions. That amendment led to an offer of a simple compromise: these top financial management executives would remain Senate-confirmed positions, but would be moved to the streamlined confirmation process that the Rules Committee is now considering.

Chairman Lieberman and Ranking Member Collins expressed tentative support for this approach, but asked that Senator Portman withdraw his amendment until the Rules Committee acted on this compromise proposal. On April 14, Senators Lieberman and Collins wrote Chairman Schumer and Ranking Member Alexander to ask that the Rules Committee consider placing chief financial officers on the expedited confirmation track. I had hoped we would consider this amendment today, but it will also have to wait until the bill is on the floor.

I believe holding markups for important legislation is an important part of the legislative process in the Senate and it is the responsibility of each committee to carefully look at the legislation within its jurisdiction. Unfortunately, most committees no longer fulfill that responsibility, which is just one more indication that the Senate no longer functions as our founders intended.

I have withdrawn my amendments, but I do plan to offer them, and probably several others, when the resolution goes to the floor. I hope at that time we can have an open and honest debate on this legislation and consider amendments to improve the resolution.

I ask that the April 14 letter from Senators Lieberman and Collins to Senators Schumer and Alexander be included with my statement in the hearing record.

Thank you again, Mr. Chairman.

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

April 14, 2011

The Honorable Charles E. Schumer
Chairman
Committee on Rules
United States Senate
Washington, D.C. 20510

The Honorable Lamar Alexander
Ranking Member
Committee on Rules
United States Senate
Washington, D.C. 20510

Dear Chairman Schumer and Ranking Member Alexander:

Thank you for your leadership of the working group on executive nominations. We have been privileged to participate in the working group with you and with the Majority and Minority leaders, and believe that the two pieces of legislation that have emerged from that process are an important step in improving and speeding up the confirmation process.

Yesterday, as you are aware, our Committee voted to report out one of those pieces of legislation, S. 679, the "Presidential Appointment Efficiency and Streamlining Act of 2011." During our debate on the bill, Senator Portman proposed an amendment to strike the provisions of S. 679 that would eliminate the requirement for Senate confirmation for the chief financial officers (CFOs) of 17 departments and agencies and the Controller of OMB's Office of Federal Financial Management. He raised the argument that, given the financial challenges facing our government, it may be imprudent to weaken the accountability of the financial management executives in major federal departments and agencies by completely removing CFOs from the nomination and confirmation process. Although a CFO lacks substantive policymaking and budgetary authority, he argued that financial management has a major impact on the proper use of taxpayer funds, and that the Senate should retain its advice-and-consent authority with respect to these positions.

While we believe that Senator Portman has raised a number of legitimate concerns, we have not yet been persuaded that all of the CFOs that are currently Senate-confirmed need to continue to be confirmed through the traditional confirmation process. Among other things, we remain concerned that, in at least some cases, the requirement for full-blown Senate confirmation may serve as a barrier to recruiting the highly skilled professionals we need for these positions. At the Department of Homeland Security, for example, the CFO position has remained vacant for over two years. At the markup, however, we committed to pursue a compromise that would address Senator Portman's concerns, and in return, Senator Portman withdrew his amendment.

S. Res. 116 – the other piece of legislation from the working group, which is currently pending before your Committee – would, as you know, create a streamlined process for consideration of the nominations of part-time members of certain noncontroversial, bipartisan boards and commissions. Among other things, it would allow the nominations for such positions

to be considered directly by the full Senate, unless a member specifically requested that the nomination be sent to Committee. At yesterday's business meeting, Senator Portman suggested a possible compromise with respect to his amendment: allowing CFO nominees to be considered in the streamlined confirmation process provided for by S. Res. 116. We understand that you expect to consider that resolution at a Rules Committee business meeting after we return from April recess. We are therefore writing to request that, at that business meeting, you consider whether it would also be appropriate to include CFOs among the positions that should be considered as privileged nominations eligible for this expedited treatment.

Should the Rules Committee adopt Senator Portman's proposed compromise and agree to include the CFO positions in the streamlined confirmation process, we would then propose making conforming changes to S. 679 (*i.e.*, restoring Senate confirmation for the CFO positions) in a managers' amendment on the floor.

We look forward to continuing to work with you on executive nominations reform. If your staffs have any questions or concerns, please have them contact Beth Grossman with Senator Lieberman's staff (224-9256) or Molly Wilkinson with Senator Collins' staff (228-3141).

Sincerely,

Joseph I. Lieberman
Chairman

Susan M. Collins
Ranking Member

HEARING ON NOMINATION OF GINEEN BRESSO, THOMAS HICKS, AND MYRNA PÉREZ TO BE MEMBERS OF THE ELECTION ASSISTANCE COMMISSION

WEDNESDAY, JUNE 29, 2011

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

The committee met, pursuant to notice, at 10:07 a.m., in Room SR–301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Alexander, Cochran, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Jennifer Griffith, Deputy Staff Director; Jason Abel, Chief Counsel; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Administrative and Legislative Counsel; Carole Blessington, Assistant to the Staff Director; Josh Brekenfeld, Professional Staff; Sonia Gill, Counsel; Lauryn Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Jeff Johnson, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Elections Counsel; and Trish Kent, Republican Professional Staff

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The Committee on Rules and Administration will come to order. We are going to try to finish this in record time. So, we are going to ask everybody to be very brief. In fact, I am going to start with myself.

I have an opening statement. I am going to put it in the record. The hearing, as you know, is a confirmation hearing of the nomination of three nominees to the Election Assistance Commission. We know how important the EAC is.

And so, I am going to put my entire statement in the record. I know that Senator Alexander very much wants to make an opening statement, and so, I am going to defer to him.

With unanimous consent, my entire statement is entered into the record.

[The prepared statement of Chairman Schumer included in the record:]

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thanks, Mr. Chairman. I am going to be reasonably succinct——

Chairman SCHUMER. You do not have to be succinct.

Senator ALEXANDER. I need to make my statement.

Chairman SCHUMER. I understand. Please.

Senator ALEXANDER. It is good to see you and good to see Senator Cochran.

Mr. Chairman, with all due respect to the nominees before us, I think this hearing is premature. Instead of considering new nominees, we ought to be abolishing this commission.

The Election Assistance Commission was constituted in 2003. Since then, our Committee has not had one single oversight hearing on it. My predecessor at this Committee, Senator Bennett, wrote in 2009 to ask for an oversight hearing. We did not have one. I wrote in March to suggest one. We did not have one.

Our government is borrowing 40 cents out of every dollar we spend. We have a terrific finance problem with the Federal Government. Yet today, we are considering new appointments to a commission that should cease to exist.

Now, here is why I say that. This commission was created by the Help America Vote Act in 2002. The Election Assistance Commission was authorized for three years and given certain tasks. The primary task of the commission was to distribute federal payments to the states to help them upgrade their voting systems. $3.2 billion was appropriated for these statements, and it has been distributed.

Given our current fiscal situation, it is very unlikely any more federal money is forthcoming. The current Administration seems to agree with that. They have asked for no funds for this purpose in either of their last two budgets.

The commission was also directed to develop voluntarily voting system guidelines and a testing and certification program for voting machines. The actual work involved in this is performed by the National Institute of Standards and Technology.

Finally, the commission was to act as a clearinghouse to collect and distribute information on best practices. Yet the intended beneficiaries of this service do not seem to have much use for it.

The National Association of Secretaries of State, a bipartisan organization, has twice voted in favor of a resolution calling for abolition of the commission.

So, we have a situation where we are saying we are the government, we are here to give you help that you do not want. The tasks of the commission have now either been completed or can be performed by more appropriate entities.

The commission did its job. We should thank the commission and the staff for their service. But if the completion of their appointed task is not enough of a reason to close it down, the commission also appears to have serious management problems.

Though its mission has dwindled, its staff has grown. The commission had 20 staff in 2004. Last year it had 64 staff. The average salary of the staff, according to Congressman Greg Harper, is over $100,000. Why is more staff needed, Mr. Chairman, for less work?

This year's budget submission for the commission proposes spending $5.4 million to manage $3.4 million worth of programs. Now, does this make any sense? When the cost of the overhead and staff salaries exceeds the amount of a program, clearly something is wrong.

Finally, the commission has an unfortunate history of hiring discrimination. The office of special counsel found that they engaged in illegal discrimination when, during a search for a general counsel, an employment offer was made and then withdrawn when the

Democratic commissioners discovered the applicant was a Republican.

The result was a substantial settlement being awarded to the applicant, forcing taxpayers to bear the cost. It has been reported that in subsequent interviews a similar thing has happened within appropriate questions about military service.

Mr. Chairman, I recognize the nominees before us are not to blame for this incident but that is beside the point. Even if we were to assume that the nominees could right the ship and correct the problems, the question would remain where would the ships sail and why make the trip?

Do we even need the commission? With its main job completed and with a big budget problem in Washington, why could not its remaining duties be better performed somewhere else?

Can a government program once created ever be terminated? Mr. Chairman, Ronald Reagan once said, "A government bureau is the nearest thing to eternal life we will ever see on this earth."

Should we not try, using this opportunity, to prove President Reagan wrong?

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Mr. Ranking Member. That is sort of a different issue than moving nominees, whether the commission should continue.

I appreciate your views, and we will continue the discussion on that. I have heard carefully what you said. We should not gainsay that the commission has done some good things - testing voting equipment, dealing with butterfly ballots which created all the kinds of problems, and establishing the military heroes grants which help injured combat veterans vote.

But it is an issue that we will discuss. I understand your strong feelings and I understand the need to cut back and I understand the need for having the kinds of functions the commission does be done somewhere. The commission has done a good job.

But with that, we both believe, even though we may not agree on the commission, we both believe that nominees should move quickly. And so we will move forward with our nominees if that is okay with the other members here.

Senator COCHRAN. Mr. Chairman.

OPENING STATEMENT OF SENATOR COCHRAN

Chairman SCHUMER. Senator Cochran.

Senator COCHRAN. I would like to join my colleague from Tennessee and express my concerns that we are walking into an area where there is some uncertainty. And in fairness to the nominees who are before the Committee for confirmation, I hope we can resolve this issue.

I notice one of the Congressional members from my State has joined in introducing legislation in the other body that would eliminate the commission, and I noticed that it is expected that if we did, we would save about $33 million in taxpayer funds.

And the question is a legitimate question that I think the distinguished Senator from Tennessee has raised.

Chairman SCHUMER. It is a legitimate question and we will figure out a forum to deal with that question.

Senator COCHRAN. With that assurance, I will shut up and let you do what you want to do.

Chairman SCHUMER. Senator Blunt.

OPENING STATEMENT OF SENATOR BLUNT

Senator BLUNT. Mr. Chairman, I heard your last statement and I was just going to ask if that was our intention, but I would like to look at this as well.

When I was the Secretary of State of Missouri, I was the chief election official of the state for eight years. In 2010, I know many of the Secretaries of State called for the elimination of the Election Assistance Commission agency and the President has not requested any grant funds to be distributed which was one of the early and maybe most successful purposes of the agency.

I join my colleagues in looking forward to your decision to call a hearing to talk about the future of this agency. This request implies nothing about the quality of the nominees, but just the purpose of the agency.

Chairman SCHUMER. I did not agree to have a hearing. I just said we would continue our discussions. We will.

Senator BLUNT. Well, I was optimistic in the way I heard you say that.

Chairman SCHUMER. I did not say we would not. I did not say we would.

Senator BLUNT. I tend to be optimistic anyway, Mr. Chairman. That is why I think we are going to get things done.

Chairman SCHUMER. Okay. Thank you. And you are a fine member of this Committee and I appreciate your optimism. Okay.

Let me introduce the three witnesses here. We have three nominees. Our current commissioner, Gineen Bresso, was recommended by Speaker Boehner and has been an EAC commissioner since 2008. Thank you for your service, and I am sure my colleagues join me in that. The comments about the need for the commission is no reflection on the job that you have done.

Tom Hicks is recommended by Leader Pelosi, and he has served as Senior Elections Counsel for the House Administration Committee. Myrna Pérez, recommended by Majority Leader Reid, has an impressive legal career with degrees from Yale, Harvard, and Columbia. In her current job she is a counsel at the Brennan Center for Justice.

So, we are going to swear the nominees in. Please stand. I ask the nominees to raise their right hand. Do you swear that the testimony you are about to provide is the truth, the whole truth, and nothing but the truth, so help you God?

Ms. BRESSO. I do.

Mr. HICKS. I do.

Ms. PÉREZ. I do.

Chairman SCHUMER. Thank you. Please be seated.

Now, your statements are going to be put in the record. They are available to members.

Because we want to expedite these hearings, I am going to take the liberty, with the permission of my colleagues here, to go right ahead to questions, if that is okay with you, Mr. Chairman, Mr.

Ranking Member. He is almost the chair. We work in such a bipartisan way that I did not want to call him the chairman——

Senator ALEXANDER. I just hope to be the Chairman.

Chairman SCHUMER. So, with that, let me ask two questions to each of you and then we will go to my colleagues.

I am interested in learning what you each want to focus on as commissioner of the Election Assistance Commission, number one.

And second, there has been some criticism of the EAC in recent years regarding management and personnel issues. What measures would you take to improve the administration of the agency?

First, Ms. Bresso, then Mr. Hicks, and then Ms. Pérez. Then we will call on my colleagues.

TESTIMONY OF GINEEN BRESSO, NOMINATED TO BE A MEMBER OF THE ELECTION ASSISTANCE COMMISSION

Ms. BRESSO. Thank you, Chairman Schumer.

Certainly all of the HAVA mandates that the commission has to fulfill are important, but I believe what I would like to focus on certainly is the testing and certification of our voting systems.

We do have systems that are in the field; and through our quality monitoring program, we are going to have to observe and see how they do perform.

When I was chair, during my tenure, we did not have any systems that were certified prior to my coming to the EAC. But during that time, I worked with my colleagues and we had certified four systems; and since then, we have certified an additional two systems and also two modifications.

So, I believe that is very important for the upcoming election cycle.

[The prepared statement of Ms. Bresso is included in the record:]

Chairman SCHUMER. Mr. Hicks.

TESTIMONY OF THOMAS HICKS, NOMINATED TO BE A MEMBER OF THE ELECTION ASSISTANCE COMMISSION

Mr. HICKS. Thank you, Chairman Schumer.

I think that there are a couple of things that the commission can still focus on. One being its clearing house function. Elections, as you know, happen every two years, and those elections might have problems in them. That is not to say that the commission should be abolished.

I believe that the commission can still function very well in terms of getting information out to the state and local officials who are very adamant in their decision to keep the agency alive.

The NASS decision was not necessarily unanimous. There were secretaries of states, particularly Mark Ritchie from Minnesota, who voiced his opinion of the commission being still available.

The testing labs, I believe, function very well and I believe that the functions of that program should remain with the EAC.

Mr. Harper's bill would transfer most of these functions over to the FEC, I think, should not be passed. I should also express that these are my opinions and not of my bosses who currently employ me.

The bill itself would move particular items over to the FEC. The FEC has been viewed by many as an agency that is deadlocked on

the simplest of things. Some say that sometimes they cannot even agree on what day of the week it is.

So, I do not believe that the EAC should be abolished. I think that it can still function really well. I think that the state and locals have voiced their opinion. I think that the civil rights groups have voiced their opinion, and I believe that the administration of elections which is different than the financing of elections which the FEC holds, makes these two agencies completely different and, therefore, they should remain different.

[The prepared statement of Mr. Hicks is included in the record:]

Chairman SCHUMER. Thank you, Mr. Hicks.

Finally, Ms. Pérez.

TESTIMONY OF MYRNA PÉREZ, NOMINATED TO BE A MEMBER OF THE ELECTION ASSISTANCE COMMISSION

Ms. PÉREZ. Thank you, Senator.

At this time, I would not feel comfortable committing to a firm list of priorities without talking to election administrators and seeing what it is that they need. But I think my focus would be on three things.

One is growing confidence in the agency. It is very, very important that election administrators, Congress, and the public feel like they are getting expert service from the EAC, and that Congress and the public feel like taxpayers dollars are being well spent.

I would also like to focus on making sure that the voting system standards were the gold standard for voting system certification, and I think this is one area where it is possible for there to be economies of scale.

It should not be the case that every state has to expend what could be prohibitive resources just to make sure that our voting systems are safe and reliable; and by having one agency that can collect all of the information and be accessible to all of the vendors so they know what sort of benchmarks they have to hit, I think will produce efficiencies of scale and economies of scale.

The last thing I think I would like to focus on is that of making sure that the Agency is ahead of the cutting edge technical and legal issues that are facing election administrators today.

Election administration is dynamic. The technology is changing at a rapid pace and the laws are changing at a rapid pace. And election administrators have to do a great deal of work under very challenging situations including resource challenges.

And if the agency is operating well and can predict what those issues are and figure out an effective way to disseminate and collect that information, I think that the comprehensiveness of its scope and the fact that it has a nationwide mission will allow it to be beneficial to the election administrators.

I would like to note in my final moments that I find it deeply disturbing that NASS has lost its confidence in the EAC, and if I am confirmed, I will talk to them. I will try to figure out where the disconnect is and try to make sure that the EAC provides them the best customer service available.

[The prepared statement of Ms. Pérez is included in the record:]

Chairman SCHUMER. I thank all three of you for your good and succinct answers. We are going to try to finish by 10:30. So, I

would ask my colleagues for brevity. We can have statements submitted into the record, of course, and other questions for the nominees. We will have ample questions.

But I want to call on my friend and colleague, Senator Alexander.

Senator ALEXANDER. Thanks, Mr. Chairman. I would just ask one question. I would observe, I think these nominees are very well qualified, and you and I have just completed an extensive review of all the positions that the Senate advises and confirms and I think we ought to find a commission upon which they could serve where they have something to do.

So, none of what I am saying has any reflection upon the three of them. I think they are exceptionally talented people.

My question is for each of you. Our election system leaves responsibility for running elections in the hands of state and local officials. The Help America Vote Act provided some federal assistance, some minimal federal requirements; but it basically left the system of elections in state and local hands.

Do you see that as a good or bad thing? Do you think the elections would benefit from more federal control? Do you think the EAC would be more effective if it had more power?

Chairman SCHUMER. Ms. Bresso.

Ms. BRESSO. Certainly. I agree that the elections should be administered on the state level as you had articulated; and certainly, you know, just traveling around and talking to election officials, each state is different, each locality is different. There is not a "one size fits all" approach. So to the extent that EAC can provide assistance to states and localities with the administration of elections, I believe that would be most beneficial.

Chairman SCHUMER. Thank you for your good and succinct answer.

Mr. Hicks

Mr. HICKS. The Help America Vote Act was crafted in a bipartisan manner back in 2001 and 2002. There was a lot of blood, sweat, and tears that came up with that piece of legislation. If Congress should decide that it should be change is when I will change with it.

Chairman SCHUMER. Thank you, Mr. Hicks.

Ms. PÉREZ.

Ms. PÉREZ. Our Constitution sets forth a very important and protected role for the states in the administration of elections, and I very much believe that states have a very important role to play. I think that state and local election administrators need resources, they need assistance, they need information being sent to them, and Congress made a determination that a federal agency could do that through a number of very delineated but very important statutory functions.

I think that we as voters are best served if the Election Administration Commission focuses on the nuts and bolts of election administration and focuses on the core activities that Congress set forth for the Agency in the Help America Vote Act.

Chairman SCHUMER. Thank you, Senator Alexander.

Senator COCHRAN.

Senator COCHRAN. Mr. Chairman, let me ask Ms. Bresso.

You have previously expressed some concerns about the budget submitted by the EAC. What role do you see the commissioners playing in the formation of a budget submission and what, if any, changes would you recommend be reviewed by the Committee during that process?

Ms. BRESSO. Currently, the commissioners play a role in the budgets but it is more at the last part of the budget process.

Under our roles and responsibilities document that was adopted through a consensus vote prior to my tenure, the commission had delegated the authority to the executive director to develop the agency's financial plan.

And certainly as commissioners, being appointed to the commission and having accountability to the taxpayers and Congress, we need to play a much more active role, and I want to work with my colleagues here to make sure that we do that moving forward.

Senator COCHRAN. Thank you very much.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you. Now, since we have a few extra minutes because of everyone's brevity, do any of the witnesses want to say anything else that you did not get a chance to add? Do not feel obligated but take the opportunity.

Mr. HICKS. Thank you, Chairman Schumer.

I would just like to acknowledge the presence of my mother——

Chairman SCHUMER. Isn't that nice.

Mr. HICKS. —who flew down from Boston to be here today.

Chairman SCHUMER. Would she please stand so we can acknowledge her as well. Hi. I am sure you are proud of your son, Ms. Hicks.

[Applause.]

Mr. HICKS. The only other thing that I would like to add is that my children were not able to make it here today. They will be watching this via the webcast so I just wanted to acknowledge the three of them.

Elizabeth, who is seven. Megan, who is four, and Edward, who is two. Thank you.

Chairman SCHUMER. Well, God bless them, and I am sure they are proud of their dad as we all are.

Ms. PÉREZ.

Ms. PÉREZ. If I may do the same. My husband Mark Muntzel, members of my family, members of my church family, longtime friends, classmates, colleagues are here today to provide their love and support. I am truly blessed.

Chairman SCHUMER. Great. Thank you. Would they like to, would at least your husband and immediate family like to stand so we can acknowledge them and thank them.

Thank you both for being here.

That was nice. Again I want to repeat what Lamar Alexander said. You are all three very well qualified. There is discussion as to whether the EAC should continue as you have heard, and that is a discussion we will continue. I promise that to Senator Alexander, but that issue is not a reflection on the quality of either your service, Ms. Bresso, or your nominations, Mr. Hicks and Ms. Pérez. You are outstanding people and I am glad you are looking to work in our government.

So, let me thank the nominees for testifying this morning.

The record will remain open for five business days for additional questions and statements.

The hearing is adjourned.

[Whereupon, at 10:29 a.m., the Committee adjourned.]

APPENDIX MATERIAL SUBMITTED

Executive Summary of Testimony of Gineen M. Bresso
Nominee for Commissioner for the U.S. Election Assistance Commission
Senate Committee on Rules and Administration
June 29, 2011

Good morning Chairman Schumer, Ranking Member Alexander and members of the Committee

Thank you for the opportunity to testify before the Senate Committee on Rules and Administration. It has been an honor to serve as a Commissioner on the U.S. Election Assistance Commission (EAC) for the past two and a half years. My background, working in elections first in Maryland and then at the Committee on House Administration, has served me well in my time at the EAC. As a Commissioner I have worked with my fellow Commissioners and staff to fulfill our mandates under the Help America Vote Act (2002) and provide assistance to State and local election officials. I look forward to working with my fellow Commissioner Donetta Davidson, Mr. Hicks, Ms. Perez, EAC staff and all of our stakeholders.

Thank you and I look forward to any questions you may have.

Statement by Gineen M. Bresso
Nominee for Commissioner for the U.S. Election Assistance Commission
Senate Committee on Rules and Administration
June 29, 2011

Chairman Schumer, Ranking Member Alexander and members of the Committee

Thank you for holding this hearing to consider my nomination to serve a second term on the U.S Election Assistance Commission (EAC). It has been an honor to serve on the Commission for the past two and a half years. I want to thank President Obama for re-nominating me as an EAC Commissioner. I also thank Speaker Boehner for his support and recommendation to the President that I serve a second term on the Commission. Many of you may already know me, because of my position as a sitting Commissioner, or my previous position as staff to the House Administration Committee. For those who may not, I would like briefly to review my background for the Committee.

My interest and experience in the area of elections began with my work in Maryland. As a policy advisor to the Governor, I was responsible for providing advice and guidance on federal and state election law issues, including the newly-enacted Help America Vote Act (HAVA) of 2002. I extended my study and expertise of election law when serving as elections counsel for Ranking Member Vern Ehlers on the Committee on House Administration.

EAC is an independent, bipartisan commission charged with adopting voluntary voting system guidelines, developing guidance to meet HAVA requirements, accrediting voting system test laboratories and certifying voting equipment, and serving as a national clearinghouse of information on election administration to assist states in meeting HAVA's requirements.

One of EAC's most important responsibilities is the operation of its voluntary federal voting system testing and certification program. When I became Chair of the EAC, the agency had yet to certify any voting systems. During my tenure as Chair of EAC, I made it a priority to work with my fellow Commissioners and staff to ensure our testing and certification division had the resources necessary to move voting systems through the process. Because of this effort, voting systems were certified and ready for use by states and localities during the 2010 federal election cycle. EAC successfully certified four voting systems during my time as Chair, and an additional two systems and two modifications have been certified since then.

Our clearinghouse is an area where the Commission provides a conduit for the exchange of information regarding the administration of elections. As a Commissioner, I worked with my colleagues to improve our clearinghouse by collecting best practices in the industry and share them with our stakeholders. Topics covered in the clearinghouse include voting system reports, contingency plans and information about community partnerships.

In the decade since HAVA was enacted, I have found it rewarding to work on election law and policy at the state and federal level. I look forward to working with my fellow Commissioner Donetta Davidson, Ms. Perez, Mr. Hicks, EAC staff and all of our stakeholders.

Again thank you and I look forward to any questions you may have.

Gineen M. Bresso
Biography

Ms. Gineen Bresso was nominated by President George W. Bush and confirmed by the United States Senate on October 2, 2008 to serve on the U.S. Election Assistance Commission (EAC). Ms. Bresso served as Chair of the EAC in 2009. Her term of service extends through December 12, 2009.

Prior to her appointment with EAC, Commissioner Bresso was the minority elections counsel for the Committee on House Administration. She previously served as a policy advisor to former Maryland Governor Robert L. Ehrlich, Jr. where her primary area of focus was on election law. She also served as an attorney-advisor for the U.S. Patent and Trademark Office, where she reviewed and prosecuted applications for federal trademark registration. Ms. Bresso began her legal career by serving as a judicial law clerk for the Honorable Arrie W. Davis, in the Maryland Court of Special Appeals.

Ms. Bresso received her Juris Doctor from Western New England College School of Law (1999) where she was a member of the Law Review. In 1995, she received a Bachelor of Arts in political science from the University of Massachusetts at Amherst.

Summary of Opening Statement of Thomas Hicks
Nominee for Commissioner
Elections Assistance Commission

Thank you for allowing me to testify this morning on my qualifications to be a commissioner at the Election Assistance Commission.

Over the last 7 plus years, I have worked at the Committee on House Administration, the equivalent committee in the House to Senate Rules and Administration. My primary responsibility is advising and providing guidance to the committee members and caucus, on elections issues. Prior to that, I worked at Common Cause, a nonpartisan, nonprofit advocacy organization that empowers citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. I enjoyed working with state and local election officials, civil rights organizations and other stakeholders to improve the voting process.

Throughout my childhood, my parents instilled in me two basic lessons of life. The first was that, in the most basic terms, your car may break down, your house may burn down, and life will inevitably throw you a series of unexpected curveballs, but your education will always be there, so get as much of it as you can. The second lesson was to always treat your fellow man as you would like to be treated. These lessons have guided me through life and, if confirmed, I hope to continue to apply these life lessons at the EAC.

Should I be confirmed, I hope to use the lessons learned in life and my experiences to continue working to achieve this goal. Thank you and I will be happy to answer any questions.

Senate Committee on Rules
Statement by Thomas Hicks, Nominee to be a Member of the Election Assistance Commission
Wednesday, June 29, 2011

Chairman Schumer, Ranking Member Alexander, members of the Committee, thank you for giving me the opportunity to testify on my qualifications and thoughts on becoming a commissioner on the Elections Assistance Commission. I would like to thank House Minority Leader Pelosi, the Committee on House Administration Ranking Member Bob Brady, House Minority Whip Hoyer, Democratic Caucus Chair Larson, and a list of other members from both sides of the aisle that is too long to state during my five minutes. I would also like to thank everyone who supported and encouraged my nomination. I am honored and humbled to be nominated and re-nominated by President Obama to serve on the Election Assistance Commission.

I would like to acknowledge the presence of my three children, Elizabeth who is 7, Megan who is 4 and Edward who is 2. I would also like to recognize my mother Annie Hicks who traveled from Boston for this occasion. I would also like to express my appreciation to all the people who helped me get to this point today, many of whom could not make it but are here in spirit.

I am the oldest child of Benny and Annie Hicks, who were born and raised in southern Georgia. They moved to Massachusetts after marrying in the late sixties to start a family and seek out new work opportunities. Although, they were not able to access the formal educational opportunities provided to me, both have taught me more lessons than any text book. They are now enjoying their retirement and doting on their grandchildren. My mother retired from the Massachusetts Bay Transportation Authority and my father as a Mechanic for various companies.

Throughout my childhood, my parents instilled in me two basic lessons of life. The first was that, in the most basic terms, your car may break down, your house may burn down, and life will inevitably throw you a series of unexpected curveballs, but your education will always be there, so get as much of it as you can. The second lesson was to always treat your fellow man as you would like to be treated. These lessons have guided me through life and, if confirmed, I hope to continue to apply these life lessons at the EAC.

Another powerful experience was watching my mother vote for the first time. She brought my brother and I into the voting booth and pulled the lever. She gently reminded us that when she was growing up in southern GA, it was a lot harder for minorities to vote than on that day when she voted for President Jimmy Carter. I was able to share this story with President Carter a few years ago. The ability to help facilitate access to our voting system – the cornerstone of our system of government – for all eligible Americans, has been a strong motivating factor in my career.

Over the last 7 plus years, I have worked at the Committee on House Administration, the equivalent committee in the House to Senate Rules and Administration. I interviewed for the job the day after my oldest daughter was born. My primary responsibility is advising and providing guidance to the committee members and caucus, on elections issues. Prior to that, I worked at Common Cause, a nonpartisan, nonprofit advocacy organization that empowers citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. I enjoyed working with state and local election officials, civil rights organizations and other stakeholders to improve the voting process.

Growing up in Boston, and participating in a voluntary busing program to the Boston area suburbs for high school, gave me a unique perspective on working with a diverse constituency—not just racially, but economically, and culturally. As Senior Class President, I was able to bridge gaps of mistrust between the school's administration, students, teachers and parents. These experiences have served me well in my collegiate athletic career, but also in my pursuit of higher education and my career path.

I believe that, regardless of partisan ideology or political affiliation, we all want the same thing—fair, accurate elections, where we are confident of the outcome and all eligible Americans (domestic and overseas) are able to participate in our process, the best in the world. Should I be confirmed, I hope to use the lessons learned in life and my experiences to continue working to achieve this goal. Thank you and I will be happy to answer any questions.

Thomas Hicks

Thomas Hicks serves as the Democratic Senior Elections Counsel for the Committee on House Administration. In this role, he is responsible for issues relating to campaign finance, election reform, contested elections and oversight of both the Election Assistance Commission and Federal Election Commission. Mr. Hicks came to the committee from the government watchdog group Common Cause, where he served as a Senior Lobbyist and Policy Analyst.

Prior to joining Common Cause, Mr. Hicks worked for nearly 8 years in the Clinton Administration as a Special Assistant and Legislative Assistant in the Office of Congressional Relations for the Office of Personnel Management.

Mr. Hicks, a native of Boston, Massachusetts, earned his Bachelor's Degree in Political Science from Clark University in Worcester, MA. He earned his law degree from the Catholic University of America - Columbus School of Law.

Summary of Opening Statement of Myrna Pérez

Nominee for Member,

Election Assistance Commission

Before the

Committee on Rules and Administration

United States Senate

June 29, 2011

Elections are the cornerstone of our democracy, and all Americans have an interest in their efficient and secure administration. Administering elections, however, is a difficult task. State and federal election laws governing election administration are complicated, resources for election administration are scarce, the technology is always changing, and it is can be challenging to inoculate the administration of elections from the politics of elections.

I understand election administration from a variety of perspectives and have certain skills which will be useful to the EAC in performing its duties. First, I have substantial experience in research and collecting and disseminating information. Second, I have substantial amount of subject matter knowledge on issues related to election administration. Finally, I have strong strategic and public management skills. My approach, if confirmed, to my role and duties would reflect the following: (1) a clear understanding of the role of the EAC, (2) a desire to work closely with election administrators, (3) responsible stewardship of public funds, and (4) a respect for data.

A significant part of my career has been dedicated to protecting and preserving the right to vote and improving our election systems. As a voter, and as a person who has represented voters, I know that election administration is critically important to our democracy.

Written Statement of Myrna Pérez

Nominee for Member,

Election Assistance Commission

Before the

Committee on Rules and Administration

United States Senate

June 29, 2011

Chairman Schumer, Ranking Member Alexander, and distinguished members of the committee:

Thank you for holding this hearing and giving me the opportunity to discuss with you my qualifications to serve on the Election Assistance Commission ("EAC"). I care deeply about the fair, impartial and accurate administration of elections, and I would be immensely honored by the chance to serve, should the Senate choose to confirm my nomination.

I have been extremely fortunate in my life and career. I am a native Texan, a resident of New Jersey, and a lawyer working in New York City. My parents were born in Mexico, moved to the United States as children, and grew up with limited means. They raised me and my brother in an environment which respected public service — my father served in the Air Force and works for county government, my mother works for the US Postal Service; and they made possible my ability to attend Yale College, Harvard's Kennedy School of Government, law school at Columbia, and for my brother to pursue a career in law enforcement. I have been given a great many gifts, and I believe responsible stewardship of those gifts means I must explore opportunities to use my good fortune in service of others, whether it be by correcting bible study lessons for persons in prison, or serving breakfast to those in my neighborhood who are food insecure, or in a variety of others way, including in my professional experiences in the private, nonprofit, and government sector. It is with great gratitude that I experience your consideration for the opportunity to serve my country and the democratic principles for which it stands.

Experience

Elections are the cornerstone of our democracy, and all Americans have an interest in their efficient and secure administration. Administering elections, however, is a difficult task. State and federal election laws governing election administration are complicated, resources for election administration are scarce, the technology is always changing, and it can be challenging to inoculate the administration of elections from the politics of elections.

The EAC's mission, in my view, is to provide resources and reliable information to election administrators and voters on issues of election administration. I believe I can further that mission because I understand election administration from a variety of perspectives. My interest in voting and election administration started the summer in college that I worked for my county's election administrator processing registration forms and identifying potential polling locations. Today, I serve as chair of the election law committee of the New York City Bar Association. Professionally, as Senior Counsel at the non-partisan Brennan Center for Justice at NYU School of Law, I represent voters, talk frequently with election administrators, study federal and state election laws, and research election practices.

Congress gave the EAC the duties of conducting research, collecting and disseminating information, certifying voting systems, and maintaining the federal form. I have certain skills which I think, if confirmed, will be useful to the EAC in performing those duties.

First, I have substantial experience in research and collecting and disseminating information. As a policy analyst for the Government Accountability Office, I had to perform qualitative and quantitative research on issues requested by Congress. At the Brennan Center, I also conduct research. In both jobs, I have had to pay close attention to appropriate methodologies, talk to people on the frontlines, and make that information accessible to a variety of audiences. Second, I have a substantial amount of subject matter knowledge on issues related to election administration. I have spent the better part of the past five years working on issues related to election administration — from list maintenance efforts to statewide voter registration databases. And while my focus has been on the interests of voters, one cannot effectively serve voters without understanding the realities faced by election administrators. Finally, I have strong strategic and public management skills. In my personal and professional life, I have worked for organizations where resources are limited, the organizational purpose has been defined, and the operational environment has been key to mission achievement, very much like the EAC.

Approach

While it would be premature to commit to any particular course of action without being more familiar with the internal workings of the EAC and talking to my fellow commissioners and election administrators, I can tell you that if confirmed, my approach to my role and duties would reflect the following:

A clear understanding of the role of the EAC – State and federal laws govern election administration, not the EAC. Congress has set forth the EAC's responsibilities of assisting states and localities with their administration of elections by providing data and technical assistance, and those responsibilities are static unless and until Congress decides to change them. The EAC will function best if it focuses on the nuts and bolts of election administration and is not distracted by those questions best suited for legislatures and the courts.

A desire to work closely with election administrators – I have a great deal of respect for election administrators and the work that they do, and do not believe the EAC can function effectively without their input and perspectives. I am fortunate that my current job requires me to talk frequently with

election administrators and I am glad that if confirmed, I can continue to have those conversations. I am interested in learning more about their research and information needs and their ideas about what shared practices would be helpful.

Responsible stewardship of public funds – These are tough fiscal times, which make it ever more critical that the EAC operates efficiently. I bring a personal frugalness to my own decision-making, and, if confirmed, I will expect the EAC to use its resources effectively and thoughtfully. If confirmed, I will work with the other commissioners to ensure that the management of the Commission is top-notch, and that the concerns of the public and election officials are addressed. I want all stakeholders to be confident that the taxpayer dollars supporting the EAC is money well-spent.

A respect for data – My work on election administration is guided by research and evidence about what works and what does not. If confirmed as an EAC Commissioner, I would work to ensure that any advice and assistance provided to election administrators be thoughtful and well-researched.

Conclusion

A significant part of my career has been dedicated to protecting and preserving the right to vote and improving our election systems. As a voter, and as a person who has represented voters, I know that election administration is critically important to our democracy. The EAC, if operating well, is a valuable resource available to election administrators because of its nationwide scope, narrow focus, and expressly delineated responsibilities. I believe that my experience, skills, and approach make me well-equipped to help the EAC efficiently and effectively fulfill its congressional mandate. If confirmed, I would look forward to working collaboratively with the members of this Committee to achieve that goal. Thank you for this opportunity to be before you today and I would be pleased to respond to any questions you may have.

Biography of Myrna Pérez

Myrna Pérez is currently Senior Counsel at the Brennan Center for Justice at NYU School of Law, where she has worked and published on a variety of voting rights issues. Previously, Ms. Pérez was the Civil Rights Fellow at Relman, Dane, and Colfax, a civil rights law firm in Washington, DC, and served as a policy analyst at the United States Government Accountability Office. She currently is Chair of the Election Law Committee of the New York City Bar Association. Ms. Pérez is the recipient of several awards, including the Puerto Rican Bar Association Award for Excellence in Academia and the Robert F. Kennedy Award for Excellence in Public Service. She clerked for Judge Anita B. Brody of the United States District Court for the Eastern District of Pennsylvania and for Judge Julio M. Fuentes of the United States Court of Appeals for the Third Circuit. Ms. Pérez holds a B.A. from Yale College, an M.P.P. from Harvard University's Kennedy School of Government, and a J.D. from Columbia Law School.

Committee on Financial Services
Ranking Democratic Member,
Subcommittee on Oversight
& Investigations

Committee on Transportation &
Infrastructure

Democratic Steering & Policy
Committee

Democratic Caucus
Chair, Committee on Oversight,
Study & Review

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Congress of the United States
House of Representatives
Michael E. Capuano
8th District, Massachusetts

WASHINGTON OFFICE
1414 Longworth Building
Washington, DC 20515-2108
(202) 225-5111
Fax: (202) 225-9322

DISTRICT OFFICES
110 First Street
Cambridge, MA 02141
(617) 621-6208
Fax: (617) 621-8628

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June 30, 2011

Senator Charles Schumer
Chairman
Senate Rules & Administration Committee
305 Russell Senate Office Building
Washington, DC 20510

Senator Lamar Alexander
Ranking Member
Senate Rules & Administration Committee
305 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Schumer and Ranking Member Smith,

I would like to submit for the committee's record this letter of support for Thomas Hicks, nominee for Commissioner of the Election Assistance Commission. Tom, originally from the 8th Congressional District of Massachusetts, is a stellar nominee for the EAC.

As you may know, Tom is currently Senior Elections Counsel for the Committee on House Administration Minority Staff. I had the pleasure of working with him during my tenure on the House Administration Committee from 2007-2010. Through the time both my staff and I spent getting to know Tom, it became clear that his experience and demeanor would make him a solid choice for Democratic EAC Commissioner.

Tom, originally from the neighborhood of Roxbury in Boston, Massachusetts, attended Clark University for his undergraduate education and later received his law degree from the Catholic University of America. He has worked in the executive and legislative branches of the federal government as well as in the nonprofit sector at Common Cause. He has served on the Committee on House Administration as majority and minority staff. His experience recommends him well for the position of EAC Commissioner.

However, it is Tom's reputation as an even-tempered, pragmatic problem-solver that augurs best what he might bring to the EAC. Tom is known and respected for being fair-minded and exceedingly reasonable. He is a person who would seek the just and right answer to any challenging question, but would not be consumed with debating academic points or scoring personal victories. Rather, I believe based on my knowledge of Tom that he would work to seek a rational and moderate path forward on whatever issues might come before the Commission.

It was no doubt an honor for Tom to receive President Obama's nomination to the EAC, but I urge you to complete this process and confirm Thomas Hicks to the EAC based on his extensive qualifications and experience.

Best,

Michael E. Capuano
Michael E. Capuano
Member of Congress

S. 2219, THE DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS ACT OF 2012 (DISCLOSE ACT OF 2012)

THURSDAY, MARCH 29, 2012

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

The committee met, pursuant to notice, at 10:07 a.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, Chairman of the committee, presiding.

Present: Senators Schumer, Feinstein, Durbin, Tom Udall, Leahy, Alexander, and Blunt.

Staff Present: Jean Bordewich, Staff Director; Josh Brekenfeld, Deputy Staff Director; Adam Ambrogi, Chief Counsel; Veronica Gillespie, Elections Counsel; Julia Richardson, Counsel; Nicole Tatz, Professional Staff; Lynden Armstrong, Chief Clerk; Jeff Johnson, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Counsel; Lindsey Ward, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. Good morning and the Rules Committee will come to order.

I would like to thank my friend, Ranking Member Alexander for joining us at this hearing and all of my colleagues to discuss the DISCLOSE Act of 2012, which our colleague Sheldon Whitehouse introduced last week.

The Supreme Court's Citizens United decision, in conjunction with other cases, has radically altered the election landscape by unleashing a flood of unlimited, often secret, money into our elections. In response to that disastrous decision, we introduced the DISCLOSE Act of 2010, which would have increased transparency by requiring full disclosure of the real sources of money behind political advertising. The House passed it. The President was ready to sign it. But in the Senate, it failed to get cloture by one vote.

Now the problem is no longer hypothetical. The public is now living with the aftermath of the Citizens United decision every time they turn on their TV sets. An endless stream of negative ads is now drowning out all other voices, including the candidates themselves. The events of the 2010 election cycle and what we have seen so far in 2012 have confirmed our worst fears about the impact of Citizens United and subsequent court decisions.

Two years ago, we were warned about these harmful effects, but the results are even worse than expected. Just this morning, we woke up to the breaking story reported by Bloomberg News that major corporations, including Chevron and Merck, gave millions to groups who ran attack ads in the 2010 elections and no one knew about it until now. That means voters two years ago were left to-

tally in the dark about who paid for the attack ads hitting the airwaves.

The trend is disturbing. According to the Center for Responsive Politics, a study they did showed that the percentage of campaign spending from groups that do not have to disclose their donors rose from a mere one percent in 2006 to 47 percent in 2010. We can only imagine by what percentage it will grow by the end of 2012, almost certainly over 50. So more than half the ads now run in America have no disclosure. That is incredible and awful, in my opinion.

And the money is coming overwhelmingly, of course, from the wealthiest Americans, as you would expect. A recent study in Politico found that 93 percent of the money that was contributed by individuals to super PACs in 2011 came in contributions of $10,000 or more. And here is the most astounding thing about Politico's study. Half of that money came from just 37 donors. Half of the money in the super PACs came from 37 donors. Is that democracy?

Even more worrisome, we are increasingly seeing contributions to super PACs from nonprofit organizations, groups that can use the tax code to hide their sources of money, and from shadowy shell corporations. Some of these groups are nothing more than a post office box in the middle of an office park.

By now, it should be clear to everyone that better disclosure is desperately needed. The 2012 DISCLOSE Act introduced by Sheldon Whitehouse, our Rules Committee colleague Senator Tom Udall, and myself, among others, is already supported by 40 Senators. It is a bill that should be acceptable to people of every stripe. That is how it was designed. That is how Senator Whitehouse and those of us working with him designed it.

The previous bill imposed bans on government contractors and foreign-owned corporations, but those bans have been taken out, even though most of the sponsors thought it was the right thing to do. The 2010 legislation also required reporting donations of $600, but that threshold has been raised to $10,000 because, as we have seen, these huge donations dwarf that amount and make a donation of $100 seem irrelevant.

The new bare bones DISCLOSE Act has two key components, disclosure and disclaimer, and it is very simple. Disclosure means outside groups who make independent expenditures in electioneering communications should disclose all their large donors in a timely manner—all their large donors. The bill includes a way to drill down to the original source of money in order to reveal those who are using intermediaries as a conduit to obscure the true funders. Through this covered transfer provision, even the most sophisticated billionaires will find it difficult to hide behind a 501(c) organization or shell corporation.

Disclaimer means that voters who are watching the political ad will know who paid for it. Under current law, candidates are required to stand by their ads. Why should outside organizations engaging in this same kind of political activity be any different? The 2012 DISCLOSE Act would make super PACs, 501(c)s, 527s, corporations, and labor unions identify their top five funders in their TV ads and top two funders in radio ads. The leader of the organization would have to stand by the ad, just like candidates must do.

Transparency is not just a Democratic priority. My colleagues on both sides of the aisle have declared their support for greater disclosure as a way to prevent corruption. And eight of nine Supreme Court Justices in the Citizens United decision supported disclosure. The potential for corruption in the post-Citizens United era is all too clear. It is time to get serious about full transparency. This bill would do that.

That is why we are holding this hearing: to examine the need for better disclosure and to discuss this particular legislation. And before we turn to our distinguished panel of experts, I want to ask my good friend Ranking Member Alexander and any other member who is here if they would like to make opening statements. As is the usual practice, I would ask that statements by members and witnesses are limited to five minutes. So without further ado, let me call on Senator Alexander.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you, Mr. Chairman. It is good to be with you on this beautiful spring day, and this hearing is as predictable as the spring flowers. In the middle of an election, my friends on the other side of the aisle are trying to change the campaign finance laws to discourage contributions from people with whom they disagree, all to take effect by July 1, 2012. I deeply appreciate the sympathy that the Chairman is showing for the victimized Republican primary candidates Santorum and Gingrich in this whole process and I am sure they would want me to thank you for that, as well.

This is a quickly called hearing——

Chairman SCHUMER. Their thanks are accepted with gratitude and humility.

Senator ALEXANDER. Thank you. A quickly called hearing, quickly drawn up bill. Most of the enthusiasm for this hearing and this bill comes, as the Chairman indicated in his remarks, because of the Citizens United legislation, which basically says that rich noncandidates and corporations have the same rights rich candidates have to spend their money in support of campaigns.

This legislation is in the name of full disclosure. I am in favor of full disclosure, but there is nothing in the Constitution about full disclosure. There is something in the Constitution about free speech. I often go by the Newseum down the street. Congress shall make no law abridging the freedom of speech, it says on the wall. The provisions in this bill chill and discourage free speech.

There is a way to have full disclosure and free speech, and that is to take all the limits off campaign contributions. The problem is the limits. These new super PACs exist because of the limits we have placed upon parties and contributions. Get rid of the limits on contributions and super PACs will go away and you will have full disclosure because everyone will give their money directly to the campaigns and the campaigns must disclose their contributions in ways that we have already agreed do not discourage free speech.

I have done some research in preparation for this and I found an especially compelling statement before this committee that was rendered just exactly 12 years ago today, March 29, 2000. Some of you were actually here that day. It was given by an obscure former

Governor who had run for President and who had permanently retired from politics, and he came before this committee and these were the words that he said. "I have come to Washington to argue one practical proposition, that the $1,000 individual contribution limit in our Presidential nominating system makes it virtually impossible for anyone except the front runner or a remarkably rich person to have enough money to run a serious campaign. This has a number of bad effects for our democracy. It limits the voters' choices and the opportunity to hear more about the issues. It gives insiders and the media more say, outsiders less. It protects incumbents, discourages insurgents. It makes raising money the principal occupation of most candidates, which in turn makes campaigns too long. The $1,000 limit was put in place in 1974 after Watergate to reduce the influence of money in politics. It has done just the reverse. I have also come with this practical solution. Raise the limit." That obscure retired former Governor was me.

And a few years earlier, Senator McCarthy, a better known retired politician, came before this committee and said he never would have been able to challenge Lyndon Johnson if Stewart Mott and others who agreed with him had not given him so much money in the 1968 campaign.

Now, the reason I am talking about limits is because if we took the limits off, we would solve the disclosure problem. Rich candidates can continue their campaigns. The super PACs have actually permitted candidates like Gingrich and Santorum and others to continue to run. Presidential races before this year were like the Patriots lose the first three games, we tell them to get out of the race. If Tiger Woods shoots 40 on the front nine, we say, end the Master's. In the NFL and at the Master's, you play all the way through to the end. Having money is what you need to play all the way through to the end. And if Senator Kerry and Steve Forbes have their own money, then others ought to be able to contribute their money.

So, Mr. Chairman, as long as we have a First Amendment to the Constitution, individuals and groups have a right to express themselves. And the best way to combine free speech with full disclosure in a way that does not chill free speech is to take off all the limits which would cause most contributors to give to campaigns. It would drop the super PACs. And it would make this legislation, which chills free speech, completely unnecessary.

Thank you, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Alexander.

Senator Feinstein.

OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN. Mr. Chairman, I thank you very much.

Given what we have seen in the Republican primary this year, I really believe we must try to pass the DISCLOSE Act. In 2010, we came close to passing it and it looks like we need just one additional vote to move the bill forward now.

This new Act is a critical step, really, to ensure that corporate dollars will not flow in the dark to one candidate against another, but instead, our election process will regain the transparency it has lost after Citizens United.

I find this whole hidden, shadowy world of the super PAC to be really discouraging, and I suspect it is going to have a very discouraging impact on candidates that have not yet run for office but might be considering to run for office. There is really no way the average person, new candidate, can fight it. So if a company does not like what you are doing, whether it is a big bank and you are for financial reform, go out and get this person with untold, unknown millions of dollars. I do not think it is the American method of electing candidates.

I think this is the first step forward. I was really surprised at the Supreme Court, and I want to thank the author and I want to thank you and hopefully we can move on with this.

Chairman SCHUMER. Thank you, Senator Feinstein.

Senator Blunt.

OPENING STATEMENT OF SENATOR BLUNT

Senator BLUNT. Thank you, Mr. Chairman. Thank you for holding this hearing today. I appreciate the opportunity to discuss the DISCLOSE Act.

I have some concerns with the bill. As a former Secretary of State of Missouri, where I also served as the chief election official, I am particularly interested in policies that affect elections. I believe this bill would place additional burdens on nonprofits as they seek to advocate for public policies. I am also concerned, as Senator Alexander was, about the First Amendment challenges that I believe this bill would present.

Before we consider adding new restrictions, I think we would be well served to carefully examine our current laws and ensure they are having their intended effect. Mr. Chairman, I would suggest that might be a good topic for another hearing, particularly in this election year, to look at the laws we have on the books now.

I am pleased we are having this hearing. I look forward to hearing from the witnesses and thank you for holding it, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator Blunt.

Senator Durbin.

OPENING STATEMENT OF SENATOR DURBIN

Senator DURBIN. Chairman Schumer, thank you for the hearing. I support the DISCLOSE Act.

We are not talking about super PACs. We are talking about super secret PACs, and the question is whether there ought to be any transparency so the people of America know who is paying for the information that is being shoveled at them.

We have seen a dramatic increase in these independent expenditures to the point where mere mortals who dare run for office have to wonder whether they are going to be overrun by some super PAC or some individual or some special interest group, regardless of the merits of their campaign or what the voters may care for in their district.

And I think what we are doing here is introducing an element into the body politic which is fundamentally corrupting. Senators who have to wonder whether this morning's speech on the floor or this afternoon's vote or tomorrow's amendment just might irritate a Los Vegas casino magnate, or two billionaire brothers who made

a fortune in oil, or a retired plutocrat lounging in Jackson Hole, because tomorrow, the world may change for you.

We have seen candidates in this race already for the Senate, for reelection, with more than $5 million being spent by March before the election in negative ads by super PACs in their States. That is a phenomena which is not conducive to an active, positive, and productive debate among voters in this country about where this country should go and how it should move forward.

And now, for something totally different, I support the DISCLOSE Act, but I really believe that we need to get to the heart of the matter, and that is why I have introduced the Fair Elections Now Act, public funding. States as diverse as Maine and Arizona have voted by referendum to move to public funding. Take the special interests and the fat cats out of the picture. Shorter campaigns, less money spent, direct contact with voters instead of sitting for endless hours on a telephone begging for money from strangers, that is what they think is the right thing for the future of their States. I think it is the right thing for the future of this country.

Major reform, unfortunately, often requires a major scandal. Sadly, this year's campaign for President is building up to a major scandal when it comes to fundraising and the amount of money spent. Will it be enough? Will it be the breaking point for real change? I hope that this bill passes. I hope the DISCLOSE Act starts basically lifting the veil on some of the expenditures that are taking place. But we need to step beyond this or we run the risk of dramatically changing this democracy which we all love.

Chairman SCHUMER. Thank you, Senator Durbin.

I just want to thank particularly Senator Udall for being here. He has been an active member of the task force, has introduced legislation, which does not come before this committee, it comes before our most junior member's committee——

[Laughter.]

Chairman SCHUMER [continuing]. Chairman Leahy, which would undo Buckley v. Valeo, which is the whole decision that started us in this somewhat convoluted way of dealing with campaign finance reform and has been a real leader here. So we thank him for coming and call on him for an opening statement.

OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you, Chairman Schumer. This is an important bill and I really appreciate you holding a hearing on it.

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

The Citizens United and SpeechNow decisions renewed our concerns about campaign finance, but the Court laid the groundwork for this broken system many years ago. In 1976, the Court held in Buckley v. Valeo that restricting independent campaign expenditures violates the First Amendment right to free speech. In effect,

the Court established the flawed precedent that money and speech are the same thing.

The damage is clear. Elections become more about the quantity of cash and less about the quality of ideas, more about special interests and less about public service. I don't think we can truly fix this broken system until we undo the flawed premise that spending money on elections is the same thing as free speech. That can only be achieved if the Court overturns Buckley or we amend the Constitution. Until then, we fall short of the real reform that is needed.

But we can still do all that we can in the meantime to make a bad situation better. That is what we are trying to do with the DISCLOSE Act. It is not the comprehensive reform that I would like to see, but it is what is possible under the flawed Supreme Court precedents that constrain us. The DISCLOSE Act of 2012 asks the basic and imminently fair question, where does the money come from and where is it going? This is a practical, sensible measure. It does not get money out of our elections, but it does shine a light into the dark corners of campaign finance.

A similar bill in the last Congress had broad support with 59 votes in the Senate and it passed the House. Now that we are seeing the real impact of Citizens United and SpeechNow decisions on our elections, the need for this legislation has become even more apparent. The downpour of unaccountable spending is wrong. It undermines our political process. And it has sounded an alarm that is truly bipartisan.

I recall the debate when we considered the DISCLOSE Act in the last Congress. Many of our concerns then were still hypothetical. We could only guess how bad it might get. Well, now we know. Unfortunately, our worst fears have come true. The toxic effect of Citizens United and subsequent lower court rulings have become brutally clear. The floodgates to unprecedented campaign spending are open and threaten to drown out the voices of ordinary citizens.

Look at what we have seen already, and we are already in the primary season. Huge sums of money flooding the airwaves. An endless wave of attack ads paid for by billionaires. The poisoning of our political discourse. The spectacle of 501(c)(4), so-called "social welfare" organizations, abusing their nonprofit status to shield their donors and funnel money into super PACs. They spend at will and they hide at leisure.

The American public, rightly so, looks on in disgust. A recent Washington Post-ABC News poll found that nearly 70 percent of registered voters would like super PACs to be illegal. Among independent voters, that figure rose to 78 percent. Supporters of super PACs and unlimited campaign spending claim they are promoting the democratic process, but the public knows better. Wealthy individuals and special interests are buying our elections. Our nation cannot afford a system that says, "come on in" to the rich and powerful and says, "do not bother" to everyone else. The faith of the American people in their electoral system is shaken by big money. It is time to restore that faith. It is time for Congress to take back control.

There is a great deal to be done to fix our campaign finance system. I will continue to push for a constitutional amendment. We need comprehensive reform. But in the interim, let us at least

shine a light on the money. The American people deserve to know where this money is coming from and they deserve to know before, not after, they head to the polls. That is what the DISCLOSE Act will achieve.

Chairman Schumer, I want to thank you again on this hearing and look forward to hearing from our witnesses and ask that my entire statement will be put in the record.

[The prepared statement of Senator Udall included in the record]

Chairman SCHUMER. Without objection.

Last, but not least, and we joke about him being the member way down there, but his knowledge of all of these issues and the fact that the Judiciary Committee is actively involved in this issue, particularly on the constitutional side, make us really glad that he is a member of this committee. It will help us as we move forward greatly in this effort. So Chairman Leahy.

OPENING STATEMENT OF SENATOR LEAHY

Senator LEAHY. Well, thank you, Mr. Chairman. I appreciate the fact that we new guys get a chance, also, to speak on this.

I did join with you and the others in reintroducing the DISCLOSE Act. I think it is an important hearing and I appreciate you having this. Our efforts to restore transparency in campaign finance laws were gutted by a narrow conservative activist majority of the Supreme Court and we cannot wait any longer. By the stroke of a pen, five Supreme Court Justices overturned a century of law designed to protect our elections from corporate spending, ran roughshod over longstanding precedent, struck down key provisions of our bipartisan campaign finance laws.

And I remain troubled today that the Supreme Court extended to corporations the same First Amendment rights of the political process that are guaranteed by the Constitution to individual Americans. Corporations are not the same as individual Americans. Corporations do not have the same rights or the same morals or the same interests. They cannot vote in our democracy. If you followed them to logic, you would say, logically, what the Supreme Court has said about them being persons, you would say, well, this country elected General Eisenhower as President. Should we not elect General Electric as President? We know we have elected a lot of yahoos as Vice Presidents. I think of people like Millard Fillmore. Why not elect Yahoo!, a corporation, as Vice President?

The Founders understood this. Americans across the country long understood that corporations are not people in this political process. And unfortunately, a very narrow majority of the Supreme Court apparently did not want to believe what all Americans have believed.

Like all Vermonters, I cherish our democratic process, cherish the fact that Vermont has one of the highest turnouts for elections of any State in the Union. But we ought to be heard as Vermonters and not be undercut by corporate spending, but that is exactly what is happening with the waves of corporate money being spent on elections around the country. And it will continue to happen until we start to take action by passing the DISCLOSE Act.

When I cosponsored the first DISCLOSE Act after the Supreme Court's decision in 2010, I hoped Republicans would join with

Democrats to mitigate the impact of it. We were trying to restore much of the McCain-Feingold law. All we needed was to have one Republican vote to restore McCain-Feingold, and we could have done it. Instead, we did not and they filibustered it and we needed that one vote and we did not get it.

I think this is going to hurt both parties if they are unable to do that. It has ensured that the flood of corporate money flowing from undisclosed and unaccountable sources, such as Citizens United, would continue. And the Chairman mentioned the sudden and dramatic effects in the Republican primaries, but this could happen on either side, this barrage of negative advertisement from so-called super PACs. I would advise my colleagues on both sides of the aisle, this uninhibited, undisclosed spending is hurting every one of us.

It is one of the reasons why the American people are so turned off on how government is run and politics are run. It is going to hurt every single person. But more importantly, it is going to hurt the institutions I cherish. The Congress—it is going to hurt the ability of Republicans and Democrats to work together for the best interests of the country.

My State of Vermont is a small State. It would not take more than a tiny fraction of the corporate money playing the airwaves to outspend every single Republican and every single Democrat in our State running for anything. That is wrong. You know, if the local city council or the zoning board is considering an issue of corporate interest, what is to stop the corporations from just wiping them out?

So I would urge my colleagues, whether you are a Republican or a Democrat, you have an interest in getting government back where everybody knows who is involved in the government, everybody knows who is spending in the government, and you have a chance for the candidates actually to have their voices to be heard.

I will tell you, if we do not do this, the inability of good people in either party to come forward is going to stop and the disrespect of our institutions, including the United States Supreme Court, will grow, and I can tell you right now, this country will suffer.

Thank you.

Chairman SCHUMER. Thank you, and I would like to thank all of our colleagues for their excellent statements.

Now, we will ask our witnesses to come forward. Okay. I have a brief introduction for each witness, all of whom are well known in this area.

Mr. Fred Wertheimer is the President of Democracy 21, which he founded in 1997. He was previously President of Common Cause and has served as a Fellow at Harvard University and visiting lecturer at Yale Law School. He has been a nationally recognized leader on campaign finance and transparency reform. He serves as an analyst at CBS News and ABC News.

Mr. David Keating is the President of the Center for Competitive Politics and former Executive Director of the Club for Growth. Previously, he served as Executive Vice President of the National Taxpayers Union and Executive Director of Americans for Fair Taxation. He founded the SpeechNow.org in 2007.

Rick Hasen is a Chancellor's Professor of Law at the University of California, the Irvine School of Law, and is the author of the Election Law Blog. He has written more than four dozen articles on election law issues and several books, including the Supreme Court and Election Law. He previously taught at Loyola Law School in Los Angeles and at the Chicago Kent School of Law.

Thank you all for coming, gentlemen. Each of your statements will be read into the record and we would ask you to limit your opening statements to five minutes each.

Mr. Wertheimer.

STATEMENT OF FRED WERTHEIMER, FOUNDER AND PRESIDENT, DEMOCRACY 21

Mr. WERTHEIMER. Chairman Schumer and members of the committee, I am Fred Wertheimer, President of Democracy 21, and I appreciate the opportunity to testify today in support of the DISCLOSE Act.

If the opportunity arises later on, I would like to address Senator Alexander's long-held views about contribution limits, but I will focus my comments now on the DISCLOSE Act.

The DISCLOSE Act restores a cardinal rule of campaign finance laws. Citizens are entitled to know who is giving and spending money to influence their votes. This fundamental right to know has been recognized for decades by Congress in passing campaign finance laws and by the Supreme Court in repeatedly upholding the constitutionality of the laws.

In 2010, more than $135 million in undisclosed, unlimited contributions were injected into the Congressional race. This amount is expected to dramatically grow in 2012 in terms of the undisclosed contributions absent new disclosure requirements. This has returned the country to the era of the Watergate scandals, when huge amounts of secret money were spent in Federal elections. Secret money in American politics is dangerous money. As the Supreme Court held in Buckley v. Valeo, disclosure requirements deter actual corruption and avoid the appearance of corruption.

The DISCLOSE Act would ensure that citizens know on a timely basis the identities of and amounts given by donors whose funds are being used to pay for outside spending campaigns in Federal elections.

New disclosure laws were enacted during the Watergate era to address the problem of secret money in Federal elections, and from the mid-1970s until 2010, there was a consensus in the country and in the Congress among Democrats and Republicans alike in support of campaign finance disclosure. In 2000, for example, in response to a disclosure loophole that was allowing certain 527 groups to spend undisclosed money in Federal elections, a Republican-controlled Congress acted to close the loophole. Congress passed the new disclosure legislation with overwhelming support from Republicans and Democrats. The House vote was 385 to 39. The Senate vote was 92 to six.

Bipartisan support for disclosure, however, disappeared in 2010. The policy issues have not changed, but the votes have. We urge the Senate to return to the bipartisan approach of support for cam-

paign finance disclosure that was the rule for almost four decades in the Senate and in the House.

These gaping loopholes in the disclosure laws were caused by a combination of the Citizens United decision and ineffectual FEC regulations. This problem has been made all the more worse by groups improperly claiming tax-exempt 501(c)(4) social welfare organization status in order to keep secret their donors. We have petitioned the IRS to change their regulations to deal with eligibility for this tax status and I would like to enclose those petitions in the record.

[The information of Mr. Wertheimer included in the record]

Chairman SCHUMER. Without objection.

Mr. WERTHEIMER. The Citizens United decision was based on a false assumption that in striking down the corporate ban, there would be effective disclosure for the independent campaign expenditures that followed. Justice Kennedy wrote, "A campaign finance system that has corporate independent expenditures with effective disclosure has not existed before today." That effective disclosure still does not exist, and that is what will be cured by the DISCLOSE Act.

There is no constitutional problem with disclosure and no constitutional problem with the DISCLOSE Act. The Supreme Court, by an eight-to-one vote in Citizens United, upheld disclosure for the kinds of expenditures that are dealt with in this legislation.

The Court specifically noted the problems that result when groups run ads while hiding behind dubious and misleading names and thereby conceal the true source of their funds. The Court also explicitly rejected the argument that disclosure requirements can only apply in the case of express advocacy or the functional equivalent of express advocacy.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Wertheimer included in the record]

Chairman SCHUMER. Thank you, and you finished exactly in five minutes. You are a well rehearsed witness, Mr. Wertheimer, as well as a very good one.

Mr. KEATING.

STATEMENT OF DAVID KEATING, PRESIDENT, CENTER FOR COMPETITIVE POLITICS

Mr. KEATING. Mr. Chairman and members of the committee, thank you for inviting the Center for Competitive Politics to present our analysis of S. 2219.

While the stated goal of the bill is to increase disclosure on spending to elect or defeat candidates, the radical proposal actually chills speech, forces nonprofits to fundamentally alter their fundraising and public advocacy efforts, and hijack 25 percent or more of the advertising copy during an election year if it simply mentions the name of a Congressman. I think many of these provisions will generate significant First Amendment questions and will generate litigation that has a good chance of success.

Now, perhaps the most infamous provision of the McCain-Feingold bill was its restriction on the ability of groups to even mention the name of a Congressman running for reelection within 60 days

of a general election or 30 days of a primary. This bill would stretch that restriction to the entire election year for members of Congress. That change would wreak havoc on groups that want to use TV or radio ads to lobby Congress or candidates.

In my testimony, I give the example of an environmental group that might want to run an ad urging support for a bill to regulate carbon dioxide. Under the bill, it might have to disclose all significant donors, several of whom might even work for a utility or maybe even a coal company. Now, these donors might have supported the group's clean water efforts in response to appeals for funds on that basis, yet had not thought to earmark their checks. Yet they may be listed on the ad itself as supporting the ad when, in fact, they do not support any such thing.

Now, another thing that is not talked about in this bill at all, from what I can tell, is the disclaimer requirements, which are just totally ridiculous. Consider, under today's law, a radio ad that would run right now, when there is no primary within 30 days. The ad for this group that I list in my testimony, which I made up, American Action for the Environment, the radio ad would just say at the end, "Paid for by American Action for the Environment." Well, I think most Americans would think that is a pretty good disclaimer under the law today. You know who is running the ad. You know who paid for it.

But the bill would require this, and it is going to take about ten percent of my testimony to read the disclaimer on this radio ad. It would have to say something like this, and no editing really is allowed. The FEC Commissioners behind me could affirm this because the group that I used to work at once asked for an exemption from some of these disclaimers and they said the FEC could not grant it due to the law.

It would say, "Paid for by American Action for the Environment, www.AmericanActionfortheEnvironment.org," or the address or phone number, "not authorized by any candidate or candidate's committee, and I am John Smith"—I am not really John Smith, obviously—"the Chief Executive Officer of American Action for the Environment, and American Action for the Environment approves this message. Major funders are Ronald B. Coppersmith and Donald Wasserman Schultz."

Now, that disclaimer took about 20 seconds to speak. How are groups supposed to purchase a 30-second radio ad if you have a 20-second disclaimer? And I have not even mentioned groups with longer names, such as the American Academy of Otolaryngology, Head and Neck Surgery. This is ridiculous to have this kind of disclaimer on a radio ad.

Now, all this is totally unnecessary. Current law already requires disclosure of all spending to the FEC for all independent expenditures and electioneering communications and all contributions over $200 a year to further such communications. I have given examples of this disclosure in my written statement.

Now, there is more in this bill that goes far beyond disclosure and adds confusion to an election code and regulations and that are already just too complicated. I tell people election law makes the tax code look simple by comparison. There is a new and, what I

consider, indecipherable definition of express advocacy and that really should be deleted from the bill.

In conclusion, I want to emphasize that, this bill piles new costs on nonprofits and other speakers, costs that are certain to chill speech and appear intended to accomplish indirectly through costly and arbitrary compliance provisions, long disclaimers, what Congress may not do directly under the First Amendment, and that is silence dissent and speech. Thank you.

[The prepared statement of Mr. Keating included in the record]

Chairman SCHUMER. Mr. Hasen. Professor Hasen, excuse me.

STATEMENT OF RICHARD L. HASEN, CHANCELLOR'S PROFESSOR OF LAW AND POLITICAL SCIENCE, UNIVERSITY OF CALIFORNIA–IRVINE SCHOOL OF LAW

Mr. HASEN. Chairman Schumer, Ranking Member Alexander, and members of the Rules and Administration Committee, thank you very much for the opportunity to be here today to testify about the DISCLOSE Act.

I strongly support the measure as a way of closing loopholes and requiring the disclosure of information which will deter corruption, provide the public with relevant information, and allow for the enforcement of other laws, such as the bar on foreign money in U.S. elections.

The proposed legislation uses high-dollar thresholds and enables contributors to tax-exempt organizations to shield their identity when making non-election-related contributions. These steps ensure that the First Amendment rights of free speech and association are fully protected. I hope the Senate returns to its prior bipartisan consensus in favor of full and timely disclosure.

We have heard what Justice Kennedy thought the world after Citizens United would look like, and unfortunately, that world has not materialized. The main problem is that action has shifted from PACs and 527 organizations, which have to disclose all of their contributors, to new 501(c)(4) and other types of 501(c) organizations which require no public disclosure of contributors. And under the FEC rules, most contributors who are funding electioneering communications are not disclosed.

How serious of a problem is secret money? The Center for Responsive Politics found that in 2010, the spending coming from groups that did not disclose rose from one percent to 47 percent since the 2006 mid-term elections and that 501(c) spending increased from zero percent of total spending by outside groups to 42 percent in 2010.

Furthermore, with the rise of super PACs, contributors can easily shield their identity from the public, hiding behind innocuous names like Americans for a Strong America. The public does not get the information on who is funding the ads when it needs it the most, when it hears the ads.

Even worse, contributors can shield their identities by contributing to a 501(c)(4), which in turn donates to a super PAC, as recently happened when nearly half of FreedomWorks' super PAC contributions came from its sister 501(c)(4). Disclosing that FreedomWorks' contributions came from FreedomWorks is not helpful to voters.

I now turn to the benefits of the bill. The first benefit of all disclosure bills is that they can prevent corruption and the appearance of corruption. While the first best solution might be to return to the days before Citizens United and bar corporate spending in elections, disclosure is an important, though second-best, alternative to corporate spending limits to ferret out corruption.

Second, disclosure laws provide valuable information to voters. This was apparent to California voters recently when they turned down a ballot proposition that would have benefitted Pacific Gas and Electric. PG&E provided almost $46 million to the Yes on 16 Campaign, compared to very little spending on the other side. Thanks to California's disclosure laws requiring top contributors' names to be mentioned, PG&E's name appeared on every Yes on 16 ad and the measure narrowly went down to defeat. The DISCLOSUE ACT has a similar kind of provision.

Third, the DISCLOSE Act would help enforce other campaign finance laws. If you are worried about foreign money in elections or conduit contributions, where one person gives through another, the only way to find these out is through adequate disclosure.

Finally, let me turn to the question of whether the DISCLOSE Act would face First Amendment challenge. We have heard that in Buckley v. Valeo and in Citizens United and in other cases, the Supreme Court has repeatedly and nearly unanimously upheld disclosure laws, going much further than just the requirement of disclosure as to express advocacy. But the Supreme Court has also stated that if a group can demonstrate a history or a threat of harassment, it is entitled to a constitutional exemption from those rules.

As to harassment, in a forthcoming article in the Journal of Law and Politics of the University of Virginia, I closely analyzed the claims of harassment that have been made in recent court cases surrounding controversial ballot measures about gay marriage and gay rights. Both of the district courts found that harassment is not a serious problem, and if it is, there is the entitlement to an exemption.

The DISCLOSE Act provisions are ingenious in allowing contributors to nonprofits to keep information private when their money is going to be used for non-election purposes. The nonprofit can set up a separate account only for election purposes. The DISCLOSE Act sensibly targets the activity, contributing money to election-related ads, rather than the type of organizational forum. If someone is contributing money to run an election ad, that should be disclosed, regardless of the name of the organization that is used.

Thank you again for the opportunity to speak and I welcome your questions.

[The prepared statement of Mr. Hasen included in the record]

Chairman SCHUMER. Thank you, and I thank all three witnesses for their testimony.

My first question is to Mr. Keating. Mr. Keating, as you know, the example Professor Hasen used, where somebody contributes a great amount of money to a 501(c)(4), the 501(c)(4), a shell organization, gives it to the super PAC or the 501(c)(3) and just discloses the name of that 501(c)(4), your written testimony does not account for that loophole. Do you not agree that there is no effective disclosure when a 501(c)(4) is given a large contribution and a certain

percentage—a large percentage of that money is used to put ads on TV?

Mr. KEATING. Well, I think there are already laws—a law against contributing in the name of another. It is already in the election laws——

Chairman SCHUMER. No, no, no. But what——

Mr. KEATING. If——

Chairman SCHUMER. Mr. Keating, let me——

Mr. KEATING. Yes.

Chairman SCHUMER. You have got to answer the specific question. He said that FreedomWorks, just having FreedomWorks be the listing is not adequate. It does not tell us anything. You can have a false name in your example. Citizens Against Pollution could be funded by people who want to remove pollution controls. So just having any name on the ad does not tell you anything. The name could be deliberately deceptive. Do you disagree with that, that simple proposition that 99 percent of all Americans would say, yes, sure, obviously.

Mr. KEATING. So if a group like the Sierra Club runs an ad, we need to know, are the donors to the Sierra Club—I mean, that is the implied——

Chairman SCHUMER. No, but let us say the Sierra Club——

Mr. KEATING [continuing]. Behind the question——

Chairman SCHUMER. Let us say the Sierra Club wants to take out somebody who is a defender of—in a State where coal is used and they set up an ad campaign saying, Citizens for Coal Use, and then fund ads against that person, that candidate, that incumbent, on an unrelated issue. Disclosure does no good. In fact, it is deceptive. Yes, if they use the name the Sierra Club, people know what the Sierra Club is. You are using an obvious example. But they could set up a shell organization with a totally opposite name, the Pollution Club.

Mr. KEATING. And under the law today——

Chairman SCHUMER. All that would be disclosed, and you seem to be defending it, is the name Pollution Club.

Mr. KEATING. No, that is incorrect, Mr. Chairman.

Chairman SCHUMER. That is absolutely correct if they give to a 501(c)(4).

Mr. KEATING. No, you are incorrect about that. If it is an independent expenditure, that group needs to report the donors used for that independent expenditure. That would be listed in the FEC filings. So we would know that the Sierra Club gave to this front group that you are talking about here.

Mr. WERTHEIMER. If I could——

Chairman SCHUMER. Go ahead, Mr. Wertheimer.

Mr. WERTHEIMER [continuing]. Step in at this point, the statute does require contributors to be disclosed. The regulations issued by the FEC have gutted the disclosure provision.

Chairman SCHUMER. Explain how.

Mr. WERTHEIMER. That is how—because they have limited the disclosure to only individuals who give for the specific purpose——

Chairman SCHUMER. Exactly.

Mr. WERTHEIMER [continuing]. Of running those ads, and no one says they do. That is how we wound up with $135 million——

Chairman SCHUMER. Right.

Mr. WERTHEIMER [continuing]. In undisclosed contributions.

Chairman SCHUMER. Correct, and the effect, the practical effect is we do not know where this 501(c)(4) money is coming from, and we will never know. That is the bottom line, is that not correct, Professor Hasen?

Mr. HASEN. Yes. I think that if you listen to Mr. Keating very closely, he talked about disclosure of contributions funding independent expenditures.

Chairman SCHUMER. Right.

Mr. HASEN. What is happening, technically speaking, is that these groups are running electioneering communications, which as Mr. Wertheimer explained, contributions to fund electioneering communications are not adequately disclosed thanks both to FEC regulations as well as a deadlock on the FEC as to how the rules should be——

Chairman SCHUMER. So my example is correct.

Mr. HASEN. I believe so, yes.

Chairman SCHUMER. Thank you. Okay. My time is running out, and we will try to have a second round, but I want to try to stick to the five minutes.

So my second question just goes to Mr. Wertheimer. Senator Alexander and others have suggested removing contribution limits for candidates and parties—that was a key part of McCain-Feingold—would be a solution. Can you just give us a brief sketch of what would happen in the political landscape if we did that? I take it, Senator Alexander, your proposal would be that then everything would be disclosed. If someone wanted to give to a 501(c)(4) or an independent expenditure, there would be disclosure of that if we lifted all limits, is that——

Senator ALEXANDER. I am assuming, Senator Schumer, that if the limits were lifted, that people would give to campaigns and the campaigns and candidates would disclose. There would be no reason to give to a political——

Chairman SCHUMER. Except——

Senator ALEXANDER [continuing]. Super PAC or operation.

Chairman SCHUMER. Unless you did not want to disclose.

Senator ALEXANDER. Well——

Chairman SCHUMER. Okay. But anyway, why does Mr. Wertheimer not just give us a little example of why—a little sketch of what might happen, in his opinion.

Mr. WERTHEIMER. Well, I think, in my view, that would take us back to a system of legalized bribery that we used to have years ago, and let me give a few comments from people other than me about this.

The Supreme Court in Buckley v. Valeo said contributions were necessary to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions. An inherently corrupt system is what the Supreme Court called a system of unlimited contributions.

Former Republican Senate Whip Alan Simpson said about the unlimited soft money system, the system of unlimited contributions to national parties, quote, "prostitutes ideas and ideals, demeans democracy, and debases debates. Who, after all, can seriously con-

tend that a $100,000 donation does not alter the way one thinks about, and quite possibly votes on, an issue?"

Former Republican Senator Warren Rudman said about the unlimited soft money system, "I know firsthand and from working with colleagues just how beholden elected officials and their parties can become to those who contribute to their campaigns and to their parties' coffers. Individuals on both sides of the table recognize that larger donations effectively purchase greater benefits for donors." Unlimited contributions to the parties, quote, "affect what gets done and how it gets done. They affect outcomes, as well."

And one last quote from a former colleague, a late former colleague of the Senate, Senator Russell Long, the Chairman of the Finance Committee, who well knew his way around campaign money. He once said, "The distinction between a large campaign contribution and a bribe is almost a hairline's difference."

So my view is, we go back to a system of buying results in Congress, direct purchases, if we go back to a system of unlimited contributions.

Chairman SCHUMER. But certainly in—and I am not going to ask you to respond to this because my time is up—what Senator Alexander, my good friend, who I have tremendous respect and affection for—and that is God's honest truth – is suggesting we would go back to the old system. Basically, he is saying, let us go back to the system with no limits which was in existence 30 years ago, right?

Mr. WERTHEIMER. It was in existence when we got Watergate.

Chairman SCHUMER. Before 1974, right. Okay.

Senator Alexander.

Senator ALEXANDER. Thank you, Senator Schumer. Thanks for asking Mr. Wertheimer that question. I was going to ask him that if you did not.

Of course, Senator McCarthy in testimony before this committee said the following. "Watergate was cited as an example of corruption of the system, although there was nothing in Watergate that would have been prevented or made illegal by the 1975 Act," which was the Act identifying limits on contributions.

I would like to come back to limits on contributions just a minute with Mr. Keating. Let me ask you, do you think if the DISCLOSE Act as it is written passed, there would be less spending by the groups affected on elections?

Mr. KEATING. It is hard to say, Senator. There is no way of knowing in advance. I think there probably would be less spending. There certainly would be massive disruption in the way many of these organizations need to handle their fundraising efforts.

And I did want to mention something, which is what one of the other witnesses identified as a problem in the regulations or the law. If there is a problem with that, why would you not just take a surgical knife and just fix that one small problem?

I can tell you, I recently worked at the Club for Growth, and that group was a qualified nonprofit corporation. Before Citizens United, that group, as well as the League of Conservation Voters, Planned Parenthood, and some other groups, were allowed to do independent expenditures from their general funds. We did not raise money for independent expenditures from people. We ran

independent expenditures out of our general budget. Now, that is something that I think most people—most Americans would agree that groups like—whether it is the Sierra Club or something else—should be able to fund these ads out of their own budget.

If there is consensus that the problem with disclosure is created by a vague law or the regulations being vague about raising money for independent expenditures or electioneering communications, then why not just fix that one thing? This bill goes way beyond that, way beyond that, to cover anything that is run during an entire election year.

Senator ALEXANDER. Mr. Keating——

Mr. KEATING. I think that goes too far.

Now, as far as——

Senator ALEXANDER. Mr. Keating, you are using up all my time.

Mr. KEATING. Oh, I am sorry.

Senator ALEXANDER. Let me ask you this question. Do you think if we took all the limits off contributions to campaigns, do you think that would tend to dry up super PACs?

Mr. KEATING. I think a lot of this money going to super PACs would go directly to the candidate. I do not have any doubt in my mind, because——

Senator ALEXANDER. And if it went to the candidate, it would be fully disclosed, is that right?

Mr. KEATING. Absolutely.

Senator ALEXANDER. Under current rules. On limits, I have a little different view than Mr. Wertheimer and I have a little different experience than he does. I have actually run in a Presidential campaign with limits and in other campaigns, and here is the way it works. Because of the limits in 1995, when I was a candidate, I went to 250 fundraisers to try to get money from people who could not give more than $1,000. So I spent a lot of time with people who could afford to give $1,000, 70 percent of my time, probably, over a year. That is 250 events. That raised $10 or $11 million.

At the same time, Steve Forbes was able to spend $43 million of his own money. That is what he did in 1996, and in 2000, he spent $38 million of his own money.

I told that to Senator Kerry when I was on the Harvard faculty in the early 2000s and I said, you know, there has never been a credible candidate for President who spent his own money, and if you are ever in that position and you did it, it would probably help you. He was in that position in 2003. Howard Dean was beating him pretty badly in terms of the amount of money raised. Dean had raised $14 million, Kerry $4 million, and the media was saying, Kerry cannot raise money. Therefore, he will not make a good President. Kerry put $6 or $7 million of his own money in and won the Iowa caucus and became the nominee.

I watch FOX and MSNBC sometimes when I am down in the gym with Senator Schumer watching television and they run ads regularly, just the way that—I mean, their broadcasts are ads, in many cases, for a political point of view. That is their right to do. In countries where we do not have a democracy, the first thing the leaders do is to take over the television stations and keep everybody else from having enough money or resources to advertise their views.

So it seems to me that as long as we have a First Amendment, as long as we have a First Amendment that permits Steve Forbes, a fine American, John Kerry, a fine American, and others to spend their own money, that all we are doing with limits is turning Washington into a city of panderers for $1,000 and $2,000 contributions. Before 1975, we did not spend all our time at fundraisers. After 1975, Congressmen did, and the only reason you do is because you cannot raise money in sufficient amounts to run a campaign that buys enough television time to compete with the ads the TV stations are already running or the ads that rich Americans might buy because they have the money themselves.

So taking the limits off would solve almost all of the disclosure problem because the money would then be given to candidates and campaigns and more people would participate, campaigns would run longer, as they have this year in the Republican primary, more voters would have a chance to vote, and elected officials would spend a lot less time with people who are trying to give them money.

Chairman SCHUMER. Thank you, Senator Alexander, but just one point I would make. If you do not—still, if you do not require disclosure of the super PACs, there will be people who will want to give undisclosed, so you will still have that ability to do it. But if you want to give a million dollars to the candidate, you will have to disclose it.

Senator ALEXANDER. Yes. If you give to the President's super PAC, you have to disclose that.

Chairman SCHUMER. So my only question, just for clarification, because he has put out an alternative, is are you recommending that there be some kind of disclosure in the 501(c)(4)s, (c)(6)s, (c)(3)s, in addition to removing the limits?

Senator ALEXANDER. If you are willing to remove the limits, I am willing to discuss with you what the disclosure definition ought to be.

Chairman SCHUMER. Thanks. Okay. I appreciate that.

Senator Feinstein.

Senator FEINSTEIN. I have been sitting here reflecting on the change in times. Mr. Keating mentioned that disclosure, sunlight, knowledge, was a radical idea, and I was really taken aback by that because I do not see how it possibly can be. This bill is modest. You can give under $10,000 without disclosure to a super PAC. It is over $10,000. Now, someone that contributes over $10,000 generally has some kind of motivation to contribute. The disclosure simply allows individuals to look at this and see who is supporting a candidate or a cause. What about this is such a radical idea, Mr. Keating?

Mr. KEATING. Well, Senator, it sounds like I may have been misinterpreted or I misspoke, but I was talking about the bill itself, not the concept of disclosure being a radical concept.

There are provisions in this bill that I consider radical and I think perhaps the most radical is the government-mandated disclaimer that goes on for 20 seconds or more, in many cases, on a radio ad. Now, this would cover all radio ads that mention the name of a Congressman, something as simple and innocuous as a bill being before Congress and it says, "Call Congressman Smith

and urge him to vote for the bill." You would have to run an ad at least a minute long to even hope of getting your message across.

So you are going to drive up the costs of these ads, and I do not understand why we need a disclaimer that goes on for 20 seconds when something as simple as "Paid for by Americans for Action for the Environment" does the trick. To me, that is a radical approach, requiring groups to state a bunch of bureaucratic nonsense in a disclaimer that drives up the cost of advertising by a tremendous amount.

Senator FEINSTEIN. Well, I am running for reelection, in a big State, very expensive for television, and yet I should be responsible for the ads I put up on television. Therefore, the disclaimer is important because it says to people that the ad is speaking for me and I take responsibility for it. What is radical about that?

Mr. KEATING. Well, I think what is radical about it is the bill specifies a disclaimer that goes on seemingly forever when it could be said in far fewer words.

Senator FEINSTEIN. Mr. Wertheimer.

Mr. WERTHEIMER. Mr. Keating has focused on the radio ads. Let us move to the TV ads for a minute. The TV ads require the head of an organization to take responsibility for the ad in the same way that you have to take responsibility for your ad, so that there is accountability and responsibility for campaign ads. The TV ads also require the ad to list the top five donors, but that can be done in a crawl and would take up no time from the content of the ads.

With respect to the radio ads, there were provisions added last time that are still in this bill that give the FEC the power through regulation to exempt the kinds of ads that Mr. Keating——

Mr. KEATING. That is incorrect.

Mr. WERTHEIMER. It is correct. It is in the bill.

Mr. KEATING. No, it is not. For radio? It is not correct. It only exempts the major donor listing, not the rest of the disclosure.

Mr. WERTHEIMER. Well——

Senator FEINSTEIN. My time——

Chairman SCHUMER. Let me just—there is a hardship exception which the FEC can use for just what you are talking about. You are correct, Mr. Wertheimer.

Senator FEINSTEIN. If the disclosure is too long or burdensome——

Chairman SCHUMER. Now, it takes eight seconds. Of course, if you say it very slowly, you could stretch it out to 20 seconds if you should want to. It takes eight. There is a hardship exception.

Senator FEINSTEIN. Yes, please.

Mr. HASEN. I would just add that as a fellow Californian, I can tell you that we have rules very much like this. We hear political ads on the radio all the time. They mention the top two funders. It is really not a burden. You can get your message out, and everyone does.

Senator FEINSTEIN. Yes. I was—well, my time is up, but I was just reading——

Chairman SCHUMER. You have an extra couple of minutes because——

Senator FEINSTEIN. I was just reading about the PG&E case, where—oh, I wish I had it in front of me. I put it down somewhere.

Oh, here it is. That the PAC raised approximately $46.2 million, all of which was donated by PG&E. Now, PG&E is a good company. It has fallen on very hard times for certain things. I do not want to get into that. But at one point, it donated $9 million in one day. There is a consumer group called TURN, The Utility Reform Network. They were the main opponents and they were able to raise $33,000. The PAC outspent 500-to-one, which amounts to approximately $25 per vote, and they lost. And I think the reason they lost—this is my opinion—is because of the disclaimer, and then everybody was able to come to the conclusion, this is not fair. This is the company about which this initiative is and it is not fair.

Now, the company is not necessarily an individual speaking. It is a group. It is a kind of oligarchy, if you will. It is a board of directors, I would assume, who makes that decision. But it seems to me that this is a very good example of disclosure. In other words, the entity that does the super PAC without disclosure has a very unfair position on the ballot. You would disagree with that, Mr. Keating, would you?

Mr. KEATING. Well, I am not familiar with the details of California law, but if it worked there, then great. I have no problem with that.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman SCHUMER. Just two points. I believe our law is quite the same as California. And second, the hardship exemption I mentioned, if for some reason the man's name is Richard Q. Quiddlehopper the Fourteenth and it takes 20 seconds to say their name, the hardship exception is on page 21, lines five through 14. It is in the bill.

With that——

Senator BLUNT. And, Mr. Chairman, is the hardship exemption you are talking about eight seconds? If it takes more than eight seconds?

Chairman SCHUMER. They say if it takes——

Senator FEINSTEIN. Read the language.

Chairman SCHUMER. I will read it. If the communication is transmitted through radio and is paid for in whole or in part with a payment which is treated as a campaign-related disbursement under 324, the top two funders list, if applicable, unless, on the basis of criteria established in regulations by the Commission, the communication is of such short duration—perhaps a 30-second ad—that including the top two funders list in the communication would constitute a hardship to the person paying for the communication by requiring a disproportionate amount of content of the communication to consist of the top two funders—I imagine if you had a 30-second ad with 20 seconds, the disclosure would take 20 seconds, that would clearly be a hardship. I would be happy to say on the floor that that is the legislative intent.

Senator BLUNT. And I guess the FEC would maybe decide that.

Mr. Wertheimer, I do not want to take a lot of time on this, but let me be sure I understand. You said earlier on disclosure, the statute currently required disclosure—that the FEC, I think, has gutted the disclosure.

Mr. WERTHEIMER. The contribution disclosure.

Senator BLUNT. And how has the FEC gutted the contribution disclosure?

Mr. WERTHEIMER. By defining the only contributions required to be disclosed as the contributions that were given for the specific purpose of making campaign-related expenditures.

Senator BLUNT. And these would be contributions to these various groups——

Mr. WERTHEIMER. Organizations, yes.

Senator BLUNT [continuing]. Like the Sierra Club or Democracy 21 or whatever other group might spend money for that purpose.

Mr. WERTHEIMER. Yes.

Senator BLUNT. Okay. Do you think we should be having a hearing on enforcing the statute?

Mr. WERTHEIMER. I think you ought to have a separate hearing on fundamentally reforming the Federal Election Commission, but I do not think a hearing on enforcing the statute on this regulation is going to get us to solve the problem of disclosure.

Senator BLUNT. But the statute, you said, required disclosure.

Mr. WERTHEIMER. Under the current rules of the statute, there is a contribution disclosure provision which has resulted, as I said, in more than $130 million not being disclosed.

Senator BLUNT. All right. Let me be sure I understand. Mr. Keating made a statement that groups like the Sierra Club or Club for Growth should be able to run ads out of their own budget, is that a fair——

Mr. KEATING. Yes.

Senator BLUNT. And do you all agree with that, that groups like the Sierra Club or Club for Growth should be able to run ads out of their own budget, just a yes or no.

Mr. WERTHEIMER. Yes, and the statute accounts for that.

Senator BLUNT. And Mr. Hasen?

Mr. HASEN. Yes. I think so long as they apply with the applicable disclosure rules, sure.

Senator BLUNT. And what would those be, Mr. Keating, the applicable disclosure rules for running ads out of your own budget?

Mr. KEATING. Well, you have to—if it is an independent expenditure, you must list the independent expenditure to the FEC within 48 hours, or 24 hours, depending on when it was run, and if it is an electioneering communication, you need to disclose the expenditure.

If money was given for the independent expenditure, and this is where I alluded to the confusion both from the statute and the regulations, different people take different interpretations of what that means. I can tell you that when I worked at Club for Growth, we interpreted that to mean that if you raised money just generally for an independent expenditure, the donor would have to be disclosed. Now, other people may take a different view of that. So that is how our group took the view.

So when we ran independent expenditures, we only did it from our general funds. We never asked anyone for money for independent expenditures——

Senator BLUNT. And from your general funds, you did not disclose all the donors to Club for Growth on any report anywhere?

Mr. KEATING. That is correct, because no money was given for independent expenditures. Now, Club for Growth today has a super PAC, Club for Growth Action, and it uses that entity to raise money for independent expenditures, and all the donors to that organization are disclosed.

Senator BLUNT. So the super PAC donors for Club for Growth are disclosed, but the regular donors for Club for Growth or the Sierra Club, the two examples we have used here, are not disclosed.

Mr. KEATING. Correct. Now, if a group did raise money for independent expenditures, you know, it is my view that this would have to be disclosed under the current law.

Senator BLUNT. And other——

Mr. KEATING. Other people may interpret the requirements of the law and regulations differently and may not disclose.

Senator BLUNT. And under the law we are talking about today, is it accurate that a member of the House or Senate, that some groups, outside groups—which groups cannot mention their name for the entire year of the election?

Mr. KEATING. Well, any group, unless it would want to—if we are talking about this bill becoming law——

Senator BLUNT. Right.

Mr. KEATING [continuing]. Any group that wanted to run an ad during an entire election year, if they spend more than $10,000, would have to meet the requirements of this Act.

Senator BLUNT. And how would you mention the name of a House member or Senator?

Mr. KEATING. Well, you could not unless you complied with all the provisions in this bill.

Senator BLUNT. Mr. Wertheimer, do you want to say something about that?

Mr. WERTHEIMER. Well, there are no restrictions in this bill. There are disclosure requirements.

Senator BLUNT. Well, there are restrictions that say you cannot mention somebody's name from January 1 until the election. That seems like a pretty big restriction to me.

Mr. WERTHEIMER. That is not a restriction in the bill.

Senator BLUNT. It is not in the bill?

Mr. WERTHEIMER. The bill does not have restrictions. The bill has disclosure requirements if you run ads.

Mr. HASEN. The bill provides a definition of an electioneering communication, which already exists in the law, and extends it. But if something is triggered as an electioneering communication, all that this does is provide for disclosure of information. It does not prevent anyone. There were limits before in the McCain-Feingold law. Those were struck down——

Senator BLUNT. So we take the 60 or 90 days that were—30 or 60 days in the law now and we take that same principle and expand it for an entire year?

Mr. HASEN. As to disclosure to the election year, that is right.

Senator BLUNT. So I would think that members of the House and Senate would like that, that they could not have their name mentioned without these restrictions for the entire election year. That is half a House term and one-sixth of a Senate term, and the one-sixth of the Senate term you are running for election.

Mr. KEATING. There is——

Senator BLUNT. All right. I think I am out of time, Mr. Chairman.

Chairman SCHUMER. Thank you, Senator——

Mr. KEATING. Senator, if I might add one other observation, there is no limiting principle to this. I mean, why could it not be both years? Why could it not be at all times? I do not see any limiting principle here.

Chairman SCHUMER. Senator Udall.

Senator UDALL. Mr. Wertheimer, under existing law, have primaries been held where super PACs ran ads and their donors were not disclosed until after the primary? And if that is so, is this not a problem and how does the bill deal with it?

Mr. WERTHEIMER. Well, I think it was a big problem in this election. The Iowa caucuses and the New Hampshire, South Carolina, and Florida primaries were all run and over with before we had the first disclosures of the super PACs of who their funders were, and that was because the way the law currently functions, in an off-election year, a PAC only discloses semi-annually and at the end of the year. So all of the money raised in the six months—the last six months of 2011, there was no disclosure of the donors until January 31.

The bill fixes that by basically requiring disclosure to be made when the expenditures are made. Then you have to disclose the contributors, as well. So it does solve the problem of that serious disclosure problem for super PACs that existed in this election.

Senator UDALL. Now, the 2010 elections, and I did not look at all of these, but I notice, and I think Senator Schumer, Chairman Schumer will remember this, I believe Senator Bennet, our friend out in Colorado, told us that the combined expenditures, total independent expenditures, far overwhelmed both—the totals for both candidates, both Democrat and Republican.

Do you see, when we are moving down the road, as we get into 2012 and 2014, where we have elections where the combined spending of super PACs and independent expenditures are well beyond what the candidates are spending? Is this a good trend? Is this something that better informs the voters about what the candidates' positions are? Do you think this is good for democracy? Mr. Wertheimer.

Mr. WERTHEIMER. No, nor do I think the solution to it, as I said before, is to remove the contribution limits. You know, the studies have shown that almost all of the super PAC ads are negative ads, negative attack ads, and that leads me to believe that even if you did remove the contribution limits, you would still have super PACs raising large amounts of money and running negative ads and also potentially (c)(4) organizations.

But we believe that one of the steps that should be taken and can be taken is to end the candidate-specific super PACs of the type we have seen in the Presidential election. Those super PACs can be eliminated. When the Supreme Court ruled in Citizens United that corporate independent expenditures took place, they also said that they had to be independent of the candidate and they left to Congress to define what is independent, what is coordination. Once again, we have very weak and problematic coordination

rules. Even under those rules, we believe a number of the candidate-specific super PACs are operating illegally.

But we clearly feel that you could define super PACs in a way that they are not going to be run by close associates of the candidate and they are not going to be having their money raised by the candidate's campaign. These super PACs are not independent PACs. They are arms of the campaign and I think most people recognize that. And they are hiding behind their own views of what constitutes coordination under the law and also under a realization that the law is not going to be enforced against them by the FEC.

The Supreme Court, when it talked about independent expenditures in the past, was very clear. It had to be wholly independent, fully independent, truly independent. These super PACs are anything but those concepts.

Senator UDALL. And I know I only have a couple of seconds here, but it seems to me that in reading about the super PACs in the Presidential campaign, these are individuals who worked very closely with the candidate in many cases. They may have left the campaign recently, or left official officer recently, or were the chief of staff within the last year. These are the kind of people that are running the super PACs and amassing the money and putting them together, are they not?

Mr. WERTHEIMER. That is correct.

Senator UDALL. Most of the cases——

Chairman SCHUMER. If my colleague would yield——

Senator UDALL [continuing]. Most of the cases—yes, please——

Chairman SCHUMER [continuing]. In one case, it was the candidate's father who ran the super PAC, as I understand it, is that correct?

Mr. WERTHEIMER. Well, he was the major—overwhelmingly major funder of it.

Chairman SCHUMER. Yes. Sorry. Go ahead.

Mr. KEATING. Well, I think this is a strange concept, that somehow a father can corrupt the son through a donation. There is another provision we have in the law that a husband can run but could not take a contribution from his wife because, presumably, his wife might corrupt him by giving him a contribution that is too large.

As I said earlier, the election law has some very strange provisions in it. There are things that are incredibly vague. I think we have heard the call for tax code simplification. One of the things we need to have is election law simplification. Even though Fred Wertheimer is a student of this area for many years, he is saying some things that are, I think, misleading.

For example, the idea that a campaign manager can go to a super PAC—there is a restriction in the regulations on the definition of an independent expenditure. In that regulation it says you cannot have someone who is going from a campaign to a PAC and then working on that independent expenditure for a period of days, I forget the number, I think 90 or 120. So there are restrictions. There is no evidence that these super PACs are illegally coordinating.

Of course, people who know, understand or maybe support strongly these candidates may feel strongly about starting up such a group, so that is not a surprise.

The final thing that I would like to observe is money is not everything. You look at the Republican primary for President this time and you look at candidates who soared during this primary, and it was often on the strength of their performance in the debates, and a lot of people were watching these debates. So there are other ways to get information out other than just money, but money is very important. It is part of speech, and I think the increased money that we have in this primary that we are seeing going on today has been a good thing. Turnout is up. There is more information for voters. There have been more front runners. It has been a very competitive race.

Senator UDALL. Mr. Wertheimer, would you like to respond to that, just briefly?

Mr. WERTHEIMER. Well, I think there is one example where a major fundraiser for the Romney campaign left the campaign and a few days later went to work for the Romney super PAC. Now, if you think that is illegal, I would be interested, and maybe you would do something about it.

But the way this has worked is that former close political associates of the candidates, whether it is Mitt Romney or President Obama, have left or have set up these super PACs. In the case of President Obama, two former White House staff people left the White House and a few months later set up Priorities USA Action. And this has happened over and over again, where the people who are running them are closely tied to the candidates.

You also have—I mean, in the case of President Obama and Mitt Romney, they are sending their top aides to these fundraising events. Now, they are claiming that, well, we are not there to solicit unlimited money for the super PACs. We are only here to ask for $5,000. But the reality of what is going on here is that they are coordinating with the expenditures of those fundraising events. I mean, I think that happens to be blatant.

So this is happening all over the place. Everyone is doing it. That is not good. That does not make it right. And in the end, I think the highest priority here is to protect the interests of the American people, not the Democratic party or Democratic candidates or the Republican party or Republican candidates. The American people have the bottom-line stake here and they have a right to know who is putting up the money and who is spending it to influence their votes.

Chairman SCHUMER. Well, I had hoped we could have a second round here of questions, but they moved up the vote. It started at 11:15, so we are going to have to vote. So I hope people will submit questions in writing. There are a lot more questions that I had.

I also hope we can move this bill to the floor in a relatively short period of time. I think it is a really important issue. My worry—this is me speaking—I think that what has happened after Citizens United is corroding the very essence of our democracy. And when a handful of people—free speech is not an absolute. You cannot scream "Fire!" in a crowded theater falsely. We have libel laws. We have anti-pornography laws. And when in the name of free speech

a handful of individuals can have such a hugely disproportionate effect on the election, undisclosed, I think that corrodes the very roots of our democracy. I worry about the future of this country in terms of accountability. So in at least my view, and I take the liberty as Chairman of making a closing statement, is that we have to move forward.

With that, without objection, the hearing record will remain open for ten business days for additional statements and documents submitted for the record. We also request that our witnesses respond in writing to additional written questions from committee members.

I want to thank my colleagues for participating, Senator Alexander, Senator Udall. And I want to thank our witnesses for a very illuminating discussion.

And with that, the committee is adjourned.

[Whereupon, at 11:33 a.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Statement of Charles E. Schumer on S. 2219, DISCLOSE Act of 2012
March 29, 2012

Good morning. The Rules Committee shall come to order. I'd like to thank my friend, Ranking Member Alexander, for joining us and all of my colleagues at this hearing to discuss the DISCLOSE Act of 2012, which our colleague Senator Whitehouse introduced last week.

The Supreme Court's *Citizens United* decision, in conjunction with other cases, has radically altered the election landscape by unleashing a flood of unlimited, often secret money into our elections.

In response to that disastrous decision, we introduced the DISCLOSE Act of 2010 which would have increased transparency by requiring full disclosure of the real sources of money behind political advertising. The House passed it, the President was ready to sign it, but in the Senate, it failed to get cloture by one vote.

Now the problem is no longer hypothetical. The public is now living with the aftermath of the Citizens United decision every time they turn on their TV sets. An endless stream of negative ads is now drowning out all other voices, including the candidates themselves.

The events of the 2010 election cycle and what we've seen so far in 2012 have confirmed our worst fears about the impact of *Citizens United* and subsequent court decisions.

Two years ago, we were warned about these harmful effects, but the results are even worse than expected. Just this morning, we woke up to the breaking story, reported by Bloomberg News, that major corporations – including Chevron and Merck – gave millions of dollars to groups in attack ads in the 2010 elections and no one knew about it until now! That means voters two years ago were left totally in the dark about who paid for the attack ads hitting the airwaves.

The trend is disturbing. According to the Center for Responsive Politics –a study they did—the percentage of campaign spending from groups that don't have to disclose their donors rose from a mere 1% in 2006 to 47% in 2010. We can only imagine by what the percentage will grow to by the end of 2012. Almost certainly over 50%. So over half of spending will be from groups that don't disclose their donors. That's incredible and awful in my opinion.

And the money is coming overwhelmingly from the wealthiest Americans as you'd expect. A recent study reported in *Politico* found that 93% of the money that was contributed by individuals to SuperPACs in 2011 came in contributions of $10,000 or more—and here's the most astounding thing in that *Politico* study –half of that money came from just 37 donors. Is that democracy?

Even more worrisome, we are increasingly seeing contributions to SuperPACs from non-profit organizations —groups that can use the tax code to hide their sources of money – and from shadowy shell corporations. Some of these groups are nothing more than a P.O. Box in the middle of an office park.

By now it should be clear to *everyone* that better disclosure is *desperately* needed. The 2012 DISCLOSE Act, introduced by Senator Sheldon Whitehouse, our Rules colleague Senator Tom Udall, and myself among others, and already supported by 40 Senators, is a bill that should be acceptable to people of every stripe. That's how it was designed. That's how Sheldon Whitehouse and those of us working with him designed it.

The previous bill imposed bans on government contractors and foreign-owned corporations, but those bans have been taken out even though they're the right thing to do. The 2010 legislation also required reporting of donations over $600, but that threshold has been raised to $10,000 because, as we have seen, these huge donations dwarf that amount and make a donation of a hundreds dollar seem irrelevant.

The new, bare-bones DISCLOSE Act has two key components: disclosure and disclaimer. And it's very simple. Disclosure means outside groups who make independent expenditures and electioneering communications should disclose all their large donors in a timely manner. All their large donors. The bill includes a way to drill down to the original source of money in order to reveal those who are using intermediaries as a conduit to obscure their true funders. Through this "covered transfer" provision, even the most sophisticated billionaires will find it difficult to hide behind a 501(c) organization or shell corporation.

Disclaimer means that voters who are watching a political ad will know who paid for it. Under current law, candidates are required to "stand by" their ads – why should outside organizations engaging in this same kind of political activity be any different?

The 2012 DISCLOSE Act would make SuperPACs 501(c)s, 527s, corporations and labor unions identify their top 5 funders in their TV ads and top 2 funders in radio ads. The leader of the organization would have to "stand by" the ad, just like candidates must do.

Transparency is not just a Democratic priority. My colleagues on both sides of the aisle have declared their support for greater disclosure as a way to prevent corruption. And eight of nine Supreme Court justices in the *Citizens United* decision supported disclosure.

The potential for corruption in the post-*Citizens United* era is all too clear. It's time to get serious about full transparency. This bill would do that. That's why we are holding this hearing, to examine the need for better disclosure and to discuss this particular legislation.

Statement of Senator Tom Udall
Senate Committee on Rules and Administration
Hearing on S. 2219, the DISCLOSE Act of 2012
March 29, 2012

Mr. Chairman,

Thank you for holding today's hearing on this important bill.

In January 2010, the Supreme Court issued its disastrous opinion in *Citizens United v. FEC*. Two months later, the DC Circuit Court of Appeals decided the *SpeechNow v. FEC* case. These two cases gave rise to Super PACs, organizations that have poured millions of dollars into negative and misleading campaign ads, often without disclosing the true source of the donations.

While the *Citizens United* and *SpeechNow* decisions sparked a renewed focus on the need for campaign finance reform, the Court laid the groundwork for a broken system many years ago. In 1976, when the Court held in *Buckley v. Valeo* that restricting independent campaign expenditures violates the First Amendment right to free speech, it established the flawed precedent that money and speech are the same thing. Since then, our nation's policymakers are all too often elected based on their ability to raise money or the size of their personal fortunes, rather than the quality of their ideas or dedication to public service.

I don't think we can truly fix this broken system until we undo the flawed premise that spending money on elections is the same thing as exercising the constitutional right of free speech. That can only be achieved if the Court overturns *Buckley* or we amend the Constitution. Until then, we will fall short of the real reform that is needed.

But we still should do all that we can in the meantime to make a bad situation better. That's what we're trying to do with the DISCLOSE Act. It's not the comprehensive reform that I would like to see, but it's what's possible under the flawed Supreme Court precedents that constrain us.

The DISCLOSE Act of 2012 asks the basic, and eminently fair, question—Where does the money come from and where is it going?

Under the bill, any covered organization – including corporations, labor unions, non-profit organizations, and Super PACs – that spends $10,000 or more on campaign-related disbursements during an election cycle would have to file a disclosure report with the Federal Election Commission within 24 hours. It would also have to file a new report for each additional $10,000 or more that is spent, detailing the amount and nature of each expenditure over $1000 and the names of all its donors who gave $10,000 or more. The report also would include a certification by the head of the organization that the disbursement was not coordinated with a candidate campaign.

This is a practical, sensible measure. It doesn't get money out of our elections. But, it does shine a light into the dark corners of the campaign finance system. A similar bill in the last Congress

had broad support, with 59 votes in the Senate and passing the House. Now that we are seeing the real impact of the *Citizens United* and *SpeechNow* decisions on our elections, the need for this legislation has become even more apparent.

The downpour of unaccountable spending is wrong. It undermines our political process. And it has sounded an alarm that is truly bipartisan.

Just this week, my friend John McCain said the following at a panel hosted by Reuters:

> "What the Supreme Court did is a combination of arrogance, naiveté and stupidity the likes of which I have never seen. I promise you, there will be huge scandals because there's too much money washing around, too much of it we don't know who's behind it and too much corruption associated with that kind of money,"

In 2010, in the aftermath of *Citizens United*, Senator Collins's spokesman provided this statement to *The Hill*:

> "As a co-sponsor of the 2002 campaign reform law, Senator Collins was disappointed that the Supreme Court struck down so many key provisions of this bipartisan legislation. She believes that it is important that any future campaign finance laws include strong transparency provisions so the American public knows who is contributing to a candidate's campaign, as well as who is funding communications in support of or in opposition to a political candidate or issue."

The DISCLOSE Act of 2012 does exactly what Senator Collins called for – it lets the American people know who is funding political advertising.

But even this simple requirement for transparency in our elections has critics. Today we'll hear from David Keating, the president of the Center for Competitive Politics and one of the plaintiffs in the *SpeechNow* case.

Mr. Keating recently coauthored an op-ed in *The Wall Street Journal* titled "Meet the Parents of the Super PACs." The authors take credit for the creation of Super PACs and argue that they provide an important function of informing voters about candidates.

The authors state that, "Money is a proxy for information in campaigns." I might agree, if the information provided to voters was balanced and accurate. But the campaigns and their affiliated Super PACs don't go out and spend millions of dollars educating the public about their candidates' qualifications to hold elected office. Instead, they dump millions into inaccurate and misleading attack ads about their opponents. This is bad for our democracy, is a disservice to the voting public, and to defend it by hiding behind the First Amendment is an affront to our Founders.

I recall the debate when we considered the DISCLOSE Act in the last Congress. Many of our concerns then were still hypothetical. We could only guess how bad it might get. Well, now we know. Unfortunately, our worst fears have come true. The toxic effect of the *Citizens United* and

SpeechNow decisions has become brutally clear. The floodgates to unprecedented campaign spending are open and threaten to drown out the voices of ordinary citizens.

Look at what we have seen already, and we're only in the primary season. Huge sums of unregulated, unaccountable money are flooding the airwaves. An endless wave of attack ads, paid for by billionaires, is poisoning our political discourse. 501c4 "social welfare organizations" are abusing their non-profit status to shield their donors and then funnel the money into Super PACs.

The American public, rightly so, looks on in disgust. A recent Washington Post–ABC News poll found that nearly 70% of registered voters would like Super PACs to be illegal. Among independent voters, that figure rose to 78%. Supporters of Super PACs and unlimited campaign spending claim they are promoting the democratic process. But the public knows better– wealthy individuals and special interests are buying our elections.

Our nation cannot afford a system that says 'come on in' to the rich and powerful. And says 'don't bother' to everyone else. The faith of the American people in their electoral system is shaken by big money. It is time to restore that faith. It is time for Congress to take back control.

There is a great deal to be done to fix our campaign finance system. I will continue to push for a constitutional amendment that will allow comprehensive reform. But, in the interim, let's at least shine a light on the money. The American people deserve to know where this money is coming from. And they deserve to know before, not after, they head to the polls. That's what the DISCLOSE Act will achieve.

Thank you again, Mr. Chairman, for holding this hearing. I look forward to hearing from our witnesses. I ask that my entire statement be included in the record.

Executive Summary of Rules Committee Testimony by Democracy 21 President Fred Wertheimer

Democracy 21 strongly supports the DISCLOSE Act of 2012 and urges the Senate to act promptly to pass the legislation. The legislation restores a cardinal rule of campaign finance laws: citizens are entitled to know who is giving and spending money to influence their votes. This fundamental right to know has been recognized for decades in disclosure laws passed by Congress and in decisions by the Supreme Court that upheld the constitutionality of these laws.

The current gaping loopholes in the nation's campaign finance disclosure laws result from a combination of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), and ineffectual FEC disclosure regulations.

This enormously damaging decision struck down the ban on corporate expenditures in federal elections and paved the way for the rise of Super PACs and the return of secret money to our elections. The decision also was based on the false assumption that in striking down the corporate ban, there would be effective disclosure for the independent campaign expenditures that followed.

Justice Kennedy wrote for the majority in the *Citizens United* opinion, "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." Justice Kennedy had that half right. Corporate independent expenditures did not exist before the decision. The DISCLOSE Act of 2012 will provide the effective disclosure the Court majority thought was constitutional, necessary and in existence when it issued the opinion but which in fact was not and is not there.

In 2010, more than $135 million in undisclosed, unlimited contributions were injected into the congressional races. The amount of secret money injected into the 2012 presidential and congressional elections is expected to dramatically grow, absent new disclosure requirements.

This has returned the country to the era of the Watergate scandals when huge amounts of secret money were spent in federal elections. Secret money in American politics is dangerous money. As the Supreme Court held in *Buckley v. Valeo* (1976), disclosure requirements "deter actual corruption and avoid the appearance of corruption." Secret money creates the opportunity for influence-buying that is unknown and unaccountable to the American people.

New disclosure laws were enacted during the Watergate era to address this problem. And from the mid-1970s until 2010 there was a consensus in the country and in Congress, among Democrats and Republican alike, in support of campaign finance disclosure. Bipartisan congressional support for disclosure, however, disappeared in 2010.

Democracy 21 strongly urges the Senate to return to the bipartisan approach in support of disclosure that was the rule for almost four decades. The DISCLOSE Act of 2012 is effective, constitutional and fair and deserves the votes of Republican and Democratic Senators.

Testimony of Fred Wertheimer

President of Democracy 21

Before the Senate Rules Committee

On the DISCLOSE Act of 2012

March 29, 2012

Executive Summary

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Chairman Schumer and Members of the Committee, I am Fred Wertheimer, the president of Democracy 21. I appreciate the opportunity to testify today in support of the DISCLOSE Act of 2012 and why it is important for Congress to enact this essential disclosure legislation.

Democracy 21 is a nonpartisan, nonprofit organization which promotes effective campaign finance laws to protect against corruption and the appearance of corruption, to engage and empower citizens in the political process and to help ensure the integrity and credibility of government decisions and elections.

Summary

Democracy 21 strongly supports the DISCLOSE Act of 2012 and urges the Senate to act promptly to pass the legislation.

The legislation restores a cardinal rule of campaign finance laws: citizens are entitled to know who is giving and spending money to influence their votes.

This fundamental right to know has been recognized for decades in disclosure laws passed by Congress and in decisions by the Supreme Court that upheld the constitutionality of these laws.

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The DISCLOSE Act of 2012 will provide the effective disclosure the Court majority thought was constitutional, necessary and in existence when it issued the opinion but which in fact was not and is not there.

Polls have shown the public overwhelming supports disclosure for outside spending groups. For example, according to a *New York Times* article on a *New York Times/CBS News* poll

released on October 28, 2010, Americans overwhelmingly "favor full disclosure of spending by both campaigns and outside groups."

Unlike the DISCLOSE Act of 2010, the new DISCLOSE 2012 Act focuses solely on disclosure requirements. It does not contain the nondisclosure provisions that were in the 2010 DISCLOSE legislation and it does not contain exceptions for any groups.

The new legislation would ensure that citizens know on a timely basis the identities of and amounts given by donors who are funding independent campaign expenditures by tax-exempt organizations and other groups.

The legislation would also fix the problem of untimely disclosure of the donors to Super PACs supporting federal candidates. This problem arose in the 2012 presidential nominating race when the disclosure of most of the donors to presidential candidate-specific Super PACs did not occur until after the Iowa caucus and the New Hampshire, South Carolina and Florida primaries were over.

The new legislation also requires Super PACs and other "independent" spending entities that run broadcast ads to identify in each TV ad their top five donors and the amounts they gave, either by listing the information in the ad or by running a crawl at the bottom of the ad with the information. The bill also requires the top official of the group to appear in each TV ad and take responsibility for it.

The Need for Disclosure Legislation

In 2010, more than $135 million in undisclosed, unlimited contributions were injected into the congressional races. The amount of secret money injected into the 2012 presidential and congressional elections is expected to dramatically grow, absent new disclosure requirements.

This has returned the country to the era of the Watergate scandals when huge amounts of secret money were spent in federal elections.

Secret money in American politics is dangerous money. As the Supreme Court held in *Buckley v. Valeo* 424 U.S. 1, 43-55 (1976), disclosure requirements "deter actual corruption and avoid the appearance of corruption."

Secret money creates the opportunity for influence-buying that is unknown and unaccountable to the American people.

New disclosure laws were enacted during the Watergate era to address this problem.

And from the mid-1970s until 2010 there was a consensus in the country and in Congress, among Democrats and Republican alike, in support of campaign finance disclosure.

Even opponents of other campaign finance reform laws supported disclosure as appropriate and necessary to provide the public with basic information about who is raising and spending money to influence their votes.

In 2000, for example, in response to a disclosure loophole that was allowing certain 527 groups to spend undisclosed money to influence federal elections, a Republican-controlled Congress acted to close the loophole.

Congress passed the new disclosure legislation with overwhelming support from Republicans and Democrats in both the House and Senate. The vote in favor of the legislation was 385 to 39 in the House and 92 to 6 in the Senate.

Bipartisan congressional support for disclosure, however, disappeared in 2010.

Democracy 21 strongly urges the Senate to return to the bipartisan approach in support of disclosure that was the rule for almost four decades. The DISCLOSE Act of 2012 is effective, constitutional and fair and deserves the votes of Republican and Democratic Senators.

Impact of *Citizens United* Decision

The *Citizens United* decision changed the landscape of American politics.

The decision has brought enormous amounts of unlimited contributions and secret money back into federal elections.

The *Citizens United* decision paved the way for the Super PACs that are flooding federal elections with expenditures financed by huge contributions from the super rich, corporations, labor unions, and other entities.

The Court's decision allowed corporations to make unlimited independent expenditures in federal campaigns. In the subsequent *SpeechNow* decision, the D.C. Circuit Court of Appeals ruled that individuals could make unlimited contributions to groups, like Super PACs, that make independent campaign expenditures. The FEC interpreted *Citizens United* to allow corporations and labor unions to make such unlimited donations to groups, like Super PACs, as well.

The D.C. Circuit Court based its *SpeechNow* decision *directly* on the *Citizens United* decision. The Circuit Court held that the Citizens United decision "resolves this appeal" stating:

> In accordance with that decision, we hold that the contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals' contributions to SpeechNow.

The result: according to a recent report by the Campaign Finance Institute, just *seventeen donors* who each gave $1 million or more accounted for *half of the $72 million* given to the Super PACs associated with the four remaining Republican presidential primary candidates. And

just *three* donors who each gave $1 million or more were responsible for *62 percent of the $6.4* million raised by the Super PAC associated with president Obama.

The American people get the fact that Super PACs are nothing but trouble for the nation. Nearly seventy percent of the public believes that Super PACs should be illegal. (*Washington Post/ABC News* poll, March 13, 2012)

While we cannot end all Super PACs, as long as the *Citizens United* decision stands, we can get rid of the type of candidate-specific Super PACs that have played a dominant role in the 2012 presidential nominating race and will spread quickly to Congress if they are not eliminated. The Supreme Court left to Congress to define what constitutes "coordination" for purposes of determining whether spending by outside groups is independent, as required by law and the Court.

Democracy 21 has drafted legislation to define "coordination" that would eliminate the kind of candidate-specific Super PACs operating in the 2012 presidential election. The legislation is well within the bounds of the *Citizens United* decision.

The *Citizens United* decision also paved the way for unlimited, secret contributions being injected into federal elections by 501(c) groups, including 501(c)(4) groups, that are defined by tax law as "social welfare" organizations, and 501(c)(6) business associations, like the Chamber of Commerce.

The Court's decision allowed these tax-exempt groups, almost all of which are corporations, to make unlimited independent expenditures in federal elections. These expenditures had been prohibited prior to the decision. Ineffectual FEC regulations gutted the contribution disclosure requirements that exist for outside spending groups.

Tax-exempt, non-profit groups are not required by tax law to publicly disclose their donors. They could end up spending hundreds of millions of dollars in secret contributions in the 2012 elections.

Contributions to 501(c) groups can come from corporations, labor unions, individuals and other entities. They also can come from foreign entities. Absent effective disclosure requirements, it is exceedingly difficult to monitor and determine if foreign money is being illegally used by any of these groups to pay for expenditures to influence federal elections.

A number of organizations appear to be improperly claiming tax-exempt status as 501(c)(4) "social welfare" organizations in order to keep secret the donors financing their campaign expenditures.

Existing IRS regulations require section 501(c)(4) groups to have as their "primary purpose" engaging in "social welfare" activities. Participation in candidate campaign activities does not qualify as a "social welfare" activity.

Yet some section 501(c)(4) groups, including groups that ran campaign ads in the 2010 election and are doing so again this year, have as their overriding purpose to influence elections. They appear to be engaged primarily, if not almost exclusively, in campaign activity, in violation of IRS rules.

Democracy 21, joined by the Campaign Legal Center, has filed several complaints at the IRS challenging the eligibility of these groups to receive 501(c)(4) tax-exempt status and thereby to keep their donors secret. We also petitioned the IRS last year and again this year to undertake a rulemaking to revise and clarify its regulations that define when a group is eligible for 501(c)(4) tax-exempt status.

The fact that tax-exempt groups are not disclosing the sources of the funds they are using to pay for campaign-related expenditures undermines the integrity of our elections. It also undermines the integrity of the tax laws when groups improperly claim section 501(c)(4) tax-exempt status in order to keep secret the donors whose funds are being used for campaign-related expenditures in federal elections.

The DISCLOSE Act is Constitutional

The DISCLOSE Act of 2012 contains comprehensive new requirements for corporations, labor unions, advocacy groups and trade associations to disclose to the public their campaign-related expenditures.

Reporting organizations are required to disclose on a timely basis the campaign-related expenditures they make and the donors whose funds are being used to pay for these expenditures. These provisions are essential to ensure that effective campaign finance disclosures are made to citizens – and that donors providing tens of millions of dollars to influence federal elections are not hidden from the public through the use of conduits, intermediaries and front groups.

Since *Buckley v. Valeo,* the Supreme Court has upheld the constitutionality of provisions enacted by Congress to require disclosure of campaign expenditures and the donors funding the expenditures.

In *Citizens United*, the Supreme Court held, by an 8 to 1 vote, that disclosure requirements for campaign expenditures "do not prevent anyone from speaking," and serve governmental interests in "providing the electorate with information" about the sources of money spent to influence elections so that voters can "make informed choices in the political marketplace." Importantly, the Court in *Citizens United* specifically noted the problems that result when groups run ads "while hiding behind dubious and misleading names," thus concealing the true source of the funds being used to make campaign expenditures:

> 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. 424 U. S., at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§201 and 311. 540

> U. S., at 196. There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" Id., at 197 (*quoting McConnell I,* 251 F. Supp. 2d, at 237). The Court therefore upheld BCRA §§201 and 311 on the ground that they would help citizens "'make informed choices in the political marketplace.'" 540 U. S., at 197 (quoting *McConnell I, supra*, at 237); see 540 U. S., at 231.

Id. (emphasis added).

The Court in *Citizens United* also specifically rejected the argument that disclosure requirements can constitutionally apply only to ads which contain express advocacy (or its functional equivalent). Indeed, a central issue raised by the plaintiff in *Citizens United* was whether disclosure requirements could constitutionally be applied to broadcast ads run by the group to promote its movie. The ads did not contain express advocacy but they did refer to a candidate, thereby triggering existing "electioneering communications" disclosure requirements.

In rejecting Citizen United's challenge to the disclosure requirements, the Court said:

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. *See, e.g., MCFL*, 479 U. S., at 262. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U. S., at 75–76. In *McConnell*, three Justices who would have found §441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U. S., at 321 (opinion of KENNEDY, J., joined by Rehnquist, C. J., and SCALIA, J.). And the 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) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Id. at 916 (emphasis added).

Even for the ads at issue in *Citizens United* "which only attempt to persuade viewers to see the film," and that "only pertain to a commercial transaction," the Court found there was a sufficient "informational interest" to justify a disclosure requirement in the fact that the ads referred to a candidate in an election context. *Id.*

Additionally, the Court in *Citizens United* noted that among the benefits of disclosure is increased accountability, and in particular the accountability of corporations to their shareholders when corporate managers decide to spend shareholder money to influence federal elections:

> Shareholder objections raised through the procedures of corporate democracy, *see Bellotti, supra*, at 794, and n. 34, can be more effective today because modern technology makes disclosures rapid and informative. . . . 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." 540 U. S., at 259 (opinion of SCALIA, J.); see *MCFL*, supra, at 261. 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.

Id. at 916 (emphasis added).

While a bare majority of five Justices in the *Citizens United* case voted to unleash campaign spending by corporations in federal elections, eight of the nine Justices in the same case strongly endorsed disclosure as a means to "provide shareholders and citizens with information needed to hold corporations and elected officials accountable for their positions and supporters," and recognized that "transparency enables the electorate to make informed decisions."

The rationale of the Supreme Court in upholding the constitutionality of disclosure in *Citizens United* is directly relevant to the DISCLOSE Act. The Court's focus on "groups hiding behind dubious and misleading names," 130 S.Ct. at 914, goes directly to the central rationale of the Act's requirement that groups engaging in campaign-related spending disclose the donors whose funds are being used to pay for campaign-related expenditures. This disclosure requirement will provide the public with information about the true source of funding for campaign ads and will thereby allow the public to "make informed choices in the political marketplace." *Id.*

Congress is unquestionably acting within its constitutional power by requiring groups engaged in campaign-related expenditures to disclose their spending and the donors whose funds are being used to pay for these expenditures. The DISCLOSE Act addresses the problem of generically named front groups and conduit groups being employed to mask the true sources of money used to fund campaign ads.

As the Supreme Court has noted, disclosure requirements do not "prevent anyone from speaking," but they do serve the interests of "transparency," accountability and promoting informed decision-making by voters. The DISCLOSE Act of 2012 furthers these important goals that have been endorsed by the Supreme Court.

Responses to Objections Raised

Critics of disclosure legislation have raised constitutional objections to disclosure legislation, but these objections lack validity.

For example, critics have complained that disclosure of donors to groups that make campaign-related expenditures will "chill" such donations. The Supreme Court considered and rejected this argument in *Citizens United* as a general basis for invalidating disclosure requirements. 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, disclosure requirements are not invalid because of a general and theoretical concern about chilling donations.

Further, the DISCLOSE 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 expenditures and use only those funds for such expenditures. Under these circumstances, only the donors of $10,000 or more to this separate account 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 expenditures. If the group agrees to the restriction and segregates the money, the identity of the donor is not disclosed. These measures allow donors and groups to ensure that donors whose funds are not used for campaign-related expenditures are not subject to any disclosure.

Critics also charge that the disclosure legislation will force groups to disclose their membership lists, in violation of the Supreme Court's ruling in *NAACP v. Alabama.*

This is not correct.

First, the legislation requires disclosure only of donors who give more than $10,000 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 large donors to such groups. Furthermore, the legislation provides for the additional protections cited above that allow donors to an organization to avoid any disclosure as long as their funds are not being used to make campaign-related expenditures.

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 of threats, harassments or reprisals to the group's donors, campaign finance disclosure requirements are constitutional.

The $10,000 threshold for disclosing donors appropriately balances the interest in privacy for donors to groups with a major purpose other than to influence elections with the interest of citizens in knowing who is financing campaign-related expenditures to influence their votes. The $10,000 threshold achieves this balance by requiring disclosure only of substantial donors to such groups whose funds are used to pay for campaign-related expenditures.

Critics also contend that disclosure requirements will impose an unreasonable burden on groups wishing to engage in campaign-related spending. But the legislation only requires a group to disclose 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. Further, any group that wants to limit the scope of its disclosure obligations can set up a separate bank account from which to make all of its campaign-related expenditures. If it does this, 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.

And contrary to the view of some critics of disclosure, the privacy rights of donors are respected as well by the legislation. 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, donors concerned about privacy can take steps to ensure that their identity is not disclosed.

Some critics may object to the expanded time frame for disclosure of "electioneering communications" in the bill and claim it is overbroad because it triggers disclosure for broadcast ads that mentions a congressional candidate in the year of the election (and for presidential candidates, starting 120 days before the first primary).

The legislation, however, appropriately reflects the realities of the current campaign season. The post-*Citizens United* experience shows that outside spending groups are running broadcast ads to influence federal elections throughout the course of the election year, and even earlier. 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 election year, and campaigns are in full swing during this period. Even if broadcast ads mentioning candidates also discuss issues, the ads can and will influence voters. Citizens are accordingly entitled to know the identity of the groups spending money for these ads as well as the donors who funds are being used to pay for the expenditures. Further, as discussed above, the Supreme Court has rejected the notion that disclosure is limited only to ads which contain express advocacy or the functional equivalent of express advocacy.

As Justice Scalia wrote in a concurring opinion upholding 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."

Conclusion

History tells us that secret money in elections is dangerous and leads to scandals.

This is not history we should repeat by allowing hundreds of millions of dollars in undisclosed contributions to be laundered into federal elections through outside spending groups.

The DISCLOSE Act of 2012 addresses this problem effectively, constitutionally and fairly.

Democracy 21 strongly urges Senators to support and promptly pass the DISCLOSE Act of 2012.

FRED WERTHEIMER

Fred Wertheimer is the Founder and President of Democracy 21, a nonpartisan, nonprofit, organization that works to strengthen our democracy and ensure the integrity and fairness of government decisions and elections. The organization promotes campaign finance reform, lobbying and ethics reforms and related government integrity, transparency and accountability measures to accomplish these goals.

The organization's principal focus is promoting effective campaign finance laws to protect against the corruption of federal officeholders and government decisions, and to engage and empower citizens in the political process.

Wertheimer has spent more than four decades working on democracy and governance issues. He is a recognized national leader and spokesman on money in politics issues and campaign finance reform, and on related government integrity and accountability reform measures, including ethics, lobbying and transparency reforms.

Wertheimer was named as one of the 90 greatest Washington lawyers of the last 30 years by *Legal Times* (2008) and as one of Washington's top lobbyists by *The Hill,* a Capitol Hill newspaper (2009, 2010 and 2011).

Wertheimer has been described by *The New York Times* as "the country's leading proponent of campaign finance reform," and as "the dean of campaign finance reformers," by *Time Magazine* as "a godfather of the campaign finance reform movement and by the *Boston Globe* as a "legendary open-government activist." *The Washington Post* said "Democracy 21 is one of Washington's foremost watchdog groups."

Wertheimer is a graduate of the University of Michigan and Harvard Law School and served from 1981 to 1995 as President of Common Cause, a nonpartisan citizens' lobby. He served in 1996 as a Fellow at the Shorenstein Center on the Press, Politics and Public Policy at Harvard University, and in 1997 as the J. Skelly Wright Fellow and Visiting Lecturer at Yale Law School. Wertheimer also has served as a political analyst and consultant for CBS News, ABC News and ABC's Nightline.

Wertheimer created and manages the Democracy 21 legal team, and serves along with Democracy 21 counsel Don Simon on the team. Wertheimer and Simon each have more than 30 years of experience in working on campaign finance cases and defending the constitutionality of campaign finance laws.

The Democracy 21 *pro bono* legal team consists of law firms and campaign finance lawyers that defend the constitutionality of campaign finance laws and their proper interpretation and enforcement. The legal team is headed by the law firm of WilmerHale and its Supreme Court litigation is led by WilmerHale partner Seth Waxman, former U. S. Solicitor General.

www.campaignfreedom.org

Summary of Statement by David Keating
President, Center for Competitive Politics

While the stated goal of S. 2219 is to increase disclosure of spending to elect or defeat candidates, this radical proposal will chill speech, force nonprofits to radically alter their fundraising and public advocacy efforts, and hijack 25% or more of any advertising in an election year that merely mentions the name of a congressman. Not surprisingly several provisions in the legislation also present significant First Amendment problems, which will generate litigation that has a good chance of success.

There are six key flaws in the bill.

1. The bill would force nonprofits to radically alter their fundraising and public advocacy efforts as nearly all broadcast ads aired in an election year that mention the name of a congressman would be covered by the bill.
2. It would force nonprofits to cut their ad copy by 25% or more in many cases.
3. The bill is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.
4. The bill would add a new and complicated bureaucratic disclosure regime to federal campaign finance law while federal elections are in full swing. The FEC would not have time to draft clarifying rules.
5. The new definition of the "functional equivalency of express advocacy" is vague.
6. The rule regarding covered transfers is probably unenforceable, and would be a nightmare for many non-profits.

As a result of the burdensome new requirements, the legislation would cause nonprofit's fundraising costs to go up dramatically or cause donations to decline, or some combination of the two. Alternatively, many groups would avoid lobbying ads during even numbered years, which is when many important bills become law.

The new television ad disclaimers would take 7-8 seconds or more to speak and the radio ad disclaimers would take 20 seconds or more. Such absurdly long disclaimers would silence many groups or make ads unaffordable.

Conclusion

S. 2219 piles enormous costs on nonprofits and other speakers – costs that are certain to chill speech, and which appear intended to accomplish indirectly, through costly and arbitrary compliance provisions, what the Congress may not do directly: silence disfavored speakers.

www.campaignfreedom.org

Statement of David Keating
President, Center for Competitive Politics
Before the Committee on Rules and Administration
United States Senate
March 29, 2012

Mr. Chairman and members of the Committee, thank you for inviting me to present our analysis of S. 2219, a bill which would expand campaign finance regulations.

While the stated goal of the legislation is to increase disclosure of spending to elect or defeat candidates, this radical proposal will chill speech, force nonprofits to fundamentally alter their fundraising and public advocacy efforts, and hijack 30% or more of any advertising in an election year that merely mentions the name of a congressman.

Not surprisingly, several provisions in the legislation also present significant First Amendment problems, which will generate litigation that has a good chance of success.

Additionally, if approved, the legislation would go into effect on July 1, 2012. Changing the basic ground rules for campaign finance so far into an election year would be unprecedented. McCain-Feingold, which was considered and debated for years, still only went into effect for the following election cycle.

Key Flaw #1: The bill would force nonprofits to radically alter their fundraising and public advocacy efforts.

Current law defines a so-called "electioneering communication" as a broadcast ad that mentions the name of a candidate within 60 days prior to a general election or 30 days before a primary. The bill would radically expand that definition. The new time period would be from January 1 to Election Day of each election year for congressional candidates.

Therefore, if the bill became law the following ad would be considered an electioneering communication subject to burdensome restrictions if aired on January 2 of an even numbered year in the district of a hypothetical congressman John Doe who is running for reelection and faces a September primary:

> [Pelosi]: Hi. I'm Nancy Pelosi, lifelong Democrat and former Speaker of the House.
> [Gingrich]: And, I'm Newt Gingrich, lifelong Republican and I used to be Speaker too.
> [Pelosi]: We don't always see eye-to-eye, do we, Newt?
> [Gingrich]: No, but we do agree that our country must take action to address climate change.

[Pelosi]: We need cleaner forms of energy and we need them fast.
[Gingrich]: If enough of us demand action from our leaders, we can spark the innovation we need.

On screen: Call Congressman John Doe and urge him to vote for HR 10000.
202-224-3121
Paid for by American Action for the Environment

I think most people would agree that there is no justification for forcing any additional disclosure on such an ad by this hypothetical group. Yet this legislation would do just that.

American Action for the Environment (AAFE) would face several bad choices in funding such an ad. It might have to disclose all donors, as proposed by the bill, to the public, several of whom might work for utilities or coal industries. Those donors might have supported the group's clean water efforts in response to an appeal for funds on that specific basis, but had not thought to earmark their checks.

Under the bill AAFE would report these donors to the FEC, where they would be publicly listed, and several might find it hard to keep their jobs. Worse yet, imagine if one of the donors didn't even agree with the ad, but was listed as a major donor on the ad itself.

Under the Act, AAFE could set up a special bank account and deposit into it only funds from donors who want to support ads that might run in even-numbered years. But that would massively complicate their fundraising efforts, which are already difficult in this economy. Besides, the Supreme Court has already noted, in *Citizens United v. FEC,* that the existence of an alternative way of engaging in speech – in that case PACs – did not save a prohibition on the use of general-treasury funds to pay for political advertisements.

What would certainly happen is that AAFE's fundraising costs would go up dramatically, or their donations would decline, or some combination of the two. Alternatively, many groups would avoid lobbying ads during even numbered years, which is when many important bills become law.

And what of their donors? The Act's segregated funds provisions require donors to choose between their rights under *NAACP v. Alabama*, the seminal case that allows advocacy groups to shield their membership lists, and their rights under *Citizens United.* Under this law, they cannot exercise both by keeping membership payments and donations private while still contributing to a group's general fund.

Key Flaw #2: It would force nonprofits to cut their ad copy by 25% or more in many cases.

Since our hypothetical ad would now be defined as an electioneering communication, Action for the Environment would be required to speak a very long disclaimer.

What do you suggest they cut from the ad?

Here is the absurd spoken disclaimer that appears would need to be substituted for much of the television ad copy.

> I am John Smith, the chief executive officer of American Action for the Environment, and American Action for the Environment approves this message.

When I tried speaking this disclaimer, it took me 7-8 seconds. Some persons have longer names or titles, and some groups have longer names, such as The American Academy of Otolaryngology—Head and Neck Surgery that would make the disclaimer far longer.

Now if this was a radio ad, here is what would have to be spoken today:

> Paid for by American Action for the Environment.

Under the bill it appears the required spoken disclaimer would be as follows:

> Paid for by American Action for the Environment
> www dot AmericanActionfortheEnvironment dot org (or the address or phone)
> Not authorized by any candidate or candidate's committee.
> I am John Smith, the chief executive officer of American Action for the Environment, and American Action for the Environment approves this message.
> Major funders are Ronald B. Coppersmith and Donald Wasserman Schultz

This disclaimer took me 20 seconds to speak. How are groups supposed to purchase 30 second radio ads, a common length for radio ads?

Although this legislation does provide for the FEC to exempt communications from the top two funders list disclaimer if that imposes a hardship, the bill does not allow the FEC time to craft regulations defining what constitutes a "hardship," meaning organizations wishing to speak during the 2012 elections will be forced to guess whether the FEC will find after-the-fact that their specific situation warrants a hardship exemption.

Even beyond 2012, however, either the law would gut advertising on politics and issues, or the FEC would have to craft a "hardship exemption" that essentially exempted all ads of 30 seconds or less – in which case, why include this provision in legislation at all? It is not clear that the FEC would have any statutory authority to write an exemption other than for listing major donors.

The issue of unconstitutional compelled speech is also still alive -- not only are citizens and organizations forced to engage in government-required speech, but the very real possibility exists that donors to organizations will be forced to be listed on an ad implying they "approve" of a particular commercial when in fact they may have little interest or may even oppose the particular expenditure. This is because the bill does not limit identification of "major funders" to those who give or were solicited to support independent expenditures or electioneering communications, but also includes persons or groups that give to an organization's general treasury.

Finally, what does the disclaimer showing the group's leader accomplish? Viewers and listeners would learn something about John Smith – his sex, weight, appearance, race, age and accent. But nothing additional about AAFE. How does this "disclose" anything relevant to judging AAFE's message? Do we want speech – whether it concerns issues or candidates – to be judged on that basis?

Key Flaw #3: The bill is a solution in search of a problem. Current law already requires disclosure of all spending on independent expenditures and electioneering communications and all contributions to further such communications.

I think it is appropriate to review and illustrate some of the disclosures already required by law.

Current 2 U.S.C. 434(c) requires that groups report independent expenditures greater than $250. This includes the name of the group, individual, or other entity that is doing the spending, the date on which it occurred, the amount spent, the candidate who is supported or opposed by the independent expenditure, the purpose of the expenditure and a statement certifying the expenditure was made without coordination between the party authorizing the communication and the candidate whom it promotes. This regulation requires that the reporting follow the money—both who gives and who receives. For example, in the recent Massachusetts Senate race, TeaPartyExpress.org spent hundreds of thousands on independent expenditures. However, their political action committee, called Our Country Deserves Better PAC, was the source of the funds. A simple search of the FEC website shows that both of these names are listed on the filing papers, along with the names of any person who donated money that furthered the production of the communication. An example is shown below:

SCHEDULE A

ITEMIZED RECEIPTS
All Listed Line Numbers

Committee: OUR COUNTRY DESERVES BETTER PAC - TEAPARTYEXPRESS.ORG

There are a total of 1311 Itemized Receipts

Displaying 1 through 100

Previous Page	Page 1 of 1 (13 21)		Next Page
Contributor's Name Contributor's Address	Employer Occupation Memo Description	Date Memo Text	Amount ($) Aggregate ($) Limits
QUENTIN WARD PO BOX 8000 #263 MESQUITE, Nevada 89024	NONE RETIRED	01/01/2010	500.00 800.00
Mr. DON WILLIAMS 1615 EVE DRIVE CONCORD, California 94521	NONE RETIRED	01/01/2010	25.00 250.00
Dr. DONALD LESTER 47-109 EL MEZARA PALM DESERT, California 92260	NONE RETIRED	01/02/2010	150.00 300.00
ROBERT MAYFIELD 11309 FOXFAIR AUSTIN, Texas 78750	ROBERT MAYFIELD INJ	01/02/2010	100.00 800.00
WILLIAM GILES 22587 COVERT ROAD GIBSONIA, Pennsylvania 15243	WILLIAM GILES ARTIST	01/03/2010	500.00 500.00
CHARLES F LADER 50 COBURN DRIVE WEST BLUFFTON, South Carolina 29909	NONE RETIRED	01/03/2010	25.00 325.00
	NONE	01/03/2010	50.00

Reporting also follows where the money in independent spending goes. A separate tab on the FEC report shows the disbursements by the group—to whom each payment was made and for what purpose. Consider the example below:

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

Purpose of Expenditure: Email Newsletter Costs
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/06/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

Amount Expended = $11027.73
Calendar YTD Per Election for Office Sought = $348671.17

RUSSO MARSH + ASSOCIATES, INC.

PO BOX 1863
SACRAMENTO, California 95812

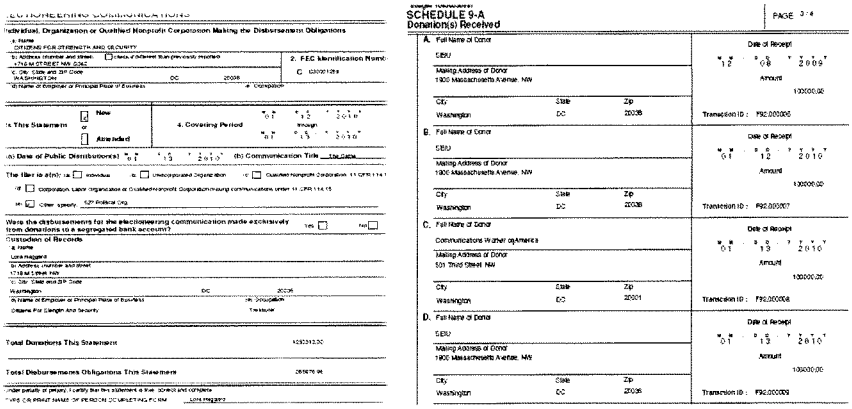
Purpose of Expenditure: Internet Newsletter Costs - Candidate Specific
Name of Federal Candidate supported or opposed by expenditure: Scott Brown
Office Sought: Senate
State is Massachusetts in District
Date Expended = 01/09/2010
Person Completing Form: Betty Presley
Date Signed = 02/18/2010

Amount Expended = $10500.00
Calendar YTD Per Election for Office Sought = $348671.17

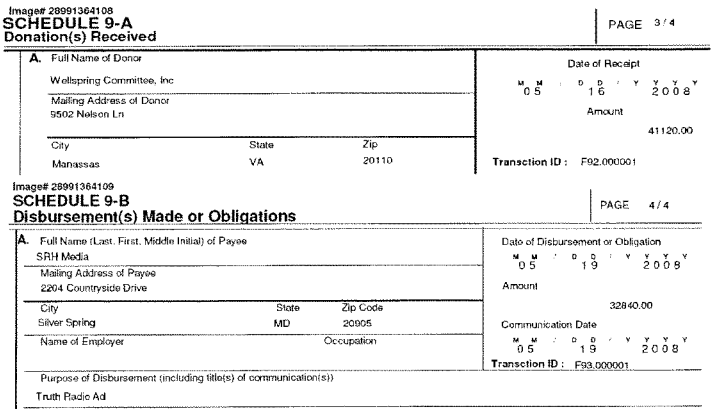
2 U.S.C. 434(f) requires groups to report "electioneering communications" when they exceed $1,000.

Current law also requires reporting of "electioneering communications." This mandates that the identity of the person making the disbursement, any person sharing or exercising direction or control over the activities of such person, the custodian of the books and accounts of the person making the disbursement, the principal place of business of the person making the disbursement (if not an individual), each amount exceeding $200 that is disbursed, the person to whom the expenditure was made and the election to which the communication pertains be disclosed. Contributions made by individuals that exceed $1,000 are disclosed, accompanied by the individual's name and address.

As with independent expenditures, the reporting of electioneering communications also tracks the money. Looking again at the Massachusetts Senate election in January 2010, a quick search of the FEC database shows that the ambiguous-sounding group "Citizens for Strength and Security" spent $265,876.96 for a communication on Jan. 13, 2010. While the name of the group may not reveal much, the list of donors who funded the electioneering communication do—the eight donations listed came from two labor unions, the SEIU and Communications Workers of America. Such concerns that corporations like Exxon could set up "shadow groups" through which to funnel money for political advertisements are unfounded. That spending would be tracked just as the disbursements by "Citizens for Strength and Security" were.



Similarly, non-profit groups, such as 501(c)(4)s, are also subject to the same kind of disclosure when they commit to running electioneering communications. FEC records show that Susan B. Anthony List Inc., a 501(c)(4), spent $32,840.00 on creating and airing a radio advertisement called "Truth." The funding for the ad came from another group, Wellspring Committee, Inc, which is clearly identified on the form.



Image# 28991364108
SCHEDULE 9-A
Donation(s) Received

PAGE 3 / 4

A. Full Name of Donor
Wellspring Committee, Inc
Mailing Address of Donor
9502 Nelson Ln
City: Manassas | State: VA | Zip: 20110

Date of Receipt: 05 / 16 / 2008
Amount: 41120.00
Transaction ID : F92.000001

Image# 28991364109
SCHEDULE 9-B
Disbursement(s) Made or Obligations

PAGE 4/4

A. Full Name (Last, First, Middle Initial) of Payee
SRH Media
Mailing Address of Payee
2204 Countryside Drive
City: Silver Spring | State: MD | Zip Code: 20905
Name of Employer | Occupation

Date of Disbursement or Obligation: 05 / 19 / 2008
Amount: 32840.00
Communication Date: 05 / 19 / 2008
Transaction ID : F93.000001

Purpose of Disbursement (including title(s) of communication(s))
Truth Radio Ad

Other disclosures required by existing law

In addition to the above reporting requirements, existing law requires that any organization organized under section 527 of the tax code that does not file with the FEC (other than for

electioneering communications or independent expenditures) must also report its donors who give more than $200 in the calendar year with the IRS, and that information is publicly listed. Moreover, any group whose "major purpose" is the funding of express advocacy expenditures—whether organized under section 527 or some other provision—would also become a PAC, subject to additional, ongoing reporting to the FEC, including the names of all donors of more than $200 to the group. Finally, as noted previously, all independent expenditures and electioneering communications already must include "disclaimers" clearly stating who is paying for the ad.

Key Flaw #4: The bill would add a new and complicated bureaucratic disclosure regime to federal campaign finance law while federal elections are in full swing.

The legislation does not provide time for the FEC to update its regulations, ensuring that groups wishing to speak would face confusion and uncertainty about what is permitted and how to report under the new laws—perhaps the intent of incumbents wary of criticism. Groups would have to choose between disclosing all their donors (violating the right of anonymous association established in *NAACP v. Alabama*) and setting up a separate account for campaign activity (violating *Citizens United*'s holding that nonprofits, businesses and unions may spend from their general treasuries).

Similarly, donors—many unsophisticated grassroots activists unfamiliar with the laws—would have to affirmatively request that their funds not be used on campaign activity to remain anonymous. Current law mandates disclosure only when funds are given to further independent expenditures or electioneering communications. This is sufficient to provide transparency. And it avoids the misleading possibility that contributors to a group, whether the NRA or the Sierra Club, who do not specifically earmark their contributions for such ads, may be associated with advertisements they had no part in developing, and with which they may disagree.

Key Flaw #5: The new definition of the "functional equivalency of express advocacy" is vague.

There is a new "functional equivalency of express advocacy" standard in the bill. Despite claiming to be a "pure disclosure" proposal, it adds a new and indecipherable definition to a core element of campaign finance law. To remind the Committee, the bill states that any ad must be treated as an independent expenditure if it:

> Expressly advocates the election or defeat of a clearly identified candidate, or is the functional equivalent of express advocacy because, when taken as a whole, it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate, taking into account whether the communication involved mentions a candidacy, a political party, or a challenger to a candidate, or takes a position on a candidate's character, qualifications, or fitness of office.

What does that mean? Doubtless, I could show 50 ad scripts to this committee, and its members would disagree as to which are issue advocacy and which are "the functional equivalent of express advocacy." And if individuals who have gone through federal elections cannot agree, how can grassroots organizers, many of whom may be new to politics? How is a group to know, *in advance,* that it has not run afoul of this vague provision? How is it anything but an invitation to burdensome and costly investigations by federal officials?

Finally, even provisions that create specific burdens are themselves vague. I have already discussed the requirement that advertisement disclaimers include a list of major donors. But, unlike the heavily regulated "stand by your ad" provisions, no language is mandated for this section of the disclaimers. And the FEC will have no time to provide guidance. How are speakers supposed to know what they can and cannot do when the disclaimer that must be attached to every last ad may be the source of a federal penalty?

Key Flaw #6: The rule regarding covered transfers is probably unenforceable, and will be a nightmare for many non-profits.

The bill requires any entity transferring $1000 or more in funds to a "covered organization" to disclose its donors if the donor knew or "should have known" that the "covered organization" - a definition that includes corporations, labor unions, trade associations, 527s, and non-profit 501(c)(4) organizations - would make expenditures or electioneering communications of $50,000 or more in the coming two years, or had made such expenditures in the prior two years. The look-back requirement is bad enough; a donor may not know of those expenditures by another, unrelated organization, and has no safe-harbor even if it inquires of the receiving organization and receives an innocent but incorrect answer. The look-forward requirement, however, is worse. If the donating organization does not "designate[], request[], or suggest[]" that the donation be used for "campaign-related disbursements," and does not make the donation in request to a "solicitation or other request" for "campaign-related disbursements," and does not "engage[] in discussions ... regarding ... campaign-related disbursements" - all separate liability triggers - how is it supposed to know that the organization will spend $50,000 on "campaign related disbursements"?

The provision seems designed to trip up the unwary and provide a means for post-hoc investigations of unsuspecting organizations.

Conclusion

S. 2219 piles enormous costs on nonprofits and other speakers – costs that are certain to chill speech, and which appear intended to accomplish indirectly, through costly and arbitrary compliance provisions, what the Congress may not do directly: silence disfavored speakers.

www.campaignfreedom.org

David Keating

David Keating is the president of the Center for Competitive Politics (CCP), the leading organization dedicated solely to protecting First Amendment political rights.

In 2007 Mr. Keating founded the organization SpeechNow.org due to his frustration by the incessant attacks on the First Amendment. His goal was to give Americans who support free speech a way to join together, pool their resources, and advocate for federal candidates who agree with them—and work to defeat those who do not.

At that time, current campaign finance laws were restricting SpeechNow.org's ability to engage in independent expenditures due to burdensome contribution limits on their donors. This led to the court case SpeechNow.org v. FEC and the result was a ruling by the federal courts that such a law was indeed unconstitutional. This ruling created what has now become known technically as an Independent Expenditure Only Political Committee, also known as a Super PAC.

Prior to becoming president of CCP, he was the executive director of the Club for Growth. He has played a key role in helping the Club grow its membership and influence in public policy and politics.

For many years, Mr. Keating served as executive vice president of the National Taxpayers Union. Mr. Keating also served as the Washington Director of Americans for Fair Taxation, a tax reform group that promotes passage of the FairTax to replace the income tax.

In May 1996 he was appointed to the National Commission on Restructuring the Internal Revenue Service by then Senator Bob Dole because of his leading role in the development and passage of the Taxpayers' Bill of Rights. The Commission's report was released in June 1997, and served as the basis for legislation approved by Congress in 1998, which included a further expansion of taxpayers' rights as advocated by Mr. Keating during his work on the Commission.

He also played key roles in passage of income tax indexing legislation to prevent inflation from boosting taxpayers into higher tax brackets and passage of a bill to protect innocent spouses from being dunned by the IRS for unfair tax debts.

Richard L. Hasen

Executive Summary of Testimony on S.2219,
"The Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012",
before United States Senate Committee on Rules and Administration,
March 29, 2012

Thank you very much for the opportunity to appear before you today to testify about Senate Bill 2219, which would restore an effective set of disclosure tools to federal campaign finance law. I have written extensively about campaign finance law, and in particular about campaign finance disclosure laws and the limits of such laws under the First Amendment. I strongly support the proposed legislation as a way of closing loopholes and requiring the disclosure of information that will deter corruption, provide the public with relevant information, and allow for the enforcement of other laws—such as the bar on foreign money in U.S. elections. The proposed legislation uses high dollar thresholds and enables contributors to tax exempt organizations to shield their identity when making non-election-related contributions. These steps ensure that First Amendment rights of free speech and association are fully protected.

In my testimony I will briefly explain (1) why changes in campaign finance law and practice have made this legislation necessary; (2) the benefits of this bill for American democracy; and (3) the clear constitutionality of the bill in the face of the argument that it will chill speech protected by the First Amendment. Put briefly, the rise of 501(c)(4) and other groups allows donors to shield their donations from public view, depriving the public of valuable information and depriving the government of a valuable anticorruption tool. Full disclosure helps voters make informed decisions, as recent experience with one-sided spending in a California ballot race illustrates. Finally, courts have examined the extent to which campaign finance disclosure can lead to harassment. Courts have found that even in the case of controversial issues such as gay marriage, harassment is rare. Nonetheless, to preserve individuals' informational privacy, high threshold limits, as set in this bill, are appropriate.

Although members of the Supreme Court divided strongly in *Citizens United* over the constitutionality of limits on corporate *spending* in elections, they voted 8-1 to sustain broad *disclosure* requirements against constitutional challenge. It is my hope that the Senate will once again return to overwhelming bipartisan agreement in favor of campaign finance disclosure.

United States Senate Committee on Rules and Administration
Hearing on S.2219, "The Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012" (DISCLOSE Act of 2012),
March 29, 2012

STATEMENT OF RICHARD L. HASEN

Richard L. Hasen
Chancellor's Professor of Law and Political Science
UC Irvine School of Law*
401 E. Peltason Drive, Suite 1000
Irvine, CA 92697
(949)824-3072 — voice
(949)824-0495 — fax
rhasen@law.uci.edu
http://law.uci.edu/faculty/page1_r_hasen.html
http://electionlawblog.org

***Affiliation for identification purposes only.**

Chairman Schumer, Ranking Member Alexander, and Senators on the Rules and Administration Committee:

Thank you very much for the opportunity to appear before you today to testify about Senate Bill 2219, which would restore an effective set of disclosure tools to federal campaign finance law. I have written extensively about campaign finance law, and in particular about campaign finance disclosure laws and the limits of such laws under the First Amendment.[1] I strongly support the proposed legislation as a way of closing loopholes and requiring the disclosure of information that will deter corruption, provide the public with relevant information, and allow for the enforcement of other laws—such as the bar on foreign money in U.S. elections. The proposed legislation uses high dollar thresholds and enables contributors to tax exempt organizations to shield their identity when making non-election-related contributions. These steps ensure that First Amendment rights of free speech and association are fully protected.

In my testimony I will briefly explain (1) why changes in campaign finance law and practice have made this legislation necessary; (2) the benefits of this bill for American democracy; and (3) the clear constitutionality of the bill in the face of the argument that it will chill speech protected by the First Amendment. Although members of the Supreme Court divided strongly in *Citizens United* over the constitutionality of limits on corporate *spending* in elections, they voted 8-1 to sustain broad *disclosure* requirements against constitutional challenge.[2] It is my hope that the Senate will once again return to overwhelming bipartisan agreement in favor of campaign finance disclosure.

1. Why Changes in Campaign Finance Law Have Made This Legislation Necessary

Congress first enacted meaningful disclosure provisions in 1974, in the wake of Watergate.[3] The 1974 Amendments to the Federal Election Campaign Act imposed broad disclosure requirements on candidates, party committees, and political action committees (PACs), and all who would spend money on election-related advertising. In 1976, the Supreme Court in the *Buckley v. Valeo* case[4] upheld the Act's disclosure requirements, even for very

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[1] I have primary responsibility for drafting and updating the campaign finance chapters in DANIEL LOWENSTEIN, RICHARD L. HASEN, & DANIEL P. TOKAJI, ELECTION LAW—CASES AND MATERIALS (4th ed. 2008 & 2011 Supp.). Chapter 18 covers campaign finance disclosure in depth. My most recent article exploring the Supreme Court's approach to campaign finance regulation is Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICHIGAN LAW REVIEW 581 (2011). I have written the following articles specifically on the topic of campaign finance disclosure: Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure in the Internet Era*, JOURNAL OF LAW AND POLITICS (forthcoming 2012), *draft available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948313 and draft placed on file with this Committee; Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 4 ELECTION LAW JOURNAL 251 (2004); and Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA LAW REVIEW 265 (2000). I have also written articles about campaign finance disclosure for the popular media, most recently, Richard L. Hasen, *Show Me The Donors: What's The Point of Campaign Finance Disclosure? Let's Review*, SLATE, Oct. 14, 2010, http://www.slate.com/articles/news_and_politics/politics/2010/10/show_me_the_donors.html.

[2] Citizens United v. FEC, 130 S.Ct. 876, 914–916 (2006).

[3] On the legislative history and the history of the *Buckley* litigation, see Richard L. Hasen, *The Nine Lives of* Buckley v. Valeo, in FIRST AMENDMENT STORIES ch. 12 (Richard Garnett & Andrew Koppelman eds. 2011).

[4] Buckley v. Valeo, 424 U.S. 1, 65–84 (1976).

modest contributions and spending, against First Amendment challenge, while recognizing that any group which could demonstrate a threat of harassment is constitutionally entitled to an exemption from disclosure. However, the *Buckley* Court found part of the disclosure law to be vague, and it interpreted the law to apply only to what has come to be known as "express advocacy," advertising such as "Vote for Senator X." The result of this interpretation was that contributions and spending for many "issue advocacy" ads went unreported.

Congress fixed the vagueness problem in the Bipartisan Campaign Reform Act of 2002, or "BCRA" (commonly known as McCain-Feingold).[5] Among other things, BCRA requires disclosure of contributions and spending on so-called "electioneering communications," which are radio and television advertisements featuring a federal candidate and broadcasting to a wide audience close to the election. The Supreme Court upheld the disclosure provisions in the *McConnell v. FEC* case,[6] and held that the provisions could be applied to a broad array of ads—even those that are not the functional equivalent of express advocacy—in the *Citizens United* case.[7]

Justice Kennedy's opinion for the Court in *Citizens United* case incorrectly assumed that current federal disclosure laws work effectively. He said that "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today...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."[8]

Unfortunately, the world Justice Kennedy imagined has not materialized. The main problem is that many political groups, which used to organize either as PACs or as 527 organizations, are no longer using these organizational forms. PACs and 527 groups must regularly disclose their contributions. Many political groups are now using the 501(c)(4) or other types of organization that require no public disclosure of contributors.[9] The information is released only to the IRS. A strong argument could be made that some of these groups are violating both the Internal Revenue Code—by not have a primary purpose of "social welfare"—and the Federal Election Campaign Act—by not registering as political committees despite having a major purpose of influencing federal elections. Lack of enforcement by these agencies and uncertainty in the law make new Congressional legislation necessary.

How serious of a problem is secret money? A Center for Responsive Politics study

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[5] Pub. L. 107-155, 116 Stat. 81 (enacted March 27, 2002).
[6] 540 U.S. 93, 196 (2003).
[7] *Citizens United*, 130 S.Ct. at 915–16.
[8] *Id.* at 916.
[9] On the issue of the relationship between tax law and political activities since *Citizens United*, see the recent symposium in the *Election Law Journal*, "Shadows & Light: Nonprofits and Politics in a Post-*Citizens United* World" featuring Ellen P. Aprill, *Political Speech of Noncharitable Exempt Organizations after* Citizens United, 10 ELECTION LAW JOURNAL 507 (2011); Richard Briffault, *Nonprofits and Disclosure in the Wake of* Citizens United, 10 ELECTION LAW JOURNAL 227 (2011); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of* Citizens United, 10 ELECTION LAW JOURNAL 407 (2011); Nancy E. McGlamery & Rosemary E. Fei, *Taxation with Reservations: Taxing Nonprofit Political Expenditures After* Citizens United, 10 ELECTION LAW JOURNAL 449 (2011); and Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION LAW JOURNAL 427 (2011).

found that in 2010 the percentage of "spending coming from groups that did not disclose their donors rose from 1 percent to 47 percent since the 2006 midterm elections," and "501(c) non-profit spending increased from 0 percent of total spending by outside groups in 2006 to 42 percent in 2010."[10] This stands to be an even larger problem in 2012.

Furthermore, with the rise of "Super PACs"—political committees that take unlimited contributions from individuals, corporations, and labor unions to spend on independent ads—contributors can more easily shield their identity from the public, hiding behind innocuous names like "Americans for a Strong America." The public does not get the information on who is funding the ads when it needs it the most—alongside the ad. Even worse, donors can shield their identities by contributing to a 501(c)(4) which in turn donates to a Super PAC—as recently happened when *nearly half* of FreedomWorks' Super PAC contributions came from its sister 501(c)(4).[11] Disclosing that FreedomWorks' contributions came from a FreedomWorks affiliate is not helpful to voters.

2. The Benefits of the Bill for American Democracy

I turn now to the benefits of a bill providing for enhanced disclosure. In *Buckley v. Valeo*, the Court held that three societal interests justified the disclosure laws.

First, disclosure laws *can prevent corruption* and the appearance of corruption. Having no more paper bags of cash makes it harder to bribe a candidate. There is a serious question whether Justice Kennedy was right in *Citizens United* in stating that independent corporate spending can neither corrupt nor cause the public to lose confidence in the fairness of the electoral process. In a recent article,[12] I explain how outside spending *can* corrupt, both directly through threats against legislators to run large independent efforts against them unless those making the threats get their way, and indirectly, through the fundraising pressures which an outside money campaign brings to bear on legislators. *Citizens United* prevents Congress from reimposing corporate limits on these anticorruption grounds. Disclosure is an important—though second best—alternative to corporate spending limits to help ferret out corruption.

Second, disclosure laws provide *valuable information* to voters. A busy public relies on disclosure information more than ever. This was apparent when California voters recently turned down a ballot proposition that would have benefited Pacific Gas and Electric.[13] PG&E provided almost all of the $46 million to the "Yes on 16" campaign, compared with very little spent opposing the measure. Thanks to California's disclosure laws requiring top contributor names to be on ads, PG&E's name appeared on every "Yes on 16" ad and the measure narrowly went down to defeat. DISCLOSE has a similar provision for disclosure of the top funders.

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[10] Spencer MacColl, Citizens United *Decision Profoundly Affects Political Landscape*, Center for Responsive Politics, Open Secrets Blog, May 5, 2011, 11:16 am, http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html.

[11] Robert Maguire and Viveca Novak, *The Freedom Works Network: Many Connections, Little Disclosure*, Open Secrets Blog, March 16, 2012, 2:14 pm, http://www.opensecrets.org/news/2012/03/if-tk-year-veteran-indiana-sen.html.

[12] Richard L. Hasen, *Of Super PACs and Corruption*, POLITICO, March 22, 2012, http://www.politico.com/news/stories/0312/74336.html. I have submitted a copy of this article for inclusion in the record.

[13] *See* Hasen, *Chill Out*, *supra* note 1 (draft at 16–17).

Voters who know whether the NRA or Sierra Club backs a candidate will have valuable information to make a more informed choice.

Third, disclosure laws *help enforce other campaign finance laws*. Worried about foreign money in elections? Disclosure tells you how much money is coming in and from what source. It will also deter illegal conduit contributions, whereby a contributor tries to launder contributions through the use of one or more sham entities. Disclosure helps ferret out such chicanery.

2. The Constitutionality of the DISCLOSE Act of 2012

I have a high degree of confidence that courts would hold constitutional the Senate's version of the DISCLOSE Act of 2012 if it were challenged on First Amendment grounds. Preliminarily, let me note that I take the constitutional question very seriously, and I do not believe that the constitutional question necessarily lines up with my view of good policy. In 2006, for example, I testified before the Senate Judiciary Committee that certain parts of the Voting Rights Act that I supported were in danger of being struck down as unconstitutional.

The main constitutional claim likely to be made against the DISCLOSE Act of 2012 is that it impermissibly chills the First Amendment rights of speech and association through the requirement of disclosure. To begin with, the Supreme Court has repeatedly stated that groups that can demonstrate a real threat of harassment are entitled to an exemption from disclosure.[14] This provides a safety valve for any disclosure provision. Second, since *Citizens United* the courts have uniformly rejected broad-based attacks on disclosure rules on grounds of chilling effect.[15]

In a forthcoming Article in the *Journal of Law and Politics* at the University of Virginia,[16] I closely analyze the claims of harassment that have been made in recent cases surrounding controversial ballot measures concerning gay marriage and gay rights. Two federal courts examined in detail evidence of harassment and found the claims wanting.[17] While some *leaders* of groups faced public protests, as to campaign contributors or signature gatherers, there was nothing beyond the occasional "mooning" of someone collecting ballot signatures. Harassment in this context is just not a common problem. As Justice Scalia explained in a recent case, people participating in the life of democracy ordinarily should have the "civic courage" to stand behind what they say.[18]

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[14] *Buckley*, 424 U.S. at 74; Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); *Citizens United*, 130 S.Ct. at 916; Doe v. Reed, 130 S.Ct. 2815, 2821 (2010).

[15] *See* Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After* Citizens United *and* Doe v. Reed, 27 GEORGIA STATE LAW REVIEW 1057 (2011).

[16] Hasen, *Chill Out*, *supra* note 1.

[17] Doe v. Reed, No. C09–5456BHS, --- F.Supp.2d ----, 2011 WL 4943952 (W.D. Wash. Oct. 17, 2011); ProtectMarriage.com v. Bowen, No. 2:09-CV-00058-MCE-DA, --- F.Supp.2d ----, 2011 WL 5507204 (E.D. Cal. Nov. 4, 2011).

[18] Doe v. Reed, 130 S.Ct. at 2837 (Scalia, J., concurring in the judgment) ("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.").

In this same Article, I also discuss how the rise of the Internet has greatly decreased the costs of obtaining information about even very tiny campaign finance contributions made to controversial causes. While there is little evidence that the availability of such information has led to harassment, I question whether the public gains much from having information about these very small contributions made public. While not of constitutional magnitude, this interest in "informational privacy" justifies having higher thresholds for disclosure of campaign-related contributions. The DISCLOSE Act, with its $10,000 thresholds, provides that breathing room for informational privacy.

Relatedly, the DISCLOSE Act provisions are ingenious in allowing contributors to non-profits to keep that information private when the money will not be used for election-related purposes. Either the non-profit can set up a separate account for election-related disbursements—and only such information is disclosed to the public—or a contributor to a non-segregated fund of a 501(c) can keep the information private through a written agreement that the contribution should not be used for election-related ads. The DISCLOSE Act sensibly targets the nature of the activity—contributing money for election-related ads—and not the type of organizational form under the Tax Code, as the basis for requiring disclosure of contributor information.

Thank you again for the opportunity to speak. I welcome your questions.

Richard L. Hasen
Biography

Professor Richard L. Hasen is the Chancellor's Professor of Law and Political Science at the University of California, Irvine. Hasen is a nationally-recognized expert in election law and campaign finance regulation, and is co-author of a leading casebook on election law. From 2001-2010, he served (with Dan Lowenstein) as founding co-editor of the quarterly peer-reviewed publication, Election Law Journal. He is the author of more than eighty articles on election law issues, published in numerous journals including the *Harvard Law Review, Stanford Law Review*, and *Supreme Court Review*. He was elected to the American Law Institute in 2009. His opeds and commentaries have appeared in many publications, including the *New York Times*, *Washington Post*, *Politico*, and *Slate*. Hasen also writes the often-quoted Election Law Blog. His newest book, *The Voting Wars: From Florida 2000 to the Next Election Meltdown*, will be published in summer 2012 by Yale University Press.

Professor Hasen holds a B.A. degree (with highest honors) from UC Berkeley, and a J.D., M.A., and Ph.D. (Political Science) from UCLA. After law school, Richard Hasen clerked for the Honorable David R. Thompson of the United States Court of Appeals for the Ninth Circuit, and then worked as a civil appellate lawyer at the Encino firm of Horvitz and Levy. From 1994-1997, Hasen taught at the Chicago-Kent College of Law and from 1998-2011 he taught at Loyola Law School, Los Angeles, where he was named the William H. Hannon Distinguished Professor of Law in 2005. He joined the UC Irvine School of Law faculty in July 2011.

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Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age

Richard L. Hasen
rhasen@law.uci.edu
University of California, Irvine ~ School of Law

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CHILL OUT:
A QUALIFIED DEFENSE OF CAMPAIGN FINANCE DISCLOSURE LAWS IN THE INTERNET AGE

RICHARD L. HASEN*

INTRODUCTION

Everywhere you look, campaign finance disclosure laws are under attack. The National Organization for Marriage ("NOM"), a group opposing marriage equality for gays and lesbians, has filed numerous lawsuits attacking state campaign finance disclosure laws on constitutional grounds.[1] Congress failed to fill the gaping holes in the federal disclosure rules that followed the Supreme Court's *Citizens United* decision,[2] freeing corporate and labor union money in the political process.[3] Senator and Republican leader Mitch McConnell ardently opposed the DISCLOSE Act, which would have plugged some of those holes, despite his earlier calls for a campaign finance system with no limits but full and instant disclosure.[4] Republican Commissioners on the Federal Election Commission worsened things by embracing an interpretation of existing federal disclosure law making it child's play for political groups to

* Professor of Law and Political Science, UC Irvine School of Law. Prepared for presentation at Thomas Jefferson Center for Free Expression conference, "Disclosure, Anonymity, and the First Amendment," October 29, 2011, University of Virginia. Thanks to conference participants, Bruce Cain, and Lloyd Mayer for useful comments and suggestions, and to Jeremy Hufton for research assistance.

[1] 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.

[2] Citizens United v. FEC, 130 S. Ct. 876 (2010).

[3] Dan Eggen, *Senate Democrats Again Fail to Pass Campaign Finance Disclosure*, WASH. POST, Sept. 23, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/23/AR2010092304578.html.

[4] Editorial, *McConnell's Hypocrisy on Campaign Disclosure*, LEXINGTON HERALD-LEADER, Aug. 1, 2010, http://www.kentucky.com/2010/08/01/1372068/mcconnells-hypocrisy-on-campaign.html. Democrats coupled their disclosure proposal with new limits on campaign spending by government contractors, a provision of dubious constitutionality which doomed the chances for the disclosure portions of the bill to attract moderate Republican support. Richard L. Hasen, *Show Me the Donors: What's the Point of Campaign Finance Disclosure? Let's Review*, SLATE, Oct. 14, 2010, http://www.slate.com/articles/news_and_politics/politics/2010/10/show_me_the_donors.single.html.

shield the identity of their donors.[5] The U.S. Chamber of Commerce strongly opposed attempts by the Obama administration to impose disclosure provisions on federal contractors through executive order,[6] and almost comically raised the specter that major American businesses will suffer government harassment if compelled to disclose their campaign spending.[7] We face the first presidential election since Watergate with the prospect that a significant portion of the money spent on the election will remain secret to the public, though not necessarily to the beneficiaries of the spending.

But attacks on disclosure have come not only from the right. Members of the academy, and not just the usual suspects who oppose virtually all campaign finance regulation,[8] have criticized disclosure laws. Bill McGeveran chides election law scholars for failing to take informational privacy concerns seriously, in the way scholars take such privacy interests seriously in other areas of the law when rethinking the costs of campaign finance disclosure.[9] Richard Briffault, a longtime supporter of reasonable campaign finance regulation, now believes disclosure is inadequate to deter corruption, and that the potential chill of disclosure in the Internet era warrants raising the threshold for disclosure of campaign contribution information.[10]

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[5] Richard L. Hasen, *The FEC is as Good as Dead: The New Republican Commissioners are Gutting Campaign Finance Law*, SLATE, Jan. 25, 2011, http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dead.html.

[6] Coalition Letter from the U.S. Chamber of Commerce to President Obama on the Draft Executive Order (May 16, 2011), *available at* http://www.uschamber.com/issues/letters/2011/coalition-letter-president-obama-draft-executive-order.

[7] Jake Tapper, *Chamber of Commerce: The White House Wants Our Donor Lists So Its Allies Can Intimidate Our Donors*, POL. PUNCH (Oct. 13, 2010, 11:10 AM), http://abcnews.go.com/blogs/politics/2010/10/chamber-of-commerce-the-white-house-wants-our-donor-lists-so-its-allies-can-intimidate-our-donors/. The interview quotes Bruce Josten, executive vice president for government affairs for the Chamber as follows: "When some of those corporate names were divulged, not by us, by others, what did they receive? They received protests, they received threats, they were intimidated, they were harassed, they had to hire additional security, they were recipients of a host of proxies leveled at those companies that had nothing to do with the purpose of those companies. So we know what the purpose here is. It's to harass and intimidate." So far as I can tell, most of these charges were never proven. Others involved economic boycotts which are not harassment but protected First Amendment activity.

[8] BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 221-23 (2001).

[9] William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859 (2011).

[10] Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273 (2010).

Lloyd Mayer dismisses the anticorruption interest for disclosure laws in a single sentence,[11] and expresses considerable skepticism that current disclosure laws can serve the important governmental interest of providing valuable information to voters.[12] Bruce Cain believes that many reformers push disclosure to dissuade people from giving money to campaigns, and he has called for treating campaign finance disclosure information as we do sensitive individual level census data—disclosed to the government but not to the public.[13]

In this short essay, I offer a qualified defense of government-mandated disclosure, one which recognizes the concerns of these prominent academics but also sees much of the anti-disclosure rhetoric of the Chamber and others as overblown and unsupported — offered disingenuously with the intention to create a fully deregulated campaign finance system, in which large amounts of secret money flow in an attempt to curry favor with politicians, but avoid public scrutiny. To the contrary, disclosure laws remain one of the few remaining constitutional levers to further the public interest through campaign finance law.

Even in the Internet age, in which the costs of obtaining campaign finance data about small-scale contributions by individual donors often have fallen to near zero, there is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak. In the face of evidence of a real threat of serious harassment, courts should freely grant exemptions from campaign finance laws. Even absent proof of harassment, Congress and state legislatures should modify their disclosure laws to protect the informational privacy of those individuals who use modest means to express symbolic support for candidates or ballot measures. But major players in the electoral process

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[11] Lloyd H. Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255 (2010).
[12] *Id.*
[13] Bruce Cain, Lead Essay, *Shade from the Glare: The Case for Semi-Disclosure*, CATO UNBOUND (Nov. 8, 2010, 11:08 AM), http://www.cato-unbound.org/2010/11/08/bruce-cain/shade-from-the-glare-the-case-for-semi-disclosure/.

generally should not be able to shield their identities under a pretextual appeal to the prevention of "harassment" because of the important government interests in preventing corruption and providing valuable information to voters which are furthered by mandated disclosure.

It is no surprise that the Internet has been primarily responsible for the loss of informational privacy in the campaign finance disclosure context. Perhaps more surprisingly, the Internet is at least indirectly responsible for strengthening the two primary government interests supporting mandatory disclosure. As I will argue, the rise of the Internet was a prime force in the unraveling of the older campaign finance regime, and the subsequent emergence of new campaign finance organizations such as "Super PACs," which raise the danger of the corruption of elected officials dramatically. Disclosure laws may not be the best tool to police the potential for corruption from these new or supercharged campaign finance vehicles (limits on corporate and labor union spending, along with limits on contributions to independent expenditure committees, are far better but currently unconstitutional). Nonetheless, disclosure laws are much better than nothing in ferreting out when an elected official might act to benefit her supporters rather than act in the public interest.

As for the information interest, campaign finance data, especially when included on the face of campaign advertising, provides an important heuristic cue helping busy voters decide how to vote. Such data assist voters who face Internet-driven information overload and a variety of potentially misleading campaign ads seeking to mask the identity of those behind campaigns and campaign advertising.

I. CHILL

To listen to some critics of the recent attempts to plug the holes in our federal disclosure laws, harassment of donors is commonplace and severe. In fact, the available evidence is to the

contrary, and the reason for the focus on harassment is to fit challenges to campaign finance disclosure laws into a narrow exception created by Supreme Court. The Supreme Court has repeatedly upheld campaign finance disclosure laws against First Amendment challenge,[14] most recently in the *Citizens United* case, recognizing only an "as applied" exemption for people or groups facing a realistic threat of serious harassment.

Although much of the debate about harassment is empirical (how much harassment is there?), the debate actually begins with a definitional problem about what constitutes "harassment" of campaign contributors or spenders. The Supreme Court has been somewhat unclear on the issue,[15] so perhaps the best place to start is with *Brown v. Socialist Workers '74 Committee*,[16] the one case in which the Court recognized that the Constitution mandated an exemption based upon harassment for contributors to the Socialist Workers Party ("SWP").

The harassment of SWP contributors was pervasive and egregious:

> Appellees introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial. These incidents, many of which occurred in Ohio and neighboring states, included 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. 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. Although appellants contend 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."
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> The District Court also found a past history of government harassment of the SWP. FBI surveillance of the SWP was "massive" and continued until at least

[14] For the doctrinal history, see Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000). The one major exception to the constitutionality of campaign finance disclosure laws appears is McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), which recognized a right to anonymous campaign speech in certain circumstances. But as Professor McGeveran explains, that case has been mostly ignored in subsequent Supreme Court cases. McGeveran, *supra* note 9, at 859-60 ("Boy was I wrong [in] suggest[ing] the Supreme Court might find constitutional problems with mandatory disclosure of modest campaign contributions.").

[15] McGeveran, *supra* note 9, at 868.

[16] 459 U.S. 87 (1982).

> 1976. The FBI also conducted a counterintelligence program against the SWP and the Young Socialist Alliance (YSA), the SWP's youth organization. One of the aims of the "SWP Disruption Program" was the dissemination of information designed to impair the ability of the SWP and YSA to function. This program included "disclosing to the press the criminal records of SWP candidates, and sending anonymous letters to SWP members, supporters, spouses, and employers." Until at least 1976, the FBI employed various covert techniques to obtain information about the SWP, including information concerning the sources of its funds and the nature of its expenditures. The District Court specifically found that the FBI had conducted surveillance of the Ohio SWP and had interfered with its activities within the State. Government surveillance was not limited to the FBI. The United States Civil Service Commission also gathered information on the SWP, the YSA, and their supporters, and the FBI routinely distributed its reports to Army, Navy and Air Force Intelligence, the United States Secret Service, and the Immigration and Naturalization Service.[17]

In determining whether SWP supporters were entitled to a harassment-based exemption from campaign finance laws, the Court took the fact-inquiry regarding harassment seriously. The lesson of the case is that the threat of harassment must be proven, not assumed. And it must be severe, not casual or minor, such as merely being "mooned" or "flipped off" by detractors for engaging in controversial political activity.[18]

A majority of the Supreme Court today likely would require proof of a potential for harassment on the scale of what the SWP members faced in order to justify the granting of an as-applied exemption to an otherwise constitutional disclosure law. In the recent *Doe v. Reed*

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[17] *Id.* at 423-24 (footnotes omitted). One of the omitted footnotes, footnote 18, includes the following finding from the district court:

> "The Government possesses about 8,000,000 documents relating to the SWP, YSA . . . and their members. . . . Since 1960 the FBI has had about 300 informants who were members of the SWP and/or YSA and 1000 non-member informants. Both the Cleveland and Cincinnati FBI field offices had one or more SWP or YSA member informants. Approximately 2 of the SWP member informants held local branch offices. Three informants even ran for elective office as SWP candidates. The 18 informants whose files were disclosed to Judge Breitel received total payments of $358,648.38 for their services and expenses."

Id. at 424 n.18.

[18] Doe v. Reed, No. C09–5456BHS, 2011 WL 4943952 (W.D. Wash. Oct. 17, 2011) (hearing allegations made of signature gatherers for anti-gay rights referendum in Washington State).

case,[19] the Court rejected a constitutional argument against the disclosure of the names of people signing referendum petitions in Washington State, but it remanded the case to the district court to consider whether the signers of a particular anti-gay rights referendum were entitled to an as-applied exemption based upon proof of harassment. Although the Court, in dicta, split in the *Doe* case over the precise standards for the as-applied harassment exemption to be applied on remand, the District Court examining *Doe* on remand concluded that Justice Sotomayor's standard, which mirrors the *Socialist Workers*' standard, had the support of a majority of the Court.[20] This standard requires proof of "serious and widespread harassment that the State is unwilling or unable to control."[21]

With *Socialist Workers* likely enshrined as the governing standard, we can turn to the empirical evidence of harassment. Using the *Socialist Workers* standard, evidence of harassment of campaign finance contributors and spenders these days is sparse indeed. Violence, intimidation, and government interference with unpopular groups in this country is currently blessedly rare and even rarer among groups choosing to participate in the political process through campaign contributions and expenditures. Indeed, outside the context of disputes over gay marriage-related measures, it is hard to think of examples of even credible *allegations* of harassment. As a political scientists' amicus brief in the *Doe* case noted, "[w]ith respect to the twenty-eight statewide referenda that have qualified for the ballot [nationwide] between 2000 and 2009, well over a million citizens have signed their names to petitions. Yet petitioners have

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[19] 130 S. Ct. 2811 (2010).
[20] Doe v. Reed, No. C09 5456BHS, 2011 WL 4943952, at *18 (W.D. Wash. Oct. 17, 2011).
[21] *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring). One open question is whether the exemption is available only to "minor parties" or "fringe groups." *See* Doe v. Reed, No. C09 5456BHS, 2011 WL 4943952, at *5 (W.D. Wash. Oct. 17, 2011).

identified no individual petition signer—not one—who has alleged any instance of harassment or intimidation."[22]

It is worth noting an ideological split on the empirical evidence of harassment. Judged from their recent opinions, conservative Supreme Court Justices Thomas and Alito appear to believe that intimidation of conservatives for their political opinions is commonplace.[23] (I cannot help but believe that the contentious Senate confirmation hearings for these Justices, especially of Justice Thomas, contributed to a feeling of conservatives being under siege.) This concern about leftist harassment appears to be widespread among staunch conservatives. As NOM lawyer Jim Bopp recently put it in a posting to the Election Law listserv, "Blacks, gays and leftist[s] were harassed yesterday; conservatives and Christians are harassed today. And no one is safe from the thugs and bullies tomorrow."[24]

But courts looking at the empirical evidence of harassment have concluded otherwise. In the remand in the *Doe* case, the court found virtually no evidence that voters who signed of the anti-gay rights referendum were subject to harassment.[25] Nor did financial contributors who supported the referendum face harassment. It was true, and lamentable, that national *public*

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[22] Brief for Direct Democracy Scholars as Amicus Curiae in Support of Respondents at 12, Doe v. Reed, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 1256467 at *12.

[23] *Doe*, 130 S. Ct. at 2822 (Alito, J., concurring); *id.* at 2837 (Thomas, J., dissenting). Justice Thomas also dissented on the disclosure issues in the *Citizens United* case. Citizens United v. FEC, 130 S. Ct. 876, 979-82 (2010) (Thomas, J., concurring in part and dissenting in part).

[24] Posting of Jim Bopp, JBoppjr@aol.com, to law-election@department-lists.uci.edu (Oct. 17, 2011) (on file with author) (quoted with the permission of the author).

[25] Doe v. Reed, No. C09 5456BHS, 2011 WL 4943952, at *18 (W.D. Wash. Oct. 17, 2011) ("Applied here, the Court finds that Doe has only supplied evidence that hurts rather than helps its case. Doe has supplied minimal testimony from a few witnesses who, in their respective deposition testimony, stated either that police efforts to mitigate reported incidents was sufficient or unnecessary. Doe has supplied no evidence that police were or are now unable or unwilling to mitigate any claimed harassment or are now unable or unwilling to control the same, should disclosure be made. This is a quite different situation than the progeny of cases providing an as-applied exemption wherein the government was actually involved in carrying out the harassment, which was historic, pervasive, and documented. To that end, the evidence supplied by Doe purporting to be the best set of experiences of threats, harassment, or reprisals suffered or reasonably likely to be suffered by R-71 signers cannot be characterized as 'serious and widespread.'").

leaders of anti-gay marriage measures suffered some harassment, but mere petition signers or contributors did not.[26]

A federal district court judge reached the same conclusion in a challenge to the disclosure of the names of contributors to Proposition 8, California's anti-gay marriage initiative. On the request for a preliminary injunction, the trial judge found a similar lack of evidence of harassment to meet the *Socialist Workers* standard.[27] The court recently granted summary judgment for California on the same issue, ending the case.

Part of the rhetorical divide appears to stem from conservatives' adopting a broader definition of harassment than the one allowed by *Socialist Workers*. Most importantly, conservatives seem to count economic boycotts as harassment. But as Elian Dashev argues in an important student note, economic boycotts are themselves protected First Amendment activity which should not be the basis for claiming a harassment exemption.[28]

The United States Chamber of Commerce has raised its own harassment objection to a proposed Obama administration executive order requiring disclosure of the campaign finance activities of federal contractors.[29] The Chamber describes what economists would term a form

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[26] *Id.* at *19 (Plaintiffs "have developed substantial evidence that the public advocacy of traditional marriage as the exclusive definition of marriage, or the expansion of rights for same sex partners, has engendered hostility in this state, and risen to violence elsewhere, against some who have engaged in that advocacy. This should concern every citizen and deserves the full attention of law enforcement when the line gets crossed and an advocate becomes the victim of a crime or is subject to a genuine threat of violence.").

[27] ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

[28] Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of* Doe v. Reed, 45 LOY. L.A. L. REV. 207 (2011).

[29] U.S. Chamber of Commerce, *supra* note 6 ("The proposed order will either encourage covered speakers to refrain from exercising their constitutional speech rights so as to avoid jeopardizing their competitiveness for federal contracts, or it will encourage speakers to alter their political messages in ways perceived to increase their chances of being awarded federal contracts.").

of "rent extraction," whereby politicians punish companies that do not contribute to the politicians or their party (or who contribute to their rivals).[30]

But public disclosure actually should minimize, not exacerbate, the dangers of rent extraction. Without public disclosure, politicians would be *the only ones* to know if they are getting campaign finance support from a government contractor, and could shake down those who do not support the candidate or her party. Public disclosure makes such retaliation by politicians much less likely because the public can more easily see patterns of retribution. The Chamber, representing the most powerful corporations in the United States, hardly seems akin to those SWP members who faced violence and intimidation. I am confident that Philip Morris and Exxon Mobil can hold their own in the public square.[31]

The bottom line is that constitutionally significant harassment is extremely rare, and in all but the most hot-button cases (perhaps these days only in the gay marriage cases), we may safely discount the danger of harassment as a reason for opposing generally applicable campaign finance laws. Of course, all such laws should include procedures for receiving an as-applied exemption upon showing the threat of serious and pervasive harassment of the *Socialist Workers* variety. But the granting of exemptions should be rare because harassment is rare.

Despite the lack of evidence of harassment, federal, state, and local governments still should dramatically raise the reporting thresholds for campaign finance contributions. The issue here is not harassment but the informational privacy concern raised by Professor McGeveran.

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[30] FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997); *see also* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

[31] Eric Lipton et al., *Top Corporations Aid U.S. Chamber of Commerce Campaign*, N.Y. TIMES, Oct. 21, 2010, http://www.nytimes.com/2010/10/22/us/politics/22chamber.html ("These large donations [from major corporations] — none of which were publicly disclosed by the chamber, a tax-exempt group that keeps its donors secret, as it is allowed by law — offer a glimpse of the chamber's money-raising efforts, which it has ramped up recently in an orchestrated campaign to become one of the most well-financed critics of the Obama administration and an influential player in this fall's Congressional elections.").

For example, I live in a neighborhood populated by a number of liberals in the entertainment industry. I, or anyone else, can go to the Huffington Post's "fundrace.huffingtonpost.com" website and figure out which of my neighbors gave $100 to Herman Cain and or conservative candidates. Those conservative neighbors making such donations will not face harassment for making such contributions, but I would guess there would be some whispering among the typical liberal people living in my neighborhood who would think differently about these neighbors if they got this information. Whispering is not harassment, but the entire process is unseemly and unnecessary.

This type of snooping is a new phenomenon facilitated by the Internet. One of the pioneers of the study of money in politics, Professor Louise Overacker, reports how in the 1930s she literally had to go into the men's room at the House of Representatives to retrieve campaign finance records from dusty, unlabeled bundles above some lockers.[32] Campaign finance data was hard to come by. In the 1970s, if you wanted campaign finance records, you needed to go down to the Federal Election Commission and peruse the papers organized by campaign, not donor. By the 1990s, enterprising private organizations were digitizing the data for searching. Today, anyone with an Internet connection can have the information about federal (and many state and local) campaign contributions in seconds from either the FEC, private organizations, or good government groups such as the Center for Responsive Politics that maintains the indispensable Open Secrets website and database.

The unseemliness of Fundrace-type snooping would be worth putting up with if disclosure of very small contributions served some important interest. Knowing that one's Hollywood neighbor gave $100 to Herman Cain or one's Houston neighbor gave $50 to

[32] ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 25-26 (1988).

Elizabeth Warren does not do much to prevent the corruption of these candidates or give voters valuable information about choosing candidates. As Professor Mayer argues, modest contributors are engaging in a symbolic act of support for the candidate. Like voting, such modest action generally should be considered a private matter.

Privacy is also advisable given occasional disturbing instances of serious economic boycotts against those making very small campaign contributions to anti-gay marriage causes. As Dashev describes, the most famous victim was Majorie Christofferson who donated only one hundred dollars in support of Proposition 8. After her donation was publicly disclosed, her family-owned establishment, popular Los Angeles restaurant El Coyote, was besieged.[33] While boycotts are constitutionally protected and do not constitute legal harassment, the state interest in disclosure of modest contributions is weak, and the cost of such disclosure can be more serious.

While the Constitution does not require raising the reporting thresholds, good policy sense does. Only contributors giving over a more significant threshold, say $1000, should have their names disclosed publicly (though all contributions of any amount should be reported to government agencies to make sure there is no fraud, sham, or conduit contributions taking place in campaigns, and government agencies should regularly audit these campaigns).

II. ANTICORRUPTION

In *Buckley v. Valeo*,[34] the Supreme Court rejected a First Amendment challenge to a provision of the Federal Election Campaign Act requiring individuals and groups that expressly advocate the election or defeat of candidates for federal office to file reports detailing contributions and expenditures with the Federal Election Commission. The Court upheld the disclosure requirements because they furthered three "sufficiently important" interests: deterring

[33] Dashev, *supra* note 28, at 248.
[34] 424 U.S. 1 (1976).

corruption, by allowing interested parties to look for connections between campaign contributors or spenders and candidates who benefit from those contributions or spending; providing information helpful to voters; and aiding in the enforcement of other campaign finance laws, such as contribution limits.

As Professor Briffault acknowledges, disclosure is not a strong anticorruption tool:[35] the most direct way to prevent a candidate from being improperly influenced by money in campaigns is to limit money in campaigns, not merely to shed a light on it. But spending limits are now unconstitutional, even as to corporations and labor unions, and contribution limits are coming under increasing constitutional pressure in the courts. Disclosure sometimes will be the *only* weapon available to the government for combating corruption, aside from the possibility of bribery prosecutions (which are themselves difficult to bring thanks to the Supreme Court's cases in that area). Mandated disclosure may not be a great tool, but it is better than nothing, allowing the press, opposing campaigns, and the public to look for a connection between an elected officials' financial supporters and the actions taken in office by the official.

That need for a "better than nothing" tool has increased exponentially, thanks to post-*Citizen United* developments, especially the rise of so-called Super-PACs. These PACs are political organizations which can accept unlimited sums from individuals, corporations and labor unions to fund election-related ads.[36] Holes in disclosure law, and the ability to funnel money through related 501(c)(4) organizations, make it possible to shield the identity of most campaign contributors to independent groups from public scrutiny.[37]

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[35] Briffault, *supra* note 10, at 287 ("Nor is it likely that disclosure enables the voters to define and enforce an anti-corruption norm.").

[36] *See* DANIEL H. LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, ELECTION LAW—CASES AND MATERIALS 70-72 (Supp. 2011).

[37] Kim Barker & Marian Wang, *Super-PACs and Dark Money: Pro Publica's Guide to the New World of Campaign Finance*, PRO PUBLICA (July 11, 2011), http://www.propublica.org/blog/item/super-pacs-propublicas-guide-to-the-new-world-of-campaign-finance.

In *Citizens United*, Justice Kennedy, writing for a majority of the Court, appeared to determine as an empirical matter for all cases that spending independent of a candidate cannot corrupt a candidate or be an improper influence on her.[38] As I have argued elsewhere,[39] this was one of the least persuasive portions of the Court's controversial opinion. If the Court believes that the government may limit a $3000 contribution to a candidate because of its corruptive potential, how could it not believe that the government has a similar anticorruption interest in limiting $3 million contributions to an independent effort to elect that candidate? The government's anticorruption interest stemming from large contributions to such groups is especially strong because these Super-PACs, while nominally independent, often have close ties to candidates.

It is not even clear that a majority of the Court (or even Justice Kennedy) actually believes Justice Kennedy's statement that independent spending cannot corrupt. The holding in *Citizens United* was in considerable tension with Justice Kennedy's opinion from just a year earlier in *Caperton v. Massey*,[40] recognizing that a $3 million contribution to an independent group supporting the election of a West Virginia Supreme Court Justice required that the Justice recuse himself from a case involving the independent spender supporting his candidacy. The *Caperton* Court pointed to the "disproportionate" influence of that spending on the race and at least an appearance of impropriety.[41]

With so much money sloshing around after *Citizens United* in these nominally independent groups, the country needs mandated disclosure to attempt to ferret out and deter

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[38] Citizens United v. FEC, 130 S. Ct. 876, 909 (2010).
[39] Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).
[40] 129 S. Ct. 2252 (2009).
[41] *See* Hasen, *supra* note 39, at 611-15 (discussing tension between the two cases).

quid pro quo corruption. Without mandated disclosure, it will often be impossible for anyone—rival campaigns, the press, or the public—to connect the dots.

We have already seen the role which the Internet has played on the cost side of mandated disclosure. But the Internet has had a somewhat surprising role in increasing the state interest in disclosure as well. Briefly put, the rise of the Internet has undermined the argument for the "media exemption."[42] The media exemption provides that the government may constitutionally limit for-profit corporations' electoral spending but exempt from those limitations the spending of the institutional corporate press, such as major newspapers and television stations.

In the pre-Internet era, many people (although not all)[43] accepted the idea that major newspapers could play an educative and civic role in elections that was different in kind than the role played by for-profit corporations such as General Motors. But the line became harder to defend with the rise of multiple media platforms via the Internet, and now social media. These forces make it much harder to define who "the press" is (or whether it applies to a technology, not an entity[44]), and to draw defensible lines between those corporations entitled to the media exemption and those who are not.

The inconsistency of the media exemption played a prominent role in Justice Kennedy's opinion in *Citizens United*, and provided a linchpin in the Court's argument against further limits on independent spending by corporations. After the corporate limit fell, other regulations fell too, collapsing like a house of cards. The rise of unlimited contributions via 501(c)(4)s and Super-PACs followed, dramatically increasing the danger of corruption in campaigns, especially

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[42] Adam Liptak, *In Arguments on Corporate Speech, The Press is a Problem*, N.Y. TIMES, Feb. 7, 2011, http://www.nytimes.com/2011/02/08/us/08bar.html; Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999).

[43] Contrast the majority opinion and Justice Scalia's dissenting opinion on this point in *Austin v. Michigan Chamber of Commerce*. *Compare* 494 U.S. 652 (1990) *with id.* at 679 (Scalia, J., dissenting).

[44] Eugene Volokh, *"The Freedom . . . of the Press," from 1791 to 1868 to Now — Freedom for the Press as an Industry, or Press as Technology*, 160 U. PA. L. REV. (forthcoming 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802229.

when such spending and contributions remain undisclosed. The anticorruption need for mandated disclosure is currently dire.

III. INFORMATION

Aside from the anticorruption function of campaign finance disclosure laws,[45] the Supreme Court has recognized an important "information" function. Busy voters rely upon campaign finance information to make decisions about how to vote, especially in initiative campaigns. Campaign finance information provides busy voters with important cues about how to vote:[46] knowing a candidate is backed by environmental groups or the gun rights lobby may be all you need to know to cast a ballot consistent with your interests.

This benefit of mandated disclosure was apparent when California voters recently turned down a ballot proposition which would have benefited Pacific Gas and Electric ("PG&E").[47] PG&E provided almost all of the $46 million to the "Yes on 16" campaign, compared with very little spent opposing the measure. Thanks to California's disclosure laws, PG&E's name appeared on every "Yes on 16" ad and the measure narrowly went down to defeat.

As with the anticorruption interest, the information interest's benefits can be exaggerated. As Professor Mayer points out, disclosure of campaign finance information may be less useful in the context of partisan general election campaigns, when voters can rely upon partisan labels such as "Democrat" or "Republican."[48] Busy voters also may not have time to check campaign finance data themselves, or see what opposing campaigns or the press have come up with out of

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[45] The third interest the Supreme Court recognized in *Buckley*, the "enforcement" interest, is in fact a subset of the anticorruption interest. Disclosure deters people who seek to evade contribution limits through giving in another's name—supporting the enforcement of the law and the corruption that may follow from its non-enforcement.

[46] Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295 (2005).

[47] For the relevant links, see Richard L. Hasen, *Show Me the Donors: What's the Point of Campaign Finance Disclosure? Let's Review*, SLATE (Oct. 14, 2010), http://www.slate.com/articles/news_and_politics/politics/2010/10/show_me_the_donors.single.html.

[48] Mayer, *supra* note 11, at 260-71.

the campaign finance data. Mayer acknowledges that disclosure on the face of the advertisement is most helpful to voters in evaluating the messages, as with the PG&E advertisement. Moreover, as Bruce Cain has argued,[49] it may be better for the government to provide information in the aggregate (e.g., disclosing the amount of contributions from people working for the oil and gas industry) than to provide individual information to voters because of the potential for snooping and harassment.

Still, especially in the Internet era, campaign finance disclosure data can serve an important public function in helping voters make choices consistent with their interests. Voters looking for reliable campaign finance information are faced with information overload; a recent Google search for Mitt Romney returned 189 million results. Campaign finance data are especially reliable evidence as to who backs a candidate. If voters know who puts their money where their mouth is, they will be able to make more intelligent estimates about the policy positions of candidates.

In an era of dirty tricks, disclosure is especially important. Consider in this regard to two incidents. The first involves an advertisement run in the 2010 Nevada U.S. Senate race between the Democratic incumbent, Senate Majority Leader Harry Reid and his Republican challenger, Sharron Angle.[50] The ad, run by the group called "Latinos for Reform," was entitled "*¡No Votes!*" (Spanish for "Don't Vote"). It urged Latinos not to vote in the upcoming election because President Obama and Democrats in Congress had promised a vote on immigration reform and nothing yet had happened.

How should voters evaluate such an ad? Was this ad backed by a group such as MALDEF, which supports comprehensive immigration reform? Thanks to campaign finance

[49] Cain, *supra* note 13.

[50] I give the details on this story in RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (forthcoming 2012). The quotations come from sources cited in chapter 5.

disclosure data, we know that Latinos for Reform is actually supported by conservative Republicans. The largest contributor to Latinos for Reform in 2008 was John T. Finn, a pro-life activist in Southern California with no apparent Latino ties. The head of Latinos for Reform, Robert Posada, was a former Republican National Committee chair whose idea of immigration reform is "heightened border security, and drug enforcement; employee verification; and a temporary worker program. 'No amnesty.'[]"

Why would this group urge Latinos not to vote? Latinos were a key constituency for Senator Reid, and few supported Angle. Getting Latinos not to vote would help Angle win. Voters knowing this information about who backs Latinos for Reform could help busy voters know how better to evaluate the "*¡No Votes!*" advertisement.

Second, consider the "fake Tea Party" episode in Michigan. Ruth Johnson, the Republican Secretary of State of Michigan, recently called for increased financial disclosure to expose schemes such as a Democratic scheme to run fake Tea Party candidates in the 2010 elections to siphon off votes from Republican candidates.[51] One of the charged Democrats recently pled no-contest to his participation in the scheme. "The charges relate to a scheme to put two county commission candidates and a state senate candidate on the ballot in November 2010, without the candidates' knowledge. The two Democrats were charged with forging the supposed candidates' signatures and falsely swearing under oath to qualify them to enter the race."[52] Campaign finance disclosure can help expose such chicanery and help voters make choices consistent with their interests and preferences.

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[51] Ruth Johnson, *Election System Reform Essential to Michigan*, DETROIT NEWS, Oct. 20, 2011, http://www.detnews.com/article/20111020/OPINION01/110200337/1008/opinion01/Election-system-reform-essential-to-Michigan; Stephanie Condon, *Two Michigan Democrats Indicted in Fake Tea Party Scandal*, CBS NEWS POLITICAL HOT SHEET (Mar. 18, 2011), http://www.cbsnews.com/8301-503544_162-20044674-503544.html.

[52] Jillian Rayfield, *Michigan Dem Pleads No Contest in Fake Tea Party Scheme*, TPM MUCKRAKER (October 20, 2011), http://tpmmuckraker.talkingpointsmemo.com/2011/10/michigan_dem_pleads_no_contest_in_fake_tea_party_s.php.

IV. CONCLUSION

Forget the hype from NOM and the United States Chamber of Commerce about violence and harassment of campaign contributors being commonplace. We are fortunate to live in a country where such harassment is very rare. Government harassment of unpopular groups, such as members of the SWP, appears to have all but waned. While there are occasional and lamentable private acts of harassment against the leaders of groups with the most controversial causes, such harassment can be dealt with on a case-by-case basis rather than by a wholesale abandonment of campaign finance disclosure laws. Economic boycotts do not count as unconstitutional harassment. Disclosure thresholds should be raised significantly, not because of the danger of harassment, but because disclosure of those making modest contributions interferes with informational privacy while serving no important government interest.

When it comes to more significant funds being spent in the campaign context, however, the calculus is different and mandated disclosure is desirable. In the post-*Citizens United* era, when the country will be increasingly awash in money flowing through various organizations in order to hide its true sources, mandated disclosure can serve the important interest in deterring corruption and providing valuable information to voters. Those who want to significantly influence political decisions in this country should have, in Justice Scalia's words, the "civic courage" to stand up for their political ideas.[53] They should not hide behind the false threat of harassment and have their influence hidden behind layers of anonymity, depriving voters of information on who is bankrolling campaigns and, in the worst-case scenario, buying off corrupt politicians.

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[53] Doe v. Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("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 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.").

POLITICO

Of super PACs and corruption

By: Richard Hasen
March 22, 2012 06:13 AM EDT

Can Super PACs and other outside campaign finance groups corrupt?

This question is at the heart of a case out of Montana which the Supreme Court will likely decide next term. Corruption is an urgent question for 2012 voters — as outside spending on federal elections skyrockets, and negative ads (sometimes paid for by undisclosed donors) flood the airwaves in the wake of the Supreme Court's controversial *Citizens United* decision.

Though I have no confidence that it will — the Supreme Court should reverse course from *Citizens United*. It should recognize real evidence showing that unlimited spending by these groups can undermine society's interest in preventing corruption and the appearance of corruption. It is time to rein in the Super PACs and the their non-disclosing cousins, political 501c4s.

To understand the importance of the corruption issue — here's a brief campaign finance primer. Since 1976, the Supreme Court has recognized only the government's interest in preventing corruption, or the appearance of corruption, as a justification for limiting money in elections in the face of a First Amendment challenge. It is this anticorruption interest that allows Congress to impose limits on political contributions made directly to candidates.

At the core of Justice Anthony Kennedy's 2010 *Citizens United* ruling was his conclusion that, in contrast to contributions to candidates, independent spending cannot corrupt. If the spending is independent, Kennedy reasoned, and there is no chance of coordination, there cannot be any quid pro quo.

Kennedy also rejected the idea that the concept of corruption should be read broadly beyond bribery and related conduct to include "ingratiation and access." In any case, he noted, there was "scant evidence" that independent spending can even "ingratiate." Independent spending, he concluded without a shred of evidence, will not cause the public to lose confidence in the electoral process.

Lower courts and the Federal Election Commission followed up on *Citizens United* with rulings that led to the creation of outside groups — the Super PACs — which can collect unlimited contributions to fund independent expenditure campaigns. They reasoned that if *Citizens United* held that independent spending cannot corrupt, how could contributions to fund such spending corrupt? And it doesn't matter whether the contributor is a real person or an artificial corporation.

So long as the groups do not "coordinate" with candidates, they are free to raise and spend what they wish.

It's time to rethink the whole relationship between independent spending and corruption. Independent spending—and contributions funding independent spending—can indeed spawn corruption both directly and indirectly.

For example, consider evidence described by the late Judge M. Blane Michael in a 2008 case challenging North Carolina's limit on contributions to what we would now call Super PACs. The evidence submitted by North Carolina demonstrated the tactics of a group called "Farmers for Fairness." As Michael described the actions of "Farmers":

"Farmers created advertisements directly opposing certain legislative candidates. Instead of simply running the advertisements during election time, Farmers scheduled meetings with legislators and screened the advertisements for them in private. Farmers then explained that, unless the legislators supported its positions, it would run the *advertisements that attacked the candidates on positions unrelated to those advocated by Farmers*..... The record reveals that Farmers did not discuss its central issue, deregulation of the hog industry, in its advertisements. Instead, it threatened and coerced candidates to adopt its position, and, if the candidate refused, ran negative advertisements having no connection with the position it advocated."

A 2011 column by Norm Ornstein, a resident scholar at American Enterprise Institute, shows these same kind of threats are reaching Congress. "As one senator said to me," Ornstein wrote, "'We have all had experiences like the following: A lobbyist or interest representative will be in my office. He or she will say, "You know, Americans for a Better America really, really want this amendment passed. And they have more money than God. I don't know what they will do with their money if they don't get what they want. But they are capable of spending a fortune to make anybody who disappoints them regret it."' No money has to be spent to get the desired outcome."

Now you might think that such contact with candidates would count as illegal coordination. Unfortunately, this is not the case. In fact, as Stephen Colbert demonstrated with comedic genius, campaigns and Super PACs can cooperate and communicate in numerous ways without running afoul of the FEC's technical coordination rules. And any attempt to broaden the coordination rules to capture something like the Farmers for Fairness tactics will no doubt be met with vociferous calls from the anti-reform community that tighter coordination rules violate the First Amendment.

Large independent spending can also lead to indirect corruption. Ornstein's column explains that the prospect of a large Super PAC drop against a senator or representative puts pressure on candidates to raise ever more money in $2,500 chunks (the largest amount allowed for direct individual contributions) and lean on lobbyists for it.

"Ask almost any lobbyist," Ornstein wrote, "I hear the same story there over and over — the lobbyist met with a lawmaker to discuss a matter for a client, and before he gets back to the office, the cell phone rings and the lawmaker is asking for money. The connections between policy actions or inactions and fundraising are no longer indirect or subtle."

Maybe this counts as only "scant evidence" of a danger of corruption, or maybe Kennedy meant to drain the term "corruption" of any meaning short of quid pro quo bribery. But for most people, the potential for this kind of exchange raises troubling issues of corruption.

Even if this is not proof of "corruption" in Kennedy's terms, it is proof of something closely related which should count as much. The Supreme Court has recognized "appearance of corruption" as an alternative basis for limiting campaign finance laws.

This alternative basis has always left me a bit squeamish—laws should be justified based on actual effects, not appearances. But a better way of conceptualizing this issue was

described many years ago by Daniel Lowenstein, a law professor at University of California, Los Angeles. The problem, Lowenstein wrote, is not an appearance of corruption, but an actuality of a conflict of interest.

The money chase, now with unlimited outside money, creates too many unavoidable conflicts for lawmakers. Lawmakers worried about millions spent against them will bend to either please those outside groups or to curry favor with other groups to fight back. Outside money should be limited to prevent this pervasive conflict of interest which arises between the interests of the big spenders and the public interest.

Finally, to make things worse, we have seen some political organizations shift from the Super PAC form to an abuse of the 501c4 form of organization. 501c4s are groups organized under the tax code for "social welfare" purposes. But we are, for the first time, seeing these groups spend big money on election-related advertising. They don't need to disclose their contributors publicly.

This dark money creates an even greater danger of corruption and conflict of interest. The public won't be able to see the connections between campaign money and a candidate. But, at the same time, nothing stops contributors to these shadowy groups from contacting Members of Congress and candidates with threats or enticements.

The Internal Revenue Service needs to take away the tax-exempt status of these c4 groups, and the FEC needs to start regulating them as political committees so that we can get adequate disclosure. Congress needs to amend the disclosure laws as well — to target the nature of the political activity, not how the group is organized under the tax code.

The Supreme Court may not use the Montana case to reopen the evidentiary question about the link between independent spending, Super PACs and corruption.

But if the court is willing to look at the evidence, the truth is inescapable.

Richard L. Hasen is professor of law and political science at University of California, Irvine School of Law and author of the Election Law Blog. His book "The Voting Wars: From Florida 2000 to the Next Election Meltdown" will be published this summer by Yale University Press.

APPENDIX MATERIAL SUBMITTED

SHELDON WHITEHOUSE
RHODE ISLAND

COMMITTEES:
AGING
BUDGET
ENVIRONMENT AND PUBLIC WORKS
HEALTH, EDUCATION, LABOR, AND PENSIONS
JUDICIARY

United States Senate
WASHINGTON, DC 20510-3905

http://whitehouse.senate.gov
(202) 224-2921
TTY (202) 224-7746
170 WESTMINSTER STREET, SUITE 1100
PROVIDENCE, RI 02903
(401) 453-5294

Statement of Senator Sheldon Whitehouse
Senate Committee on Rules and Administration
Hearing on S. 2219, the DISCLOSE Act of 2012
March 29, 2012

Chairman Schumer and Ranking Member Alexander – I thank you for holding this hearing on the blight of unlimited, anonymous corporate spending in elections, and on the DISCLOSE Act of 2012, which would shine a light on that spending.

Sen. Schumer, you have demonstrated exemplary leadership and determination on this incredibly important issue. In the 111th Congress, due in large part to your efforts, the Senate came within one vote of passing your DISCLOSE Act of 2010. In this Congress, following your lead, Senators Bennet, Franken, Merkley, Shaheen, Tom Udall, and I have worked together on the bill that the Rules Committee is considering today. With this legislation, every citizen will be able to know who is spending these great sums of money to get their candidates elected. I am pleased to say that the DISCLOSE Act of 2012, which we introduced last week, is already cosponsored by 38 Senators.

The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* opened the floodgates to unlimited corporate and special-interest money in elections, bringing about an era where corporations and other wealthy interests can drown out the voices of individual voters in our political system. Worse still, much of this spending is anonymous, so the public does not even know who is spending millions to influence elections.

In the 2010 congressional elections, *Citizens United* produced a fourfold increase in expenditures from super PACs and other outside groups compared to 2006, with nearly three quarters of political advertising coming from sources that were prohibited from spending money in 2006. Also in 2010, 501(c)(4) and (c)(6) organizations spent more than $135 million in unlimited, secret contributions, with anonymous spending rising from one percent of outside spending in 2006 to forty-seven percent in 2010.

We are already seeing ominous signs of the influence of money on the 2012 elections. As of Monday, super PACs, corporations, 501(c) organizations, and other groups had spent over $92 million, roughly two and a half times as much as in the same period in 2008. In the two weeks leading up to Super Tuesday, outside PACs that supported the Republican presidential candidates spent three times as much as the candidates themselves.

Our campaign finance system is broken. Immediate action is required to fix it.

The DISCLOSE Act of 2012 does two simple things:

1. If you are an organization – like a corporation, a super PAC, or a 501(c)(4) group – spending money in an election campaign in support of or opposition to a candidate, you have to tell the public where that money came from, and what you're spending it on, in a timely manner.

2. If you are a top executive or a major donor of an organization spending millions of dollars on campaign ads, you have to take responsibility for those ads by having your name on the ad, and in the case of an executive, appearing in the ad yourself.

These are reasonable provisions that should have wide support from Democrats and Republicans alike.

The DISCLOSE Act of 2012 is a trimmed-down version of the original DISCLOSE Act – Call it "DISCLOSE 2.0." It includes only the most basic disclosure requirements from the original DISCLOSE Act, and it has refined them to reduce the burdens on covered organizations as much as possible while still achieving meaningful disclosure.

For example, we have raised the threshold for donations requiring disclosure from $600 to $10,000. That may sound like a lot of money, but ninety-three percent of money raised by Super PACs in 2010-2011 that can be traced to specific donors came in contributions of $10,000 or more. This bill targets only the biggest spenders, while leaving smaller donations or dues payments to membership organizations private.

The Act also does not require the disclosure of non-political donations, affiliate transfers, business investments, and other transfers of money that have nothing to do with electioneering.

At the same time, however, the bill contains strong provisions to prevent the use of dummy organizations or shell corporations to hide the true sources of funding.

Passing this law would prove to the American people that Congress is committed to fairness, equality, and the fundamental principle of a government "of the people, by the people, and for the people."

I look forward to working with any of my colleagues here in the Senate who feel that the voices of American citizens should be defended, and I appreciate this Committee's careful consideration of this critical piece of legislation.

WASHINGTON
LEGISLATIVE OFFICE

March 28, 2012

Senate Rules & Administration
United States Senate
Washington, DC 20510

Re: ACLU Opposes S. 2219 – The Democracy is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Dear Senator:

On behalf of the ACLU, a non-partisan organization with over half a million members, countless additional supporters and activists, and 53 affiliates nationwide, we urge you to oppose S. 2219, the Democracy Is Strengthened by Casting Light on Spending in Elections ("DISCLOSE") Act when it is considered before the Committee on Rules and Administration.[1]

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

We acknowledge that the sponsors of the DISCLOSE Act seek the laudable goal of fair and participatory federal elections. We also appreciate the drafters' efforts to address the ACLU's concerns with previous campaign disclosure legislation. And, we do support numerous campaign disclosure and fair election measures that promote and inform the electorate, including disclosures of corporate political spending to shareholders and rules that provide low-cost airtime to all political candidates.

However, we believe this legislation ultimately fails in its attempts to improve the integrity of our campaigns in any substantial way, while significantly harming the speech and associational rights of Americans. We urge you to oppose S. 2219 when it is considered before the Committee.

The election of public officials is an essential aspect of a free society, and campaigns for public office raise a wide range of sometimes competing civil liberties concerns. Any regulation of the electoral and campaign processes must be fair and evenhanded, understandable and not unduly burdensome. It must assure integrity and inclusivity, encourage participation, and protect

[1] S. 2219, 112th Cong. (2012). In significant part, S. 2219 resembles the House version of the DISCLOSE Act (H.R. 4010, 112th Cong. (2012)). While we oppose both bills, these comments will focus on S. 2219, on which there will be a hearing before the Senate Rules and Administration Committee on March 29, 2012.

privacy and rights of association while allowing for robust, full, and free discussion and debate by and about candidates and issues of the day. Measures intended to root out corruption should not interfere with freedom of expression by those wishing to make their voices heard, and disclosure requirements should not have a chilling effect on the exercise of rights of expression and association, especially in the case of controversial political groups.

Small donations to campaigns—and contributions of any size to political communications that are made without any coordination with a candidate's campaign—have not been shown to contribute to official corruption.[2] Although the ACLU supports measures to guarantee the independence of groups making independent expenditures, we are concerned that heavy-handed regulation will violate the anonymous speech rights of individuals and groups that associate with these independent expenditure groups, subjecting them to harassment and potentially discouraging valuable participation in the political process.

The scope of the DISCLOSE Act, of course, extends beyond regulating the "Super PACs" that are currently dominating the news, and have surely prompted this measure. The DISCLOSE Act, as written, would infringe on the anonymous speech rights of donors to groups like the ACLU, which engage in non-partisan issue advocacy that would be covered by the disclosure requirements of the law under consideration.

We offer broad comments in four areas.

1. **The DISCLOSE Act Would Radically Extend the Period During Which Special Reporting Rules for Pure, Non-Partisan Issue Advocacy Apply.**

The DISCLOSE Act expands the period of time during which issue advocates—those taking no position in support of or in opposition to a political candidate—must disclose their donors if they wish to publish issue ads.[3] The Act would expand the "electioneering communications" period—currently the 30 days before a primary and the 60 days before a general election—quite significantly. For communications that refer to a candidate for the House or Senate, the period would begin on January 1 of the election year and end on the election, and would encompass the entire period following the announcement of a special election up to the special election. In concrete terms, were this bill law now, the period for communications referring to a member of this Committee would extend for a full 10 months before the 2012 election in early November, whereas currently the relevant period is limited to two months.

As a result, the special reporting rules would apply to communications about all House members and one-third of senators for effectively the entire second session of each Congress. During this period of time—nearly half of every Congress for members of the House—if any advocacy organization wished to run an ad that even mentioned a candidate's name, that organization would face the obligation of publicly disclosing personally identifying information about many of its donors. Such organizations would face two unsatisfactory choices: protect the privacy of their donors by refraining from issue advocacy or give up the privacy of their donors and place at

[2] We acknowledge the increase in the trigger threshold to $10,000.
[3] S. 2219 § (2)(a)(2).

risk the opportunity for additional donations by those supporters. Either way, this bill would have a deeply chilling effect on political speech about pending legislation for more than 40% of each Congress.

For communications mentioning a presidential or vice presidential candidate, the period would extend from 120 days before the primary or caucus in an individual state, which would radically extend the heightened disclosure period in numerous jurisdictions. Under current law, the electioneering communications period in Iowa—the first state in the Republican presidential nominating process—started on December 4, 2011, 30 days prior to the caucus on January 3, 2012. Under the DISCLOSE Act, with respect to the presidential or vice presidential candidate, that disclosure period for presidential candidates would extend all the way back to September 5, 2011, *and* would continue unabated until the election.

Accordingly, pure non-partisan issue advertising that happens to mention a presidential or vice-presidential candidate—including ads commenting, for instance, on a candidate's record on contraception, gun control, or trade with China, and even if they assiduously avoid support or opposition for the candidate—would be subject to the heightened disclosure rules in most states for significantly more than a year before a general presidential election. For similar ads mentioning other candidates, the special rules period will begin on January 1 of the election year.

The concerns are further heightened when, as in the current presidential election year, one of the candidates is the incumbent president running for reelection. The result of the extended period is a chilling effect on public criticism of the president or vice president, including truly non-partisan criticism on specific policy issues, during more than a fourth of a president's first term.

Both of these rules will impose a dramatic chill on the quantity and vigor of both partisan and non-partisan political speech.

2. The DISCLOSE Act Fails To Protect the Anonymous Speech Rights of Donors Who Have No Intention of Making a Gift for Political Communication Purposes.

The draft under consideration would require disclosure in two circumstances. A "covered organization"[4] that spends more than $10,000 in a cycle on "campaign-related disbursements,"[5] and does not maintain a separate segregated account for such disbursements, would have to disclose the identity, specific payments and aggregate amount donated of any person giving more than $10,000 to the entity during the cycle.[6] Any entity that maintains a separate segregated account for such disbursements would only have to do the same for those individuals donating specifically to that account in an amount greater than $10,000.[7]

[4] That is, virtually any politically active entity save organizations that are exempt from taxation under § 501(c)(3) of the Internal Revenue Code. S. 2219 § (2)(b)(1)(e).
[5] Defined in S. 2219 § (2)(b)(1)(d) to include independent expenditures and electioneering communications.
[6] S. 2219 § (2)(b)(1)(a)(2)(F).
[7] S. 2219 § (2)(b)(1)(a)(2)(E).

Even with a $10,000 trigger, the present exceptions in the DISCLOSE Act may still leave the door open to disclosure when a donor had no intention that a gift be used for political purposes.[8] It is both impractical and unfair to hold contributors responsible for every advertisement that an organization publishes, and even donors who give more than $10,000 may be small relative to the size of the covered organization's donor base as a whole.

Any effort to increase voter awareness of an organization's funding must respect the freedom of private association that the Supreme Court recognized in *NAACP v. Alabama.*[9] In that case, the Supreme Court sternly rebuked government-mandated membership disclosure regimes as thinly veiled attempts to intimidate activist organizations that worked by instilling a fear of retaliation among members of the activist group. The lessons of that time must not be lost simply because the causes of today are different from those of the civil rights era.

The disclosure provisions are likely to do one of two things, particularly when an organization is engaged in advocacy on controversial issues with which typical donors or members might not want to be associated publicly. First, the organization might refrain from engaging in public communications that would subject its donors to disclosure, in which case the organization's speech will have been curtailed. Alternatively, donors sensitive to public disclosure may refrain from giving to the organization (or may cap disclosure just below the trigger threshold), in which case the organization's ability to engage in speech will have been curtailed. And in both cases, those whose names are disclosed would be subject to personal, political or commercial impacts.

3. The DISCLOSE Act's Unwieldy Disclaimer Provisions Threaten to Overwhelm the Communications Being Disclaimed.

The DISCLOSE Act mandates disclaimers on television and radio advertisements that are potentially so burdensome they could either drown out the intended message or discourage groups from speaking out at all.[10] The individual or organizational disclosure statement, and the "top funders" statements, could conceivably take up so much of a television or radio spot that they would overwhelm the political message. The hardship safety valve only applies to the "top two funders" list for radio messages, and, in any event, it is unclear whether a provision for "hardship" situations would satisfactorily resolve any problems.

The DISCLOSE Act would, of course, allow an organization to avoid these disclaimer requirements if it eschews "electioneering communications" and "independent expenditures." This will be exceedingly difficult to accomplish, however, given that the electioneering communications disclosure period will extend potentially more than a year for ads featuring a presidential or vice-presidential candidate, and for almost as long for others. The burdensome disclaimer requirements would be likewise difficult to avoid given the added uncertainty in the definition of "independent expenditures," as expanded by the DISCLOSE Act.

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[8] S. 2219 § (2)(b)(1)(a)(3)(B). The donor would have to specifically prohibit, in writing, use of the funds for any covered payment, and the covered organization would have to agree and then segregate the funds.
[9] 357 U.S. 449, 460 (1958).
[10] S. 2219 § (3).

The top funder statements are additionally troubling because they could require the prominent endorsement of a political message by an individual or organization that has funded a group without intending or desiring to control the content of a specific advertisement. The significant funder for a given ad might be a supporter who has given money without designating its use for the ad in question—or even the general political activity in question. For many organizations, advertising is a small part of their overall operations, and the significant funder might even disagree with the content of an organization's advertisements while supporting the organization as a whole. Any required disclosure statements should not compel individuals to endorse a message with which they disagree or mandate that an organization alter its procedures to seek significant funder approval of specific messages.

At best, the disclaimers could reduce the opportunity for "speech" in many advertisements by a sizeable percentage. At worst, they would drive from the airwaves many organizations that wish to share their views on important public issues. The DISCLOSE Act's "hardship" provisions apply only to radio and are of dubious practical utility. Current law already provides for the disclosure of an advertisement's sponsor. There is no need for further requirements that limit or discourage public discussion of important issues.

4. The DISCLOSE Act's Ostensible Super PAC Provision is Vague and Unnecessary.

Section 4 of the DISCLOSE Act would extend the scope of the disclosure and disclaimer requirements to "[a] political committee with an account established *for the purpose* of accepting donations or contributions that do not comply with the contribution limits or source prohibitions under this Act, but only with respect to the accounts established for such purpose" (emphasis added). We question whether this addition is necessary given the extension of the independent expenditure disclosure requirements discussed above. We are also concerned about the vagueness of the term "for the purpose." Accordingly, we urge the Committee to at least provide greater specificity in the legislation describing those specific entities covered by this provision.

Additionally, we acknowledge the exclusion of organizations classified under 501(c)(3) of the Internal Revenue Code, and appreciate the drafters' attempt to narrow the sweep of the legislation.

5. Conclusion

The ACLU welcomes reforms that improve our democratic elections by providing for a properly informed electorate. Some elements of the DISCLOSE Act move in that direction. Unfortunately, the most promising proposal in past disclosure reform is missing in S. 2219. The provision offering candidates the television advertising rates equal to the lowest amount charged for the same amount of time in the previous 180 days is the type of solution that would increase speech, rather than stifling speech about elections and issues of public importance.[11] We also suggest the inclusion of the shareholder disclosure provision in H.R. 4010, the House version of

[11] *See, e.g.*, DISCLOSE Act, S. 3295, 111th Cong. § 401 (2010).

the DISCLOSE Act. Shareholder disclosure is an appropriate and effective way of promoting transparency in political campaign expenditures.[12]

The electoral system is strengthened by efforts to facilitate public participation, not by chilling free speech and invading the privacy of donors to controversial causes. Indeed, our Constitution embraces public discussion of matters that are important to our nation's future, and it respects the right of individuals to support those conversations without being exposed to unnecessary risk of harassment or embarrassment. Only reforms that promote speech will bring positive change to our elections, and overbroad disclosure requirements do the opposite.

Accordingly, the ACLU urges you to oppose the DISCLOSE Act when it comes before the Committee for consideration.

Please contact Legislative Counsel Gabe Rottman if you should have any questions or comments at 202-675-2325 or grottman@dcaclu.org.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Michael W. Macleod-Ball
Chief of Staff/First Amendment Counsel

Gabriel Rottman
Legislative Counsel/Policy Advisor

[12] DISCLOSE 2012 Act, H.R. 4010, 112th Cong. § 4 (2012).

April 4, 2012

Senate Rules Committee
305 Russell Senate Office Building
Washington, DC 20510

Dear Members of the Senate Rules Committee:

Thank you for this opportunity to submit a statement for the public record on S. 2219, the Democracy Is Strengthened by Casting Light on Spending in Elections Act ("DISCLOSE") Act of 2012. **Alliance for Justice** is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans.

We are the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process. AFJ is based in Washington, D.C. Alliance for Justice is a national association of over 100 organizations. We are the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations to fully exercise their right to be active participants in the democratic process.

We ask that the attached statement be included in the hearing record for S. 2219.

Thank you for your consideration. We welcome the opportunity to discuss these issues with you in the future.

Sincerely,

Nan Aron
President

Shannon Billings
Director of Advocacy Programs

Abby Levine
Legal Director of Advocacy Programs

Attachment: Statement on S. 2219

April 4, 2012

Alliance for Justice Statement on S. 2219

Based on our understanding of the current version of the bills, a lot of smaller—and even larger—501(c)(3) public charities and 501(c)(4) social welfare organizations will limit their advocacy and refrain from speaking out on environmental, economic, social justice, and other important issues that protect and strengthen the public good.

We are troubled by the creation of the new term, "campaign-related disbursements," that covers both independent expenditures and electioneering communications. No one disputes that independent expenditures are disbursements related to and focused on campaigns. By defining electioneering communications as "campaign-related disbursements," however, the bill makes two troubling assumptions. First, it assumes that any and all advertising that references an elected official is intended to influence their reelection. Second, it assumes there are no legitimate advertising campaigns aimed at influencing an elected official's position on an issue or legislation. This is simply not true and dilutes the disclosure for communications actually meant to influence elections.

This new terminology presents particular concerns for 501(c)(3) organizations. While these organizations are prohibited by federal tax law from supporting or opposing candidates for public office, are appropriately excluded from the definition of "covered organizations," it is our understanding that they still must disclose electioneering communications under the existing regime. Forcing them to report a greater number of electioneering communications, characterized as "campaign-related," could wrongly suggest that they are engaging in prohibited activity and lead to frivolous complaints and unnecessary IRS examinations, at significant cost to the organization and divert the IRS from important and valid complaints. Rather than run "campaign-related" advertisements, these organizations may instead decide to remain silent—a loss to the policy-making process.

This concern is exacerbated when the bill expands the period of time during which communications are treated as electioneering communications. Under current law, an electioneering communication is defined as a broadcast communication that refers to a federal candidate within 60 days of a general election or 30 days of a primary election. S. 2219 significantly expands this time period to include any broadcast communication that refers to a candidate for the House or Senate disseminated after January 1 of an election year—the entire second session of a Congress. And, where a broadcast communication refers to a candidate for President or Vice President, the time period is broadened to

include any such ad disseminated in the period beginning 120 days before the first primary or preference election or convention—beginning as early as September of the year preceding a presidential election. To be clear, this rule applies when an elected official is merely mentioned in the advertisement even if their candidacy or an election is not. The fact that the official is up for reelection is sufficient to meet the standard for electioneering communication.

To understand the potential impact of the new time periods for all entities, consider, for example, an ad like the following if it were aired on CBS in Rhode Island on April 2012 with the legislation in place:

> *"Our elections have been co-opted by wealthy corporations. We need to change the law. Call Senators Reed and Whitehouse and tell them to vote yes on the DISCLOSE Act of 2012."*

Because Senator Whitehouse is up for reelection in November 2012, he is a candidate for public office and, thus, this ad will be considered an electioneering communication under the expanded windows of the proposed bill. Clearly, this ad is not intended to influence the election nor is it intended to be campaign-related. The hypothetical organization wants the bill to pass and would run the ad even if neither of the senators were up for reelection.

The practical effect of this expanded window is that any and all broadcast communications during the vastly expanded prescribed timeframe—whether intended to influence a vote in Congress, the signing of a bill by the President, thanking a Member for her vote, or even a PSA featuring an elected official—would be characterized as "campaign-related." This reinforces the misconception that groups only run broadcast advertisements to influence elections rather than to legitimately mobilize grassroots support for or opposition to pending legislation.

We strongly believe that the *Citizens United* decision poses a threat to the integrity of the electoral process and we support legislation that provides for effective disclosure, while at the same time protecting free and independent speech and promoting active participation in elections by individuals and organizations. We applaud the goals of the DISCLOSE Act of 2012 and, in that spirit, are willing to bear some of the new administrative burdens that will result. However, we want to make sure this legislation is crafted in a manner that does not chill valuable, constitutionally protected speech. 501(c)(3) and 501(c)(4) organizations are often the only voice for underrepresented and vulnerable communities in this nation, and the new rules created by this legislation could effectively silence them.

AMERICANS FOR CAMPAIGN REFORM
Our future depends on it.

5 Bicentennial Square
Concord, NH 03301
603.227.0626
ACRreform.org

April 5, 2012

U.S. Senate Committee on Rules and Administration
United States Senate
305 Russell Senate Office Building
Washington DC 20510

Attached is our Statement for the Record regarding the March 29, 2012 hearing on S. 2219, the "Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012 (DISCLOSE Act of 2012) for inclusion in the hearing record.

Thank you,

John Rauh
Chair of the Board and Chief Executive Officer
Jrauh@ACRreform.org

AMERICANS FOR CAMPAIGN REFORM
Our future depends on it.

Statement for the Record
Hearing March 29, 2012 on S. 2219
The Disclose Act of 2012

April 5, 2012

The DISCLOSE Act of 2012 is sorely needed to provide the sunlight of transparency on our political discourse and improve the health of our democracy. Given the unprecedented amount of undisclosed spending that occurred in the 2010 mid-term elections and the expenditures that have continued during this election cycle, there is a significant public interest in providing voters with information on who is funding each candidate's campaign.

Indeed, the American people have a basic right to know what entities are involved in trying to influence their votes. Transparency is a fundamental value that lies at the heart of our democracy and is essential to maintaining the trust between voters and elected officials. The DISCLOSE Act of 2012 reflects this time-honored value.

Both the US Congress and the Supreme Court have long endorsed the importance and constitutionality of the disclosure of political expenditures. Even as the US Supreme Court issued its narrow 5-4 ruling in the case of Citizens United v. the FEC, an 8-1 majority concurrently reiterated its support for the critical role that transparency plays in our elections. It is time for Congress to enact legislation that implements this important principle. Without broad disclosure of political expenditures, voters will be denied the opportunity to make truly informed decisions – a hallmark of the democratic process.

On behalf of the Co-Chairs of Americans for Campaign Reform – former Senators Bill Bradley, Bob Kerrey, Alan Simpson, and Warren Rudman –we urge swift enactment of the DISCLOSE Act of 2012 by the U.S. Senate.

Submitted by:
John Rauh
Chair of the Board and Chief Executive Officer
For Americans for Campaign Reform

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

Testimony of
Adam Skaggs, Senior Counsel, and Mimi Marziani, Counsel,
Brennan Center for Justice at NYU School of Law[1]

On S. 2219, The Democracy Is Strengthened by Casting Light On Spending in Elections Act ("DISCLOSE") Act of 2012

Submitted to the Committee on Rules and Administration
U.S. Senate

March 28, 2012

Since *Citizens United v. FEC*[2] lifted restrictions on independent spending in U.S. elections, outside parties—including business corporations, unions, wealthy individuals, nonprofits, and Super PACs—have spent astronomical sums on campaign advertisements. Because of numerous loopholes in federal disclosure law, these spenders have essentially been able to choose whether, and when, to publicly reveal the details of their spending, including the source of their funds. As a result, lawmakers, the media, and shareholders of politically-active corporations have been left with incomplete information about this spending. Even worse, American voters have been left in the dark about the individuals and groups spending millions of dollars to influence our votes.

The Brennan Center commends Senator Sheldon Whitehouse and the dozens of co-sponsors of the DISCLOSE Act of 2012, and urges the Rules Committee to approve the Act without delay. This important legislation would fix three of the most serious flaws in our porous federal disclosure scheme. Specifically, the Act would:

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[1] The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money in Politics project works to reduce the real and perceived influence of special interest money on our democratic values. Our counsel defend campaign finance, public funding, and disclosure laws in courts around the country, and provide legal guidance to state and local reformers through counseling, testimony, and public education. The Brennan Center thanks NYU School of Law students Mary Kate Hogan and Alina Mejer, who work with the Center's Money in Politics project, for their invaluable assistance with today's testimony. We also thank Sari Bernstein, a student at Brooklyn Law School, and Sophia Ghiandoni, a student at Northeastern Law School, for their careful review of this testimony's citations.

[2] 130 S. Ct. 876 (2010).

(1) expand current reporting requirements to capture any outside person or organization that spends substantial amounts of money on campaign advertising, either directly or by transferring money to another;

(2) accelerate the timetable for reporting such spending; and

(3) enhance current disclaimer requirements to provide more information on the face of campaign advertisements.

As detailed below, each of these provisions would address specific—and serious—problems that currently plague our elections process. They would safeguard the integrity of our elections and shore up public confidence in our democracy.

Moreover, as Supreme Court case law, including *Citizens United*, makes abundantly clear, these crucial reforms stand on unquestionably firm constitutional ground. When information about the individuals and groups spending millions of dollars to influence elections is concealed, voters lack the information they need to make informed choices at the polling place. The Supreme Court has recognized that one cannot "satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public," and has made clear that transparency in political spending furthers the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."[3]

For all of these reasons, the Rules Committee should approve the Act as quickly as possible, so that it may be promptly considered by the full Senate. This is a crucial first step and one that, in conjunction with the more sweeping reforms highlighted below, will create an election process that is fair, trustworthy, and invites robust participation from the American people.

THE DISCLOSE ACT OF 2012 ADDRESSES GAPING LOOPHOLES IN FEDERAL DISCLOSURE LAW

A. *Expanded Reporting*

The Disclose Act of 2012 would bring vastly increased transparency to U.S. elections by eliminating major loopholes in the existing disclosure regime. Although federal law requires political advertisers to file a disclosure report once they spend more than $10,000 on "independent expenditures" or "electioneering communications," existing regulations severely undermine this scheme. The FEC rules intended to implement this statutory mandate in fact allow political spenders to withhold all information about the underlying source of funds unless contributors expressly indicate that their donations were given to further a particular ad. Not surprisingly, donations are rarely earmarked in this manner, and savvy donors understand that it is not difficult to contribute major support for electioneering while keeping their identities, and the amount of their support, shielded from public knowledge.

Politically active nonprofits that are under no other obligation to disclose their supporters—such as social welfare nonprofits organized under section 501(c)(4) of the tax code and trade

[3] *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (citation omitted).

organizations organized under section 501(c)(6)—can thus permanently shield the sources of their funding from public scrutiny.[4] Indeed, just a few weeks after *Citizens United* was decided, one of the country's largest law firms advised its corporate clients that trade organizations could provide "sufficient cover" from campaign finance disclosure.[5] Now, trade organizations and 501(c)(4) groups are enthusiastically taking advantage of political donors' desire for secrecy, and playing a larger role in federal elections than ever before.

In the 2010 federal elections, the first after *Citizens United*, outside groups spent $294 million on political advertising—an increase of more than 400 percent compared with the previous midterm cycle.[6] Forty-six percent of these expenditures—$135 million worth—was spent by groups that did not provide any information about their sources of money.[7] And, of the ten highest spending outside groups that year, seven disclosed nothing about their contributors—even though they collectively accounted for nearly half of all outside spending.[8]

These trends are continuing. While the final totals cannot yet be known, nonprofits that do not disclose any of their donors have already spent substantial money in the 2012 election cycle on campaign advertisements. For instance, as of March 23, 2012:

- The U.S. Chamber of Commerce, a trade association for business interests, has spent over $3.4 million dollars.
- Freedom Path, a conservative advocacy group, has spent over $300,000.
- NARAL Pro-Choice America, an abortion rights group, has spent over $284,000.
- The National Organization for Marriage, which supports "traditional marriage," has spent over $50,000.[9]

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[4] *See, e.g.*, BRUCE F. FREED & JAMIE CARROLL, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING 1 (2006), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932 ("Trade associations are now significant channels for company political money that runs into the tens if not hundreds of millions of dollars. In 2004, more than $100 million was spent by just six trade associations on political and lobbying activities, including contributions to political committees and candidates. None of this spending is required to be disclosed by the contributing corporations.").

[5] Tim L. Peckinpaugh & Stephen P. Roberts, *Citizens United: Questions and Answers*, K&L Gates Client Alert, (Feb. 12, 2010), http://www.klgates.com/icitizens-unitedi-questions-and-answers-02-12-2010/.

[6] PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF CITIZENS UNITED ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 9 (2011) [hereinafter 12 MONTHS AFTER]; *see generally* Cory G. Kalanick, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform*, 95 MINN. L. REV. 2254, (June 2011).

[7] 12 MONTHS AFTER, *supra* note 6, at 10.

[8] *Id.*

[9] Running totals are compiled by the Center for Responsive Politics. Center for Reproductive Politics, *2012 Outside Spending, By Groups*, OPENSECRET.ORG, http://www.opensecrets.org/outsidespending/summ.pbp?cycle=2012&disp=O&type=A&chrt=D (last visited Mar. 26, 2012).

Through the first five presidential primaries this year—in Iowa, New Hampshire, South Carolina, Florida, and Nevada—about 40 percent of TV advertising (more than $24 million worth) was funded by nonprofit groups that will never reveal their contributors.[10]

The ability of politically active nonprofits to conceal the identities of donors who refrain from earmarking donations for specific advertisements is not the only way that these groups thwart transparency in our elections. They also contribute to the so-called "Russian doll problem," another issue for which current reporting requirements offer no solution. Substantial media attention has been dedicated to election spending by Super PACs—groups that can raise and spend unlimited sums for electioneering, so long as they do not coordinate their expenditures with candidates. While Super PACs must disclosure their donors, they can and do accept unlimited donations from nonprofit groups that never reveal their donors. As a result, underlying donors can remain anonymous simply by routing their money through an intermediary non-profit. Super PACs and affiliated nonprofits have become so brazen in their efforts to exploit the Russian doll loophole that comedian Stephen Colbert has lampooned current law as essentially legalizing money laundering.[11] The problem is so severe that the *New York Times* enlisted the help of its readers in attempts to discern the true sources of Super PAC funders.[12]

Many—if not most—Super PACs now operate with an affiliated 501(c)(4) to give camera-shy donors a means to contribute large sums of money without public scrutiny. For instance:

- In the 2010 midterm elections, American Crossroads Super PAC and its affiliated 501(c)(4)—Crossroads GPS—spent a total of $39 million on campaign ads.[13] Of that total, Crossroads GPS provided $17 million, all from undisclosed sources.[14] More recently, American Crossroads' 2011 end-of-year filings underscored the important role played by Crossroads GPS: Nearly two-thirds of the more than $50 million raised by the Super PAC came through this dark nonprofit.[15]
- In 2011, Priorities USA Action, the Super PAC supporting President Obama, received one of its biggest donations, $1 million, from the Service Employees International Union whose members

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[10] Dan Eggen, *Secret Money Is Funding More Election Ads*, WASH. POST, Feb. 6, 2012, http://www.washingtonpost.com/politics/secret-money-is-funding-more-election-ads/2012/02/03/gIQAfTxEuQ_story.html.

[11] *See* Interview by Terry Gross with Trevor Potter, attorney to comedian Stephen Colbert, *Fresh Air*, National Public Radio (Feb. 23, 2012), *available at* http://www.npr.org/2012/02/23/147294509/examining-the-superpac-with-colberts-trevor-potter.

[12] *See* Michael Luo, *Readers: Help Us Discover a Secret Donor*, N.Y. TIMES, THE CAUCUS BLOG, (Feb. 3, 2012, 10:35 AM), http://thecaucus.blogs.nytimes.com/2012/02/03/a-crowdsourcing-experiment-help-us-discover-a-secret-donor/?src=tp.

[13] Kalanick, *supra* note 6, at 2265.

[14] *Id.* at 2266.

[15] Danny Yadron, *Crossroads Groups Raise $51 Million in 2011*, WALL ST. J. WASH. WIRE BLOG (Jan. 31, 2012, 6:33 PM), http://blogs.wsj.com/washwire/2012/01/31/crossroads-groups-raise-51-million-in-2011/.

are anonymous.[16] And, in 2011, Priorities USA Action's affiliated 501(c)4 contributed over $200,000 of dark money.[17]

- The Center for Responsive Politics found that, during the 2012 election cycle, at least five Super PACs received "all or nearly all" of their funding from affiliated dark nonprofits:
  - New Power PAC received 88% of its funding from Kentuckians for the Commonwealth, a 501(c)(4) organization;
  - Environment Colorado Action Fund received roughly 99% of its funding from Environment Colorado, a 501(c)(4) organization;
  - ProgressOhio received essentially all of its funding from ProgressOhio.org, a 501(c)(4) organization;
  - Protecting America's Retirees received essentially all of its funding from Alliance for Retired Americans, a 501(c)(4) organization;
  - National Association of Realtors Congressional Fund received all of its funding from the 501(c)(6) trade association that shares its name.[18]

The DISCLOSE Act of 2012 would substantially advance voters' interest in making informed voting choices by ending the anonymous donor problem described above. The Act would require that all major donors—specifically, those who have contributed more than $10,000 to a group spending money on campaign ads during an election cycle—be named in public reports to the FEC. Moreover, the Act expands reporting requirements to cover indirect campaign spending—deemed "covered transfers"—in order to curtail Russian doll concerns. Thus, if a group or person gives funds to another for the express purpose of electioneering, in response to requests for campaign ad funding, or with reason to know that such money would be used for such purposes, that donation is subject to the same reporting requirements as a direct expenditure.

Furthermore, the Act would enhance disclosure while still protecting personal privacy. Under the Act, donors can anonymously support a politically-active organization by specifying that their contribution not be used for electioneering, in which case the donation is not subject to disclosure. Similarly, the Act gives nonprofits the choice to set up a separate account for their political fundraising and spending, thereby allowing them to keep the sources of their other funds private.

B. Accelerated Timetable

The DISCLOSE Act of 2012 would also close loopholes in existing disclosure rules that allow major election spenders to delay revealing details of their spending until well after voters have

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[16] Priorities USA Action, JULY 31 MID-YEAR REPORT (FEC FORM 3X) 14 (Sep. 22, 2011), *available at* http://images.nictusa.com/pdf/294/11932493294/11932493294.pdf#navpanes=0; Priorities USA Action, JANUARY 31 YEAR-END REPORT (FEC FORM 3X) 20 (Jan. 31, 2012), *available at* http://images.nictusa.com/pdf/969/12970340969/12970340969.pdf#navpanes=0.

[17] Priorities USA Action, JANUARY 31 YEAR-END REPORT (FEC FORM 3X) 21 (Jan. 31, 2012), *available at* http://images.nictusa.com/pdf/969/12970340969/12970340969.pdf#navpanes=0.

[18] Kathleen Ronayne, Center for Responsive Politics, *Some Super PACs Reveal Barest of Details About Funders*, OPENSECRETS.ORG (June 17, 2011, 8:00 AM), http://www.opensecrets.org/news/2011/06/some-super-pacs-reveal-barest.html.

already cast their ballots. Existing disclosure provisions are inadequate because, under certain circumstances, they permit significant delays between campaign spending and reporting. For instance, under the regular general reporting deadlines for political action committees, some contributions to Super PACs can be made up to seven months before they are disclosed, leaving voters in the dark about campaign ad funders until after they have already voted. This precise scenario unfolded earlier this year with respect to four early primary states—Iowa, New Hampshire, South Carolina and Florida. Voters in those states were bombarded with political ads in the lead-up to the primaries, yet most of the Super PACs funding those ads did not have to disclose the names of donors (some of whom had contributed as early as July 2011) until January 31, 2012, after the relevant elections.[19]

Even worse, the January disclosure statements only accounted for contributions through December 2011—money contributed in January was not disclosed until the end of February. This monthly lag in reporting will continue throughout the primary season. If, for example, a deep-pocketed supporter of Rick Santorum or Mitt Romney gives a million dollars to a friendly Super PAC three weeks before Pennsylvania's April 24th primary, the details of that contribution—and the ads it funds—will not be revealed until more than a month after votes are counted in the Keystone State.

In the Digital Age, there is no reason for disclosure to be delayed for this long. The Act would fix this problem by requiring *all* outside spending groups, including Super PACs, to report their major donors within 24 hours of each $10,000 expenditure.

C. Enhanced Disclaimers

Currently federal disclaimers only identify the funding organization. Too often, the name on the face of an ad is that of a benign-sounding group that obscures who is running the organization and how it obtains its funding. As a result, the voter viewing the ad on his or her TV receives little to no helpful information about the forces seeking to influence election results. Examples abound:

- During the 2010 election cycle, a group named "Coalition to Protect Seniors" spent $464,347 on independent expenditures targeting Democratic candidates.[20] A *New York Times* reporter, intrigued by television advertisements that featured a snarky talking baby, sought to learn more about the group's leadership and funders, but could find nothing more than an address at a Mail Boxes Etc. store in Wilmington, Delaware.[21]

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[19] Eliza Newlin Carney, *Deadline Arrives for Super PACs to Reveal Their Donors*, ROLL CALL, Jan. 31, 2012, http://www.rollcall.com/news/deadline_arrives_for_super_pacs_to_reveal_their_donors-211989-1.html.

[20] Center for Responsive Politics, *Coalition to Protect Seniors*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/detail.php?cycle=2010&cmte=Coalition%20to%20Protect%20Seniors (last visited Mar. 26, 2012).

[21] Mike McIntire, *The Secret Sponsors*, N.Y. TIMES, Oct. 2, 2010, at WK1, *available at* http://www.nytimes.com/2010/10/03/weekinreview/03mcintire.html.

- "Citizens for Strength and Security" spent over $2.794 million on independent campaigning through October 2010 to benefit Democratic candidates in federal elections.[22] The organization—a Super PAC and affiliated nonprofit—provides no public information about its leadership or funders, although the Pharmaceutical Research and Manufacturers of America apparently gave the group $2.5 million in 2010.[23] The only available addresses lead to a UPS store on M Street in Washington—an address that is shared by several other politically-active nonprofits—and a D.C. law firm.[24]

Recent examples from state elections further illustrate this problem:

- During the 2011 Wisconsin Supreme Court race, a group named "Citizens for a Strong America" funded an advertising blitz against candidate JoAnne Kloppenburg, but provided no public information about its organization, leadership, or funders. The address listed for the group led to a mailbox at a local UPS store and its phone number led to a full voicemail box. Eventually, the Center for Media and Democracy discovered that "Citizens for a Strong America" was controlled by a leader of Americans for Prosperity, a national organization largely funded by billionaire David Koch.[25]
- In a 2010 Colorado ballot measure election, a group called "Littleton Neighbors Voting No," spent $170,000 to defeat a restriction that would have prevented Wal-Mart from coming to town. When the disclosure reports for these groups were filed, however, it was revealed that "Littleton Neighbors" was exclusively funded by Wal-Mart; it was not a grassroots campaign at all.[26]

The Act imposes enhanced disclaimer requirements on political advertisements that are broadcast via radio or television. Specifically, the Act imposes a new "stand-by-your-ad" rule that requires the highest ranking official of the spending organization to expressly approve of the message. And, an organization must list the top funders whose donations paid for the advertisement. These new requirements will prevent parties from hiding behind front groups to run political ads, and will instantly inform the voting public of major financial players.

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[22] T.W. Farnam and Nathaniel Vaugn Kelso, *Campaign Cash: Citizens for Strength and Security*, WASH. POST, http://www.washingtonpost.com/wp-srv/politics/campaign/2010/spending/Citizens-for-Strength-and-Security.html (last visited Mar. 27, 2012).

[23] Michael Beckel, *Drug Lobby Gave $9.4 Million to Nonprofits that Spent Big on 2010 Election*, HUFFINGTON POST (Feb. 27, 2012, 6:47), http://www.huffingtonpost.com/the-center-for-public-integrity/drug-lobby-gave-94-millio_b_1305390.html.

[24] Ryan Sibley, *'Grassroots' Group Grows Mainly in Offices of D.C. Law and PR Firms*, SUNLIGHT FOUNDATION REPORTING GROUP (Oct. 7, 2010, 11:54 AM), http://reporting.sunlightfoundation.com/2010/grassroots-group/.

[25] Lisa Graves, *Group Called "Citizens for a Strong America" Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?*, THE CENTER FOR MEDIA AND DEMOCRACY'S PRWATCH (Apr. 2, 2011, 6:37 PM), http://www.prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad.

[26] *See* Def.'s Response Br. to Pls.' Motion for Summary Judgment, Sampson v. Coffman, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

THE DISCLOSE ACT OF 2012 STANDS ON FIRM CONSTITUTIONAL GROUND

For more than three decades—from *Buckley v. Valeo*,[27] upholding the post-Watergate regulation of money and politics in 1976, through *McConnell v. FEC*,[28] upholding the Bipartisan Campaign Reform Act's disclosure requirements for electioneering communications in 2003, to *Citizens United* and beyond—the Supreme Court has consistently and repeatedly held disclosure of the source of campaign funds to be constitutional. This consistent and unbroken chain of Supreme Court precedent leaves no doubt that the DISCLOSE Act of 2012 is constitutional.

In *Buckley*, the seminal case on money in politics, the Court explained that campaign finance disclosure serves three key governmental interests: (1) "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent;"(2) "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) "disclosure requirements are an essential means of gathering the data necessary to detect violations" of other campaign finance regulations.[29] The *Buckley* court went on to find these interests important enough to justify any incidental burdens on political speech that federal disclosure requirements could cause. In 2003, the Court reaffirmed this triumvirate of governmental interests by upholding the disclosure requirements for electioneering communications in the Bipartisan Campaign Reform Act.

More recently, in *Citizens United*, eight justices voted to uphold challenged disclosure requirements. In doing so, they explained that even if "[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking."[30] And, the Court made clear that disclosure of money in politics furthers important First Amendment values, and is a necessary component of our electoral process:

> 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.[31]

Since *Citizens United*, lower federal courts—from Washington to Florida and from Maine to Hawaii—have consistently and repeatedly upheld campaign finance disclosure laws.[32] Over and

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[27] 424 U.S. 1 (1976).

[28] 540 U.S. at 95-107.

[29] *Buckley*, 424 U.S. at 66-68.

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

[31] *Id.* at 916; *see also Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("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.").

[32] *See, e.g.*, *Family PAC v. McKenna*, Nos. 10–35832, 10–35893, 2012 WL 266111, at *6 (9th Cir. Jan. 31, 2012) (upholding $25 and $100 disclosure thresholds for reporting information about contributors to political committees that support ballot measures); *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 118 (1st Cir.

over, these courts have stressed the importance of robust disclosure.[33] As the Ninth Circuit Court of Appeals recently observed:

> Campaign finance disclosure requirements . . . advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one's vote a particular way might prove persuasive

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2011) (finding that "relatively small imposition" for disclosing information about independent expenditures is related to government interest in providing electorate with key information); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) (upholding Maine's political committee financial disclosure requirements and finding that provisions "neither erect a barrier to political speech nor limit its quantity"), *aff'd* No. 11-1196, 40 (1st Cir. Jan. 31, 2012) (finding that "ballot question committee" law, like PAC laws, are constitutional and that "transparency is a compelling objective"), *cert. denied*, No. 11-559 (U.S. Feb. 27, 2012); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (upholding Washington's political committee financial disclosure requirements and noting, "[i]ndeed, it is the Supreme Court's decision in *Citizens United* . . . that provides the best guidance regarding the constitutionality of the Disclosure Law's requirements."); *SpeechNow.org v. FEC*, 599 F.3d 686, 696–97 (D.C. Cir. 2010) (upholding ongoing disclosure requirements for organizations making independent expenditures; finding "*Citizens United* upheld disclaimer and disclosure requirements for electioneering communications as applied to Citizens United, again citing the government's interest in providing the electorate with information"); *Justice v. Hosemann*, No. 3:11-CV-138-SA-SAA, 2011 WL 5326057, at *14 (N.D. Miss. Nov. 3, 2011) (holding that Mississippi's disclosure forms are not "overly intrusive" and that $200 threshold amount is rational and substantially related to government's important informational interest); *ProtectMarriage.com v. Bowen*, No. 2:09-CV-00058-MCE-DAD, 2011 WL 5507204, at *18 (E.D. Cal. Nov. 4, 2011) (finding that alleged harassment related to financial support of Proposition 8 did not warrant exception from general disclosure laws); *Nat'l Org. for Marriage, Inc. v. Roberts*, 753 F.Supp.2d 1217, 1222 (N.D. Fla. 2010) (finding that Florida disclosure requirements connected to "electioneering communications organizations" "would not prohibit [plaintiff] from engaging in its proposed speech"); *Yamada v. Kuramoto*, No. 10-00497 JMS/LEK, 2010 WL 4603936, at *1 (D. Haw. Oct. 29, 2010) (finding that "*Citizens United* also endorsed disclosure"); *Iowa Right to Life Comm., Inc. v. Smithson*, 750 F.Supp.2d 1020, 1026 (S.D. Iowa 2010) (finding "under *Citizens United*, '[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements'" (alteration in original)); *Wis. Club for Growth, Inc. v. Myse*, No. 10-cv-427-wmc, 2010 WL 4024932, at *5 (W.D. Wis. Oct. 13, 2010) (refusing to enjoin Wisconsin's disclosure regulations; noting "[P]laintiffs' reliance on *FEC v. WRTL* ignores the Supreme Court's later treatment of disclosure and disclaimer regulations in *Citizens United*"); *Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994, 1000 (N.D. Ill. 2010) (upholding Illinois' registration, disclosure, and reporting provisions; noting "in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent").

[33] *See, e.g.*, *Nat'l Org. for Marriage v. McKee*, 649 F.3d at 41 (". . . [Disclosure provisions] promote the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas. As the Supreme Court recently observed, such compulsory "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." (citation omitted)); *SpeechNow.org*, 599 F.3d at 698 ("But the 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.").

> when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.[34]

The DISCLOSE Act of 2012 would advance the same goals of transparency as the scores of state and federal disclosure laws that federal courts have repeatedly upheld. The Act's constitutionality cannot be doubted.

THE DISCLOSE ACT 2012 IS A NECESSARY FIRST STEP

The public anger surrounding *Citizens United* provides Congress with a ripe opportunity to strengthen federal disclosure and disclaimer provisions to ensure that voters are fully aware of who is trying to sway their vote in national elections. In addition, we urge several additional "fixes" to repair the damage wrought by *Citizens United.*

First, the Rules Committee should amend the Senate version of the Act to include a provision parallel to that in the House version, which would require unions and corporations engaged in political spending to disclose that spending to their members or shareholders. Such an amendment would buttress the already strong transparency provisions of the Senate version, shedding additional light on election spending. Furthermore, with respect to corporate political spending, Congress has the authority to modify the securities law to address managers' use of shareholder resources to influence elections—and Congress should do so. The Shareholder Protection Act of 2011 (H.R. 2517) would require corporations to provide shareholders in publicly traded companies with the right to vote on corporate political expenditures or would require corporate boards to authorize such spending.

Second, in order to fundamentally address the role of money in politics, Congress must embrace public funding for congressional elections. Small donor public funding, like New York City's successful program, would provide federal money to candidates who collect small donations from their constituents.[35] By matching these small donation at a multiple rate—such as four-to-one or six-to-one—small donor public financing would leverage the power of small donors and incentivize candidates to focus on low dollar donations from their constituents instead of large contributors from lobbyists and others advancing narrow goals. Such a systemic reform would ultimately enhance voter participation and reduce the influence of special interests.

Finally, one critical way to counter the flood of new money into our electoral process is to add millions of new voters to the voter rolls by modernizing our voter registration system. Under the system proposed by the Brennan Center, as many as 65 million eligible Americans could join the electoral system permanently—while curbing potential for fraud and abuse.[36] Such an approach

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[34] *Brumsickle*, 624 F.3d at 1008.

[35] *See, e.g.*, ANGELA MIGALLY, SUSAN LISS ET AL., BRENNAN CTR. FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC EXPERIENCE (2010), http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf.

[36] *See* WENDY WEISER ET AL.,BRENNAN CTR. FOR JUSTICE, COMPONENTS OF A BILL TO MODERNIZE THE VOTER REGISTRATION SYSTEM (2010), http://brennan.3cdn.net/1c55262dffddd1f04f_xpm6bhja5.pdf; *see generally* VOTER REGISTRATION

would automatically and permanently register all eligible citizens who wish to be registered, and provide failsafe mechanisms to give voters the chance to correct their registrations before and on Election Day. We urge the Committee to move forward with voter registration modernization legislation as soon as possible.

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The DISCLOSE Act of 2012 closes longstanding loopholes that have permitted veiled actors to fund political ads without full transparency. Congress should pass this legislation promptly to ensure that disinfecting sunlight illuminates our elections in 2012 and beyond.

MODERNIZATION, BRENNAN CENTER FOR JUSTICE , http://www.brennancenter.org/content/pages/voter_registration_modernization (last visited Mar. 27, 2012).

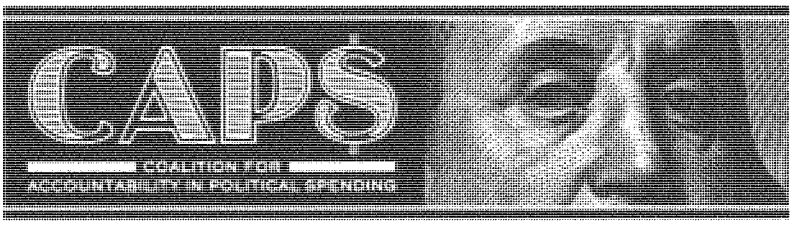
CAPS
COALITION FOR ACCOUNTABILITY IN POLITICAL SPENDING

March 28, 2012

To: Chairman and Members of Senate Committee on Rules and Administration
From: Kate Coyne-McCoy, Executive Director
RE: Testimony for Hearing on S. 2219, DISCLOSE Act of 2012

Brief testimony attached. We are deeply grateful for the opportunity and stand ready to assist in any way possible. Below is contact information should you require anything in addition.

Kate Coyne-McCoy
Executive Director
Coalition for Accountability in Political Spending (CAPS)
1 Centre St.
New York, NY 10007
401 578 0210
Kate@politicalspending.org



Statement of Kate CoyneMcCoy

Executive Director

National Coalition for Accountability in Political Spending

Senate Committee on Rules and Administration

Hearing on the DISCLOSE Act of 2012

Mr. Chairman, Senator Alexander, members of the Committee, thank you very much for the opportunity to submit testimony on behalf of the national Coalition for Accountability in Political Spending (CAPS). My name is Kate Coyne-McCoy and I am the Executive Director of CAPS, a bipartisan group of elected leaders from every region in the country working to curb the influence of corporate money in elections. CAPS members have fiduciary responsibilities in their state's pension systems, and oversight responsibility for state procurement and budgeting. Our members represent 90 million constituents and nearly one trillion dollars in pension fund assets.

Our current members include: Governor Pat Quinn (D) Illinois, State Treasurer Bill Lockyer (D) California, State Treasurer Rob McCord (D) Pennsylvania, State Treasurer Janet Cowell (D) North Carolina, Comptroller Tom DiNapoli (D) New York State, Public Advocate Bill de Blasio (D) New York City, Comptroller Wendy Gruel (D) City of Los Angeles, State Representative Bill Current (R) North Carolina, State Representative Pricey Harrison (D) North Carolina, State Representative James Pilliod (R) New Hampshire, County Commissioner Toni Pappas (R) Hillsborough County, New Hampshire.

We emphatically endorse this re-introduced Senate version of DISCLOSE and urge its passage.

The corrosive consequences of the Supreme Court's decision in *Citizens United v. Federal Election Commission* are becoming clearer with each passing day. It has sparked rising distrust of government and its leaders, disgust with constant negative public relations campaigns from unknown sources, and increasing doubt about the very nature of our electoral system.

Massive sums of money are flooding our airwaves as a result of *Citizens United*, much of it in secret, leaving the public to wonder who is paying for what, and why.

CAPS is currently engaged in a daily battle against the consequences of *Citizens United*. Without strong leadership from Congress and passage of DISCLOSE, it is a battle we well may lose, irreparably harming our democracy. Our members are working to educate and mobilize shareholders and consumers to pressure publicly held corporations into disclosing their political contributions, while also pushing for tough campaign finance laws in their respective jurisdictions.

We have stood in front of the Securities and Exchange Commission and called for a rule change that would require publicly held corporations to disclose their political spending. We have called on the Federal Election Commission to require full and timely disclosure of all funds contributed to influence electioneering. We have produced reports, and spoken out in the press, and written model legislation for introduction in states. We will continue to fight for what we believe is the most pressing issue of our time. But Congress can make a profound impact that far surpasses any of the strategies mentioned above, simply by passing DISCLOSE.

We note the differences in this version of the bill and are disappointed that it does not include disclosure of corporate contributions to shareholders. We understand however, that this bill is a first step—and a good one. We applaud the current version's intent focus on transparency, and specifically its proposal to strengthen disclosure requirements on secret spending.

The provisions which prevent corporations and wealthy individuals from using shell companies or false organizations to hide contributions are essential for providing the transparency the public demands. Lack of rigorous disclosure requirements have fostered the kind of sneaky operations that citizens abhor. Our constituents demand and deserve to know as much as possible about candidates, their supporters and our issues. This bill improves the likelihood that citizens can easily access information about candidates for elected public service.

The massive amounts of money flooding our airwaves to date can only be expected to increase as the election cycle gets into full swing. We urge you to do everything in your power to reverse the corrosive consequences of *Citizens United*, and soon. We stand ready to assist you.

Thank you again for this opportunity.

COMMON CAUSE
Holding Power Accountable

US Senate Committee on Rules and Administration
Committee Hearing on S. 2219, the "Democracy is Strengthened by
Casting Light on Spending in Elections Act of 2012" (DISCLOSE Act of 2012)

March 29, 2012

Statement for the record
Bob Edgar, president and CEO, Common Cause

During arguments for *Doe v. Reed* in April 2010, Justice Scalia eloquently if perhaps inadvertently summed up the case for the DISCLOSE Act.

"Running a democracy takes a certain amount of civic courage," he observed. "And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate or to take part in the legislative process."

Civic courage is what the DISCLOSE Act is all about. It demands that those who seek to influence our votes – individuals, corporations, associations of all stripes – have courage and indeed the simple decency to let us know who they are. It recognizes that as voters evaluate political speech, we have a legitimate need and indeed a right to know who is paying for that speech.

This bill is different from its predecessors. It focuses solely on disclosure provisions and does not contain any special exceptions for any group. It fixes the problem of untimely disclosure of donors to Super PACs that surfaced during the 2012 presidential primaries. There is no good reason for further delay. I urge the committee to act favorably and I urge Sen. Reid to schedule DISCLOSE for prompt action by the full Senate.

Demos
IDEAS & ACTION

Testimony of Liz Kennedy, on behalf of Demos
Submitted to the United States Senate Committee on Rules and Administration
Hearing on the DISCLOSE Act of 2012, S. 2219
March 29, 2012

Chairman Schumer, Ranking Member Alexander, and Members of the Committee, thank you for the opportunity to submit testimony on behalf of Demos for the record in support of the Democracy is Strengthened by Casting Light on Spending in Elections Act of 2012. DISCLOSE is a straightforward solution to the serious and pressing problem of "dark" money in our elections. Congress has a responsibility to protect voters' interests and the integrity of our democracy with common sense disclosure and disclaimer legislation. We urge you to move forward to enact these reforms without delay.

Secret political spending is a threat to our 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*[1] 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 Kennedy wrote that disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[2] Unfortunately, the disclosure rules that Justice Kennedy thought would ensure transparency and accountability are not in place. Voters lack the tools to exercise informed judgment to evaluate the content of political messages and to hold accountable those who choose to engage in political spending, and the candidates who accept their financial support.

In the 2010 election, political spending by outside groups rose dramatically. These groups spent more than four times as much as they did in the prior mid-term elections in 2006, from almost $70 million to over $294 million.[3] Secret spending also shot up. Groups that didn't disclose their underlying donors report spending over $130 million, meaning over 46 percent of the outside spending in the election was unaccountable.[4] Moreover, seven of the top ten outside spending groups did not disclose the identities of their funders – this accounted for almost three-quarters of all of the outside spending directed to influence the 2010 election.[5]

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MEDIA CONTACT
Communications Department
Lauren Strayer
lstrayer@demos.org
(212) 389-1413

In our recent report "Auctioning Democracy: The Rise of Super PACs and the 2012 election," Demos and U.S. PIRG found that six out of the top ten Super PACs that raised the most money in 2011 received money from untraceable sources.[6] The report, which is attached, also highlights the use of shell corporations to obscure the original source of contributions. Additionally, the analysis found that secret spending spiked dramatically right before the 2010 election, which is a pattern we expect to see repeated.

This cycle is predicted to break all spending records and we continue to see practices resembling legal money laundering. Donors can give to certain tax-exempt organizations that can themselves spend on elections, or can give to other groups that spend on elections, all without the public knowing where the money is really coming from. Currently, non-profit groups with anodyne names such as "Americans for Freedom" can accept unlimited contributions from anonymous donors. Their financial backers can remain anonymous because FEC regulations only require the identification of donors who specify that their funds were to be used for a particular political ad. "Americans for Freedom" can spend this dark money itself. Or it can direct the money to an independent political committee such as the ubiquitous Super PACs, even an affiliated one such as "Americans love Freedom." While political committees are required to disclose their funders, there is no true informational value for a voter to learn that "Americans love Freedom" is funded by "Americans for Freedom." The real identity of the source of the money remains hidden.

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."[7] Moreover, secret political spending breeds unaccountable political favoritism, undermining the health of a representative democracy, whereas disclosure requirements can deter corruption. The Supreme Court recognized in the 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 may be given in return."[8]

Congress must act to bring transparency and accountability to political spending

DISCLOSE would close the loopholes in the disclosure regime. It would require the identification of donors who give over $10,000 in a two-year cycle to any organization that engages in political spending, unless these donors prohibit the organization from using their money to fund political spending or the organization only funds its political activities through a separate

account. This would improve transparency and allow the public to see who is really providing the financial backing for efforts to influence elections. With this information a voter can learn about the funder's own motivation and interests, and judge their political speech accordingly.

DISCLOSE also contains "stand by your ad" disclaimer rules that would require all leaders of outside spending groups that make campaign-related advertisements to appear in the ads saying they "approve the message." In addition, the top funders of the group financing the advertisement would be disclosed in the ad. This will ensure that voters have access to real time information in order to exercise judgment and seek accountability. Candidates have to stand by the ads run by their campaigns. Outside groups and funders responsible for these ads should have to include the identity of their top funders, and the leader of the group should have to take responsibility for the ad, just like the candidates. This is particularly important since this cycle has seen an outsourcing of negative advertisements from the campaigns to outside spending groups. In the 2012 Republican primaries, Super PACs have run more advertisements than the candidates themselves, and while 27 percent of candidate campaign money has gone to fund negative ads, Super PACs have spent 72 percent of their money on negative ads.[9]

People and groups should not be allowed to 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 criticism that such activities may incur. The First Amendment was never intended to prevent political actors from being held accountable for their actions in the political marketplace. In 2009, a federal Judge in California refused to exempt the groups who supported the passage of Proposition 8 from California's disclosure laws, writing:

> Plaintiffs' 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.[10]

In a recent Supreme Court case upholding disclosure requirements, Justice Scalia wrote:

> 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.[11]

These disclosure and disclaimer provisions will enable voters to know in real time who is behind efforts to influence their vote and who a candidate relies on for financial support.

Disclosure requirements are clearly constitutional

In *Buckley*, the Supreme Court held that requiring disclosure of political spending was justified by several compelling interests: 1) it serves voters' interest in knowing who is funding a political message, and about a candidate's allegiances; 2) it prevents corruption and the appearance of corruption; and 3) it protects against circumvention of contribution limits by disclosing the identities of those making contributions and the amounts contributed.[12] These interests continue unabated.

The Supreme Court has repeatedly upheld as constitutional broad disclosure requirements, affirming that citizens have a right to know who spends money to influence elections. Indeed, in *Citizens United*, Justice Kennedy relied on the proposition that voters would know who was funding campaign advertisements and thus would be able to judge the message accordingly. He 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.[13]

Thus, it is inaccurate to describe attempts to improve transparency in political spending as an attempt to get around or overturn *Citizens United*. First, eight of the nine Justices joined together in upholding the disclosure provisions challenged in the case. Second, effective

disclosure of the source of funds used in political spending is a cornerstone of the reasoning in the *Citizens United* decision.

Conclusion

To protect the integrity of our elections and democratic government from the corruption inherent in secret political spending, we urge all members of the Committee to support the DISCLOSE Act.

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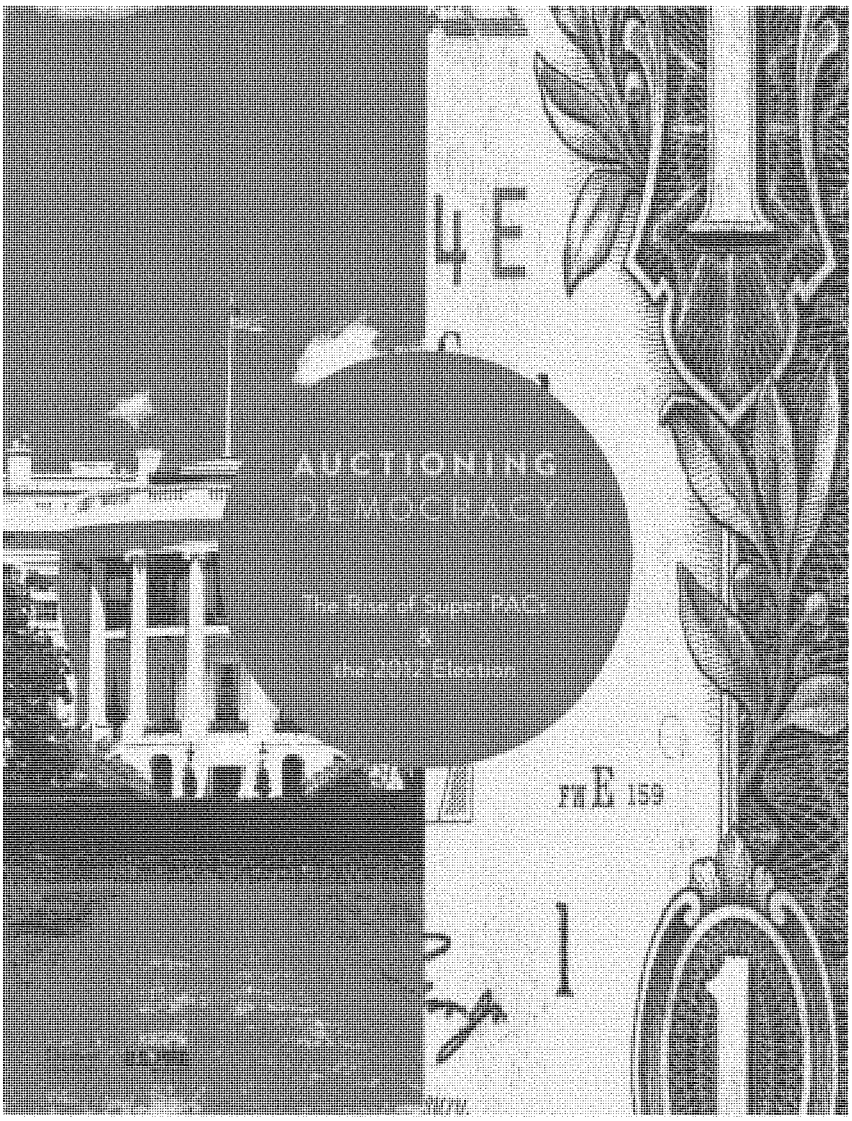
[1] 130 S. Ct. 876 (2010).
[2] Id. at 916.
[3] Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (2011), available at http://www.citizen.org/documents/Citizens-United-20110113.pdf.
[4] Id.
[5] Id.
[6] Adam Lioz, Demos, & Blair Bowie, U.S. PIRG, Auctioning Democracy: The Rise of Super PACs & the 2012 Election (2012), available at http://www.demos.org/publication/auctioning-democracy-rise-super-pacs-and-2012-election.
[7] Citizens United, 130 S.Ct. at 916.
[8] Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam).
[9] T. W. Farnam, "Study: Negative campaign ads much more frequent, vicious than in primaries past", The Washington Post, February 20, 2012, available at http://www.washingtonpost.com/politics/study-negative-campaign-ads-much-more-frequent-vicious-than-in-primaries-past/2012/02/14/gIQAR7ifPR_story.html. See also, Felicia Sonmez, "Negative ads: Is it the campaigns, or the super PACs?" The Election 2012 Blog of The Washington Post (March 22, 2012) http://www.washingtonpost.com/blogs/election-2012/post/negative-ads-is-it-the-campaigns-or-the-super-pacs-thursdays-trail-mix/2012/03/22/gIQAOf8VTS_blog.html.
[10] ProtectMarriage.com v. Bowen, --- F.Supp.2d ----, 2011 WL 5507204 (E.D.Cal.,2011).
[11] Doe v. Reed, 130 S.Ct. 2811 (2010) (J. Scalia, concurring).
[12] Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).
[13] Citizens United, 130 S.Ct. at 916 (2010).


AUCTIONING

ABOUT DĒMOS

Dēmos is a non-partisan public policy research and advocacy organization. Headquartered in New York City, Dēmos works with advocates and policymakers around the country in pursuit of four overarching goals: a more equitable economy; a vibrant and inclusive democracy; an empowered public sector that works for the common good; and responsible U.S. engagement in an interdependent world. Dēmos was founded in 2000.

In 2010, Dēmos entered into a publishing partnership with The American Prospect, one of the nation's premier magazines focussing on policy analysis, investigative journalism, and forward-looking solutions for the nation's greatest challenges.

ABOUT U.S. PIRG

U.S. PIRG Education Fund conducts research and public education on behalf of consumers and the public interest. Our research, analysis, reports and outreach serve as counterweights to the influence of powerful special interests that threaten our health, safety or well-being.

With public debate around important issues often dominated by special interests pursuing their own narrow agendas, U.S. PIRG Education Fund offers an independent voice that works on behalf of the public interest. U.S. PIRG Education Fund, a 501(c)(3) organization, works to protect consumers and promote good government. We investigate problems, craft solutions, educate the public, and offer meaningful oppo rtunities for civic participation.

ACKNOWLEDGMENTS

Written by:
Blair Bowie, U.S. PIRG Democracy Advocate
Adam Lioz, Dēmos Democracy Program Counsel

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EXECUTIVE SUMMARY

Dēmos and U.S. PIRG Education Fund analysis of Federal Election Commission data on Super PACs from their advent in 2010 through the end of 2011 reveals the following:

- For-profit businesses use Super PACs as an avenue to influence federal elections. 17% of the itemized funds raised by Super PACs came from for-profit businesses—more than $30 million.
- Because Super PACs—unlike traditional PACs—may accept funds from nonprofits that are not required to disclose their donors, they provide a vehicle for secret funding of electoral campaigns. 6.4% of the itemized funds raised by Super PACs cannot be traced back to an original source.
- Super PACs are tools used by wealthy individuals and institutions to dominate the political process. 93% of the itemized funds raised by Super PACs from individuals came in contributions of at least $10,000, from just twenty-three out of every 10 million people in the U.S. population.

Scholarly and public opinion research demonstrates that big-money dominance of campaigns skews American politics because wealthy donors have different life experiences and policy preferences than average-earning citizens. For example, a Russell Sage Foundation survey of high-earners conducted between February and June of 2011 revealed that:

- Wealthy respondents were nearly 2.5 times more likely than average Americans to list deficits as the most important problem facing our country.
- In spite of consistent majority public support for raising taxes on millionaires, among wealthy respondents, "[t]here was little sentiment for substantial tax increases on the wealthy or anyone else."
- In spite of recent scandals on Wall Street, "more than two thirds of [survey] respondents said that the federal government 'has gone too far in regulating business and the free enterprise system."

INTRODUCTION

The presidential race had barely gotten off the ground when it became clear that 2012 would be the year of the Super PAC. The millions of dollars raised and spent by these strange and powerful court-created entities have created a kind of parallel campaign.

First, Restore our Future, a Super PAC supporting Mitt Romney, pummeled Newt Gingrich in Iowa, opening the door for conservative alternative Rick Santorum.[2] Then, casino billionaire Sheldon Adelson swept in to offer Mr. Gingrich a lifeline—in the form of a $5 million contribution to Winning our Future, the Super PAC supporting his candidacy.[3] This couldn't have been more critical to Gingrich whose own campaign fund was mired in debt.[4]

In fact, through Florida's GOP primary, outside groups—driven by Super PACs—had outspent candidates on TV ads.[5] Restore Our Future ran more than 12,000 ads in Florida alone.[6]

"KNOCK KNOCK?"

"WHO'S THERE?"

"UNLIMITED UNION AND CORPORATE CAMPAIGN CONTRIBUTIONS"

"UNLIMITED UNION AND CORPORATE CAMPAIGN CONTRIBUTIONS WHO?"

"THAT'S THE THING, I DON'T THINK I SHOULD HAVE TO TELL YOU."

— **STEPHEN COLBERT**, *June 30, 2011, after receiving permission from the FEC to form a Super PAC*[1]

Super PACs are technically "independent expenditure committees," political action committees that do not contribute directly to candidates or coordinate their efforts with any candidate or campaign. Emerging from a combination of the infamous *Citizens United v. Federal Election Commission* Supreme Court ruling, a lower-court decision called *SpeechNow.org v. Federal Election Commission*,[8] and various FEC regulations and advisory opinions,[9] the new Super PACs may raise and spend unlimited funds from individuals, corporations, and unions provided they comply with the restrictions prohibiting direct contributions and coordination with candidates.

The first restriction is clear enough—Priorities USA Action,[10] the Super PAC formed to help re-elect President Obama, may not write a check to Barack Obama's campaign. This is because the Supreme Court has ruled that large direct contributions pose the risk of corruption or its appearance.

The second restriction—against coordination—is meant to give teeth to the first. After all, if a donor could give a $1 million contribution to Priorities USA Action and President Obama could control how that money is spent, it would be the functional equivalent of making that contribution directly to President Obama's campaign.

But, unfortunately, as leading satirist Stephen Colbert has made abundantly clear,[11] and several notable exchanges

during the Republican primary debates have confirmed,[12] the Federal Election Commission's current rules around coordination are ... a joke. Candidates are currently permitted to raise money for Super PACs supporting their candidacies,[13] and even appear in scripted ads run by them.[14] And, many of the Super PACs are run by close associates of the candidates they support—often former staff, as Mr. Romney readily admitted about the Super PAC supporting his candidacy. When he announced his candidacy for "President of the United States of South Carolina" Mr. Colbert even re-named his Super PAC the "Definitely Not Coordinating with Stephen Colbert Super PAC" to drive this point home.[15]

Super PACs represent much of what is wrong with American democracy rolled neatly into one package. They are tools that powerful special interests and a tiny privileged minority can use to work their will by drowning out the voices of ordinary Americans in a sea of (sometimes secret) cash.

We do not yet have nearly the full picture of how Super PACs have affected and will continue to affect the 2012 elections. Right now, we only have a complete picture of the year 2011. But, we can already see some disturbing trends.

In spite of the Supreme Court's current misguided jurisprudence, corporations are not people, and should not be permitted to spend funds to influence elections.[16] Super PACs provide a convenient way for them to do just that—sometimes in secret. A significant percentage of Super PAC fundraising has come from for-profit businesses.

In *Citizens United*, the Supreme Court majority relied heavily on the benefits of transparency, writing "disclosure permits citizens...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."[17]

But, as our research demonstrates, a small but significant percentage of the money raised by Super PACs cannot be traced back to its original source.

When an oil company wants to help elect a senator who supports policies that boost its bottom line (such as opening more federal lands or offshore sites to drilling) it will rarely sponsor an ad directly that says "Vote for Senator Smith...Paid for by ExxonMobil." More often, it will contribute to a Super PAC with an innocuous name such as "Americans for Energy Solutions" which will sponsor the ad. Or, to make its sponsorship of the ad completely invisible to voters, it can contribute to a 501(c)4 nonprofit corporation (which need not disclose its donors and can have a generic name such as "Americans for a Better Future") which can spend this money directly or in turn contribute to "Americans for Energy Solutions" Super PAC. Voters viewing the ad have no way of knowing the profit motive behind the communication.

Super PACs also provide a vehicle for the very wealthy to exert unfair influence over elections. The contributions to Super PACs that can be traced are dominated by a tiny minority of well-heeled individuals and institutions. This violates the spirit of the "one-person, one-vote" principle and a basic premise of political equality: the size of one's wallet should not determine the strength of one's voice in our democracy.

What can be done abour the Super PAC menace? Improving our democracy is never easy, but there are several solutions at hand. Ultimately, the people musr act together through Congress and the state legislatures to amend our Constitution to make perfectly clear that the First Amendment is not—and never was—intended as a tool for use by wealthy donors and large corporations to dominate the political process. In the meantime, federal agencies, Congress, the President, state legislatures, and municipalities all have roles to play. We provide specific policy recommendations below.

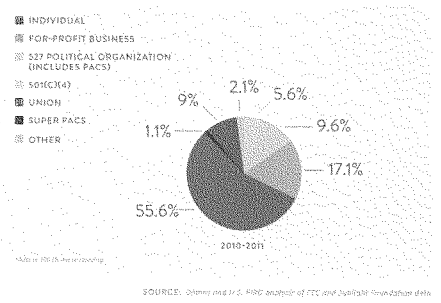
AUCTIONING DEMOCRACY

BUSINESS MONEY

Democracy is a system for people of equal worth and dignity to make decisions about collective self-government. Elections are the most concrete locus of popular decision-making in a representative democracy.

Contrary to the Supreme Court's *Citizens United* ruling, for-profit businesses should not be permitted to spend treasury funds to influence these elections. First, most businesses are constrained to participate only to maximize private profit, rather than out of regard for the public good. More important, this spending undermines political equality by allowing those who have achieved success in the economic sphere to translate this success directly into the political sphere.

Figure 1. | PERCENT OF SUPER PAC FUNDRAISING FROM VARIOUS SOURCES, 2010-2011



Yet, Super PACs have provided a convenient avenue through which 566 for-profit businesses have contributed $31 million, accounting for 17% of total itemized Super PAC fundraising since their inception (See Figure 1). For the year 2011, that figure was $17 million, for 18% of total itemized Super PAC fundraising.

SECRET MONEY

In the otherwise controversial arena of campaign finance, there has been a near-consensus—across the political and ideological spectrum—regarding the benefits of robust disclosure of the sources and amounts of campaign funds.[18] As noted above, the Supreme Court extolled these benefits in the very decision that laid the groundwork for Super PACs.[19]

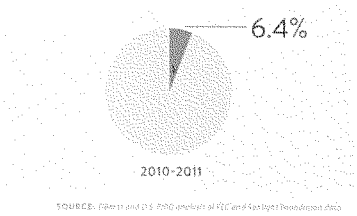
But, Super PACs have provided an avenue for secret money to influence elections.

Our analysis of FEC data shows that 6.4% of the itemized funds raised by Super PACs since 2010 was "secret money," not feasibly traceable to its original source. (See Figure 2.) That figure was just below 2.4% for the off-year of 2011.

Nearly 20% of active Super PACs[20] received money from untraceable sources in 2011. Six out of the 10 Super PACs that raised the most money in 2011 received money from untraceable sources. (See Table 1.)

Without data for a complete election cycle, it is difficult to analyze the overall trend and effect of secret money. One reasonable hypothesis is that secret money will increase with proximity to an election. See Figure 3 for money-by-month analysis that provides some support for this supposition.

Figure 2. | PERCENT OF SECRET MONEY RAISED BY SUPER PACS, 2010-2011



An important question is whether the amount of secret money will rise dramatically in the current election year. Given the spike in secret spending right before the 2010 election, and rate at which secret money has increased month to month in 2011 versus in 2010, it is reasonable to expect that in the months leading up to the 2012 election we will see secret money flowing into Super PACs at unprecedented rates in 2012.

Super PACs face the same disclosure and reporting standards as traditional PACs. The Federal Election Commission requires all PACs to report on their receipts and disbursements quarterly or monthly in non-election years, and more frequently in election years.[21] In these reports, PACs must itemize each contribution received from a donor who has given more than $200 over the course of the year.[22]

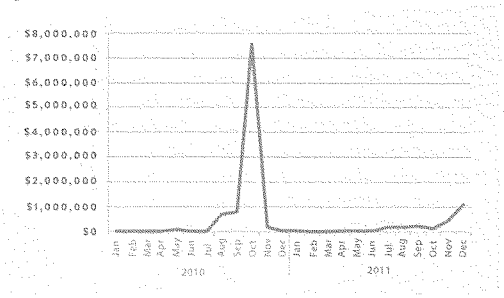
But, traditional PACs, which may make independent expenditures or contribute directly to candidates or parties, may only accept contributions that can be traced back to an individual donor.[23] Super PACs, on the other hand, may accept contributions from a wide range of sources—including sources that are not required to disclose all of their funders.

Table 1. | SIX OF THE TOP 10 FUNDRAISING SUPER PACS IN 2011 RECEIVED UNTRACEABLE FUNDS

RECEIVING SUPER PAC	TOTAL ITEMIZED FUNDS RAISED
Restore Our Future, Inc.	*$30,179,652.77*
American Crossroads	*$18,348,494.46*
Make Us Great Again, Inc	$5,485,174.00
Priorities Usa Action	*$4,386,859.42*
Afl-Cio Workers' Voices Pac	$3,706,370.27
American Bridge 21St Century	*$3,728,127.09*
House Majority Pac	*$3,019,635.00*
Our Destiny Pac	$2,680,289.90
Majority Pac	$2,461,550.00
Freedomworks For America	*$2,161,567.21*

SOURCE: [illegible]

Figure 3. | SECRET MONEY TO SUPER PACS BY MONTH



SOURCE: [illegible]

SOURCES OF SECRET MONEY

501(c)(4) Nonprofit Corporations

Non-profit corporations established under section 501(c)(4) of the Internal Revenue Code are not required by the Internal Revenue Service (IRS) to disclose their donors.[24]

On its website, the IRS states that to qualify as a tax-exempt organization, these entities must "be operated exclusively to promote social welfare;" that "the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office;" and that "a section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity."[25]

But, the IRS has never clearly defined what it means for political activity to be an organization's "primary activity" and many 501(c)(4)s take the position that they are permitted to spend up to 49% of their budgets on political activity.[26] This can include contributing to Super PACs.[27]

Our analysis of FEC data shows that 5.6% of all itemized Super PAC money came from 501(c)(4) corporations and that 19.1% of all active Super PACs received some portion of their income from 501(c)(4) corporations. For 2011, 12.5% of Super PACs received 501(c)(4) money, accounting for 2.1% of total itemized receipts.

Many 501(c)(4) nonprofits, such as the Sierra Club or the National Rifle Association, have longstanding reputations in the community that would enable a concerned citizen to evaluate their trustworthiness or intentions. But, others appear and disappear rapidly, or choose deliberately obscure names. In these situations it is particularly difficult for even the most diligent citizen to—in Justice Kennedy's words—"make informed decisions and give proper weight to different speakers and messages."[28]

Contributions from one Super PAC to another Super PAC

Another portion of untraceable money we found in some Super PACs came from other Super PACs that had raised money from an untraceable source.

We found that just over 1% of itemized Super PAC money came from other Super PACs. We deemed 68% of these funds untraceable.[29]

Shell Corporations

For the purposes of our analysis, we considered all for-profit corporations "original sources" of funding and therefore all for-profit corporate contributions traceable. But, it is worth noting a few apparent attempts to use shell corporations to obscure the original source of contributions to Super PACs.

For example, in Spring 2011, the Pro-Romney Super PAC Restore Our Future received a contribution of $1 million from the corporation W. Spann LLC.[30] The business, incorporated in Delaware, existed for a matter of months before dissolving; and the donation was its only visible work.[31] This created a reasonable suspicion that the corporation existed for the sole purpose of making this contribution. Only after Democracy 21 and the Campaign Legal Center filed a complaint with the Justice Department did the creator of W. Spann LLC and true source of the $1 million donation come forward as Ed Conard, a former colleague of Romney's at Bain Capital.[32]

A few months later, two more questionable million dollar donations appeared in Restore Our Future's reporting from apparent shell corporations Eli Publishing and F8 LLC, both registered at the same address in Provo, Utah. Those two contributions have been traced back to Paul Lund and his son-in-law, Jeremy Blickenstaff.[33]

Given that these donations were eventually traced back to their original sources one might argue that they are not "untraceable" (and we treated them as traceable for the purposes of our analysis). But, it appears that certain corporations exist not to conduct regular business but rather simply to necessitate an extra layer of research to discover the true source of contributed funds. This reduces the ability of average citizens to understand the motivations behind the money—an important interest served by disclosure.

WEALTHY CONTRIBUTORS

Long before the courts created Super PACs, financing political campaigns was, by-and-large, a rich person's game.

In the 2002 election cycle, more than half (55%) of the money congressional candidates raised from individuals came in contributions of at least $1,000—from just 0.09% of the American population.[34]

Then, Congress doubled the limit on what an individual donor can give directly to a federal candidate (from $1,000 to $2,000 per election), and indexed the new limit to inflation.[35] Setting Super PACs aside, a wealthy

couple is currently permitted to give $10,000 directly to a single candidate in one election cycle.[36]

Not surprisingly, by 2006, more than 62% of individual funds to congressional candidates came from $1,000+ donors.[37] Considering the median household income in the United States in 2010 was $49,445, it's clear that most Americans cannot afford to give nearly this much to a political campaign.[38]

Super PACs have made a bad situation worse. Now, a billionaire who wishes to help a friend, associate, or ideological ally get elected to federal office can contribute an unlimited amount to a Super PAC closely aligned (although not technically coordinated) with her favorite candidate's campaign.[39] We have already seen some examples of this in the presidential primaries. In addition the "merely rich" can make their voices heard loud and clear by contributing $20,000, $50,000, or $100,000 to a Super PAC with the sole purpose of influencing a single election—drowning out the voices of average citizens and giving the candidate or candidates they support a much better chance to win.

Our analysis of FEC data on Super PACs for 2011 reveals the disproportionate influence of the wealthiest donors.

Individuals Contributing to Super PACs

Super PACs raised 56% of their itemized funds from individuals since their inception in 2010. The average itemized contribution from an individual to a Super PAC in 2011 was $8,460.[40] For 2011, these figures where 65% and $21,380 respectively.

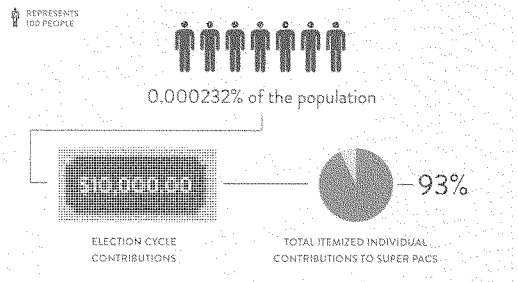
Of all itemized contributions from individuals to Super PACs 93% came in contributions of at least $10,000. Only 726 individuals, or 23 hundred thousandths of 1% (0.000232%) of the American population, made a contribution this large to a Super PAC.[41] More than half of itemized Super PAC money came from just 37 people giving at least $500,000. (See Table 2 and Figure 4.)

Table 2. | LARGE INDIVIDUAL DONOR FUNDING OF SUPER PACS, 2010-2011

CONTRIBUTIONS OF AT LEAST:	% OF TOTAL ITEMIZED INDIVIDUAL CONTRIBUTIONS TO SUPER PACS	NUMBER OF DONORS	% OF AMERICAN POPULATION
$5,000	95%	1,071	0.000342%
$10,000	93%	726	0.000232%
$20,000	90%	476	0.000152%
$50,000	86%	316	0.000101%
$100,000	79%	196	0.000063%
$500,000	52%	37	0.000012%
$1,000,000	38%	15	0.000005%

SOURCE: [illegible]

Figure 4. | A TINY NUMBER OF LARGE DONORS RESPONSIBLE FOR THE VAST MAJORITY OF ITEMIZED SUPER PAC FUNDRAISING FROM INDIVIDUALS



SOURCE: [illegible]

Total Super PAC Fundraising

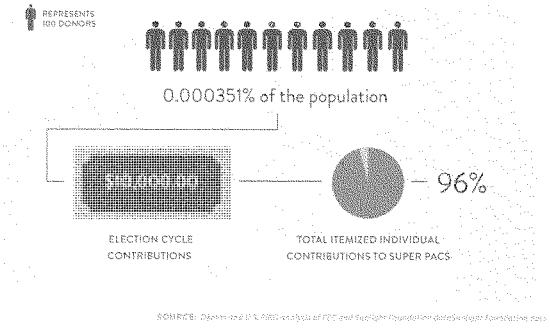
Adding in institutional donors to Super PACs tells a similar story. Of all the itemized money that Super PACs raised, 96% came in contributions of at least $10,000. Only 1,097 donors made contributions of this size,[42] the equivalent (if all of these donors were people) of less than three and a half ten-thousandths of 1% (0.000351%) of the American population. (See Table 3. and Figure 5.)

Table 3. | LARGE DONOR FUNDING OF SUPER PACS, 2010-2011

CONTRIBUTIONS OF AT LEAST:	% OF TOTAL CONTRIBUTIONS TO SUPER PACS	NUMBER OF DONORS	EQUIVALENT % OF AMERICAN POPULATION
$5,000	97%	1,551	0.000496%
$10,000	96%	1,097	0.000351%
$20,000	93%	769	0.000246%
$50,000	90%	526	0.000168%
$100,000	84%	351	0.000112%
$500,000	56%	79	0.000025%
$1,000,000	40%	35	0.000011%

SOURCE: [illegible]

Figure 5. | A TINY NUMBER OF LARGE DONORS RESPONSIBLE FOR THE VAST MAJORITY OF TOTAL ITEMIZED SUPER PAC FUNDRAISING



SOURCE: [illegible]

WHY BIG MONEY SUPER PACS ARE BAD FOR DEMOCRACY

Our analysis of FEC data shows that a tiny minority of wealthy individuals and institutions is responsible for the vast majority of funds raised by Super PACs. Why, exactly, is this a problem? There are three major reasons.

Wealthy Contributors Determine Who Wins Elections

The primary danger of our big money electoral system is that it gives a very small number of wealthy individuals and institutions vastly outsized influence over who wins elections and therefore who makes policy in the United States.

We know that financial resources make a huge difference in election campaigns. Candidates who raise and spend the most money routinely win more than 90% of federal elections in a given year.[43]

Raising and spending money directly is not exactly the same as having money raised and spent on one's behalf. But, as Newt Gingrich's lifeline from Sheldon Adelson[44] and Stephen Colbert's stinging satire have so compellingly demonstrated in recent weeks, lax FEC regulations have virtually collapsed the distinction.

This means that Americans who can afford to give thousands of dollars to political candidates or Super PACs that support them are more likely to see candidates who share their views on the key issues of the day win office and assume positions of power.

This is the influence of money on elections, rather than on politicians.

Winning Candidates Are Accountable to Wealthy Contributors

A second and related problem is the influence of money on politicians—the danger that winning candidates will feel more accountable to a narrow set of large donors than to the broad swath of constituents they are supposed to represent. This can lead to the appearance or reality of actual *quid pro quo* corruption—an officeholder supporting or opposing certain policies at the request of a donor. Or it can lead to a more subtle desire to please a political patron. If Newt Gingrich were to become president, it's reasonable to assume that he'd be more interested in Sheldon Adelson's views on major issues than those of an average single voter.[45]

Wealthy Contributors Look Different and Have Different Priorities and Opinions than Average Citizens

Wealthy contributors helping their favored candidates win elections would not systemically skew politics or policy outcomes if these well-heeled donors were like the rest of us, if on average they had the same life experiences, opinions about issues, and political views as average-earning citizens.

But, unsurprisingly, this is not the case. We have long known that large campaign contributors are more likely to be wealthy, white, and male than average Americans. And recent research confirms that wealthy Americans have different opinions and priorities than the rest of the nation.

According to a nationwide survey funded by the Joyce Foundation during the 1996 congressional elections, 81% of those who gave contributions of at least $200 reported annual family incomes greater than $100,000. This stood in stark contrast to the general population at the time, where only 4.6% declared an income of more than $100,000 on their tax returns.[46] Ninety-five percent of contributors surveyed were white and 80% were men.[47]

Recent Sunlight Foundation research shows that ultra-elite $10,000+ donors—"The One Percent of the One Percent"—are quite different than average Americans. In the 2010 election cycle, these 26,783 individuals were responsible for nearly a quarter of all funds contributed to politicians, parties, PACs, and independent expenditure groups.[48] Nearly 55% of these donors were affiliated with corporations and nearly 16% were lawyers or lobbyists.[49] More than 32% of them lived in New York City, Los Angeles, Chicago, or San Francisco, or Washington, DC.[50]

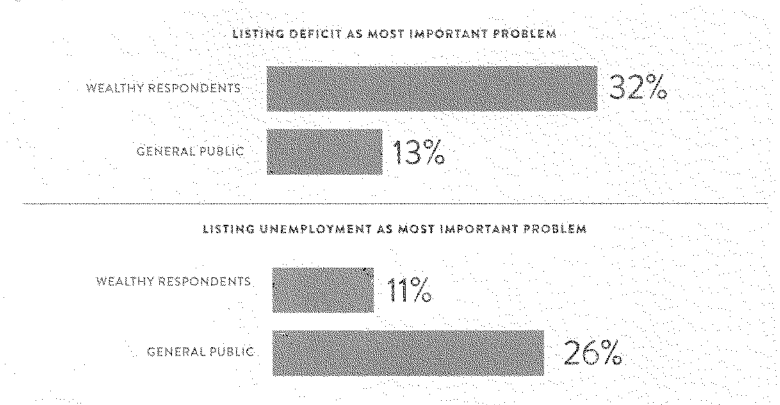
We also know that wealthy Americans hold different views than average-earning citizens. Investigators for the Joyce study cited above found that large donors are significantly more conservative than the general public on economic matters, tending to favor tax cuts over anti-poverty spending.[51]

A recent report by the Russell Sage Foundation confirms this finding. The authors surveyed "a small but representative sample of wealthy Chicago-area households."[52] They found meaningful distinctions between the wealthy respondents they surveyed and the general public on economic issues such as the relative importance of deficits and unemployment.

For example, wealthy respondents "often tend to think in terms of 'getting government out of the way' and relying on free markets or private philanthropy to produce good outcomes."[53] More wealthy respondents than average Americans listed deficits as the most important problem facing our country. Among those who did, "none at all referred only to raising revenue. Two thirds (65%) mentioned only cutting spending."[54] In spite

of majority public support for raising taxes on millionaires, among respondents, "[t]here was little sentiment for substantial tax increases on the wealthy or anyone else."[55] And, in spite of recent scandals on Wall Street, "more than two thirds of [survey] respondents said that the federal government 'has gone too far in regulating business and the free enterprise system.'"[56]

Figure 6. | WEALTHY INDIVIDUALS HAVE DIFFERENT PRIORITIES THAN AVERAGE-EARNING AMERICANS



SOURCE: Wealthy respondent numbers from Benjamin I. Page, Fay Lomax Cook and Rachel Moskowitz, *Wealthy Americans, Philanthropy, and the Common Good*, September 26, 2011; General public numbers from Gallup average of January to May 2011 [illegible]

CONCLUSION

Our research shows that Super PACs are truly kryptonite for our democracy. They are tools used by for-profit businesses and big donors to translate economic success into political gain—sometimes in secret. This undermines basic principles of citizen sovereignty and political equality, and can rob voters of the chance to evaluate political messages in light of the messenger. In the following section we provide recommendations to different federal, state, and local actors for mitigating the influence of Super PACs.

RECOMMENDATIONS

The Federal Election Commission

- *Tighten rules on coordination.* Current rules prohibiting coordination between Super PACs and candidates are riddled with loopholes. The Federal Election Commission should issue stronger regulations that establish legitimate separation between candidates and Super PACs. For example, the Commission could prevent candidates from raising money for Super PACs; prevent a person from starting or working for a Super PAC supporting a particular candidate if that person has been on the candidates' official or campaign staff within two years; and prevent candidates from appearing in Super PAC ads (other than through already-public footage).

- *Require Super PACs to include basic information about the tax and political committee status of their institutional donors in disclosure filings.* This simple adjustment would make it far easier for concerned citizens to "follow the money."

The Securities and Exchange Commission

The Securities and Exchange Commission has the authority to require all publicly traded companies to disclose their political spending, and there is currently a petition before the agency to do just that.[57] This would make it more difficult for for-profit companies to obscure their political contributions by funneling dollars through nonprofit corporations thar are not required to disclose donors, and provide the owners of such companies with essential information that could materially affect the value of their investments.[58]

The White House

The President should formally issue the current draft executive order requiring all government contractors to disclose any direct or indirecr political spending.[59] This would immediately provide critical information to the public and reduce the incidence of favoritism in government contracting.[60]

The United States Congress

Because its hands are tied by the Supreme Court, the U.S. Congress cannot immediately ban Super PACs or set limits on the amounts they may raise or spend. But, it may do the following:

1. *Propose a constitutional amendment to clarify that Congress and the states may regulate individual and corporate political contributions and spending.* The only complete solution to the problems presented by Super PACs is to amend the U.S. Constitution to clarify that the First Amendment was never intended as a tool for use by corporations and the wealthy to dominate the political arena.

2. *Tighten rules on coordination.* If the FEC refuses to act, Congress can pass legislation codifying the common-sense rules recommended above.

3. *Encourage small political contributions by providing vouchers or tax credits.* Encouraging millions of average-earning Americans to make small contributions can help counter-balance the influence of the wealthy few. Several states provide refunds or tax credits for small political contributions, and the federal tax code did the same between 1971 and 1986.[61] Past experience suggests that a well-designed program can motivate more small donors to participate.[62] An ideal program would provide vouchers to citizens up front, eliminating disposable income as a factor in political giving.[63]

4. *Match small contributions with public resources to encourage small donor participation and provide candidates with additional clean resources.* Candidates who demonstrate their ability to mobilize support in their districts should receive a public grant to kick-start their campaign, and be eligible for funds to match further small donor fundraising. This would both encourage average citizens to participate in campaigns and enable candidates without access to big-money networks to run viable campaigns for federal office.

5. *Protect the interests of shareholders whose funds may currently be used for political expenditures without their knowledge or approval.* Congress should require for-profit corporations to obtain the approval of their shareholders before making any electoral expenditures; and require any for-profit corporation to publicly disclose any contributions to a 501(c)(4) organization or trade association that either makes an independent expenditure or contributes to a Super PAC.

State Legislatures

1. *Pass or maintain state laws preventing direct corporate spending on elections.* The Montana Supreme Court recently upheld the state's longstanding prohibition against corporate spending on elections by distinguishing Montana's specific history of corporate-driven political corruption from the factual record considered by the U.S. Supreme Court in *Citizens United*.[64] State legislatures should build an exrensive factual record to support new or existing laws that protect the rights of their citizens and safeguard their democracies from corporate takeover.

2. *Pass resolutions calling for a constitutional amendment.* States should urge two-thirds of the House and Senate to propose a constitutional amendment by passing resolutions calling for such a step.

3. *Enact corporate disclosure and shareholder protection provisions.* Corporations are chartered in the several states and as such states can use their authority to require the protections recommended for Congress above.

Municipal Governments

Although municipal governments have no formal role in the constitutional amendment process, they provide a good outlet for citizens ro express their strong sentiment that Congress must propose an amendment. New York, Los Angeles, and other cities have passed resolutions calling for a constitutional amendment, and more cities should follow suit.

METHODOLOGY

DATA SETS

To create a complete data set, we combined aggregated FEC filings downloaded on 2/2/12 from http://www.fec.gov/finance/disclosure/ftpdet.shtml#a2011_2012 with 2011 data for all active Super PACs generously provided by the Sunlight Foundation.

SECRET MONEY AND DONOR TYPE

We define secret contributions as those that are not traceable back to their original sources. An original source can be an individual or the treasury of a for-profit business, union, trade association, or Indian tribe. We consider these original sources, even though some are associations of members, shareholders, etc., because in the vast majority of cases a citizen learning that a contribution comes from this source will have enough information to judge the interests or agenda of the contributor.

Contributions from traditional political action committees are traceable because these entities are only permitted to accept contributions from traceable sources.

Contributions from 501(c)4s are untraceable because these entities do not need to disclose their donors.

A contribution from one Super PAC to another Super PAC is only untraceable if there is 501(c)(4) money somewhere in the chain preceding the transfer.

In order to determine the percentage of secret money, we coded each contributor to a Super PAC since the inception of the entities as one of the following types: individual, for-profit business, union, trade association, Indian tribe, 527 organization (this includes parties, PACs, and non-federal political organizations), or 501(c)(4).

In the vast majority of cases, the type of contributor was obvious from the FEC filing. When this was not the case, we researched the entity using the FEC website, IRS website, and general Google searching. In a few cases, after a reasonable effort to research the entity using all of the information available from FEC filings we were still not sure what type of organization the contributor was. We therefore determined that their contributions were not feasibly traceable by an interested citizen, coded the contributor as "unknown" and labeled the contributions "secret."

In a few cases contributions were listed from a 501(c)(3) organization. Since this would violate the organization's tax status we presume that these contributions are recorded in error and were meant to originate with a 501(c)(4). Either way, the entity would not have to disclose its donors, so we counted these contributions as secret. In a few other cases, contributions came from personal or family trusts. Even though these are technically institutions we coded these as coming from individuals and as "not secret" since the primary donor is obvious.

When a contribution came from one Super PAC to another, we followed the chain of contributions to determine if any Super PAC in the chain had accepted contributions from a 501(c)(4). If yes, we labeled the contribution "secret;" if not, we labeled the contribution traceable.

CONTRIBUTION SIZE

All average contribution figures refer to the mean of the itemized contributions reported to the FEC. It is not possible to determine overall averages since contributions of under $200 may be reported in bulk.

The number of contributors making certain levels of contributions was determined by aggregating the contributions of single donors to single Super PACs in a single election cycle. We determined the percentage of the U.S. population by dividing these donors by 312.9 million, which the Census Bureau lists as the current population of the United States (found at http://www.census.gov/main/www/popclock.html, accessed on February 3, 2012).

ENDNOTES

1. http://tpmmuckraker.talkingpointsmemo.com/2011/06/serious_ruling_on_stephen_colberts_campaign_finance_joke.php?ref=fpa
2. Super PACs supporting Mitt Romney have raised more than $32 million: http://www.opensecrets.org/pres12/candidate.php?id=N00000286
3. http://articles.boston.com/2012-01-10/news/30612488_1_romney-sheldon-adelson-gingrich
4. http://www.washingtonpost.com/politics/gingrich-campaign-paid-off-some-debts-still-owes-600000/2012/02/03/gIQAICyMqQ_story.html
5. http://www.usatoday.com/news/politics/story/2012-01-27/gop-primaries-pd-spending-super-pacs/52895296/1
6. *Id.*
7. 130 S.Ct. 876 (2010). For more on how Citizens United has undermined democracy, see http://www.demos.org/publication/10-ways-citizens-united-endangers-democracy
8. http://www.fec.gov/law/litigation/speechnow_ac_opinion.pdf
9. http://sars.nicture.com/sodors/AO%252010-11.pdf
10. Two Super PACs formed to re-elect President Obama, Priorities USA Action and 1911 United, have raised a combined total of more than $86 million: http://www.opensecrets.org/pres12/candidate.php?id=N00009638
11. See e.g. this sublimely ridiculous exchange between Stephen Colbert, his lawyer Trevor Potter, and Jon Stewart: http://www.colbertnation.com/the-colbert-report-videos/405885/january-17-2012/fredo-sso-2012---colbert-super-pac---coordination-resolution-with-jon-stewart
12. See e.g. this exchange between Mitt Romney and Newt Gingrich: http://www.youtube.com/watch?v=N9Uz0qCtU0
13. Candidates are permitted to solicit contributions up to the limit for traditional PACs and may appear at fundraisers. See FEC Advisory Opinion 2011-12, available at http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3268.
14. http://electionlawblog.org/?p=28617
15. http://www.npr.org/blogs/monkeysee/2012/01/26/145475089/stephen-colbert-wants-you-to-know-thats-definitely-not-his-superpac
16. For a fuller explication of why corporations have no business playing in elections, see http://www.huffingtonpost.com/adam-lioz/why-corporations-shouldnt_b_783703.html
17. Citizens United at 916.
18. Even Sen. Mitch McConnell, an arch opponent of restrictions on campaign fundraising, has a long history of supporting disclosure provisions. See e.g. http://www.kentucky.com/2010/08/01/1372068/mcconnells-hypocrisy-on-campaign.html
19. Citizens United at 619. Citizens United did not create Super PACs on its own, but its logic paved the road.
20. We consider a Super PAC "active" if it has raised any amount of money.
21. http://www.fec.gov/info/report_dates_2011.shtml#frequency
22. http://www.fec.gov/pdf/forms/fecfrm3x.pdf
23. Political committees may accept contributions from individuals or other political committees—so each contribution must start with an individual.
24. http://www.politico.com/news/50_121/irs-gift-tax-501(c)-20554-1.html
25. http://www.irs.gov/charities/nonprofits/article/0,,id=96178,00.html
26. http://www.democracy21.org/index.asp?type=8_PR&SEC={91FCB139-CC82-4DDD-AE4E-3AB1E842C7F}&DE={1067C7C9-1485-4FE1-A150-A5F2E7879091}
27. There is a current lawsuit pending to force the FEC to require nonprofits that conduct electoral spending to disclose their donors: http://www.democracy21.org/index.asp?type=8_PR&SEC={91FCB139-CC82-4DDD-AE4E-3AB1E842C7F}&DE={01D73E08-C9A6-4655-B490-9E05E2467D17}
28. Citizens United at 916.
29. For a more detailed explanation of how we determined which funds were or were not traceable see our methodology section.
30. http://slatest.slate.com/posts/2012/08/06/edward_conard_mystery_romney_donor_behind_w_spann_llc_comes_forw.html
31. *Id.*
32. *Id.*
33. http://www.fox13now.com/news/local/kstu-mitt-romney-2-utah-companies-donate-1-million-apiece-to-romney-campaign-20110804,0,4424937.story
34. Adam Lioz, The Role of Money in the 2002 Congressional Elections, U.S. PIRG Education Fund (2003).
35. http://www.fec.gov/pres/litigat/bcra_overview.shtml#Contribution%20Limitations%20and%20Prohibitions
36. http://www.fec.gov/pages/brochures/contriblimits.shtml
37. http://www.cfinst.org/pdf/books-reports/RPG/House_Card_Sources_1998-2008.pdf
38. http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html
39. Due to the Supreme Court's ruling in the seminal campaign finance case Buckley v. Valeo, 424 U.S. 1 (1976), since 1976 a billionaire has been (and remains) permitted to spend his fortune directly in support or opposition to a political candidate; but prior to Speech Now v. FEC, supra, she would not have been permitted to pool this money with other donors through the use of a political committee.
40. Average here means mean. Only contributions of at least $200 must be reported itemized to FEC; therefore it is not possible to determine the overall average contribution size.
41. According to the U.S. Census Bureau, the current U.S. population is 312.9 million: http://www.census.gov/main/www/popclock.html
42. Many of these contributions are in fact aggregations of funds from upstream donors, shareholders or union members, so it is impossible to determine the exact actual number of donors.

43. Lioz, supra; http://www.politifact.com/truth-o-meter/statements/2011/oct/17/occupy-wall-street/occupy-wall-street-protesters-sign-says-99-percent/
44. http://articles.boston.com/2012-01-19/news/30613458_1_romney-sheldon-adelson-gingrich
45. Ted Koppel asked Gingrich directly what Adelson might expect in exchange for his money. See http://www.ajc.com/news/georgia-politics-elections/las-vegas-billionaire-turns-1323245.html
46. John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox. Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded (1998).
47. *Id.*
48. http://sunlightfoundation.com/blog/2011/12/13/the-political-one-percent-of-the-one-percent/
49. *Id.*
50. *Id.*
51. Green et. Al.
52. Benjamin I. Page, Fay Lomax, Cook, and Rachel Moskowitz, Wealthy Americans, Philanthropy, and the Common Good, September 25, 2011 at 6; available at http://www.scribd.com/doc/75622543/Wealthy-Americans-Philanthropy-and-the-Common-Good.
53. *Id.* at 11.
54. *Id.* at 12.
55. *Id.* at 13.
56. *Id.* at 15.
57. http://www.brennancenter.org/content/resource/comment_to_sec_on_corporate_political_spending_disclosure_petition/
58. There is also evidence that this policy is good for shareholder value. See e.g. John Coates & Taylor Lincoln, Fulfilling Kennedy's Promise, available at http://www.citizen.org/talkbog-Kennedy-promise-report
59. http://www.huffingtonpost.com/2011/04/19/obama-administration-drafts-order_n_851228.html
60. Elizabeth Kennedy & Adam Skaggs, The People's Business: Disclosure of Political Spending by Government Contractors, The Brennan Center for Justice, 6/16/11; available at: http://www.brennancenter.org/content/resource/the_peoples_business_disclosure_of_political_spending_by_government_contrac/
61. Thomas Cmar, Towards a Small Donor Democracy: The Past and Future of Incentives for Small Political Contributions, U.S. PIRG Education Fund (2004).
62. *Id.*
63. See Bruce Ackerman and Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance (2002).
64. http://electionlawblog.org/wp-content/uploads/WI-expenditures-decision.pdf

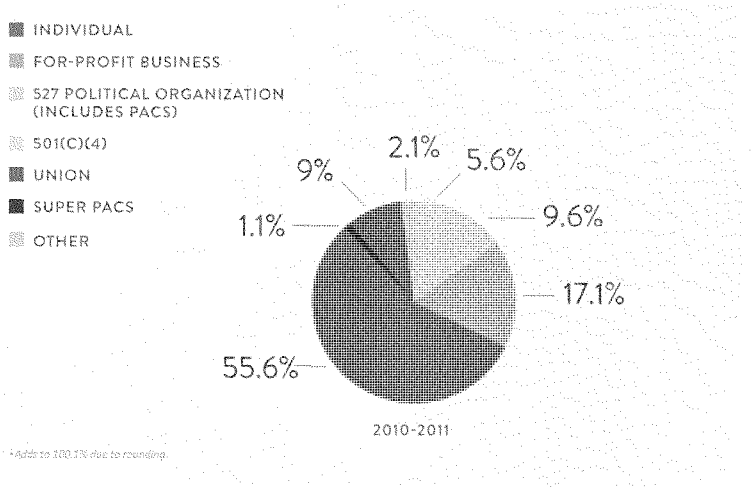
APPENDIX

Contrary to the Supreme Court's Citizens United ruling, for-profit businesses should not be permitted to spend treasury funds to influence elections. First, most businesses are constrained to participate only to maximize private profit, rather than out of regard for the public good. More important, this spending undermines political equality by allowing wealthy institutions to translate economic success into political power.

Yet, Super PACs have provided a convenient avenue through which more than 500 for-profit businesses have contributed $31 million, accounting for 17% of total itemized Super PAC fundraising since their inception. For the year 2011, businesses contributed $17 million, for 18% of total itemized Super PAC fundraising.

This appendix provides a detailed look at business funding for Super PACs: top business donors, Super PACs which received the most business money, and amount and number of contributions by state. Please see pages 11-12 of *Auctioning Democracy: The Rise of Super PACs and the 2012 Election* for our recommendations on how to increase the transparency of for-profit business contributions and reduce their negative effect on American democracy.

Figure 1. | PERCENT OF SUPER PAC FUNDRAISING FROM VARIOUS SOURCES, 2010-2011



*Adds to 100.1% due to rounding.

SOURCE: Public and U.S. PIRG analysis of FEC and Sunlight Foundation data.

Table 1. TOP 25 BUSINESSES CONTRIBUTING TO SUPER PACS, ALL TIME

RANK	DONOR	TOTAL
1	Contran Corporation	$3,000,000.00
2	Trt Holdings Inc.	$2,341,880.00
3	Alliance Resource Gp L.L.C.	$2,000,000.00
4	Rooney Holdings, Inc.	$1,050,000.00
5	Whiteco Industries, Inc.	$1,000,000.00
6	Southwest Louisiana Land L.L.C.	$1,000,000.00
7	Dixie Rice Agricultural Corporatio	$1,000,000.00
8	F8 L.L.C.	$1,000,000.00
9	Eli Publishing Inc	$1,000,000.00
10	Weaver Popcorn Company, Inc.	$974,350.00
11	Crow Holdings, L.L.C. - Distribution	$900,000.00
12	Alliance Management Holdings	$850,000.00
13	Oxbow Carbon, L.L.C.	$750,000.00
14	Illinois Manufacturers	$530,000.00
15	MBF Family Investments	$500,000.00
16	American Financial Group Inc.	$400,000.00
17	Working Assets Funding Service, Inc	$371,008.89
18	Stephens Investment Holdings L.L.C.	$350,000.00
19	Lexington Management Group Inc.	$325,000.00
20	Daniel G Schuster Inc	$316,505.00
21	MGM Resorts International	$300,000.00
22	W/F Investment Corp.	$275,000.00
23	The Villages of Lake Sumter, Inc.	$250,000.00
	Jenzabar, Inc.	$250,000.00
	Dalea Partners LP	$250,000.00
	Glenbrook LLC	$250,000.00
	Melaleuca, Inc.	$250,000.00
	Melaleuca of Southeast Asia, Inc.	$250,000.00
	Corporate Land Management Inc.	$250,000.00
	Melaleuca of Japan, Inc.	$250,000.00
	Melaleuca of Asia Ltd. Co.	$250,000.00
	Paumanok Partners LLC	$250,000.00

SOURCE: Center for Responsive Politics analysis of FEC and Sunlight Foundation data.

Table 1.2 TOP 25 BUSINESSES CONTRIBUTING TO SUPER PACS, 2011

RANK	DONOR	TOTAL
1	Contran Corporation	$3,000,000.00
2	F8 LLC	$1,000,000.00
3	Whiteco Industries, Inc.	$1,000,000.00
4	Eli Publishing Inc	$1,000,000.00
5	Rooney Holdings, Inc.	$1,000,000.00
6	Crow Holdings, L.L.C. - Distribution	$900,000.00
7	Oxbow Carbon, LLC	$750,000.00
8	MBF Family Investments	$500,000.00
9	Alliance Management Holdings	$425,000.00
10	Weaver Popcorn Company, Inc.	$400,000.00
11	Working Assets Funding Service, In	$371,008.89
12	W/F Investment Corp.	$275,000.00
13	Melaleuca of Southeast Asia, Inc.	$250,000.00
14	Paumanok Partners LLC	$250,000.00
15	Glenbrook LLC	$250,000.00
16	Melaleuca of Japan, Inc.	$250,000.00
17	Melaleuca, Inc.	$250,000.00
18	Stephens Investment Holdings L.L.C.	$250,000.00
19	Jenzabar, Inc.	$250,000.00
20	Melaleuca of Asia Ltd. Co.	$250,000.00
21	Lexington Management Group Inc.	$250,000.00
22	The Villages of Lake Sumter, Inc.	$250,000.00
23	Corporate Land Management Inc.	$250,000.00
24	Trott and Trott PC	$200,000.00
25	Consol Energy, Inc.	$150,000.00

SOURCE: Demos and U.S. PIRG analysis of FEC and Sunlight Foundation data

Table 2. | TOP 25 SUPERPACS RECEIVING BUSINESS MONEY ALL TIME

RANK	DONOR	TOTAL
1	American Crossroads	$12,998,699.46
2	Restore Our Future, INC.	$8,145,000.00
3	Make Us Great Again, INC	$1,697,000.00
4	Alaskans Standing Together	$1,229,337.40
5	New Prosperity Foundation; The	$1,039,350.00
6	First Amendment Alliance	$861,100.00
7	Patriot Majority PAC	$819,000.00
8	Club For Growth Action	$639,521.00
9	Majority PAC / Commmonsense 10	$384,850.00
10	Credo Super PAC	$371,008.89
11	Concerned Taxpayers Of America	$316,505.00
12	Freedomworks for America	$260,951.20
13	Real Leader PAC	$250,000.00
14	Campaign for American Values PAC	$250,000.00
15	America's Families First Action Fund	$170,373.70
16	Super PAC for America	$164,200.00
17	Texans For America's Future	$125,000.00
18	Restoring Prosperity Fund	$120,000.00
19	Saving Florida's Future	$110,661.00
20	Alliance To Protect Taxpayers	$101,000.00
21	2010 Leadership Council	$100,000.00
22	Women Vote!	$95,951.48
23	Florida Is Not For Sale	$93,500.00
24	Ohio State Tea Party; The	$90,300.00
25	Texas Tea Party Patriots PAC	$61,298.00

SOURCE: Dēmos and U.S. PIRG analysis of FEC and Sunlight Foundation data.

Table 2.2 TOP 25 SUPERPACS RECEIVING BUSINESS MONEY 2011

RANK	DONOR	TOTAL
1	Restore Our Future, INC.	$8,145,000.00
2	American Crossroads	$5,060,819.46
3	Make Us Great Again, INC	$1,697,000.00
4	Credo SuperPAC	$371,008.89
5	Freedomworks For America	$260,951.20
6	Campaign For American Values PAC	$250,000.00
7	Real Leader PAC	$250,000.00
8	Majority PAC	$237,500.00
9	America's Families First Action Fund	$160,373.70
10	Texans For America's Future	$125,000.00
11	Restoring Prosperity Fund	$120,000.00
12	Saving Florida's Future	$110,661.00
13	Club For Growth Action	$81,021.00
14	New Prosperity Foundation; The	$61,000.00
15	House Majority PAC	$40,000.00
16	Red White And Blue Fund	$35,000.00
17	Nea Advocacy Fund	$31,800.71
18	Women Vote!	$25,701.48
19	Texas Tea Party Patriots PAC	$24,750.00
20	Priorities USA Action	$20,000.00
21	Speak Out For America PAC	$19,171.00
22	Campaign For Primary Accountability INC	$18,750.00
23	Rebuilding America	$10,000.00
24	Alaskans Standing Together	$8,337.40
25	Citizens For Strength And Security PAC	$8,000.00

SOURCE: Opensecrets.org, Center for Responsive Politics and Sunlight Foundation data

Table 3. SUPERPAC CONTRIBUTIONS BY STATE ALL TIME

DONOR STATE	SUM OF AMOUNT
UNREPORTED	$260,201.20
AK	$1,229,337.40
AL	$46,750.00
AR	$475,000.00
AZ	$80,750.00
CA	$1,713,265.96
CO	$130,806.40
CT	$261,250.00
DC	$246,612.34
FL	$2,314,230.00
GA	$14,832.00
GU	$250.00
HI	$2,327.75
IA	$7,920.00
ID	$1,001,250.00
IL	$842,250.00
IN	$1,977,100.00
KS	$1,000.00
KY	$50,000.00
LA	$2,046,250.00
MA	$289,848.86
MD	$582,739.29
ME	$1,400.00

Table 3. CONTINUED

DONOR STATE	SUM OF AMOUNT
MI	$210,000.00
MN	$126,779.48
MO	$132,250.00
MS	$52,574.16
MT	$300.00
NC	$50,250.00
NE	$1,000.00
NH	$2,500.00
NJ	$104,250.00
NM	$30,250.00
NV	$520,587.00
NY	$361,100.00
OH	$498,575.00
OK	$4,275,250.00
OR	$223.88
PA	$490,863.21
SC	$5,500.00
TN	$14,000.00
TX	$7,807,815.00
UT	$2,306,569.76
VA	$243,257.77
WA	$2,750.00
WV	$106,000.00
WY	$26,000.00

* STATES NOT LISTED DID NOT CONTAIN IDENTIFIED BUSINESS CONTRIBUTORS TO SUPER PACS.

SOURCE: *Design and U.S. PAC statistics of FEC and Sunlight Foundation data.*

Table 3.2 | SUPERPAC CONTRIBUTIONS BY STATE 2011

DONOR STATE	SUM OF AMOUNT
UNREPORTED	$260,201.20
AK	$8,337.40
AL	$3,000.00
AR	$250,000.00
CA	$1,286,282.96
CO	$25,806.40
CT	$261,000.00
DC	$197,112.34
FL	$2,000,830.00
GA	$10,000.00
HI	$2,327.75
IA	$1,170.00
ID	$1,000,250.00
IL	$98,500.00
IN	$1,400,000.00
LA	$5,000.00
MA	$285,598.86
MD	$49,734.29
ME	$400.00
LA	$2,046,250.00
MA	$289,848.86
MD	$582,739.29
ME	$1,400.00

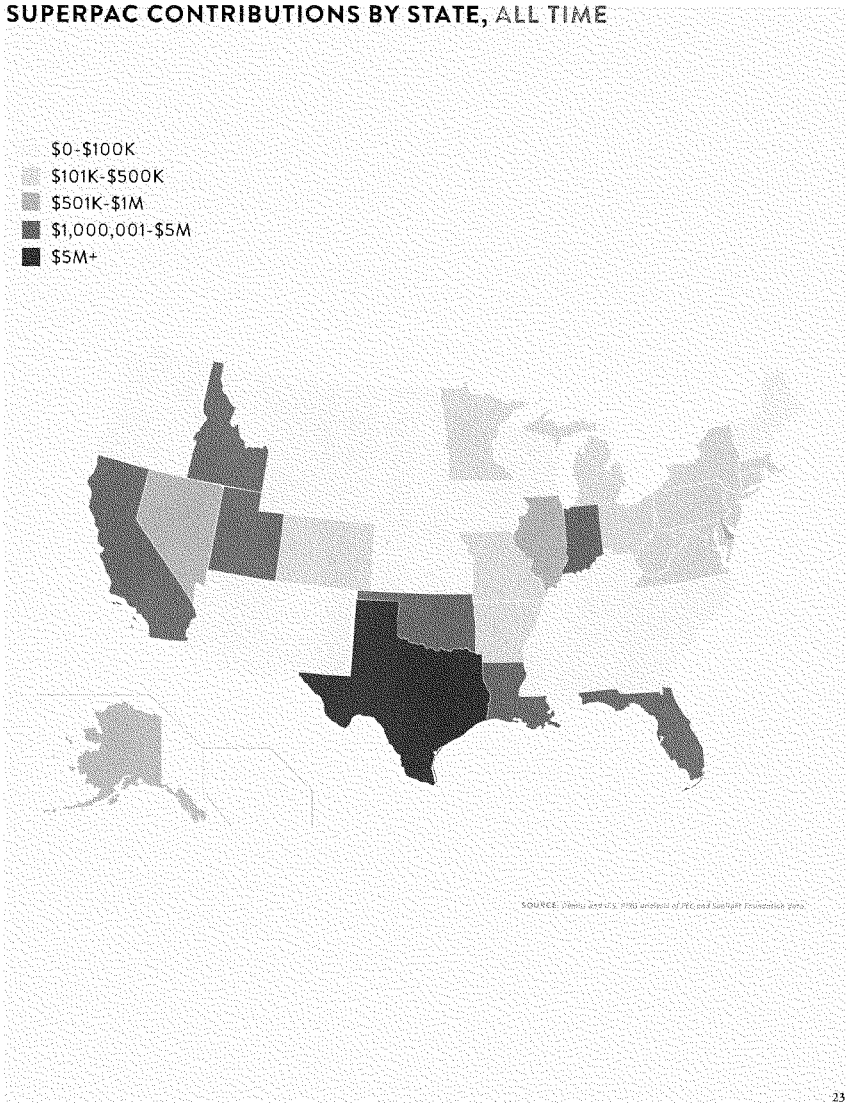
Table 3.2 | CONTINUED

DONOR STATE	SUM OF AMOUNT
MI	$207,500.00
MN	$126,279.48
MS	$2,574.16
NC	$50,000.00
NJ	$100,000.00
NM	$250.00
NV	$121,000.00
NY	$155,250.00
OH	$5,325.00
OK	$1,550,000.00
OR	$223.88
PA	$266,363.21
TX	$4,868,385.00
UT	$2,305,069.76
VA	$227,957.77
WV	$100,000.00

* STATES NOT LISTED DID NOT CONTAIN IDENTIFIED BUSINESS CONTRIBUTORS TO SUPER PACS.

SOURCE: Derived from U.S. PIRG synthesis of FEC and Sunlight Foundation data

SUPERPAC CONTRIBUTIONS BY STATE, ALL TIME



SOURCE: Demos analysis of FEC and Sunlight Foundation data

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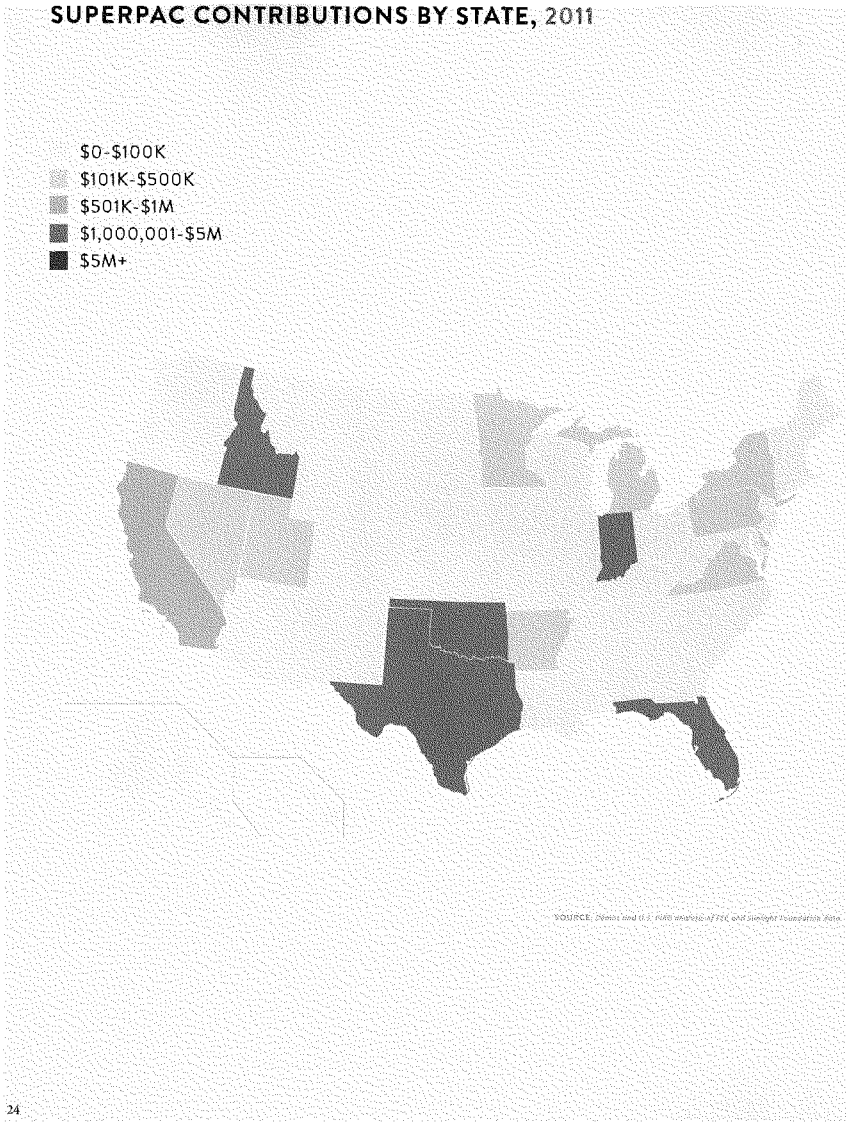

SUPERPAC CONTRIBUTIONS BY STATE, 2011
$0-$100K
$101K-$500K
$501K-$1M
$1,000,001-$5M
$5M+
24

Table 4. | NUMBER OF UNIQUE BUSINESS CONTRIBUTORS BY STATE, ALL TIME

DONOR STATE	COUNT
UNREPORTED	3
AK	24
AL	11
AR	4
AZ	6
CA	67
CO	9
CT	4
DC	21
FL	52
GA	6
GU	1
HI	1
IA	5
ID	6
IL	28
IN	7
KS	1
KY	1
LA	16
MA	9
MD	11
ME	2

Table 4. | CONTINUED

DONOR STATE	COUNT
MI	5
MN	4
MO	4
MS	2
MT	1
NC	2
NE	1
NH	1
NJ	5
NM	5
NV	10
NY	18
OH	11
OK	8
OR	1
PA	18
SC	3
TN	8
TX	124
UT	8
VA	18
WA	4
WV	3
WY	2

* STATES NOT LISTED DID NOT CONTAIN IDENTIFIED BUSINESS CONTRIBUTORS TO SUPER PACS.

SOURCE: *Telmar and U.S. PIRG analysis of FEC and Sunlight Foundation data*

Table 4.2. NUMBER OF UNIQUE BUSINESS CONTRIBUTORS BY STATE, 2011

DONOR STATE	COUNT
UNREPORTED	3
AK	1
AL	1
AR	1
CA	21
CO	4
CT	3
DC	13
FL	13
GA	1
HI	1
IA	1
ID	5
IL	5
IN	2
LA	1
MA	3
MD	3
ME	1

Table 4.2. CONTINUED

DONOR STATE	COUNT
MI	2
MN	3
MS	1
NC	1
NJ	1
NM	1
NV	3
NY	4
OH	2
OK	3
OR	1
PA	6
TX	35
UT	6
VA	9
WV	1

* STATES NOT LISTED DID NOT CONTAIN IDENTIFIED BUSINESS CONTRIBUTORS TO SUPER PACS.

SOURCE: *Demos and U.S. PIRG analysis of FEC and Sunlight Foundation data*

Dēmos
DEMOS.ORG

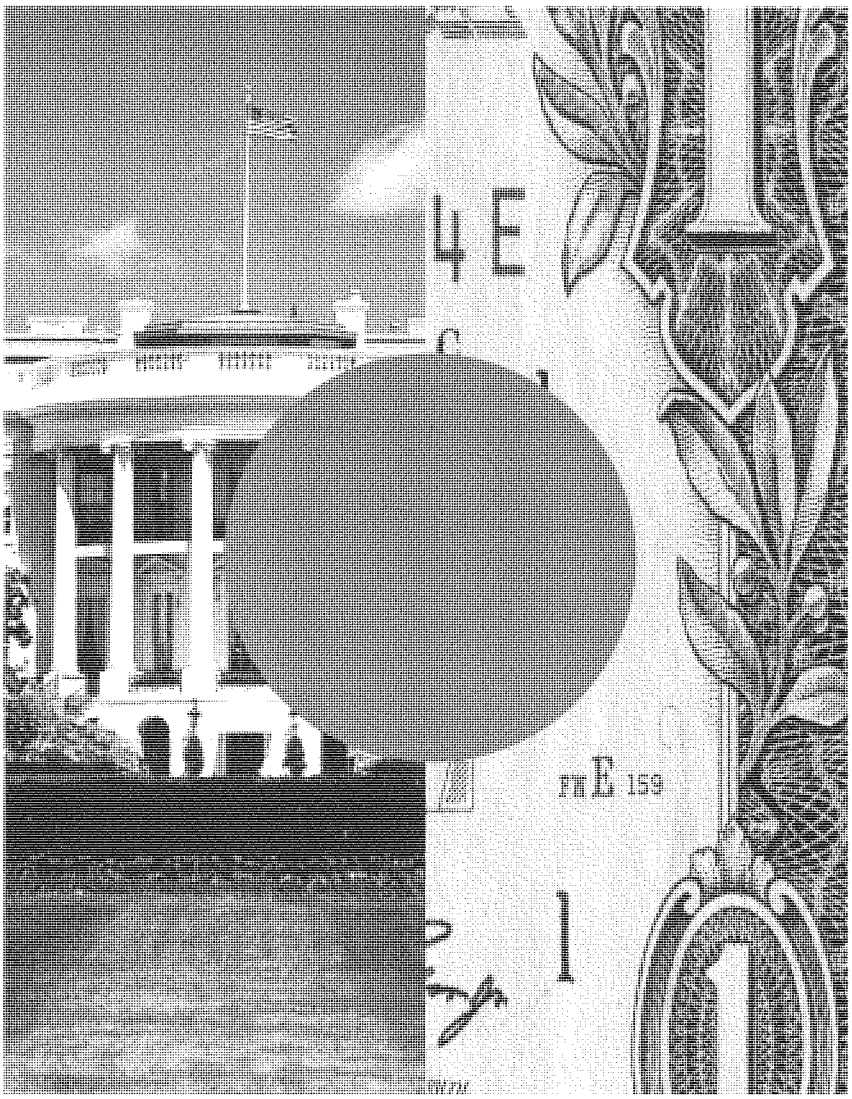
DĒMOS
220 Fifth Avenue, 2nd Floor
New York, New York 10001
Phone: (212) 633-1405
Fax: (212) 633-2015
info@dēmos.org

MEDIA CONTACT
Lauren Strayer
Associate Director of Communications
lstrayer@dēmos.org
(212) 389-1413

U.S. PIRG Education Fund

U.S. PIRG EDUCATION FUND
218 D St. SE, 1st Fl
Washington, DC 20003
Phone: (202) 546-9707
Fax: (202) 546-2461

MEDIA CONTACT
James Dubick
Communications Director
james@pirg.org
(312) 544-4436 x219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March 28, 2012

Honorable Charles Schumer, Chairman
Honorable Lamar Alexander, Ranking Member
United States Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Chairman Schumer and Ranking Member Alexander,

On behalf of the Investor Responsibility Research Center (IRRC) Institute and the Sustainable Investments Institute (Si2), attached please find a statement for the record regarding S. 2219, Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2012, or DISCLOSE Act of 2012.

The statement focuses on the organizations' recent report, *Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies.* This report is important to the Committee's deliberations as it offers a complete, objective and non-partisan analysis of what S&P 500 companies actually are doing with regard to political expenditures and disclosures. The study does not take a position on the disclosure of political expenditures. Instead, it offers the most comprehensive data analysis to date, supplemented by two case studies.

The study finds that oversight and disclosure of corporate accountability and disclosure of political expenditures is on the upswing, with the boards of 31 percent of S&P 500 companies now explicitly overseeing such spending. Yet, the study shows that this increased oversight and transparency does not necessarily translate into less spending. In fact, companies with board oversight of political expenditures spent about 30 percent *more* in 2010 than those without such explicit policies.

The analysis also tallies S&P 500 political expenditures – some $1.1 billion from corporate treasuries in 2010. It uncovers inconsistencies between companies' stated political expenditure policies and what is actually spent. That is, fifty-seven of S&P 500 companies state they will not make political contributions. But an in-depth search of federal and state records shows that only 23 of these companies actually refrained from giving to candidates, parties, political committees and ballot measures in 2010.

We appreciate your review of the statement and full report. We hope that having such a wealth of independent, non-partisan data will help your deliberations. We stand ready to respond to any questions or provide additional information.

Respectfully submitted,

Jon Lukomnik
IRRC Institute Executive Director

Heidi Welsh
Si2 Exectuive Director

Investor Responsibility Research Center Institute
One Exchange Plaza, 55 Broadway, 11th Fl.
New York, NY 10006
212.344.2424
info@irrcinstitute.org
www.irrcinstitute.org

Sustainable Investments Institute
21122 Park Hall Road
Boonsboro, Maryland 21713
301-432-4721
heidi@siinstitute.org
www.siinstitute.org

Statement of
Heidi Welsh, Executive Director, Sustainable Investments Institute
on behalf of
The Sustainable Investments Institute
and
The Investor Responsibility Research Center Institute
submitted to
The United States Senate Committee on Rules and Administration
Hearing on the DISCLOSE Act of 2012
March 29, 2012
Washington, D.C.

Thank you Chairman Schumer, Ranking Member Alexander, and Members of the Committee for the opportunity to submit a statement for the record regarding S. 2219, the Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2012, or DISCLOSE Act of 2012.

In the wake of the landmark *Citizens United* Supreme Court decision, numerous organizations are providing input on the highly contentious policy debate regarding the disclosure of political expenditures. As the Committee examines each side of the debate and potential legislation, we believe an important element of the decision making process is a careful examination of neutral, non-partisan data on what companies actually are doing with regard to disclosure of political expenditures.

Such an examination recently was conducted by the Sustainable Investments Institute (Si2) with funding from the Investor Responsibility Research Center (IRRC). This statement provides the Committee with a summary of this study, "Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies." The study (attached) offers the most comprehensive study of corporate political spending to date and is intended to help policymakers, investors and other interested parties make informed decisions with an impartial, complete, and non-partisan benchmark data analysis. Importantly, this study does not advocate for particular policy solutions

and does not take a position on the legitimacy of corporate spending. It also provides two case studies. The first examines ballot measure spending in California by Pacific Gas & Electric, while the second looks at indirect support for independent expenditures in Ohio judicial elections by Procter & Gamble.

The study finds that many companies have voluntarily heeded the call for increased disclosure, transparency and oversight. Given the high impact and high risk nature of this spending, that's probably appropriate. But, while many assume that strong disclosure and governance practices will reduce corporate political spending, the data show that's far from a foregone conclusion.

Indeed, on a revenue-adjusted basis, while companies with greater board involvement in the process clearly have more robust oversight of such spending in place, they also actually spend *more*. But it's important to note that the causation is unclear. For example, heavily regulated companies spend disproportionately. Boards of highly regulated companies could both be more concerned with such spending, and could view such spending as a necessary cost of business.

Overall, we found quite a complicated landscape. On the one hand, there's been real movement towards disclosure. But on the other, a huge part of the picture remains obscured. For example, two-thirds of the companies that appear to spend from their treasuries don't report to investors, although we put many of the pieces together for direct political spending using data from the Center for Responsive Politics and the National Institute on Money in State Politics. However, reporting on indirect spending depends on voluntary corporate disclosures. The 39 companies that disclosed such spending for 2010 reported a total of $41.1 million that went to political purposes. Most of it probably went to lobbying, yet not broken out is how much may have gone to political campaigns.

We also found a small but growing number of firms shying away from exercising their new right to fund ads that support or attack candidates. Further, only 26 companies in the whole index mention 501(c)4 social welfare groups that are playing a key role in funding issue ads.

More specifically, the study finds that:

- There is a trend towards more oversight and more "no spending" policies: 77 companies now say they will not use independent expenditures, up from 58 in 2010.

- The number of companies with policies on corporate oversight of indirect spending through trade associations has jumped to 24% from 14% a year ago. Fully half the largest 100 companies now have such policies. However, only 14% of S&P 500 companies actually give a numerical report on how much of their trade association dues are spent for political purposes.

- 65% of the S&P now identify who at the company is responsible for making political expenditure decisions, up from 58% last year.

In addition, the study uncovered inconsistencies between companies' stated political expenditure policies and what is actually spent. Fifty-seven of S&P 500 companies state they will not make political contributions, up from just 40 in 2010. But an in-depth search of federal and state records shows that only 23 of these companies actually refrained from giving to candidates, parties, political committees and ballot measures in 2010.

The analysis also tallies what S&P 500 companies spent both before and after elections – some $1.1 billion from corporate treasuries in 2010. This includes:

- $979 million for lobbying at the federal level
- $112 million on state-level candidates, parties and ballot initiatives, and
- $31 million on federally registered 527 political committees.

The data also indicate the largest companies spent the most, with the top 40% of the companies (by revenue) spending $915 million of the $1.1 billion. The average S&P 500 company spent $144 for political purposes per million dollars of revenue earned. Utilities and Health Care companies spent proportionately more than any other sectors.

For you information, The IRRC Institute is a not-for-profit organization headquartered in New York, N.Y. Its mission is to provide thought leadership at the intersection of corporate responsibility and the informational needs of investors. Si2 provides online tools and in-depth reports that enable investors to make informed, independent decisions on social and environmental shareholder proposals, providing analysis but not recommendations on how to vote.

We hope the Committee finds this report and analysis useful as it debates this important policy issue. We thank you for the opportunity to provide this information and are available at your convenience to provide additional information and respond to questions.

Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies

By Heidi Welsh and Robin Young
November 2011

Acknowledgements

This report was made possible with a generous grant from the IRRC Institute. The analysis of campaign contributions would not have been possible without the comprehensive and well-organized information made available to the public by the Center for Responsive Politics (www.opensecrets.org), where Jihan Andoni provided guidance, and the National Institute on Money in State Politics (www.followthemoney.org), with help from Denise Barber and Ed Bender. We also would like to thank the company officials who responded to Si2's inquiries. Heidi Welsh and Robin Young researched and wrote this report. Dr. Kathy Fogel of the University of Arkansas provided input and advice about future avenues for research. Peter DeSimone of Si2 provided editorial assistance.

The Sustainable Investments Institute (Si2) is a non-profit membership organization founded in 2010 to conduct impartial research and publish reports on organized efforts to influence corporate behavior. Si2 provides online tools and in-depth reports that enable investors to make informed, independent decisions on shareholder proposals. It also conducts related research on special topics. Si2's funding comes from a consortium of the largest endowed colleges and universities, other large institutional investors and grants such as the one that made this report possible.

For more information, please contact:

Heidi Welsh
Executive Director
21122 Park Hall Road
Boonsboro, MD 21713
P: 301-432-4721
heidi@siinstitute.org
www.siinstitute.org

The IRRC Institute is a not-for-profit organization established in 2006 to provide thought leadership at the intersection of corporate responsibility and the informational needs of investors. The IRRC Institute ensures its research is widely available at no charge to investors, corporate officials, academics, policymakers, the news media, and all interested stakeholders.

For more information, please contact:

Jon Lukomnik
Executive Director
IRRC Institute
One Exchange Plaza
55 Broadway, 11th Fl.
New York, NY 10006
P: 212-344-2424 F: 212-344-2474
info@irrcinstitute.org
www.irrcinstitute.org

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Key Findings

- **Board oversight has increased:** There has been a sizeable jump in political spending oversight by boards of directors in the last year. Thirty-one percent of S&P 500 company boards now are explicitly charged with oversight, an increase from 23 percent at the same time in 2010. This increase occurred in all revenue tiers, although it moved unevenly through the ten different economic sectors, with the largest proportional increases among Utilities. Information Technology companies remain the least likely to have any board involvement in political spending.
- **Management transparency has grown:** More companies now are being transparent about who is making decisions about political spending, compared with 2010. The changes occurred irrespective of revenue size or sector, and nearly two-thirds of the S&P 500 index identifies the officers who make decisions. The biggest jumps occurred for Utilities, Information Technologies, Materials and Financials companies.
- **More companies say they do not spend on politics:** The overall number of companies that assert they do not spend money in politics has grown to 57, up from 40 a year ago. But a comparison of spending records and policy prohibitions shows that only 23 companies with 'no spending' policies actually did not give any money to political committees, parties or candidates in 2010 (though they may still lobby). Only 17 of these firms avoided all forms of political spending, including lobbying. (Another 57 companies have no policies about spending but also do not seem to spend.)
- **More companies prohibit direct candidate and party support:** At least some companies are becoming less willing to give directly to candidates and parties. Fifty-nine companies in the index now say they will not give to candidates, about twice as many as in 2010. Overall, the number of companies with explicit prohibitions on campaign contributions to candidates, parties or committees has increased from 40 companies in 2010 to 64 this year, even as campaigns are revving up for the 2012 Presidential election.
- **Corporate treasury spending disclosure is up but limited:** Voluntary company disclosure of political spending remains limited and only 20 percent of S&P 500 companies report on how they spent shareowners' money. Two-thirds of the companies that appear to spend from their treasuries do not report to investors on this spending. The least transparent are Telecommunications and Financials firms; by contrast over 40 percent of Health Care companies explain where the money goes.
- **Independent expenditure bans are up:** There has been a significant increase in the number of companies that discuss independent expenditures, which following *Citizens United* are allowed at the federal level for the first time in 100 years. Comparing companies in the index in both years (468 firms) shows that 19 more companies now say they will not fund campaign advertisements for or against candidates, generally will not do so, or are reviewing their policies—up from 58 last year. But only five companies now acknowledge in their policies that they make independent expenditures, even though careful scrutiny of voluntary spending reports adds a few firms to this tally.

- **Indirect spending policies have jumped:** The proportion of companies that have adopted policies on indirect political spending through their trade associations has grown from 14 percent in 2010 to 24 percent. Half of the 100 biggest companies now disclose their policies on indirect spending through trade groups and other politically active non-profit groups, but this commitment evaporates at smaller companies.

- **Other non-profit group mentions are under the radar:** Only 26 companies in the entire S&P 500 index acknowledge any relationship with 501(c)4 social welfare organizations that are playing a key role in funding issue ads in campaigns.

- **Indirect spending disclosure has grown and includes $41 million reported:** Just 14 percent of the S&P 500 report on how much of their trade association dues are used for political purposes. The 39 companies that disclosed such spending in 2010 reported a total of $41.1 million that went to political purposes—much of it to lobbying.

- **Corporate treasury disbursement benchmarks in 2010:** Most of the money companies spend in the political arena comes after candidates are elected. Data supplied by the Center for Responsive Politics and the National Institute on Money and State Politics show S&P 500 companies allocated $979.3 million (87 percent) of the $1.1 billion they gave in 2010 to lobbying. They spent a further $112 million (10 percent) on state level candidates, parties and ballot initiatives and $31 million (3 percent) on federally registered political committees.

- **Biggest companies spend the most:** The top two revenue quintile companies were responsible for the vast majority of both federal lobbying and treasury contributions to national political committees and state political entities, with $915 million (93 percent) of the S&P 500's total.

- **Ballot initiatives get the most state-level support:** Two-thirds of the money companies spent in 2010 at the state level went to ballot initiatives ($75.2 million), while the rest was split fairly evenly between parties and candidates (a little more than $18 million for each).

- **Utilities are the most intensive spenders, especially PG&E:** The most intensive spending from companies, figured per million dollars of earned revenue, came from the Utility sector, where PG&E spent six times more than any other company in the S&P 500, half of which went to a failed ballot initiative in California that would have made it more difficult for competitors to enter the market.

- **Correlation between oversight and spending intensity:** The 151 companies with board oversight of their spending disburse on average 30 percent more than their peers that do not have such oversight, when the latter comparison is controlled for revenue size. This may give some comfort to investors and others concerned about accountability and transparency, but not to those who think that corporate governance could be used as a lever to reduce spending.

Introduction

Much popular sentiment looks askance at large companies using their vast wealth both to determine who gets elected and then to influence elected officials. Just the opposite case is made, however, by those who say the Constitution gives companies a fundamental free speech right to participate and spend money in the political process. The latter camp achieved a major victory on Jan. 21, 2010, when in *Citizens United vs. the Federal Election Commission* the U.S. Supreme Court threw out spending limits in federal elections that had been in place for decades. The decision did not strike down the ban on direct corporate contributions to federal candidates, nor disclosure mandates; reformers therefore are emphasizing transparency in their current campaigns.

The political dispute engenders a corporate governance discussion: What and whom should govern how, when, why and how much a company participates in political spending. A growing number of investors are concerned about how companies govern this spending since it uses shareowners' money and since such spending is "high impact." It has a disproportionate risk/opportunity equation compared to most other forms of corporate spending. Therefore, for eight years activist investors have been asking companies to voluntarily tell them more about political spending governance and disbursements. Since 2004, the non-profit Center for Political Accountability (CPA) has taken a leading role in that effort. Social investment firms, public pension funds, religious groups and labor unions have pursued their goals of more board oversight and spending disclosure by filing shareholder resolutions that investors consider at corporate annual meetings. These activists are not contesting the legality of political contributions by corporations, or arguing in favor of their elimination, but are instead seeking to inject greater oversight, accountability and transparency into the process. They have earned substantial support from mainstream investors in this quest and companies have begun to respond.

In 2011, the number of proposals on corporate political spending rose by more than 50 percent, broadening the set of questions from traditional disclosure issues to 1) the proposition that shareholders should vote on political spending and 2) that companies should provide more complete information to investors on direct and indirect lobbying. Average support for the 35 CPA resolutions that went to votes increased to 33 percent, up from 30 percent last year, an unusually high benchmark for dissident resolutions. There was one majority vote (53 percent) at **Sprint Nextel** and eight other votes over 40 percent, at **Coventry Health Care, EOG Resources, Halliburton, Lorillard, R.R. Donnelley & Sons, State Street, WellCare Health Plans** and **Windstream**. In addition to the 55 resolutions which reached a vote so far this year (results from two more have yet to be tallied), activists withdrew 28 proposals on the various political spending resolutions after companies agreed to disclose more about their political spending and put in place better governance of it, up from 14 in 2010.

Even as companies have responded to requests for changes in their oversight and reporting about political spending, spending overall has increased. Just how much comes from corporate treasuries remains unclear. This report uses data from the National Institute on Money in State Politics and the Center for Responsive Politics to show that in 2010 alone, S&P 500 companies contributed from their treasuries $112 million to contests in the states and $30.8 million to nationally registered political committees.

Company spending after elections through direct federal lobbying is well regulated and disclosed, and in 2010 the S&P 500 spent $979.3 million on efforts to influence national laws and regulations. Yet how much companies give indirectly through their trade associations and other non-profit groups that both spend in elections and on lobbying is not known; the 39 companies in the S&P 500 index that disclosed this type of giving for 2010 alone contributed $41.2 million. A breakdown of how much of this indirect spending went to electoral politics and how much to lobbying is not available.

Goals

This study takes a close look at the nature and extent of the voluntary governance reforms companies have made, using a broad definition of "political spending," to see how these practices affect key disclosure and accountability concerns raised by critics. We examined:

- Direct contributions to state-level candidates, party committees and ballot initiative committees;
- Direct contributions to political committees registered with the Federal Election Commission (FEC), known as "527 committees" for their tax code designation;
- Direct federal lobbying expenditures; and
- Available information on indirect contributions made through trade associations and other non-profit groups.

We also look at levels of oversight, levels of transparency, and whether those governance structures and processes have any impact on how much companies spend.

The report is impartial and non-partisan. It does not advocate for particular policy solutions nor take a position on the legitimacy of corporate spending. Rather, it provides advocates, policy makers, corporate decision makers, shareowners and commentators a set of baseline facts to which they can apply their own analyses. This study is more comprehensive than other assessments of corporate political spending governance, which have focused only on the 100 largest companies; it also looks at spending alongside governance factors, tiers the companies by revenue size and analyzes the results by sector. Importantly, it is the only report to compare two years of governance data, which allows identification of trends and changes in the corporate governance of political expenditures.

Report Structure

The overall findings from Si2's research appear first in this summary of the report, showing the results from a in-depth examination of what S&P 500 companies say publicly, including feedback some firms provided on profiles Si2 compiled of their governance and spending in September 2011. (The profiles sent for review to companies also included data aggregated by the Center for Responsive Politics and the National Institute on Money in State Politics on how much each firm spent in the 2010 election cycle on campaign contributions at the state level, registered political committees and federal lobbying.) An executive summary of the findings and survey research is followed by a more detailed presentation of the underlying research on patterns of governance, disclosure and spending. Since we examined many

of the same governance indicators in 2010,[1] we present findings on the extent of change in the last year, showing that there is measurably more oversight and disclosure although tremendous scope for additional transparency, particularly with regard to indirect spending.

Two case studies look at 1) ballot measure spending in California by PG&E and 2) indirect support for independent expenditures in Ohio judicial elections by Procter & Gamble. Our research approach is described after the presentation of findings.

In the appendices we also present a short primer on avenues for political spending and include additional background that explains the context for the research: a shareholder resolution campaign from activist investors that enjoys growing support from mainstream financial institutions, U.S. campaign finance law and the current reform proposals making the rounds in Washington. The most likely immediate avenues for change focus on disclosure and are being considered at the Securities and Exchange Commission (SEC), since campaign finance reform bills that died in 2010 face extremely dim prospects in the current Congress. Reformers also are pursuing regulatory change at the Federal Election Commission, at the Internal Revenue Service and at the Federal Communications Commission. But any movement even within the various government agencies that have skin in the game of money in politics also remains highly uncertain given the dysfunction that has Washington firmly in its grip. The voluntary corporate political spending governance reforms companies are pursuing, at the request of a growing number of their investors, therefore have critical relevancy to any consideration of company influence on our political system.

[1] *How Companies Influence Elections: Campaign Spending Patterns and Oversight at America's Largest Companies,* October 2010, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1692739.

Executive Summary

Conclusions on Governance Policy

Disclosed policies: Compared to a year ago, more companies of all sizes and sectors in the S&P 500 have publicly adopted some kind of policy that addresses their corporate political spending. The number of companies in the top 100 that say nothing about political spending on their websites has fallen to just five and now includes only **Amazon.com, Berkshire Hathaway, Costco Wholesale, Google** and **Sunoco**. Overall in the index, there was a 7 percentage point jump in policy incidence, and just 15 percent now do not address the issue. Thirty percent of policies are stand-alone documents that investor activists have been requesting in shareholder proposals over the last several years.

Lobbying: Investor activists increasingly want more information about company lobbying, and the 2012 proxy season is likely to see a big jump in shareholder proposals on the subject. This is at least partly driven by popular discontent about the extent of corporations' influence on lawmaking, but also because Securities and Exchange Commission staff recently made clear that lobbying proposals were appropriate subjects for investor consideration as long as they did not focus on a particular issue (such as climate change).

Federal lobbying is highly regulated and records filed as required with the U.S. Congress document that 80 percent of the S&P 500 spend money on it. Yet only 13 firms in the entire index provide easily accessible information for their investors and other interested parties on how much they spend, through website reports or by providing direct links to Congressional reports that contain the information. Two-thirds of companies in the S&P 500 do not mention lobbying when they talk about political spending, confining their statements to campaign spending issues. Sixty percent of the 100 biggest companies do discuss lobbying (and they are the biggest spenders of lobbying dollars), but there is a striking drop-off among those outside the top revenue tier. Just half of the 25 companies that spent the most on lobbying in 2010 (each more than $8 million) have disclosed policies about this activity. Less than a dozen companies explicitly acknowledge the "grassroots" lobbying efforts they make to mobilize their various stakeholders, including employees and the public, in attempts to influence public policy.

Justifications for spending: In the last year, more companies of all sizes and in all sectors have begun to provide public justifications for why they spend money in politics. Overall, just one-third provide justifications, but this is up from just one-quarter a year ago. Nearly 80 percent of the top 100 companies explain themselves, up from just two-thirds in 2010, and while less than half of all the smaller firms provide justifications, proffered reasons for spending clearly rose in every revenue tier. Utilities are the most likely to provide reasons for their spending (63 percent) and Financials firms the least (30 percent).

Conclusions on Formal Oversight

Boards: More boards now are paying attention to how their companies spend money in politics and fully 31 percent of S&P 500 boards now have formal, explicit corporate governance responsibilities to review or (in half a dozen cases) approve corporate political spending. The number has increased from only two board oversight mandates in 2005. This clearly reflects the broader trend for greater board

involvement in enterprise risk management that encompasses heretofore unquantified social and environmental factors affecting long-term sustainability. Board oversight is one of the key indicators investors watch most closely to gauge corporate reaction to the intense investor and public scrutiny about the role they play in elections. Information Technology companies are the least likely to have board oversight (just 20 percent of the sector) and Health Care companies are the most likely to have it (almost 45 percent).

Most boards, when they do attend to political spending, conduct annual reviews, not the semi-annual frequency most prized by reformers. But two companies (**ConocoPhillips** and **General Mills**) say their boards must provide approval for any direct use of independent expenditures to support or oppose candidates in elections, while delegating other decisions to managers. Five other companies—hospital firm **HCP**, **Occidental Petroleum**, **Bed Bath & Beyond**, **Newell Rubbermaid** and natural gas exploration firm **QEP Resources**—also report direct board involvement in specific spending decisions. (Additional information on indirect spending policy and oversight appears below.)

Management transparency: More companies now explain which officers take part in political spending decisions, with a 7 percentage point jump from one year ago, bringing the total to 64 percent for the index as a whole. Utilities, Information Technology firms and Financials saw the largest proportional increase on this indicator. However, Financials remain the least likely of any sector to explain who makes political spending decisions at their companies, a point that may have particular resonance with those questioning the influence of Wall Street firms.

Conclusions on Spending and Disclosure Practices

'No spending' companies: Compared to 2010, 17 more companies in the S&P 500 now assert that they do not spend money on politics. But the nature and specificity of these prohibitions varies widely and when companies say they do not spend, it does not necessarily mean shareholder money does not make its way into political campaigns. It certainly does not indicate that companies do not lobby. Just 17 of the companies with apparent spending bans in the entire index actually spent no money on campaigns or lobbying in 2010, the snapshot year Si2 considered. Another 57 did not appear to spend any money but did not publish policies about it. As might be expected, smaller revenue sized companies were less likely to spend. In the largest revenue quintile, just two companies—**Schlumberger** and **Philip Morris International**—did not spend on politics domestically. (The latter is not to be confused with its former parent, **Altria**, which spends handsomely throughout all levels of the U.S. political system.) Information Technology companies were markedly less likely to spend, with one-third of them not doing any federal lobbying and not giving to federally registered political committees or state parties, candidates or ballot initiatives.

Twice as many companies in the index now explicitly forbid contributions directly to political candidates compared to 2010 (59 firms versus 27 last year). Bans on party giving also increased to 43 companies, up from only 25 in 2010. These were the most commonly stated types of prohibitions; overall, 40 companies in the index articulated a set of spending prohibitions in 2010, while 64 now do.

Voluntary company spending reports versus the public record: In the post-*Citizens United* era, when companies may contribute unlimited funds from their treasuries to benefit or denigrate specific candidates at all levels of the political process, investor advocates believe the case for full transparency about spending is particularly compelling. Money that is given to groups that do not have to report on the sources of their funding need not be disclosed now—a particularly irksome burr under the saddle for many. But it may not always remain undisclosed, given the intense public interest in the subject that may prompt unsanctioned disclosure and the potential for regulatory change or legal change that may require it. *Citizens United* removed spending limits but did not cast aside disclosure requirements, a point not lost on campaign finance reformers.

Si2 compared voluntary company reports with what information can be gleaned from the public record, using data compiled by the Center for Responsive Politics and the National Institute on Money in State Politics. This gap analysis allows both reasonably accurate benchmarking of the corporate spending by all companies in the index, as well as an assessment of key gaps in the public record. In addition to the "known unknown" of sums obtained and spent by trade associations and other non-profit groups, the other missing component in public databases is a nationwide aggregation of state-level political committee data.

After excluding identifiable PAC spending from the state-level records,[2] we combined the totals and found that 106 do not appear to spend, 99 companies in the index both spend and report (in some fashion) and 278 companies spend and do not report on it (two-thirds of the spenders). Telecommunications and Financials companies are the least likely to report, doing so less than 20 percent of the time, while Health Care companies are the most likely to do so—with 43 percent of spenders reporting. Fully 60 percent of the largest revenue tier companies report to their investors, but only 10 percent of the bottom 60 percent of the index does.

Independent expenditures: Seventy-eight percent of the S&P 500 do not make their positions known on the use of independent expenditures. In the last year there has been a significant increase in the number of companies that do discuss the practice, though. Just four mentioned independent expenditures in 2010 and 38 company policies now do.

Indirect contributions: Illustrating substantial movement on a key focus of investor activists, just under one-quarter of S&P 500 companies now have disclosed policies on indirect political spending through trade associations and other non-profit groups, up from 14 percent a year ago. Utilities are the most likely to have such a policy (40 percent) and Financials and Telecommunications firms the least (less than 15 percent). For Financials, this is a big improvement from 2010 when only 5 percent talked about trade group giving, but seven of the largest firms still do not mention it, including **Allstate, American International Group, Bank of America, Citigroup, JPMorgan Chase, Morgan Stanley** and **Travelers**. Reflecting the efforts of the Center for Political Accountability and its investor allies, half in the top revenue quintile have trade group policies now, but less than 20 percent do in the bottom three revenue quin-

[2] As explained on p. 32, Si2 excluded from its corporate money tallies contributions to candidates and parties in states where only PAC giving is allowed, and then reviewed all the remaining state spending records to exclude any clearly identifiable PAC money.

tiles. Despite the growth in importance of political spending by 501(c)4 social welfare organizations, a scant 26 companies in the S&P 500 include mention of these groups in their policies.

Reporting thresholds—Companies that do report on indirect spending usually set dues thresholds that trigger reporting; 66 companies do so now, up from 41 last year—with about half saying they will report on this spending when information is available from their trade groups that receive dues of $50,000 or more. Just four companies appear to commit to disclosing all their indirect spending: **Dell, eBay, Wisconsin Energy** and **Williams Cos.**

Membership and spending disclosure—Even if a company articulates a trade group spending policy, it does not always report on the groups it has joined. A subset reports on the amounts given: just 14 percent of the index as a whole (up from only 9 percent last year when year-over-year statistics are considered), with most reporters in the top revenue quintile. The 39 companies reporting on corporate giving to trade associations and other non-profits disclose between them that they contributed $41.2 million that was used for lobbying and other political expenses.

Policy disconnects—Shareholder advocates, particularly in the 2011 spring corporate annual meeting season, vigorously took aim at company support for trade associations that advocate for public policies contrary to the positions these firms take. Activists plan to push these critiques again in 2012, and we likely will see an expansion of this type of scrutiny. We found that 14 companies in the S&P 500 acknowledge their trade associations may take positions contrary to their own, and a few high profile defections from the U.S. Chamber of Commerce have occurred over climate change issues—notably **Apple, Exelon** and **PG&E**, among others. But the companies that discuss this issue say for the most part that there are compelling business reasons to retain their memberships, as they pursue public policies that will further their joint interests.

Spending patterns: Si2's analysis of available data about corporate spending (excluding identifiable political action committee money that comes from individuals affiliated with a company) shows that S&P 500 companies spent $1.1 billion in 2010. This includes contributions to federally registered 527 political committees and state-level candidates, parties and ballot initiatives—as well as money disbursed for federal lobbying efforts.

Footprint variations—Federal lobbying accounted for 87 percent of the total ($979.3 million), federal political committees 3 percent ($31 million) and state contributions 10 percent ($112 million). Companies in the Industrials and Utilities sectors spent the most overall when all three parts of this spending footprint are tallied up (about $225 million and $175 million, respectively), while Materials and Telecommunications firms each spent less than $50 million apiece. Setting federal lobbying aside shows that Utilities companies spent more than twice what any other sector did, for a total of about $55 million (38 percent of what the entire index spent). These figures are skewed by heavy spending from just one company, **PG&E**. The top two revenue quintiles were responsible for nearly all the spending of both federal lobbying dollars as well as national political committee and state-level contributions.

Ballot measures—Two-thirds of state-level spending, about $75 million, went to ballot initiatives, where the U.S. Supreme Court has upheld the right to unlimited spending since 1978. A dozen companies each spent more than $1 million on ballot initiatives, with PG&E the largest spender by far, with just under $44 million spent in 2010 on an unsuccessful effort to prevent local electricity competition in the California utility market.

Spending intensity: To make possible a meaningful comparison of spending across the index, Si2 calculated a "spending intensity" figure that divides each firm's total disbursements by earned revenue, producing the amount each spent per million dollars of revenue earned. This approach mimics the carbon intensity analyses used to assess corporate contributions to climate change, although we acknowledge that the toxicity quotient of political dollars is not the same as carbon dioxide. Utilities and Health Care companies spent proportionately more than any other sectors ($255 and $185 of political spending per million dollars of revenue), not surprising since each faces a legislative and regulatory context much in flux. Consumer Staples, Telecommunications and Consumer Discretionary sector firms were at the bottom end of the spending intensity scale, with each spending less than $100 per million dollars of revenue.

Oversight and spending correlations: Investor activists and companies have different but sometimes complementary reasons for adopting strong corporate governance practices for political spending. Investors want accountability, and evidence that spending strategically bolsters business interests and not those of individual executives. Some investors also carry with them an implicit goal of reducing overall company spending, a goal that "good government" reformers make explicit. Companies put in place more explicit governance policies to provide investors with the requested accountability and blunt critiques that can harm their reputations, and to make their spending more efficient. But some also find that formalized procedures can help turn back what can be relentless requests for campaign cash from politicians and their supporters.

Only a small number of companies seem to concur that they should cut back on corporate spending in politics, however. In fact, a comparison of the 151 companies in the S&P 500 that give their boards explicit board oversight responsibility to those that do not shows that those with oversight spend, on average, substantially more per dollar of revenue: 20 percent more than the index average and 31 percent more than companies with no oversight. This provides little solace for reformers who want to use governance as a lever for spending cuts, but it does suggest that board involvement increases in step with political spending intensity, a central demand from investor activists.

Avenues for Further Exploration

Last year's study focused on collecting data on corporate policies, governance practices and disclosures on political spending to obtain a snapshot of these data in the wake of the landmark *Citizens United* decision. This second-year effort goes a step further to look at actual spending practices in the context of corporate governance policies and disclosure. We have tried to answer at least some questions about whether, for example, greater board oversight, stricter corporate policies or more disclosure of political spending appear to have any impact on the amount of a company's political spending. An obvious next

set of questions is whether the nature and volume of corporate political spending and its corporate governance has any impact on financial performance and shareholder returns.

Some recent work has been done in this area. Harvard Professor John C. Coates published "Corporate Governance and Corporate Political Activity: What Effect Will *Citizens United* Have on Shareholder Wealth?" in September 2010 as part of the Harvard Law School Working Paper series.[3] The paper focuses on the relationship between the governance and the performance of corporations with different levels of political spending in the S&P 500. Coates found a negative correlation between political activity, as measured by levels of donations and spending on lobbying, with the existence of shareholder-friendly governance features. At the same time, he confirmed that shareholder-friendly governance features strongly correlated with firm value. Coates concludes, "in the time period beginning in 1998 and through 2004 shareholder-friendly governance was consistently and strongly negatively related to observable political activity before and after controlling for established correlates of that activity, even in a firm fixed effects model," and that "political activity, in turn, is strongly negatively correlated with firm value." These findings, he observes, "imply that laws that replace the shareholder protections removed by *Citizens United* would be valuable to shareholders."

Coates's study focuses on the relationship between a company's broader governance features—ownership dispersion, insider ownership, blockholder ownership, shareholder rights and CEO pay—its political activity and shareholder value, and the paper offers important findings for shareholders to weigh and for further examination by researchers. However, it does not look at governance features that in particular address board and management oversight of political spending. It also does not explore the relationship between disclosure of political spending and overall transparency in reporting on the issue or how these correlate, if at all, to shareholder value. Further research in these areas is warranted.

There are obvious obstacles to providing shareholders and other stakeholders with a clearer picture of the relationships between governance, political spending and shareholder value. Several *more years of data* on policies and disclosure practices are needed to run longer-term models of at least five years. Further, *gaps in company spending records* mean we simply do not have a complete picture of the magnitude of spending, although the gap analysis Si2 presents in this study should help make clear where more work can be done. More time series data also could examine if *changes in a company's policies* or disclosures have any clear long-term impact on actual levels of political spending.

[3] Coates, IV, John C., Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth? (September 21, 2010). Harvard Law and Economics Discussion Paper No. 684. Available at SSRN: http://ssrn.com/abstract=1680861

Company Views

SEC Disclosure

New federal campaign finance legislation has no immediate prospects for passage in the U.S. Congress, so reformers are pursuing changes in various government agencies that could affect how companies disclose information about their political spending. One such initiative, as explained on p. 78, asks that the Securities and Exchange Commission require all publicly traded companies to make standardized disclosures about their spending in securities filings.

A communications equipment company told Si2 this would be a good idea, since "transparency on this issue is important for all stakeholders." None of the other companies that responded on this subject agreed, however. **Pfizer** said, "We do not support a one-sized-fits-all approach." Others also felt that existing disclosure is sufficient. A global electronics firm said, for instance, "We believe that public companies are already saddled with extensive compliance disclosure burdens and political spending disclosure would only add to this burden. Moreover, we already disclose political spending [in our annual sustainability report]. Reporting political spending to the SEC is redundant and repetitive since the majority of the information is already widely publicly available."

A multinational machinery company agreed and also felt information on political spending could reveal confidential business strategy:

> Companies already have a duty to disclose political spending to the extent it is material to the company. If a particular issue or issues become so important that the potential for an impact on the company, either in terms of the amount of spending or the impact on operations and markets, reaches a level that is material, then under existing disclosure requirements the company would be required to disclose it. To require companies to disclose political spending that is not otherwise material would run the risk of prematurely exposing their business strategies and place yet another burden on public companies that does not apply to many of their domestic and global competitors.

Shareholder Advisory Vote

One idea being proposed in shareholder resolutions (as well as in the Shareholder Protection Act) is that investors should be given the chance to vote on political spending, as they now do in the United Kingdom. None of the companies thought this was a good idea save one, which already eschews any spending. A financial services company said, "Placing this information in the proxy statement would be costly, and shareholders have many other options to communicate their advice." The machinery maker also said this would be a poor move:

> Corporate management has a duty to protect its investors' investment and to fulfill its obligations to its employees and customers. When government, at any level, proposes changes in law, regulations or policy that potentially affect a company's ability to fulfill its duties and obligations, the decision to use corporate funds to communicate its opinions to government officials with decision making authority is part of managing the business of the company. These decisions relate to business strategy and operations and should be left to company management, as they are in the best position to assess the relative benefits and detriments to the company of such spending.

Best Buy, for its part, said its current efforts are sufficient. It said the company "has a long history of productive dialogue with its shareholders and other key stakeholders regarding these and other issues. Best Buy believes that its ongoing engagement in this space provides the more appropriate and responsive way to ensure its policies and practices reflect shareholder concerns and input."

Independent Expenditures

Si2 asked companies about their plans to use independent expenditures at the federal or state level to support or oppose candidates, and their reasoning behind these plans. Just one of the respondents, a leading electric utility, said it had yet to make any decision on the issue. The rest of those that replied said they did not use independent expenditures. **Pfizer** noted, "We have adopted policy that prohibits us from engaging in direct independent expenditures as a result of the *Citizens United* case." A nationwide food company also said it has just instituted a new ban on political spending of all kinds, that it has decided to stop giving to 527 committees, and that will not use independent expenditures. The communications equipment company said it does not use independent expenditures or make any other political contributions, since "We believe that directing our resources into our core business activities—not political contributions—best serves our business and our stakeholders."

Best Buy's response was more equivocal, though: "In 2010, Best Buy did not make any independent expenditures with corporate funds and does not have any currently contemplated expenditures. Best Buy nonetheless reserves the right to provide corporate funding to candidates and/or issue campaigns that align with the company's business objectives and public policy goals. Best Buy has and will, of course, disclose any contributions allowed by law made in support of candidates or public policy issue campaigns."

Oversight Changes

Despite the findings reported in this study, only a few companies that replied to the questions Si2 posed about changes in political spending oversight in the last year explained these changes. **Pfizer** said it "constantly revisits" its policy and meets "with investors and shareholders to hear their concerns first hand." **Best Buy** also noted it had established a new steering committee last spring, which occurred after a shareholder resolution asked for more oversight following the controversy about independent expenditures in the 2010 Minnesota gubernatorial race. Finally, a nationwide property management firm that currently spends little on politics noted, "Despite our limited spending, we understand there is a growing interest in how public companies participate in the political process. As a result, we are in the process of considering whether to adopt and disclose a more formal policy."

Patterns of Governance, Disclosure and Spending

This section of the report presents the detailed results from our analysis of governance and disclosure practices for the S&P 500, alongside their spending patterns—the basis for the summarized findings presented above. Results for the entire index appear first, noting what has changed since Si2 made this examination one year ago in 2010. The results are disaggregated by economic sector and revenue quintile to explore variations in policies and spending. We found, as noted above, that oversight and transparency about spending policies have increased substantially, as boards appear to be responding to intense pressures from investors as well as the changed regulatory landscape since *Citizens United*. But disclosure of what companies spend remains inconsistent—particularly when it comes to indirect spending through trade associations and other politically active non-profit groups.

While Si2's 2010 report looked at the *types of recipients* within the political arena that received identifiable corporate money, this year we look more precisely at the *amounts* companies give to political committees (527s) registered at the federal level and state-level candidates and parties. New this year also is an analysis of how much companies spent on federal lobbying. (Si2 has excluded from the analysis any identifiable PAC spending.)[4] The sum of all three recipient categories provides a fairly comprehensive public "political spending footprint." Critically, however, as noted above, it excludes the largely unquantifiable sums companies provide to non-profit groups (including trade associations and non-profit "social welfare" organizations, organized under sections 501(c)6 and 501(c)4 of the federal tax code), some of which makes their way into political campaigns and lobbying efforts waged after candidates reach office. There is no requirement for these groups to disclose their donors and voluntary disclosure is spotty, at best. To get a glimpse of this indirect treasury spending, the report examines the nature of the relatively minimal information companies voluntarily disclose on their memberships and contributions to non-profit organizations that have begun to play an important role in political campaigns. Only 14 percent of the index discloses indirect spending, and only a few disclosures are comprehensive.

To deepen last year's analysis, the report this year also calculates a "spending intensity" figure that normalizes each company's spending footprint by revenue, producing comparable figures on political dollars spent for each million dollars of revenue earned. The dataset would allow additional examination of correlations with standard financial metrics, such as firm value, revenue growth, return on equity, total shareowner return, or other measures of considerable interest to some. Instead of venturing deep into the contentious thicket of assessments about how such measures may have some causal relationships with political spending, however, we focus primarily on spending policy, oversight and actual expenditures. We do note the overall correlation between governance and spending intensity, however, showing that the 151 companies with board oversight of their spending actually disburse on average 30 percent more than their peers that do not have such oversight, on a revenue-normalized basis. This

[4] PAC spending, which includes money contributed by individuals affiliated with companies from their own resources, substantially augments the already considerable spending that comes directly from corporate coffers, but we exclude this spending given our focus on investors and the use of their money, which comes from the corporate treasury. Any direct contributions to federal candidates from companies still must come from PACs. Si2's analysis suggests that about half the total amount of money connected to companies at the state level comes from corporate PACs and about half comes from company treasuries.

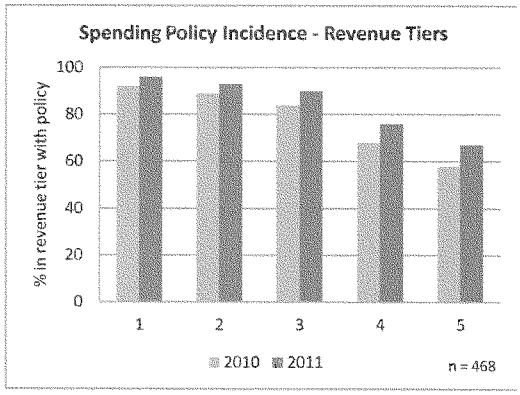
suggests that board involvement in spending does not reduce the sums companies spend, although a more rigorous examination of additional indicators would have to occur before any sort of causal relationship could be established. This preliminary evidence may give some comfort to investors and others concerned about accountability and transparency, but not to those who think that governance could be used as a lever to reduce spending.

A related issue—whether corporate political spending in campaigns and on lobbying helps or hurts the company and its shareholders financially—is difficult to establish. This year's snapshot of spending intensity per dollar of earned revenue suggests some possible conclusions, but much more additional spending efficacy research could be done. The benchmarking dataset used in this report could be used to explore how often company money goes to winning candidates, for instance—to see if companies are making the right bets about winners and thus earning the access they seek. One also could look at which of those winning candidates once in office are lobbied by the same companies, on what issues, and with what results—to see what kind of policy dividends companies effectively earn for their campaign spending. Specific legislative favors provided in exchange for campaign contributions are, of course, illegal. But money nonetheless remains a central component in the great game of influence and power where companies, legislators and their various competing stakeholders operate.

A small but growing number of companies report on their political spending to investors, although comprehensive accountings are still rare, as we document below. About 20 percent of the index does not appear to spend any money in politics (half of these formally ban spending in published policies while the rest do not take a public position on spending but refrain from contributing), about 20 percent spends and reports, and the remainder spend and do not report. We critically examine, for disclosing companies, what they include in their spending reports and how this differs from information contained in publicly available databases. Companies do not control how their spending is reported by state campaigns, which can inaccurately attribute individual contributions as coming from corporate coffers or identify PAC money as a corporate contribution. Si2 sent the governance and spending profiles to each of the companies included in the study and received detailed corrections on the spending data from a handful of firms. They largely corroborated the federal data on lobbying and 527 spending, but found some inconsistencies in the state-level data given the more uneven reporting mechanisms in place there and the gaps in data collected by the National Institute on Money in State Politics. As noted above, state level information from non-party political committees is missing, which means the publicly available information on corporate spending substantially understates how much money flows into these elections from companies. The final analysis in this report includes any corrections provided by companies, which indicated some contributions came from individuals, not the corporate treasury, or from a PAC that was not identified as such in reports from campaigns.

Policy

The vast majority of S&P 500 companies (84 percent) make some kind of statement about political spending, however minimal, on their websites.[5] This is an increase from 78 percent in 2010. As in 2010, the largest revenue earners are the most likely to have such statements, which can be loosely termed "policies." The number of companies in the top revenue tier that say nothing about political spending has fallen to just five (down from nine last year) and now includes only **zon.com, Berkshire Hathaway, Costco Wholesale, Google** and **Sunoco**. In the second revenue quintile, just eight companies do not have any policy this year (down from 11 last year): **Apache, Consolidated Edison, Jabil Circuit, Kimberly-Clark, Loews, ONEOK, PACCAR** and **Southwest Airlines**. Policy incidence rates still drop commensurate with revenue, as they did in 2010, but more companies of all sizes now say something about political spending.

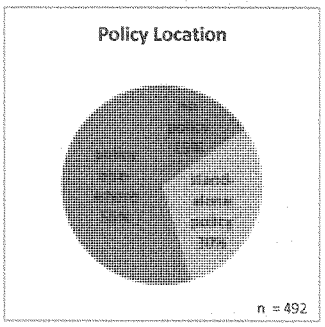


Looking just at the 468 companies that were in the index in both years, Si2 found that a total of 29 more companies established policies in the last year, a jump of 7 percentage points, from 78 percent to 85 percent. Proportionally, Telecommunications and Utilities sector companies saw the biggest growth in policy statements compared with 2010—while the Health Care and Materials sectors saw the least year-over-year change (these two sectors already had comparatively high rates of policy incidence). Looking at all sectors comparatively shows that all nine Telecommunications companies now mention political spending, as do more than 90 percent of firms in the Consumer Staples, Utilities, Materials and Industrials sectors. But only little more than three-quarters of Financials, Information Technology and Consumer Discretionary companies have a policy statement.

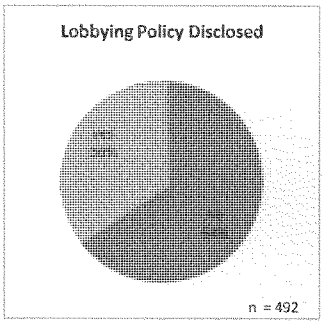
The nature of these policies varies substantially, from limited acknowledgements of a company's participation in public policy formulation to detailed explanations of how the firm comes up with its public policy positions, decision-making processes for contributions, and detailed reports on all forms of giving, as is explored in more detail below.

[5] Si2 gave companies credit for having a political spending policy if they mentioned anything about spending corporate money in politics, by any means—although companies most often discuss the ways in which they give directly to candidates and parties in political campaigns. Some companies do not discuss any domestic political spending but indicate in their ethics policies that they comply with the anti-bribery provisions of the Foreign Corrupt Practices Act; if this was the only mention of political spending, we did not give companies credit for having a policy. Credit was also withheld for companies that only provided policies for employee political contributions with no corporate connection.

Policy location: Investors advocates who are pressing companies to take more action on political spending want companies to have easily accessible stand-alone policies that provide clear statements about when and where they spend corporate money in all parts of the political arena. Si2 therefore catalogued whether companies articulated their policies in this manner, and found that just 30 percent (144 firms) have the separate, stand-alone policies investor advocates want to see. Finding a company's policy is not always a straightforward proposition, but Si2 did not try to measure the ease with which policies can be found. Baruch College researchers recently did measure the accessibility of political spending information on company websites among the S&P 100, though, and concluded just 30 percent of those firms made such information "easy" to find on corporate websites.[6] Policies often are found most often with a company's corporate governance documents, but they also can appear only in a corporate responsibility report.



Lobbying: The 2011 spring annual meeting season saw a growing number of shareholder proposals that asked for more information about companies' lobbying. Shareholder proponents appear poised for an expansion of these types of proposals in 2012, according to investors who have shared their initial plans with Si2.[7] For some time, investors have evinced particular interest in the indirect expenditures made by trade associations and other non-profit groups that receive corporate money and use it for both political campaigns and in lobbying, but information on this type of spending remains hard to come by. (See pp. 39-46 for more on Si2's findings about voluntary corporate disclosures regarding association memberships and indirect corporate political spending by them and other non-profit groups.) But shareholder proposals in 2011, sponsored by American Federation of State, County and Municipal Employees (AFSCME) and the Laborers' International Union (Liuna), also asked companies to report on both "direct lobbying and grassroots lobbying" expenditures. These resolutions appear to open a new front in the investor campaign for corporate disclosure on political spending.



Given the increased investor interest in this aspect of political spending, we carefully examined data about companies' lobbying policies, how often companies provide information on their lobbying, and data on direct federal lobbying expenditures as aggregated by the Center for Responsive Politics. In general, we

[6] See *Baruch Index of Corporate Political Disclosure* at http://www.baruch.cuny.edu/baruchindex/index.htm.

[7] As part of its impartial research for member institutional investors, Si2 closely tracks—but does not advocate about—shareholder proposals filed on shareholder resolutions and what happens to them over the course of the spring annual meeting season.

found that a substantial majority of companies do not discuss either direct or indirect lobbying when they talk about political spending. Such expenditures, however, are a critical part of companies' efforts to influence how laws are made and comprise a far bigger proportion of the total amount of corporate money spent in the political arena, writ large, than the sums they spend in political campaigns. As with corporate campaign contributions, money for lobbying comes from the company treasury; most companies view their spending on lobbying as part of the usual course of business. Direct federal lobbying is highly regulated and disclosure of expenditures must be reported to the U.S. Senate. Still, trolling through the reports and identifying all lobbying connected to a company still can be a challenge. Lobbying data at the state level is a whole additional frontier, which we did not explore.

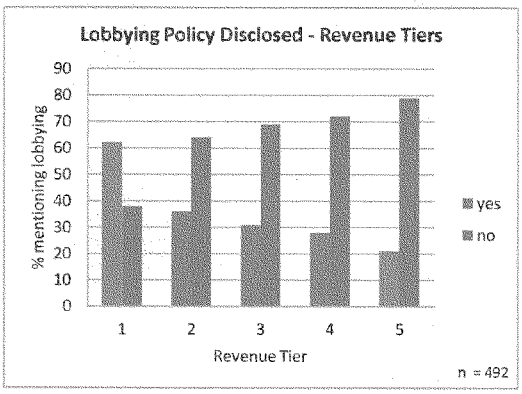
'Grassroots lobbying'—A handful of companies acknowledge that they take part in "grassroots lobbying," in which they articulate a particular view on key public policy issues and encourage their stakeholders, including employees, to promote these views with their elected officials. Si2's research found mentions from eight companies last year and another two this year. Officials from **Merck** and **Exelon** told participants at an October 2011 Conference Board symposium that they both encourage employee involvement in public affairs that affect their companies, but that these efforts take little time or money. Merck noted it does not make any candidate-specific recommendations to its employees.

One of the most explicit descriptions comes from **ConocoPhillips**, which notes that these efforts supplement its formal lobbying and "typically include the development and distribution of information and mobilization of stakeholders to contact officials." ConocoPhillips adds that it "will participate in grassroots activity on a case-by-case basis based on collaboration between appropriate Government Affairs and business unit personnel." It goes on to explain what it does and why:

> Issue advocacy may also include support of an initiative that would defeat anti-energy and/or anti-business measures. Actions typically include development and distribution/broadcasting of information either jointly or solely, and may include signature gathering on initiative petitions which the company has expressly supported. ConocoPhillips will be active in such issues, provided: there is a compelling ConocoPhillips business rationale; there is an agreement to participate between the affected business units and Government Affairs personnel and management; and where there is distribution/broadcasting of information, significant ConocoPhillips and/or energy industry involvement, input and approval of the message development and the tactics taken in the initiative process.

Altria discusses its activities as part of stakeholder outreach, noting it provides "materials that describe our position on issues and with suggestions for how to contact government officials. When appropriate, we ask our stakeholders to share their views with government officials on proposed legislation." **Marathon Oil** notes that it created a public issues advocacy program in 2009, which is supplemented with a "website that makes information easily accessible." **Aetna** points out the existence of an "employee-driven grassroots program" that is coordinated with its PAC. Most companies that conduct such activities provide civic engagement justifications, such as that offered by **Dow Chemical:** "Dow employees and retirees in the United States are active in the policymaking and political process, contacting their legislators through grassroots campaigns" and the company PAC, which Dow supports "as a way to promote open and transparent civic engagement" given that "the impact of government policy is so critical to our survival and success."

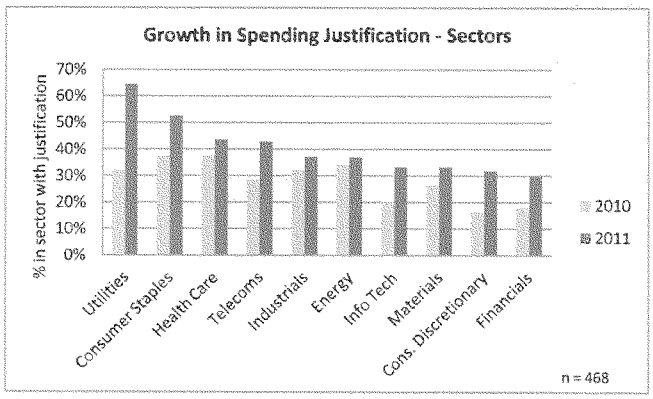
Policies—Only 36 percent of S&P 500 companies mention lobbying in their political spending policies; articulated policies are particularly scarce for companies outside the top revenue tier. A little more than 60 percent of tier-one companies mention lobbying, but—in a striking drop-off—each of the remaining tiers mention it less than 40 percent of the time, and only one-fifth of the bottom quintile does so. Sector standouts are Consumer Staples (where 46 percent discuss lobbying) and Industrials (where only 28 percent do so).



Spending and limited disclosure—The vast majority of companies do spend money on lobbying at the federal level, however, as shown by records filed with the U.S. Senate Office of Public Records. Si2 searched these data, as aggregated by the Center for Responsive Politics, and found information for such spending in 2009 and 2010 by 80 percent of all S&P 500 companies. Yet only 13 companies in the entire index (3 percent) provide easily accessible information for their investors on how much they spend on lobbying, by mentioning it on their websites or by providing direct links to the company-specific Senate reports. These companies are **Adobe Systems, American Electric Power, Baxter International, DTE Energy, Exxon Mobil, Hormel Foods, Intel, McGraw-Hill, PPG Industries, Procter & Gamble, U.S. Bancorp, Wellpoint** and **Wisconsin Energy.**

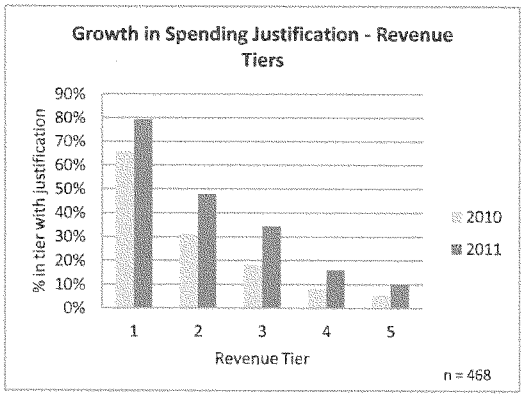
Drawing connections between the existence of a lobbying policy, disclosure for investors and any tendency to spend more or less is problematic, since the numbers are so small. About half of the 25 companies that spent the most on lobbying in 2010 (each with $8 million or more of expenditures) have disclosed lobbying policies, and two (**American Electric Power** and **ExxonMobil**) report on what they spend in investor reports. An examination of federal lobbying records filed with the U.S. Senate for 2009 and 2010 shows that **Alpha Natural Resources, PG&E, Netflix, BlackRock, Washington Post, Ecolab, R. R. Donnelley & Sons, NetApp, Masco** and **Noble Energy** all saw their lobbying increase by more than 70 percent between 2009 and 2010, although they were not among the biggest overall spenders of lobbying dollars. Yet none of these ten companies, which had the biggest proportionate increases in lobbying expenses between 2009 and 2010, either mention lobbying in their policies or disclose this spending directly to investors.

Reasons for giving: It is still not common for companies to provide information on why they give money in political campaigns and how they pick candidates or issues to support. Just over a third do so, but this is a big jump from 2010, when only about one-quarter did. Companies of all shapes and sizes seem to be responding to the growing scrutiny about their corporate political spending by offering justifications for why



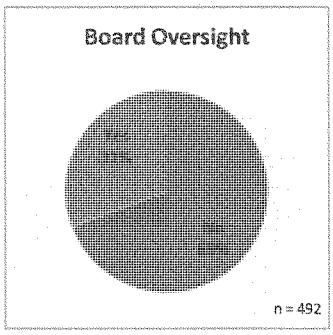
they do it. For the companies examined in both years, Si2 found that 124 firms in the S&P 500 offered spending justifications in 2010, but this year that number jumped to 179. The biggest proportionate increase occurred among Utilities, where twice as many (63 percent) now provide justifications compared with 2010. Just more than half of Consumer Staples companies now provide their reasons for giving, too—up from less than 40 percent last year. Energy companies had the least amount of change in providing justifications for any sector, hovering a little above 30 percent each year.

The very largest companies still are the most likely to provide a justification for political spending—with nearly 80 percent doing so, even more than the two-thirds that did so in 2010. But half of second-tier companies now provide justifications, too (up from only 31 percent last year) and one-third of third-tier firms (up from only 18 percent in 2010). The number of companies that offer justifications rose even among the smallest revenue tiers. Clearly, firms of all sizes seem to feel they need to explain why they spend money in politics.



A few have had the opposite reaction, though. Notably, **John Deere** this year says nothing about its spending. Last year, however, it explained, "Because accomplishing business objectives often depends on sound public policy, John Deere places a high value on involvement in the political process," and noted its "employee-involvement programs" that included its PAC and its John Deere Government Action Information Network, which "asks employees to contact elected officials about pending legislation of interest to the company."

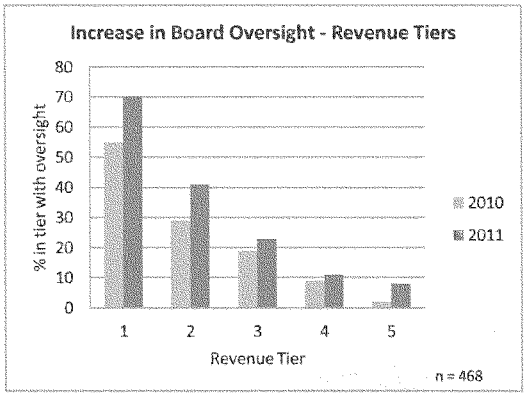
Board Oversight

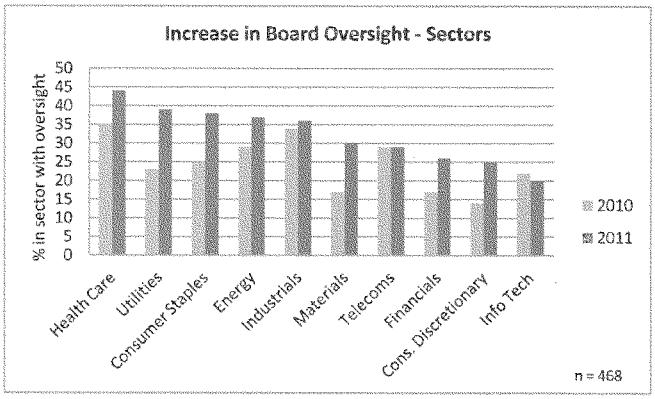


There has been a sizeable jump in political spending oversight by boards of directors in the last year. Thirty-one percent of S&P 500 companies now explicitly acknowledge in their board committee charters or in policies posted on their websites that the board, in some capacity, has oversight responsibility for the company's spending in political campaigns. Last year the figure was just 23 percent. As we observed in 2010, the true number with board oversight is probably slightly higher than this because a handful of companies—particularly the very biggest—have board level committees that oversee public affairs generally. Si2 considered that a board had oversight only when the company indicated its board receives reports on political spending or if a particular committee charter specifically mentions policy oversight or review of such spending.

Most common at the top but growing elsewhere: Board oversight of political spending increased most significantly in the top revenue quintile companies. Comparing the 468 companies in the index in both years shows that 70 percent of the biggest firms now have board oversight, up from 55 percent last year. There was a 12-point increase for tier-two companies, pushing them to just above the 40 percent mark, and all the smaller companies increased their likelihood of board oversight, although in less dramatic fashion. About 10 percent or fewer of the bottom two revenue quintiles report any sort of board oversight. But these rates of board involvement are notable compared to historical levels. In 2005, when the Center for Political Accountability surveyed 120 large companies, it found only two that required board approval of political spending. (See pp. 68-74 for more on the shareholder campaigns and recent developments.)

Sector variation: While there has been substantial movement in the overall number of companies putting in place some form of board oversight for political spending, not all sectors seem to share the enthusiasm for this sort of high-level scrutiny from directors. Utilities were the most likely to put in place board oversight in the last year, followed by companies in the Consumer Staples, Materials and Consumer Discretionary sectors. Overall, though, Health Care companies re-





tained a clear lead in board involvement—a result that probably can be pegged directly to how deeply involved these companies have been in the ongoing debate over health care reform and how much critical attention they have received about this high-stakes discussion. There was little or no change in the proportion of Industrials and Telecom firms that have board involvement in political spending. In addition, despite the contentious financial reform debate, Financials companies remain among the least likely to have any board oversight.

Types of oversight: We looked closely at how companies describe their board oversight processes, to determine the nature of director involvement in companies' decisions to spend. No company in either 2010 or 2011 indicated that the board makes recommendations on spending, and nearly 90 percent of the board involvement, when it occurs, is to review what management has done—as might be expected. A small group of company boards appears to get more closely involved, though, with about dozen reporting director involvement in approving contributions:

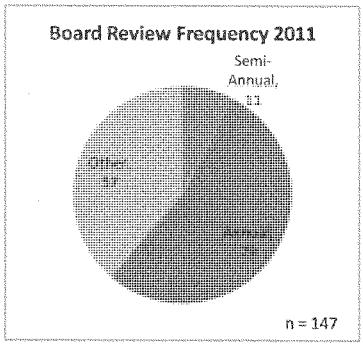
- Five companies report board involvement in specific spending decisions. At **HCP**, a hospital company, and at **Occidental Petroleum** (for both direct and indirect spending), the board must approve all contributions. **Bed Bath & Beyond** requires an unspecified "authorization" from the board, similar to the "prior authorization" required of **Newell Rubbermaid's** board. Both stand in sharp contrast to the natural gas and exploration company **QEP Resources'** very specific requirement that its board "reviews and approves the use of all corporate funds or assets intended to influence the nomination or election of any candidate for public office."
- Four companies indicate their boards set budgets, and then must approve contributions that go beyond it. At **Caterpillar**, for instance, the Public Policy Committee reviews and approves an annual budget for charitable and political contributions and—"at least annually"—the committee also approves all such contributions; in addition, the chairman can be involved in approvals, the company's policy says. At **AT&T**, the board approves an aggregate budget "for the purpose of supporting or opposing any party, candidate, political committee or ballot measure," but says that "except for contributions for ballot measures, no corporate expenditure over $1,000 may be made unless approved by the Chief Executive Officer." **Boeing** and **Wellpoint** also report their boards set annual budgets for political spending.

- At three companies the board's involvement kicks in when the sums increase. For **Exelon** companies (including Exelon, ExGen and ComEd), company CEOs may give up to $10,000 per candidate or committee, but the CEO and Lead Director "must approve any such contribution after the aggregate of all contributions to candidates and candidate political committees exceeds $100,000 in any calendar year, determined on a consolidated basis for Exelon and its subsidiaries." At **Jacobs Engineering Group**, the board also must approve contributions over $10,000. For **McDonald's**, government relations staff handle smaller amounts, with input from "legal counsel, compliance personnel and members of the Company's management," but

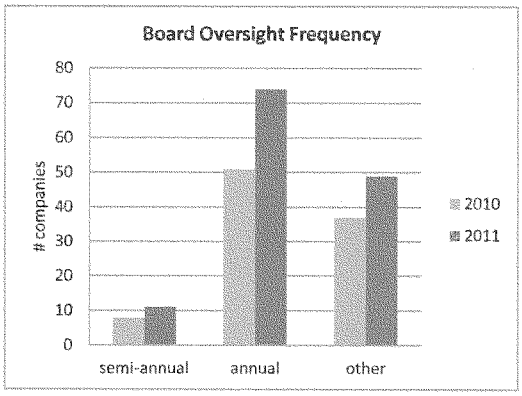
  > any Political Contributions to a single candidate, political party or ballot initiative that will aggregate to more than U.S. $100,000 in a calendar year shall require the approval of the McDonald's area of the world president of the market in which the contribution will be made. Political Contributions in excess of the spending limit established by the Board or any other exceptions to this Policy must be approved in advance by the Corporate Responsibility Committee.

- Addressing the controversial method companies now may use to spend in federal elections, two companies say their boards also must approve any independent expenditures. At **ConocoPhillips**, responsibility for contributions usually falls on government affairs personnel, but the Public Policy Committee must approve independent expenditures advocating for or against specific candidates. **General Mills** makes the same stipulation, requiring approval for any direct independent expenditures from its Public Responsibility Committee. (Indirect independent expenditures via trade or other groups are a different matter, however, and no company mentions that the boards must get involved in such spending, although some companies forbid their trade associations from using contributions for political purposes, as is explained starting on p. 39.)

Two more companies appear to indicate their boards may become involved in spending decisions, but they do not say when or why. **CMS Energy** says, "The company, individual employees and PACs all may contribute to state and local ballot question committees, voter education initiatives and other political expenditures as approved by the legal department, executive management and, in some cases, the board of directors." At **Juniper Networks**, the board's non-specific involvement is also invoked: "The Company's funds or assets must not be used for, or be contributed to, political campaigns or political practices under any circumstances without the prior written approval of the Company's General Counsel or Chief Financial Officer and, if required, the Board of Directors."



Frequency: Investor activists seeking greater accountability from companies about their political spending want boards to be involved in regular policy and spending reviews. Increasingly, companies are taking them up on this idea, although most have yet to adopt semi-annual reviews that the reformers favor most highly. A little more than half of the 147 companies whose boards review spending do so annually. A select few—now 11 firms, up from eight last year—look at the issue twice a year. New semi-annual reviewers are **Edison International, General Electric, Gilead Sciences, Merck, Target** and **Tesoro**. Last year the group also included **American Express, Campbell Soup, McDonald's, Pfizer, Tellabs, United Health Group, United Parcel Service** and **US Bancorp**—but neither American Express nor Campbell's now say they are conducting reviews this frequently. The remaining 57 boards do not indicate how often they touch the issue.

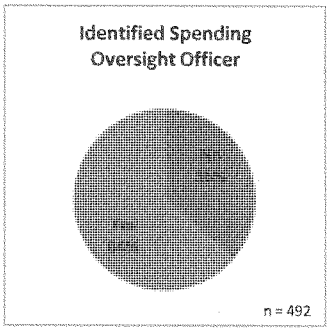


Comparing only the companies in the index during both 2010 and 2011, we found that most of the boards that added oversight did so through annual reviews (23 more companies compared to 2010).

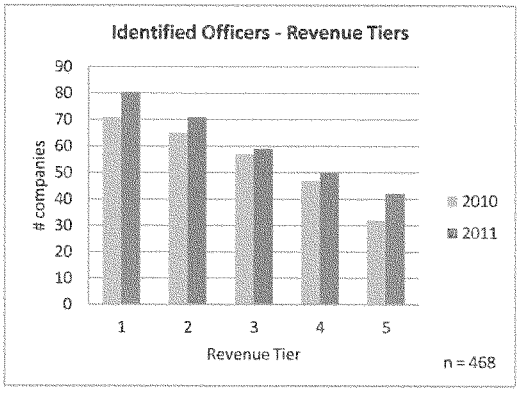
Health Care companies are the most likely of any sector to have semi-annual reviews (close to one-fifth of these companies whose boards review spending do so twice a year). But no firms in four other sectors have made this kind of commitment: Consumer Staples, Materials, Telecommunications Services and Information Technology companies either review annually or don't say how often their oversight occurs.

Management Transparency

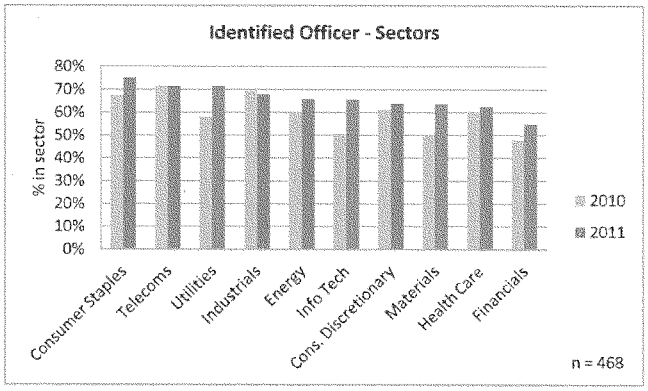
Growing corporate transparency about who is making decisions on political spending is apparent in another key area highlighted by investor activists. Nearly two-thirds of S&P 500 companies now identify which officers make spending decisions, growing to 65 percent from 58 percent in 2010, up 7 percentage points. There was growth in the disclosure of political spending officers no matter how big a company is, with the most substantial leaps occurring in the top and bottom revenue quintiles. Eighty percent of the largest tier companies now identify an officer responsible for decisions about political disbursements, up from about 70 percent in 2010, while a little more than 40 percent of the smallest



group now makes this information known, also a jump of about 10 percentage points from 2010.



Disclosure continued to vary among sectors. Looking at the 468 companies in the index for both years shows the biggest increases in disclosure of officers among Utilities, Information Technology and Materials firms, with 13 to 14 percentage point increases for each. Financials companies were the least likely to disclose which officers make decisions about political spending last year and while there has been some improvement, they remain the least transparent about how they give money, explaining who is involved just half the time.



Hewlett-Packard continues to stand out with its detailed explanation of how it forms its public policy positions and who makes decisions about its political spending. The company lists all the involved officials' titles—everyone from the PAC board of directors to its Political Contributions Committee and a separate Political Contributions Advisory Council. It also explains its process:

> A committee of HP managers annually reviews eligible recipients of funds for both the HP PAC contributions and corporate contributions and develops an HP PAC contributions plan and a corporate contributions plan. The HP PAC plan is presented to the HP PAC Board of Directors, which reviews, revises and approves the plan. Both the HP PAC plan and the corporate contributions plan are then presented to the CEO for review and approval. Once approved by the CEO the plan is presented to the Audit Committee of the HP Board.
>
> Upon approval of the plans, the HP Political Contributions Committee, comprised of HP government affairs managers, implements the plans by reviewing all specific political contributions requests and events requir-

ing corporate and HP PAC funding and makes recommendations to the Political Contributions Advisory Council. Once the Political Contributions Advisory Council approves the requests, the funds are disbursed.[8]

Spending and Disclosure

This section first presents information on how companies do and do not spend money directly on political campaigns and through lobbying. We examine what it means when companies say they do not give money in politics, the nature of treasury spending, and evolving policies on the use of independent expenditures. Briefly noted is how many companies have political action committees. Next, we look at indirect spending policies and how this has changed since last year, showing how a small but growing number of firms have policies and disclosure on their giving to trade associations and other non-profit groups that are politically active.

Prohibitions

The overall number of companies in the S&P 500 index that assert they do not spend any money on political contributions has grown to 57, up from 40 just a year ago. But it is still the case that the nature and specificity of these prohibitions varies significantly. When companies say they do not make political contributions, most of the time this does not mean they do not spend shareholder money directly on candidate campaigns. It certainly does not mean that corporate money is not used to influence lawmakers after they are elected. Out of the 57 companies (see table) that have policies apparently prohibiting political spending, only 23 companies actually did not give money to political committees, parties or candidates—although they did lobby. Just 17 (highlighted in blue) spent virtually no money at all in 2010 on either lobbying or on political campaigns via 527 political committees, state candidates, state parties or ballot initiatives, according to available data. Another 57 companies do not appear to spend any money in these areas but also have not publicly disclosed policies that explicitly ban such spending (list, p. 28).

Companies With 'No Spending' Policies and 2010 Corporate Expenditures							
	2010 Expenditures			Prohibitions			
Company	*Federal Lobbying*	*527 Groups*	*States*	*Candidates*	*Parties*	*Ballot Initiatives*	*527 Groups*
Air Products & Chemicals	$1,555,000			X			
Allegheny Technologies	$50,000			X	X		
American Int'l Group**				(temporary moratorium on all but state lobbying)			
Baker Hughes				X	X		
C. R. Bard	$160,000			X	X		
CB Richard Ellis Group				X			
Chipotle Mexican Grill			$400				
Cincinnati Financial	$70,000			X	X	X	
Colgate-Palmolive	$1,090,000			X	X		
Cummins	$2,304,191			X	X		
Dun & Bradstreet	$203,000						
Expeditors Int'l of Wash.				X	X		
Family Dollar Stores				X	X		
Flowserve				X	X		
Gannett	$60,000		$3,678				
Goldman Sachs	$4,610,000			X			X

[8] "HP Political Contributions Policies" at http://www.hp.com/hpinfo/abouthp/government/us/engagement/policies.html.

Companies With 'No Spending' Policies and 2010 Corporate Expenditures							
	2010 Expenditures			Prohibitions			
Company	*Federal Lobbying*	*527 Groups*	*States*	*Candi-dates*	*Parties*	*Ballot Initiatives*	*527 Groups*
H.J. Heinz	$120,000	$10,000		X	X	X	X
Health Care REIT				X			
Hershey	$475,000		$1,000				
Hess	$1,100,000			X	X		
Illinois Tool Works	$813,000						
Int'l Business Machines	$5,330,000			X	X		X
Integrys Energy	$280,000		$1,250				
Interpublic Group	$390,000			X			
Invesco	$280,000						
J.M. Smucker				X	X		
Joy Global	$40,000			X			
Lab Corp. of America	$670,000			X			
LSI Corp.				X	X		
National Oilwell Varco	$137,500			X	X	X	X
Nordstrom				X			
Novellus Systems				X	X		
Nvidia							
NYSE Euronext	$1,580,000			X	X		X
Parker Hannifin	$410,750			X	X		
PerkinElmer	$120,000			X	X		
Pinnacle West Capital	$710,000						
ProLogis	$490,000						
Regions Financial	$540,000		$6,200	X		X	
Sara Lee	$240,000	$10,750					
SCANA	$900,000		$57,000	X	X		
Schlumberger				X	X		
Sealed Air							
Sherwin-Williams	$40,000		$65	X	X		
Snap-On***			$399	X	X		
St. Jude Medical	$690,000			X	X		
Stericycle	$160,000	$22,000	$3,000	X	X		
Stryker	$110,000			X	X	X	
Tellabs				X	X	X	X
Teradyne							
Texas Instruments	$1,600,000			X	X		
Viacom	$3,640,000		$1,635,651	X	X		
Vulcan Materials	$500,000		$7,000	X	X		
Washington Post	$840,000	$25,900		X	X		
Waters Corporation	$190,000			X	X		
Xerox	$1,024,000	$110,000		X	X	X	
Zimmer Holdings	$713,038			X			

*Si2 excluded any identifiable PAC spending from this tally but state level campaigns may have inaccurately attributed some spending to companies (and thus their treasuries) even though the money came either from the corporate PAC or from individuals who gave on their own and reported their employers as being the company in question. This table includes any corrections companies provided to state spending data Si2 sent for review.

**The Center for Responsive Politics shows records for 527 giving by American International Group subsidiary AIG Centennial of Fort Washington, PA, in 2010 of $2,030, but AIG says it has a temporary moratorium on political contributions and federal lobbying and these did not come from the company, but it was unable to provide a further explanation in time for this report.

***Snap-On affirmed its policy is not to give any corporate money to candidates or parties and said these expenditures likely came from its employees and were incorrectly attributed to it by campaign reporters.

Viacom's exceptions: One company that particularly stands out for having an apparent spending ban that nonetheless did not preclude more than $1.6 million in contributions at the state level that appear to come from the corporate treasury at the state level is **Viacom**. The company's *Global Business Practices Statement* seems to forbid contributions, asserting:

> Viacom policy—and in many countries, the law—prohibit the contribution of Viacom funds, assets, services or facilities to or on behalf of a U.S. political party, candidate or political action committee ("PAC"). Viacom policy also significantly restricts contributions to foreign political parties and candidates. None of these restrictions is intended to discourage or prohibit Viacom employees or directors from voluntarily making personal contributions or participating in other ways in the political process. However, this must be done on your own time and at your own expense. Viacom will not compensate or reimburse employees or directors for any political contribution.[9]

Non-Spending Companies in 2010 with No Explicit Spending Bans

Abercrombie & Fitch	Intl Flavors & Fragrances
Abiomed	Intuit
Activision Blizzard	Jack in the Box
Adobe Systems	Kimco Realty
Advance Auto Parts	Kohl's
Akamai Technologies	Lam Research
Altera	Linear Technology
American Tower	LSI Logic
Amphenol	Macerich
Analog Devices	Marathon Petroleum
Bed Bath & Beyond	Marriott
Big Lots	MEMC Electronic Materials
BMC Software	Microchip Technology
Broadcom	Molex
Cabot Oil & Gas	Motorola Mobility Holdings
Cameron International	Pall
Ciena Systems	Patterson Cos.
Cintas	People's United Financial
Compuware	Philip Morris Intl***
Diamond Offshore Drilling	Polo Ralph Lauren
Dover	Priceline.com
Dr. Pepper Snapple Group	Public Storage
E*Trade Financial	Quanta Services
Electronic Arts	Ross Stores
EQT Corporation	Sherwin-Cod.
F5 Networks	Sandisk
Fastenal	Total System Services
FMC Technologies	Urban Outfitters
Gamestop	Varian
Genuine Parts	W.W. Grainger
Harman Int'l Industries	Western Digital
HCP	Xilinx
Hudson City Bancorp	

*Policy bans no spending allowed, but says exceptions can be made; no evidence of current spending.
***Spends outside the U.S. only.

Yet the policy makes it clear money is spent, since it identifies who can approve expenditures: "No Viacom funds, assets, services or facilities of any kind may be contributed to any foreign official, political party official, candidate for office, governmental organization or charity—whether directly or through an intermediary—without advance approval from a Viacom Corporate Compliance Officer, your Company's General Counsel or Viacom Government Relations."

Viacom makes no political spending disclosure to investors, but data from the National Institute on Money in State Politics indicates it contributed $35,000 to New York Assembly and Senate party campaign committees (both Democratic and Republican) and $1.6 million to the "No on 24 – Stop the Jobs Tax" ballot initiative committee in California. Championed primarily by the California Teachers Association, the measure would have repealed corporate tax breaks approved in 2008 during the tenure of former Governor Arnold Schwarzenegger (R). Viacom was joined by other broadcasting and motion picture companies, including **Time Warner, Walt Disney, News Corp.** and **CBS**, which between them spent nearly $6 million from March to October 2010. Despite an $8.9 million campaign from the teachers,

[9] Viacom's Global Business Practices Statement, at http://www.viacom.com/investorrelations/Investor_Relations_Docs/Global%20Business%20Practices%20Statement%20-%202009%20-%20Universal%20-%20FINAL.pdf

voters defeated the measure by a 16-point margin, apparently agreeing with the companies' contention that it would hurt business development and job creation in the state.

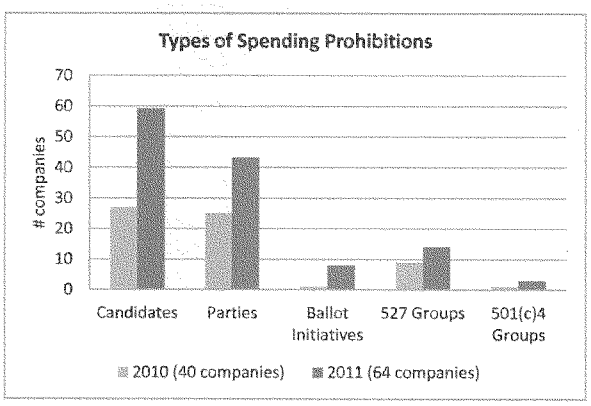
Variations in policy and practice: There was no significant variation among sectors or revenue tiers in the proportion of companies that have policies that forbid spending. But in actual practice, smaller revenue companies were more likely not to spend any money in U.S. politics in 2010, the year Si2 scrutinized. Just two companies in the largest revenue tier eschew all easily discernable domestic political spending. They are **Schlumberger** and **Philip Morris International** (which does spend outside the United States to support its foreign tobacco operations; it is an independent company not to be confused with Philip Morris USA, the **Altria** subsidiary that contributes large sums in many areas of domestic political life). In the second revenue quintile, just five companies refrain from any spending: **Baker Hughes, Genuine Parts, Jabil Circuit, Kohl's** and **Motorola Mobility** (which has no spending track record since it was spun off early this year but might spend in the future). In the bottom revenue quintile, 34 companies have no 2010 spending records.

In addition, Information Technology companies were markedly less likely to spend than those in any other sector, with one-thirds of them not contributing in any category. On the other end of the scale, all 32 Utilities spent money somewhere, and only two out of the 50 Health Care companies (4 percent) and just three of the 41 Consumer Staples companies (7 percent) did not spend.

PACs: As noted above, 23 of the "no-spending" companies did have direct federal lobbying expenditures in 2010, and 15 of these also have political action committees—as do 70 percent of all S&P 500 companies. As we observed in 2010, corporate policy prohibitions generally relate to the use of corporate treasury money, and do not cover the spending company PACs make, disbursing the pooled contributions of company employees and other individuals in the restricted group that may support a PAC.[10] Last year, just three of the 40 companies that expressly banned political contributions indicated their political spending was confined to a company PAC, while about half of the "no spending" policy companies had PACs, where spending is directed by committees made up of senior corporate officials. This means that some companies say they make no political donations on the one hand (usually indicating no support for candidates or parties), and on the other, they specify which officials at the company must approve political spending (encompassing PAC giving and non-candidate recipients of electoral spending such as ballot initiatives or political committees that companies may be excluding from their "political contributions" tally). In a handful of cases, companies also mention who has oversight for lobbying. (See p. 30 for more on PACs.)

Types of prohibitions: Twice as many companies now explicitly forbid contributions to candidates as did in 2010. While this translates to only 59 companies, it is the most common prohibition. The number of companies that say they will not give to political parties also jumped to 43, up from 25 last year. Other less common prohibitions are in place for ballot initiatives (eight bans now compared to just one last

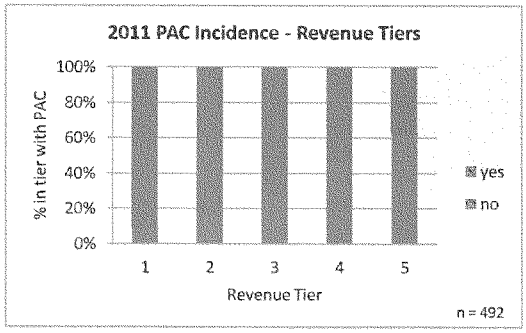
[10] A company-sponsored political action committee, also known as a special segregated fund or SSF, must include the sponsoring company's name in its title and may only solicit funds from a restricted class of donors, who may include "the corporation's stockholders, executive and administrative personnel and the families of both groups," according to "SSFs and Nonconnected PACs," FEC Fact Sheet, May 2008 at http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml.



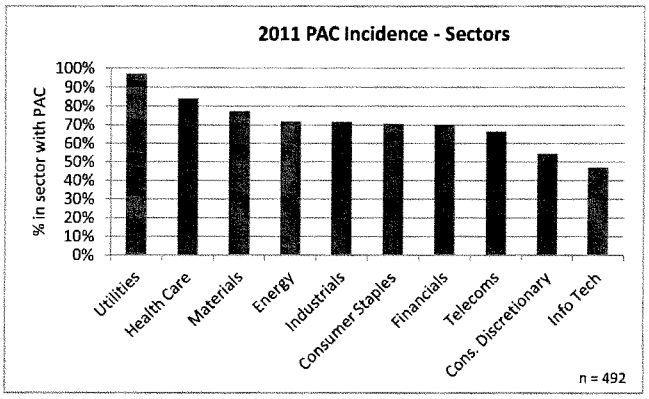
year) and 527 political committees (14, up from nine). These figures suggest that at least some companies are becoming less willing to give directly to candidates and parties. But corporate policies about giving indirectly to the closely watched 501(c)4 social welfare organizations that have become so important remain a cipher: last year just **US Bancorp** said it would not give to these groups, and this year it is joined by only two more—**Unum** and **Wells Fargo**. Overall, the number of companies that place some kind of explicit prohibition on campaign spending has increased, though, from 40 firms in 2010 to 64 this year. (The accompanying chart shows the number of named prohibitions, with some companies having more than one type.)

Political Action Committees

The debate in corporate governance circles and the social investing community about corporate political activity often bypasses PAC spending, since this is not investor money but rather cash contributed by executives and others in the restricted class allowed to contribute to a PAC. This type of spending also is highly regulated under campaign finance laws and disclosure in regular reports to the Federal Election Commission is routine. But omitting PAC money from the discussion leaves a blank patch on the full portrait of corporate political spending and influence, since the risks and rewards resulting from the spending are associated with the corporation. As the discussion above on policies shows, companies talk about both methods of spending when they discuss political spending, even though the two are legally separate. The officials responsible for making decisions about corporate contributions are almost always the same ones that determine how PAC money is spent, as well, as Hewlett-Packard's description makes plain. The full impact corporations and their executives have on campaigns and government therefore must take into account the relationships between treasury and PAC spending, corporate decision-makers



and government relations strategies, although we do not examine these issues.



Given the investor accountability angle pursued by investor activists, this report focuses primarily on the use of corporate funds. But it is worth noting that about two-thirds of S&P 500 companies have PACs: (320 out of the 468 companies in the index in both years in 2011 and 321 in 2010). Bigger companies are much more likely to have PACs, with more than 90 percent of S&P 100 firms having one compared to fewer than 40 percent in the bottom revenue quintile. Disaggregation by sector shows that Utilities are far and away the most likely to have a PAC; only **Wisconsin Energy** does not.[11] In sharp contrast, less than half of the Information Technology firms have a PAC. These proportions have not changed significantly since 2010.

Corporate Treasury

Investor activists want companies to disclose how they spend corporate treasury money on politics not only because this is their money, but also because of their generally-held belief that political spending can pose risks to shareholder value.[12] Now that companies can spend unlimited sums from their treasuries on ads that promote or oppose specific candidates, right up to Election Day because of the changes prompted by the *Citizens United* ruling, these investors believe the case for full disclosure of all types of corporate spending is made even more urgent. The amounts of money in play are potentially far larger and disclosure is much less certain than in the past. At the same time, if companies give money without reporting on it to groups that take particularly strident positions in campaigns, it is not certain such spending will remain forever secret, especially given the intense public interest in learning who is spending the increasing amounts of money in campaigns. This raises the prospect that executives ultimately may have to explain any contributions somewhere down the road, and why they did not want to make such giving public. As with many scandals, the most damage can come from a cover-up, not the original action. Indeed, corporate ethics policies routinely exhort employees not to privately involve the com-

[11] The PAC-intensive nature of the Utilities sector may be explained by the federal ban until recently on any corporate contributions by public utilities, leaving PACs as their only way to influence legislation. The Public Utility Holding Company Act of 1935 (PUHCA), which included the ban, was repealed in February 2006. This started electricity deregulation and a scramble that continues—with considerable political jockeying and commensurate spending—on how these services are delivered and priced around the country.

[12] Bruce F. Freed and John C. Richardson, *The Green Canary: Alerting Shareholders and Protecting Their Investments*, Center for Political Accountability, 2005. Available at http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/920.

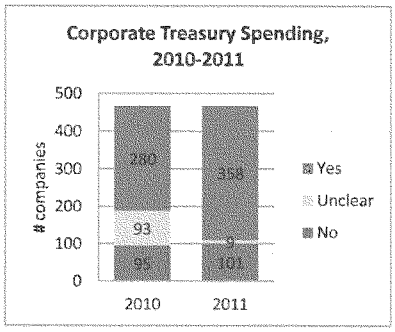
pany with anything that they would not feel comfortable being publicized on the front page of *The New York Times.*

Political spending is not done without reason, though. The opportunities presented to companies that help elect candidates sympathetic to their viewpoints clearly make many boards and executives conclude that the risks dissident shareholders raise are less significant than activists suggest. How much might a change in tax policy benefit a company and its investors, for instance? As the example about California Proposition 24 shows (p. 28), companies spent several million dollars but kept in place tax breaks that ultimately may be worth far more to their bottom lines. If a legislator comes to office with support from a friendly company, and then feels obliged to hear the company's lobbyists express concerns about legislation after the election, certainly campaign spending can be a good investment. Whether this is good for democracy is a separate, though critical, question.

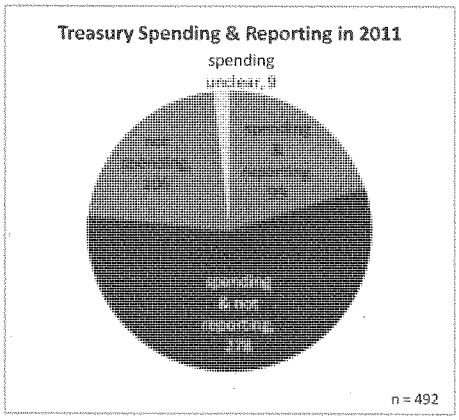
Sources of data: For this report, we compiled publicly available data on corporate giving to 527 political committees and campaign contributions records for state candidates, parties and ballot initiatives collected by the National Institute on Money in State Politics, as noted. While voluntary company disclosure has improved in the last several years, company reports nonetheless remain highly inconsistent and can include or omit large swaths of spending, making them an imperfect source of benchmarking data for the S&P 500 index as a whole. Si2 reached this conclusion after carefully comparing the reports from the 100 companies that make some form of disclosure to their investors with information in the public databases.

A key area where the voluntary reports are helpful, however, is in differentiating between PAC and corporate money. Giving at the state level can come from both treasuries and PACs, depending on the state (see p. 66 for more on state laws), and disclosures from campaigns do not always make clear which is the source of company-connected money. Si2 excluded from its corporate money tallies contributions to candidates and parties in states where only PAC giving is allowed, and then reviewed all the remaining state spending records to exclude any clearly identifiable PAC money. This winnowing process left a likely pool of corporate money spent in state politics. We sent the spending profiles we compiled to all companies in the index, soliciting their feedback and corrections. Companies that responded largely confirmed the accuracy of the data derived from public databases, with small corrections, so we are confident the analysis provides a reasonably accurate assessment.

As the discussion on spending footprints below points out, however, a close examination of gaps between the most comprehensive voluntary company reports and the public databases shows that the latter understate total corporate spending, sometimes significantly. This is because reporting about the donors to state level political committees is uneven. The National Institute on Money in State Politics does not collect state or local level political committee data, and these expenditures also are not captured by the Center for Responsive Politics 527 database. State political committees do have to report their contributions and expenditures in most states, so the potential exists for filling this gap in the national account book that has been imperfectly filled in by voluntary corporate reporters.



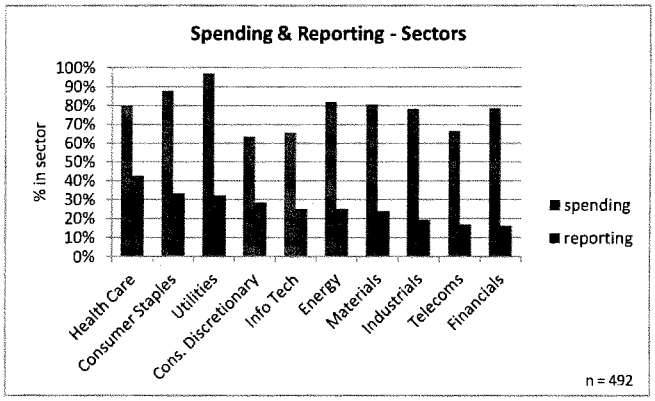
Comparisons with 2010: Last year our approach to assessing treasury spending was a little different, and relied primarily on an analysis of corporate policies. One-fifth of the companies in 2010 said they did not make political contributions at all, although these sorts of statements are an unreliable measure of whether money is actually spent in campaigns, as we have shown above. Another fifth in 2010 did not indicate one way or the other if they spent from the treasury, while eight firms said corporate money did not go to candidates or parties but might be spent in some other fashion in campaigns. We concluded in 2010 that 60 percent (280 companies) appeared to acknowledge corporate money was spent in political campaigns, about 20 percent did not, and that corporate spending could not be determined for the remaining 20 percent.



Because our assessment of the extent of treasury spending this year is grounded in actual spending records, it clears up much of what was unknown in 2010. Looking at the 468 companies in the index for both years, we found little change in the proportion of companies that do not appear to spend treasury money on campaigns (setting aside the issue of lobbying, which also is funded from the treasury). This figure remained at just over 20 percent. These non-spending figures are comparable, since we confirmed in 2010 whether companies spent anything. The more intensive examination of the state spending records did uncover more treasury spending this year, but the difference in method means the findings about affirmative treasury spending from the two years are not strictly comparable, and cannot by themselves suggest that corporate treasury spending has become more prevalent. But the exercise underscores that an accurate picture of company spending practices must be based not on what companies say they are doing, but on records of what they actually do.

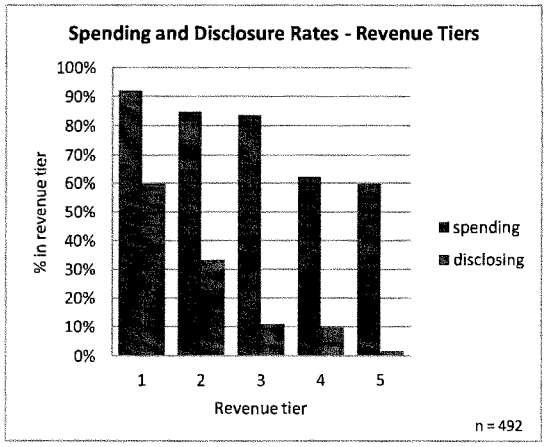
Voluntary disclosure of spending: In addition to examining in 2010 and 2011 whether companies spent from their treasuries, this year we also tallied precisely how many of the companies report to their investors on this spending. While there has been growth in the transparency of corporate political activity in the last several years, this comparison shows there is still tremendous scope for improvement. Two-

thirds of the companies that spend shareowner money fail to tell their investors where and how it is spent.



Two sectors stand out for particularly low rates of spending disclosure. Less than 20 percent of the Financials and Telecommunications companies that spend corporate dollars on politics issue reports. As with other indicators examined in this report, the Health Care sector comes out on top, with the highest rate of reporting, but even there, less than half (only 43 percent) of the companies that spend issue provide details.

Slicing the data by revenue tiers produces even more striking patterns for many of the indicators we have explored. More than half of the biggest companies (60 percent) report on their spending. This clearly reflects the success of the investor campaign for disclosure, which has been focused almost entirely on these largest of firms. To date, though, the rest of the index shows little sign of following suit. The drop-off in reporting for smaller sized companies is substantial, with about 10 percent or fewer of spending companies reporting in the bottom three revenue quintiles. Just one out of the 58 corporate spenders in the smallest tier reports on its contributions to investors—**Southwestern Energy**.[13] That company stands out in its revenue tier both for having disclosure and also for comprehensive reporting over two years. The smaller firms spend far less in aggregate than their larger peers, though, as discussed on p. 48—so the stakes are lower and for some the accountability imperative may be less compelling.



[13] See http://www.swn.com/corporategovernance/Pages/politicalactions.aspx.

Two methods of disclosure: One of the best disclosure reports comes from **Pfizer**, which posts on its website an 85-page report[14] detailing its spending in the 2010 election cycle (including contributions in both 2009 and 2010). The report includes the company's policy on giving, lists the names and titles of executives who make decisions about corporate and PAC spending, and explains why and how the money was spent. Not only does the report detail the names, party affiliations and offices to which the candidates aspire, it also indicates if each won the election and whether the candidate represents a constituency where Pfizer has a facility. Further, the report includes information on all the company's giving to leadership PACs, trade associations and party committees, at the federal, state and local level—although its threshold for political spending payment reporting by trade associations is $100,000, the highest threshold any disclosing company sets. Finally, the report gives a bottom line for Pfizer's spending, noting the totals it contributed. During this period, Pfizer and its then newly acquired subsidiary Wyeth together spent $2.8 million on candidates ($812,000 of which was Pfizer corporate money) and $4.2 million on leadership PACs, trade groups and parties ($3.3 million of which was from Pfizer's treasury). Pfizer also makes available on its website archived reports about its past giving, making it possible to assess whether the company is becoming more or less generous to political actors.

The quality and comprehensiveness of other company reports varies, but another that stands out for a different reason is the report **Altria** makes on its political giving. The company posts on its website what appears to be a comprehensive accounting.[15] Like Pfizer, Altria makes clear its positions on public policies and regulations affecting its tobacco and alcohol products, the procedures officers use to make decisions, and the board oversight that is in place to monitor this process. When it comes to disclosure of what is spent, however, the company's manner of reporting makes it impossible to get to the bottom line without a great deal of effort. Altria presents an interactive map on its website showing that it contributes in state contests in all but seven states and the District of Columbia, and for federal races (through AltriaPAC) in all but six states and the District. To learn how much it gives, though, one must click on each individual state, pull up a list of candidates that shows the names, offices, and amounts given (though no party affiliation), and scroll through it. To aggregate the information one would have to retype the entire list for each state since the information cannot be copied. Only the most recent election cycle (2009 and 2010) data are available. An Altria official told Si2 that it could not provide the information in a more accessible format because of technical hurdles concerning the way it tracks its spending. Data from the Center for Responsive Politics and the National Institute on Money in State Politics indicate that in 2010 the company gave from its treasury $2.1 million to nationally registered 527 political committees and what Si2 estimates to be $4.1 million to candidates, parties and ballot initiatives in the states.

[14] See http://www.pfizer.com/about/corporate_governance/political_action_committee_report.jsp.

[15] See http://www.altria.com/en/cms/About_Altria/Government_Affairs/Political_Contributions/default.aspx.

Independent Expenditures

When Si2 looked at corporate political spending policies in 2010, companies mostly had yet to formally react to the *Citizens United* decision and its potential impact on their political spending practices. In the intervening year, a growing number of companies have put in place policies that make varying commitments to ban spending or be transparent about it, as we have seen.

However, corporate giving to trade associations or other non-profit organizations that are politically active may have the effect (whether deliberate or inadvertent) of circumventing those policies, particularly since those entities are not required to disclose their donors. (See pp. 39-46 for more about company policies on this subject.)

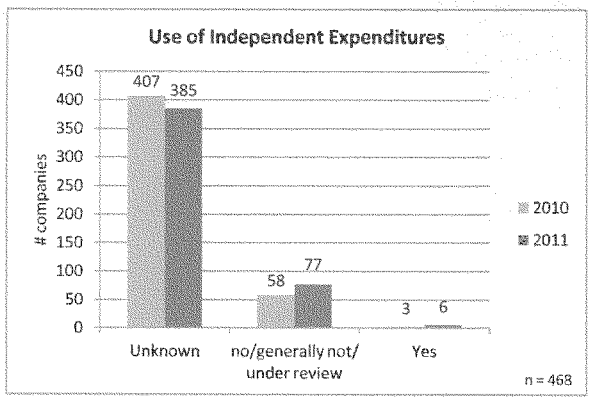
Last year we found only seven companies in the whole index that referenced on their websites independent expenditure giving, which became legal at the federal level after *Citizens United*. Early adopters that pledged not to use corporate money for electioneering were **Citigroup, Ford Motor, Kroger** and **Microsoft**, with Microsoft noting its prohibition extended to its trade association fees; the Microsoft commitment remains one of the only ones of its type. Three others last year were less adamant: **ConocoPhillips** said it might make independent expenditures "if a compelling business purpose exists," **Gilead Sciences** said it did not plan on "significant amounts of such expenditures in the near future," and **Goldman Sachs** said only that it did not spend company money "directly on electioneering communications."

To look beyond website disclosures last year, Si2 also asked all companies in the S&P 500 about their policies. Three companies—**Discover Financial Services, Harley-Davidson** and **Texas Instruments**—said they had never acted in elections this way and did not intend to do so in the future. On the other hand, **Southern** said it did allow this type of spending "in certain circumstances." Southern today remains one of only five firms—which also include **3M, Best Buy, Edison International** and **Target**—in the whole index that explicitly acknowledge in their policies that they have used independent expenditures. Voluntary reports from a few big health care companies, including **Abbott Laboratories** and **Pfizer**, also note their support for state level independent expenditure committees set up by the Pharmaceutical Research & Manufacturers' of America (PhRMA), while **PG&E** also voluntarily reports giving to California independent expenditure committees—all of which would constitute *indirect* use of independent expenditures.

The Center for Political Accountability wrote to the CEOs of the S&P 500 in July 2010, trying to pinpoint the use of both direct and indirect independent expenditures. Fifty-five companies responded to CPA, and 31 said they did not plan to engage in independent expenditures themselves, although they took a hands-off approach to indirect support for trade association independent expenditures. Only seven said they intended to put any conditions on their trade group payments.[16] (Indirect spending is explored more below.)

[16] A detailed report on the CPA's July 2010 findings is available in the organization's September 2010 newsletter at http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/3918.

Change in the last year: Since 2010 there has been a significant increase in the number of companies that make public mention of their positions on the use of independent expenditures, as well as an increase in the number that have committed not to spend this way. Still, the positions and practices of 78 percent of S&P 500 companies remain unknown regarding independent expenditures.



We incorporate for a 2010 baseline information gleaned both from the CPA's findings on independent expenditures and from Si2's research. Looking at the 468 companies in the index during both years shows that 19 more companies now either say they do not use independent expenditures, generally do not do so, or (in one case) is reviewing their use. The total tally of companies with bans, near bans or scrutiny of bans on electioneering now stands at 80 for all of the 492 U.S. companies in the index (16 percent of the total), up from 58 last year. Four companies—**Best Buy, Deere & Co., ExxonMobil** and **McDonald's**— told the CPA in 2010 that their policies on the subject were under review. Best Buy now acknowledges it uses them, ExxonMobil and McDonald's say they will not, and Deere remains mum about its position. (Bucking the trend for increasing disclosure, Deere also has removed some information about its political spending practices from its website since last year.)

The five companies that acknowledge they currently use independent expenditures have fairly complete statements about this spending and why they use it (see table). But none of them indicates how much it spends on electioneering to support or oppose specific candidates, nor commits to such precise disclosure anytime in the future. Disclosure from three companies exists about the independent expenditure committee MN Forward. None of the companies mention it, but the group supported the failed 2010 Minnesota gubernatorial candidate, Tom Emmer (R), whose views on gay rights so incensed the largest lesbian, gay, bisexual and transgender rights group, The Human Rights Campaign, and its allies—particularly those who were customers of Target and supporters of its generally gay-friendly policies. This sparked a high-profile, nationwide boycott of the company and required substantial damage control by company executives. The group's other corporate donors, including **3M** and **Best Buy**, largely escaped unscathed. But the Target firestorm has become a cautionary tale for many companies and seems to be a key incentive for corporate policy movement towards either avoiding independent expenditures or putting in place more stringent oversight.

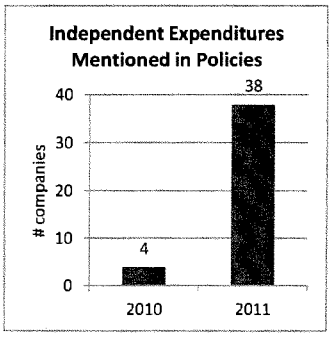
Aside from the companies noted here that currently allow independent expenditure spending are several that say they have not spent this way so far (**Aetna, Exelon, Gilead Sciences, Kimberly-Clark, Merck** and **Weyerhaeuser**) but do not have firm bans. Of these, Merck and Weyerhaeuser make clear commitments to disclose such spending if it does occur. Merck's statement about indirect independent expenditures is the most nuanced:

> With regard to trade association independent expenditures, Merck will actively monitor independent political expenditures made by associations or other tax-exempt groups where the issue relates to pharmaceutical policy. We do not plan to condition our membership specifically on an association's decision relative to its policy on reporting independent expenditures, but we do encourage disclosure of political activity on the part of all organizations to which we belong.

Policy and Disclosure at Companies Using Independent Expenditures

Company	Policy	Spending Disclosure
3M	"The U.S. Supreme Court ruled in 2010 that companies and labor unions may make expenditures that are not coordinated with candidates or political parties to express First Amendment protected views relating to federal or state elections. In September 2010, 3M contributed $100,000 to MN Forward, a Minnesota-based independent expenditure political committee that expressed its views regarding private sector job creation and economic growth in the 2010 Minnesota state elections. That contribution was properly reported by 3M and the recipient."	No disclosure of any political spending amounts, aside from acknowledgement in policy of 2010 contribution to MN Forward.
Best Buy	"Direct corporate contributions to candidates and committees are prohibited at the federal level and in some states. However, corporations may make independent expenditures on behalf of candidates and committees. Thus, Best Buy may provide corporate funding to candidates and/or issue campaigns that align with the company's business objectives and public policy goals."	Disclosure of amounts contributed in 2010 to political committees with independent expenditures, including MN Forward.
Edison International	"In addition to Edison International PAC's federal campaign contributions and other permitted company contributions made to state candidates, the EIX companies may make expenditures to support or oppose candidates, so long as the expenditures are not made in cooperation or consultation with, or at the request of, any candidate."	None.
Southern	"Additionally, Southern Company, but not its subsidiaries, is permitted under this policy to use corporate funds to make independent expenditures, and to contribute to organizations making independent expenditures, at the federal, state or local level as permitted by law."	None.
Target	"The Policy Committee reviews and approves any use of general corporate funds for electioneering activities or for ballot initiatives. This approval process applies whether the contribution is made directly to a candidate or party, or indirectly through an organization operating under Section 527 or 501(c)(4) of the U.S. Internal Revenue Code."	Disclosure of amounts contributed in 2010 to political committees with independent expenditures, including MN Forward.

(See Appendix II, p.81, for a complete listing of policy statements about independent expenditures.)

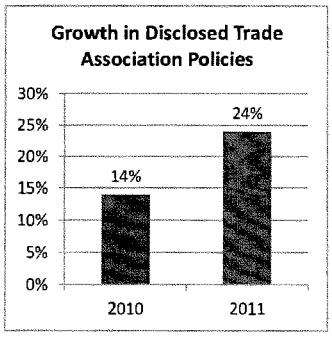


Two more companies have a wait-and-see attitude. **ConocoPhillips** generally does not plan to spend on electioneering but says exceptions could be made (unchanged from last year), while **United Technologies** seems to be waiting for a clear signal from the Federal Election Commission. It says, "The Federal Election Commission, which regulates such activity, is considering regulatory changes following this Supreme Court decision, and the U.S. Congress is considering changes in law. UTC may review its position depending on the outcome of these initiatives." Further, both **General Mills** and **Home Depot** require board approval but do not make it clear if this has ever been granted. Finally, **Altria** and **Oracle** say any independent expenditures are included in their current reports, but in those reports they do not break out which sums these might be. Both **Abbott Laboratories** and **Pfizer** note in their most recent reports that they gave during the 2009-2010 election cycle to the Pharmaceutical & Research Manufacturers of America's independent expenditure committee in California.

All in all, there has been a clear increase in the last year in the number of companies that explicitly discuss on their websites their views on independent expenditures. While Si2 found only four that mentioned the subject as of September 2010, 38 now do so. (Appendix II lists these policy statements and other disclosures companies have made about their practices.)

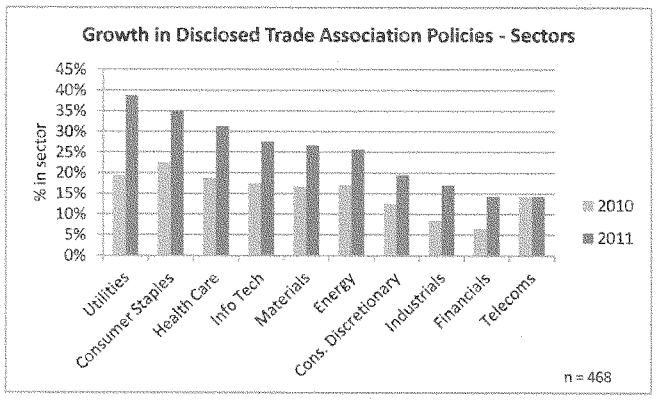
Aside from public mentions of independent expenditures, one confidential response to Si2's inquiry this year came from a leading retailer, which said it tried to avoid any political involvement at all—through independent expenditures or otherwise. The company wrote, "We decided a long a long time ago that we should not involve ourselves in politics except only in very rare instances. Our customers have opinions on both sides and we are bound to disappoint those who might have a different opinion, so we choose not to donate to individual campaigns."

Indirect Spending

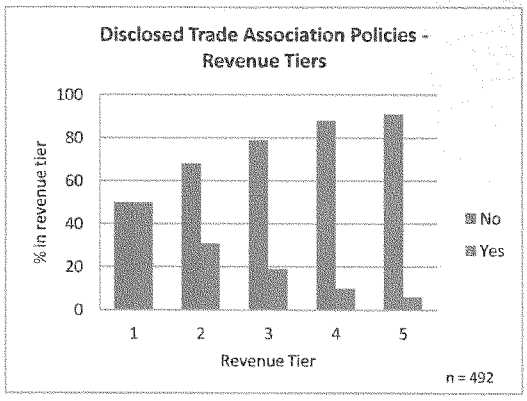


Investor activists proposing shareholder resolutions on political spending disclosure emphasize their view that companies should disclose not only their direct contributions to candidates, parties, committees and ballot initiatives, but also indirect spending, as we have noted. Companies are not keen on the idea of opening the books on their support for trade associations and other politically active non-profit groups, though. Their reluctance is apparent in wariness about taking action on independent expenditures by trade associations, as we have seen. But in the last year disclosed policies about giving to trade associations nonetheless have blossomed. This has been a central request from investor activ-

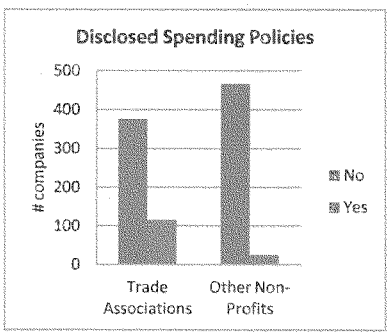
ists. Examining the 468 companies in the index in both years shows that 46 more companies have policies now, compared to a year ago—albeit from a low baseline. Comparing the companies in the index in both years, the proportion has jumped from 14 percent to 24 percent.



Change has moved unevenly through the different sectors, however. Nearly 40 percent of Utilities now have publicly articulated policies, double the rate in 2010. This sector has pushed aside Consumer Staples companies who previously were the most likely to disclose trade association policies. Financials and Telecommunications companies remain the least likely to have a stated trade association spending policy, although Financials have improved from the abysmally low rate of just above 5 percent last year to nearly 15 percent this year. Trade groups now show up for **UNUM Group, Plum Creek Timber, Comerica, U.S. Bancorp, NYSE Euronext, Wells Fargo** and **Goldman Sachs,** where they did not in 2010. On the other hand, some of the country's largest financial institutions still refrain from discussing their memberships and giving to industry associations, with no mentions from seven of the biggest: **Allstate, American International Group, Bank of America, Citigroup, JPMorgan Chase, Morgan Stanley** and **Travelers**. (American International Group told Si2 that it presently has in place a moratorium on any political contributions and federal lobbying, however.)



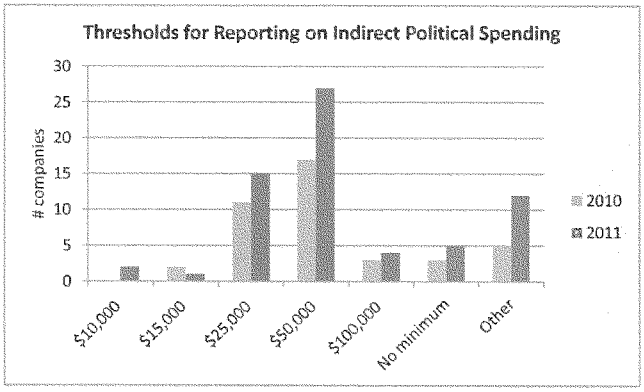
Among the 100 largest companies, half now have disclosed what their policies are with respect to political contributions and trade associations, although less than 20 percent have done so in the bottom three revenue quintiles. Stand-outs among the smaller companies include the natural gas pipeline owner **El Paso**, which reports on its trade association memberships and the political



Firms with 501(c)4 Social Welfare Group Policies	
Aetna	Hewlett-Packard
Altria	Humana
American Electric Power	International Paper
American Express	Limited Brands
Avon Products	Merck
Baxter International	Northrop Grumman
Best Buy	PepsiCo
CIGNA	PG&E
Cincinnati Financial	Procter & Gamble
Devon Energy	Starbucks
Dow Chemical	Time Warner
General Dynamics	UNUM Group
General Motors	Yum Brands

spending portion of its dues for groups that receive from it more than $50,000. **NYSE Euronext**, the stock exchange company, sets a $25,000 threshold to report memberships and a separate minimum to report any portions of dues used for political purposes that exceed $25,000. The most complete reporter for the smaller tier companies is **Wisconsin Energy**, which provides gas and electric services in Wisconsin and Michigan; it is alone in the mix of these firms to report on all its memberships and dues used for political purposes, setting no minimum.[17]While the number of companies now disclosing their policies about political spending and trade associations has grown, very few—a scant 26 companies in the whole index (see box)—acknowledge any relationship with 501(c)4 social welfare groups.

Reporting thresholds: We found in 2010 and 2011 that companies which make disclosures about their indirect spending set widely varying minimums about when they will disclose either their memberships or the political spending supported by their payments to trade associations and other non-profit groups that are politically active. Just 41 companies last year specified some sort of threshold payment amount that would trigger reporting; that number now has grown to 66 companies.



[17] See http://www.wisconsinenergy.com/csr/SO6_Lobbying.pdf.

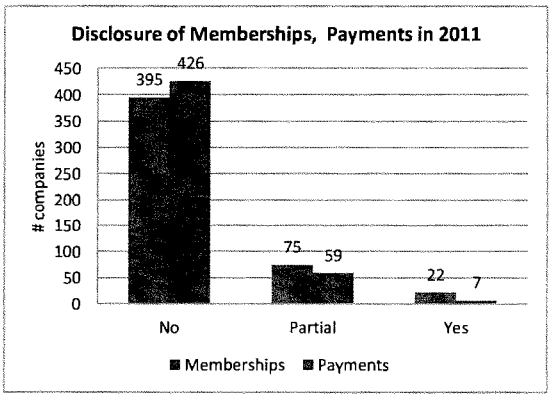
The sum of $50,000 in dues is by far the most common (27 companies), followed by $25,000 (15 firms). Three companies set very low thresholds ($10,000 for **Campbell Soup** and **Colgate-Palmolive**, $15,000 for **Hewlett-Packard**), while five set the thresholds so high as to make the disclosure ring somewhat hollow (**Abbott Laboratories, Avon Products, Bristol-Myers Squibb, Intel** and **Pfizer**).

Colgate takes an unusually strong stance against trade association political spending, attributing its stance to Boston Common Asset Management, which has been active in the shareholder campaign for disclosure:

> To help ensure that the trade associations do not use any portion of the dues paid by Colgate for political contributions, Colgate's Chief Ethics and Compliance Officer annually informs the US trade associations of our policy prohibiting such contributions. In addition, the Company's Chief Ethics & Compliance Officer requests each US trade association to which the Company pays in excess of $15,000 annually to provide a written confirmation (i) that the Company's dues or other payments were not used for contributions to political parties or candidates and (ii) a breakdown of any portion of the Company's dues which are not deductible pursuant to the Internal Revenue Code, to additionally verify that no amounts are being used for political contributions....Colgate thanks Boston Common Management, whose concerns about the potential use of trade association dues for political parties or candidates prompted the Company to adopt this annual procedure.[18]

ConocoPhillips disapproves of industry PACs, saying "Large contributions to trade association PACs" are to be "generally avoided." It elaborates:

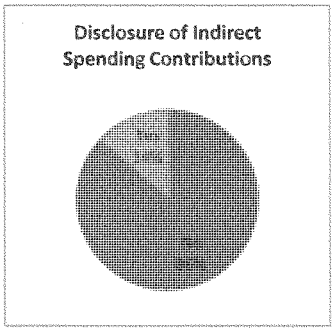
> Many industry and special interest groups have created their own political action committees to elect candidates to office. State and national petroleum marketing associations, for example, have created PACs and are soliciting members and suppliers. Corporate contributions to these external PACs are strictly prohibited under ConocoPhillips policy if the contributions are intended to be used to fund candidates or their election campaigns. This includes the expensing of any costs for events such as golf and fishing tournaments, hunts, dinners, silent auctions and other types of activities used by these PACs to raise funds. Corporate contributions to fund administrative costs of certain external PACs may be permitted if allowed under applicable law, if doing so advances company goals, and if approved by Government Affairs and Legal.[19]



[18] See http://www.colgate.com/app/Colgate/US/Corp/Governance/GlobalEthicsandCompliance/PoliticalContributionsPolicy.cvsp.

[19] See http://www.conocophillips.com/EN/susdev/policies/political_policies_giving/Pages/index.aspx.

Just four companies appear to commit to disclosing all their trade association and other tax-exempt group spending; these standouts are **Dell** and **eBay**, joined this year by **Wisconsin Energy** and **Williams Cos.**



Membership disclosure: Companies are more likely to disclose their memberships in trade associations than they are to report on the amounts of dues money that these organizations use in either political campaigns or for lobbying.

Spending disclosure: While nearly one-quarter of all companies now have disclosed their policies about trade associations (and to a lesser extent other non-profits) and politics, it is certainly not the case that all those who make policy statements actually report on how much they have given to these groups. In fact, just 14 percent of companies have made such disclosures, a number that falls woefully short of the aspirations of investor activists. Reflecting the policy incidence pattern, Utilities and Health Care companies are the most likely to report on their indirect spending (25 percent and 22 percent do so, respectively). But less than 20 percent in all the other sectors report on indirect spending, and three sectors are especially non-transparent: only 10 percent of Financials firms (eight out of 72), 8 percent of Energy companies (three out of 36) and none among the nine Telecoms. One-third of those in the top revenue tier do report on indirect spending, as do just under one-quarter in the second quintile. After that, indirect spending disclosure is virtually non-existent, with only 11 companies in the third and fourth tiers combined and none in the bottom tier. The proportion of companies that discloses indirect political spending has grown, though, and is up from only 9 percent last year.

Company reports—Estimates of precisely how much all the S&P 500 companies give to trade associations and other politically active non-profit groups are problematic given the lack of required disclosure. Parsing how much of the contributions may be spent on lobbying and how much on political campaigns presents a further hurdle to transparency. The limited available information clearly documents that the overall sums are not insignificant, however. The 39 companies that make voluntary reports about this spending in 2010 report that $41.2 million went to political expenses incurred by trade associations and other politically active non-profit groups. Details on these amounts and the conditions companies put on their disclosures appear in the table below.

Aside from the companies listed here, a few more companies make available reports on spending that is either more or less recent. **Aetna, Computer Sciences, Du Pont, Entergy, First Energy** and **United Technologies** together report on 2009 spending that totaled another $2.4 million, while **Limited Brands** and **Texas Instruments** just report on 2011 spending, which combined so far has been about $570,000. **United Health says** it will include in its semi-annual report any political expenses from groups that receive from it more than $50,000 in dues, but included no such expenditures in its current report; it does not make previous reports about its giving available on its website. Finally, four companies just report

the percentage of their dues that is used for political activities—these companies include **Capital One Financial, International Paper, General Dynamics, Weyerhaeuser** and **Whirlpool.**

Voluntary Disclosed Corporate Giving to Trade Associations and Other Non-Profits in 2010

Company	Policy		Disclosures		Political/ Lobbying Expenses Reported	Notes
	Trade Groups	Other Non-Profits	Member-ships	Payments		
Alcoa	Yes	No	Partial	Partial	$317,525	$25,000 reporting threshold, if >10% for lobbying
Amer. Elec.Pwr	Yes	Yes	Partial	Partial	$4,540,442	"reasonable de minimus limits" on reporting
Avon Products	Yes	Yes	Partial	Partial	$72,245	$100,000 dues threshold before reporting
Baxter Int'l	Yes	Yes	Partial	Partial	$291,362	$50,000 dues threshold before reporting
Best Buy	Yes	Yes	Yes	Partial	$1,386,000	Notes % of non-deductible dues but not amount
Bristol-Myers Squibb	Yes	No	Partial	Partial	$1,645,314	$100,000 dues threshold before reporting.
Campbell Soup	Yes	No	Partial	Partial	$123,857	Allows extra giving to groups for political use
Chevron	No	No	No	Partial	$500,000	
CIGNA	Yes	Yes	No	Partial	$657,359	
Cummins	Yes	No	Partial	Partial	$84,577	
Dell	Yes	No	Yes	Yes	$265,703	Reports all memberships, political expenses and "normally" forbids more political payments
Dominion Res.	Yes	No	Partial	Partial	$1,176,378	$50,000 dues threshold before reporting
Dow Chemical	Yes	Yes	Partial	Partial	$2,834,622	Includes trade association lobbying in public reports
eBay	Yes	No	Yes	Yes	$165,400	Reports all memberships, political expenses
Edison Int'l	Yes	No	Partial	Partial	$477,498	$50,000 dues threshold before reporting
El Paso	Yes	No	Partial	Partial	$133,846	
EMC	Yes	No	Partial	Partial	$328,307	Trade association percentages given.
Exelon	Yes	No	Partial	Partial	$1,037,727	$50,000 dues threshold before reporting
General Motors	Yes	Yes	Partial	Partial	$10,954	$50,000 dues threshold before reporting
Gilead Sciences	Yes	No	Partial	Partial	$160,461	$25,000 dues threshold before reporting
Hartford Finan. Services	Yes	No	Partial	Partial	$308,915	$25,000 dues threshold before reporting, forbids use in campaigns
Hewlett-Packard	Yes	Yes	Partial	Partial	$293,682	
Humana	Yes	Yes	Partial	Partial	$590,829	
Intel	Yes	No	Yes	Yes	$559,051	
Merck	Yes	Yes	Partial	Partial	$8,639,384	
Metlife		No	Partial	Partial	$1,988,284	$50,000 dues threshold before reporting
Microsoft	Yes	No	Yes	Partial	$1,236,344	$25,000 dues threshold before reporting
NYSE Euronext	Yes	No	Partial	Partial	$24,000	$25,000 dues threshold before reporting
P&G	Yes	Yes	Partial	Partial	$1,540,689	Forbids use of funds for independent expenditures
Prudential Fin.	Yes	No	Partial	Partial	$2,256,886	
Pulte Group	Yes	No	Yes	Yes	$95,217	
Target	Yes	No	Yes	Partial	$819,000	
Time Warner	Yes	Yes	Partial	Partial	$9,447	
U.S. Bancorp	Yes	No	Partial	Partial	$699,886	
UPS	Yes	No	Partial	Partial	$2,958	$50,000 dues threshold before reporting
Wellpoint	Yes	No	Partial	Partial	$3,020,347	$50,000 dues threshold before reporting
Williams Cos.	Yes	No	Yes	Yes	$2,036,361	Reports all memberships, political expenses
Wisc. Energy	Yes	No	Yes	Yes	$170,896	Reports all memberships, political expenses
Xcel Energy	Yes	No	Partial	Partial	$689,233	
				Total	$41,190,986	

Policy disconnects: Shareholder proponents, who want companies to disclose more about their relationships with trade associations and other organizations, contend that companies face reputational risks if their own policies are contradicted by the positions these groups take on controversial public policy matters. Companies generally do not see it that way, though, despite some high-level defections from the U.S. Chamber of Commerce over climate policy. Walden Asset Management and other socially responsible investment firms have pushed this point in their campaigns, in particular. The Chamber has aggressively challenged health care and financial reform and worked to defeat national climate change legislation—contradicting the stated views of some of its largest contributors, these investors point out. In an oft-cited case, **Apple** cancelled its membership in October 2009 because it disagreed with the Chamber's views on climate change, in an oft-cited case.[20] **Exelon**, which has taken particular pains to build its credentials as a green energy company, also cancelled its Chamber membership. But many remain. Shareholder proponents take careful note of which firms have leadership positions within the Chamber and other trade groups that have taken robust action on public policy issues, and companies can continue to expect public quizzes about how they may be working to moderate the views these groups express.

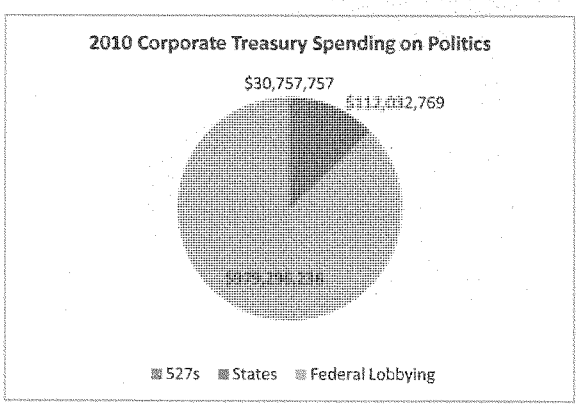
Fourteen companies acknowledge possible disconnects between trade group positions and their own, but they all say this by itself is not enough to make them abandon these associations, given the compelling business reasons to stay. Still, some companies clearly seem to have noted the criticisms and point out that that continually evaluate the efficacy of their trade group memberships. Comments include the following:

Baxter	"Baxter believes that membership in these organizations is generally consistent with the company's interests as well as those of its shareholders, customers and patients. Even when Baxter does not share all of the views of one of these organizations, it believes that membership is worthwhile because such organizations encourage dialogue on important policy issues and help to move the industry to a consensus on such issues."
Coca-Cola	"Because our Company's vision and values are an outgrowth of our unique brands and people, we recognize that political candidates and organizations may support positions that align with some, but not all, aspects of our contribution policy. In these instances, we base our involvement on those areas of mutual agreement that we believe will have the greatest benefit to our shareowners and key stakeholders."
Cummins	"While Cummins might not agree with the positions these associations take on every issue, the Company believes participating in these groups helps ensure the Company's voice is heard."
Dell	"In some instances, the official policy position of Dell may differ with that of the supported organization. Dell is a member of the organization because of the total value the organization brings to Dell, Dell employees and Dell shareholders. Dell constantly re-evaluates membership with all the organizations to which it belongs and adds and drops membership on an ongoing basis."
Dow Chemical	"Many trade and business associations have diverse memberships and diverse member views on matters of public policy. Dow endeavors to participate actively in the leadership of its key trade associations. However, we may from time to time find ourselves in disagreement with the prevailing views of the majority of the association's membership. It is our practice, and our preference, to work within the association policy process to assure that Dow's views are adequately communi-

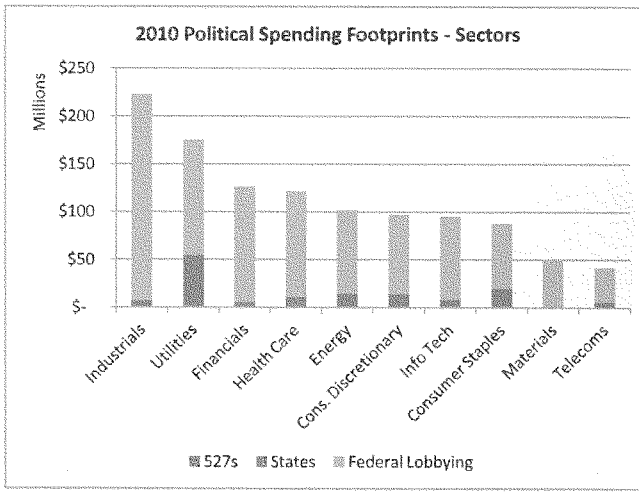
[20] Lisa Lerer, "Apple Ditches Chamber," *Politico*, October 5, 2009, at http://www.politico.com/news/stories/1009/27935.html.

	cated and represented in association policy, strategy and tactics. In all cases, any Dow position on a matter of public policy is the prevailing company position, irrespective of any trade association position to the contrary."
Duke Energy	"Duke Energy may not always agree with political positions taken by trade associations and chambers of commerce of which it is a member, however, on balance, the Company receives more benefit than detriment from these memberships."
Ford Motor	"Of course, we do not always agree with each and every position...In cases where we don't agree, we have to determine if, on balance, we agree with enough of the organization's positions that we should continue to engage with them. And, we always reserve the right to speak with our own voice and make our own positions clear, even when they may not align with the positions of associations to which we belong."
Intel	"During 2010, significant controversy surrounded the U.S. Chamber of Commerce's public statements and actions on the topic of climate change, including opposition and lobbying against provisions in proposed climate legislation. Some stakeholders asked Intel and other companies to clarify their positions on climate change or to pull out of the organization altogether. After continued review of the issue, Intel decided to remain a member of the Chamber, because the organization provides a strong industry voice on a wide range of policies that affect our business, not only in the U.S., but around the globe through Chamber affiliates and other organizations. The Chamber has a diverse membership, and we are not aligned 100% with the group on all policy matters. Likewise, our positions do not always align with those of other industry and trade organizations to which we belong."
Kroger	"It is important to note that we do not always share the same perspective on legislation as does our trade associations."
Merck	"At times we may not share the views of our peers or associations. Merck representatives on the boards and committees of industry groups and associations ensure that we voice questions or concerns we may have about policy or related activities. We may even recuse ourselves from related association or industry group activities."
PepsiCo	"We work with these groups because they represent the food and beverage industry and the business community on issues that are critical to PepsiCo's business and its stakeholders. Importantly, such organizations help develop consensus among varied interests. At times we do not share or agree with all of the views of each of our peers or associations. PepsiCo representatives on the boards and committees of such groups ensure that we voice PepsiCo's position about policy or related activities. As such, there may be times when we will not fund certain initiatives sponsored by such organizations. In addition, we require any trade association to obtain specific consent from PepsiCo to use PepsiCo's dues or similar funds for funding of exceptional political expenditures beyond regular dues and business matters. We annually review the benefits and challenges from membership in our major trade associations."
Pfizer	"Pfizer's participation as a member of these various industry and trade groups comes with the understanding that we may not always agree with the positions of the larger organization and/or other members, and that we are committed to voicing our concerns as appropriate through our colleagues who serve on the boards and committees of these groups."
Praxair	"While the company may or may not agree with every public policy position that these associations advocate, Praxair monitors, and aims to be an active participant in shaping the policy agenda, if any, of any group of which it is a member."
Wells Fargo	"Our participation in these groups comes with an understanding that we may not always agree with every position the trade association takes."

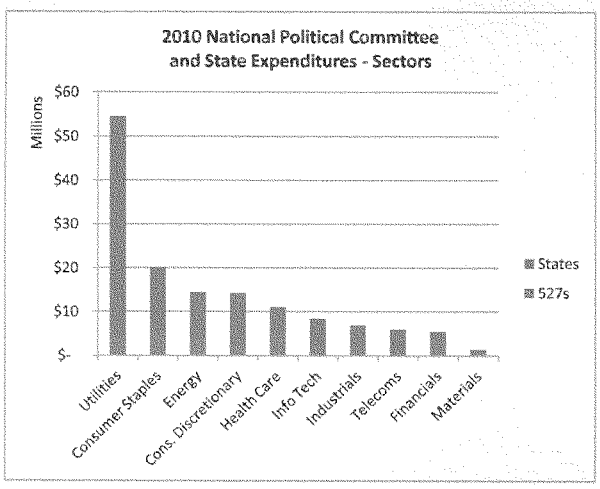
Spending Patterns and Intensity



Most of the money companies spend in the political arena is disbursed after candidates are elected. Available data from the Center for Responsive Politics and the National Institute on Money in State Politics show that 87 percent of the $1.1 billion S&P 500 companies spent from their corporate treasuries in 2010 went to federal lobbying. Nonetheless, nearly $31 million went to political committees registered with the Federal Election Commission (3 percent of the total) and companies gave about $112 million at the state level to candidates, political parties and ballot initiative committees. (These figures exclude identifiable PAC spending, but additional and probably significant sums of corporate treasury money not captured here also went to state and local political committees.) As explained in the introduction to this report, Si2 combined information about these three categories of spending to build a political spending footprint for each U.S. company in the S&P 500 index.

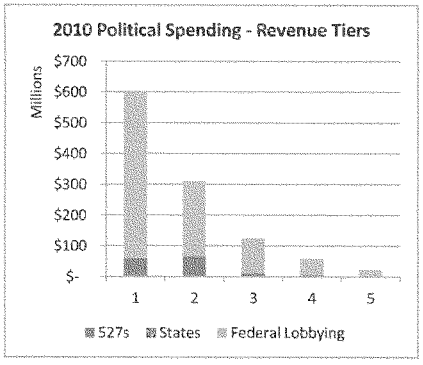


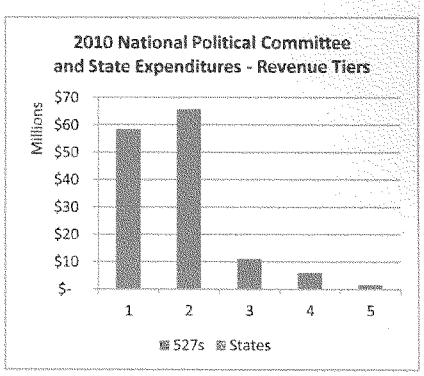
This assessment allows a comparison of spending between the different economic sectors. The results show that companies in the Industrials and Utilities sectors far outspent the other sectors, although the vast majority of Industrials' spending went to lobbying. Utilities companies stand out for their heavy spending at the state level, while neither Materials nor Telecommunications



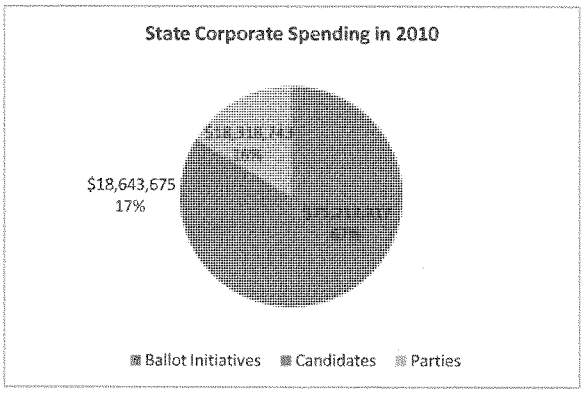
companies spent more than $50 million per sector even when lobbying is included in the total. Setting lobbying aside and looking just at expenditures that support federally registered 527 committees, alongside contributions in the states to candidates, parties and ballot initiative committees again highlights the heavy spending from Utilities, which contributed about $55 million, or 38 percent of what the entire index gave during the year. (These figures are skewed by what just one company, **PG&E**, spent both on federal lobbying and on a ballot initiative in California, as explained below.) At the low end of the scale were Materials companies, which spent just $1.4 million (1 percent of the total).

The largest companies were responsible for nearly all the spending of both lobbying dollars as well as national political committee support and state level expenditures. Writing checks for a total of about $600 million, the largest 100 companies spent about twice what the second tier firms did; together the





$915.1 million spent in these two tiers (93 percent of the total) eclipsed all the rest of what the smaller firms spent. The tendency for the biggest companies to spend most of the corporate political dollars is even more pronouced when lobbying is set aside. The bottom three revenue tiers each spent about $10 million or less on national political committees and state politics, but the top two tiers between them spent more than $124 million.



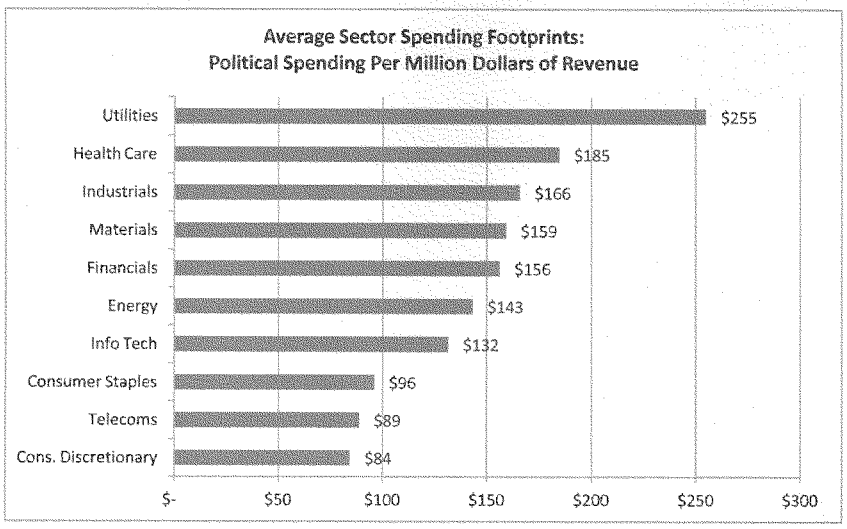
Ballot measures: Zooming in still further to see how companies spent shows that two-thirds of corporate dollars went to ballot initiatives ($75.2 million), with the remainder split fairly evenly between candidates ($18.6 million) and parties ($18.3 million). The U.S. Supreme Court struck down any limits on what companies may spend on ballot initiatives in 1978, which goes a long way towards explaining these results. Clearly, the absence of spending limits means the amounts contributed can climb precipitously, which could have implications for how much companies will give to support federal candidates through independent expenditures, now that they can. Investor attention to date has not focused intensively on ballot measure spending, company policies largely pass over it and voluntary corporate disclosures omit it.

Yet the sums are substantial. A dozen companies spent more than $1 million each (see table). Of these, a few pop out for their lack of board oversight and disclosure about spending in general—including **CBS, Cisco Systems, Costco Wholesale, Viacom, Walt Disney** and **Qualcomm.** The largest spender by far is PG&E; more information about its unsuccessful effort to quash competition in the California electricity market appears in the case study on p. 53.

Largest Ballot Measure Spenders in 2010

Company	Total Spent	Board Oversight?	Spending Disclosure?
PG&E	$43,897,000	No	Yes
Costco Wholesale	$4,835,679	No	No
Chevron	$3,805,000	Yes	Yes
Tesoro	$2,130,636	Yes	No
Altria	$1,768,400	Yes	Yes
Cisco Systems	$1,601,000	No	No
Viacom	$1,600,000	No	No
General Electric	$1,500,000	Yes	Yes
Time Warner	$1,500,000	Yes	Yes
Walt Disney	$1,400,000	No	No
CBS	$1,250,000	No	No
Qualcomm	$1,000,000	No	No

Spending intensity: It is easy enough to pick out the companies that spend the most, and as we have seen it is often the largest companies that do so given their resources. But



to make corporate spending data comparable in a meaningful fashion for investors, and to remove the large company bias from our assessment, we calculated a "spending intensity" figure for each company. This divides the total spending footprint for each company by the total revenue it earned in its most recent fiscal year, producing the amount each spent per million dollars of revenue earned. The most intensive spending comes from Utilities (even when the calculation excludes PG&E and its extraordinary spending, as the bar chart above does). Utility companies argue that they are a heavily regulated sector that is significantly affected by the laws and regulations imposed upon it by government, and that they must vigorously participate in the public policy process as a result to protect their interests. Health Care companies, the second most intensive spenders, make similar arguments and changes in national health care policy obviously have profound implications for this sector. While each of these sectors spends the most, they also are the most likely to have both board oversight and voluntary disclosure to investors about their spending, as the sections above about corporate governance show. On the bottom end of the spending intensity scale are Consumer Discretionary, Telecommunications and Consumer Staples companies—all of which spent $100 or less per million dollars of earned revenue.

25 Most Intensive Political Spending Companies in 2010							
Company	Spending/ $1 Million Revenue	National Committees	States	Federal Lobbying	Total Footprint	Board Oversight?	Spending Disclosure?
PG&E	$6,547	$25,120	$45,129,010	$45,460,000	$90,614,130	No	Yes
Peabody Energy	$1,009	$318,500	$10,000	$6,591,000	$6,919,500	No	No
Plum Creek Timber	$846		$217,100	$790,000	$1,007,100	Yes	No
Mastercard	$829			$4,590,000	$4,590,000	No	No
Monsanto	$805	$81,500	$339,350	$8,030,000	$8,450,850	Yes	Yes
Southern	$763	$100,000		$13,220,000	$13,320,000	Yes	Yes
Federated Investors	$755			$718,500	$718,500	No	No
Moody's	$753			$1,530,000	$1,530,000	No	No
Amgen	$748	$223,435	$775,950	$10,260,000	$11,259,385	Yes	Yes
American Electric Pwr	$742	$315,924	$76,000	$10,313,196	$10,705,120	Yes	Yes
Visa	$739	$188,450	$341,750	$5,430,000	$5,960,200	Yes	No
FedEx	$739	$66,512	$12,950	$25,582,074	$25,661,536	Yes	No
Intuit	$736	$305,399	$176,200	$2,060,000	$2,541,599	No	No
Edwards Lifesciences	$732	$6,100	$63,500	$990,000	$1,059,600	No	No
Intercont. Exchange	$726		$5,000	$830,000	$835,000	No	No
Norfolk Southern	$719	$70,598	$101,150	$6,673,571	$6,845,319	Yes	No
Reynolds American	$717	$1,470,619	$336,247	$4,323,293	$6,130,159	No	No
Harris	$714		$61,900	$3,656,824	$3,718,724	No	No
NASDAQ OMX Group	$707			$2,259,995	$2,259,995	No	No
Qualcomm	$689		$1,075,000	$6,500,000	$7,575,000	No	No
Altria	$682	$2,148,899	$4,111,846	$10,360,000	$16,620,745	Yes	Yes
Consol Energy	$671	$408,221	$45,000	$3,060,000	$3,513,221	Yes	No
Expedia	$645		$238,000	$1,921,000	$2,159,000	No	No
CME Group	$643			$1,930,000	$1,930,000	No	No
TECO Energy	$635	$20,000	$1,424,432	$770,000	$2,214,432	No	No

Patterns at Companies with Board Oversight

We noted in our 2010 report that one important presumption investor activists and other reformers carry with them is that board oversight will bring with it more accountability in political giving practices. Sometimes added to the mix is the implication that spending will be reduced with better oversight. Corporate supporters of robust oversight and disclosure also argue that good governance helps ensure company money is spent on improving the company's actual business, not on manipulation of the policy environment to unfairly tilt the playing field and advantage one company over its competitors, a practice referred to as "rent-seeking" in the academic literature.[21] Companies also sometimes complain they are aggressively solicited by politicians and their intermediaries who take part in the relentless race for campaign cash, and they may look to established governance mechanisms as a way to put off giving in to these demands. Another key governance argument for good oversight is the need to ensure that executives disburse company funds to benefit the business, not their personal political interests or preferences—which may or may not be concurrent with shareowner interests.

Given these arguments for strong governance, we looked at what impact board oversight by itself may have on the key performance indicators relating to political spending that we have discussed in this study. Clear differences exist for all these factors between the companies that have put in place board

[21] Rent-seeking derives from the medieval practice of "appropriating a portion of production by gaining ownership or control of land," as Wikipedia points out at http://en.wikipedia.org/wiki/Rent-seeking.

Key Indicators – Board Oversight Differences		
Board oversight?	Yes	No
No. of companies	151	340
Spending justification?	71%	21%
Any treasury spending?	91%	70%
Treasury spending disclosed?	56%	4%
Policy on 501 groups?	55%	11%
Disclosure of 501 groups?	27%	5%
Disclosure of 501 payments?	21%	2%

oversight and those that have not, as the table here summarizes. Companies with board oversight are much more likely to provide a justification for why they spend money in campaigns (or on lobbying), by a 20 point margin, while at the same time they also are more likely to spend money from their corporate treasuries, by the same margin (91 percent compared with 70 percent). Board oversight also has a dramatic impact on the likelihood a company will disclose spending, with a little more than half of oversight companies making some treasury spending report compared to just 4 percent of those with no oversight.

When it comes to key indicators dealing with trade associations and other non-profit groups, board oversight also makes a clear difference, although to a somewhat less dramatic extent. More than half (55 percent) of oversight companies also have policies on giving to these "501" groups, compared with only 11 percent of non-oversight companies. Having a policy on 501 groups does not necessarily translate into disclosure, although oversight prompts more transparency: 27 percent of the oversight group discloses memberships in these organizations and 21 percent of the group reports on payments to them—compared to 5 percent and 2 percent, respectively.

Board Oversight and Spending Intensity Rates						
Board	Revenue Tiers – Average Spending Intensity*					
Oversight?	1	2	3	4	5	Overall
No	$68	$137	$142	$139	$134	$132
Yes	$135	$194	$253	$204	$149	$173
Total	**$115**	**$160**	**$166**	**$146**	**$136**	**$144**

*Political spending per million dollars of revenue.

The available evidence does not suggest that greater oversight correlates with less political spending. Quite the opposite is the case. Companies that have board oversight are far more like to spend more money, as the table comparing revenue-normalized spending intensity in each of the five revenue tiers shows, although this becomes less significant for smaller companies. Overall, companies with board oversight spend on average $173 per million dollar of revenue earned—20 percent more than the overall average for all companies and 31 percent more than the companies that have no board oversight in place. One possible conclusion from these results is that the boards of companies involved in spending more money in the political arena are paying attention to how it is spent—surely a heartening conclusion for investors. The results provide little solace for those who would like to see spending from companies reduced, and would like to pursue this goal by means of board involvement in the decision-making process.

Case Studies

PG&E and Ballot Initiative Spending

According to the company's Political Contributions and Employee Political Activity Policy, PG&E makes contributions in support of or opposed to ballot initiatives that could affect its "current or proposed business activities or the economic, social, or cultural well-being of the communities that the Company serves." Additionally, the company's Code of Conduct states that all contributions are coordinated by Corporate Affairs and the Law Department. PG&E does not disclose any board oversight of corporate political contributions either prior to or after disbursement, but it does provide investors with a detailed accounting of its spending.

During 2010, PG&E reports[22] that it spent almost $44 million on ballot initiatives alone, with $42.93 million of that spending going to support Californians to Protect Our Right to Vote, a group that campaigned for California's Proposition 16, the Imposes New Two-Thirds Majority Voter Approval Requirement for Local Public Electricity Providers. Proposition 16 would have made it more difficult for local entities to form municipal utilities or Community Choice Aggregators (CCAs) because it would have required them to obtain approval from two-thirds of the voters living in the affected area, as the online state politics encyclopedia, Ballotpedia, notes.[23]

Opponents of the proposition felt that it would stifle competition, limit consumers' access to alternative, cleaner energy and place an incredibly high hurdle in front of any community wishing to pursue options other than the current utility provider (PG&E). In addition, critics of Proposition 16 noted that the two-thirds requirement requested is the same percentage required before any tax increase can be implemented under California law. They further suggested that supporters of Proposition 16 tried to confuse the public by conflating changes in electric utility service with tax increases.

In the end, voters rejected Proposition 16, 52.8 percent to 47.2 percent, even though its opponents spent only $143,976 (approximately 1/300th of the amount spent by PG&E), as the National Institute on Money in State Politics points out.[24]

While both municipal utilities and CCAs are direct competitors to PG&E in the California energy market, CCAs do not typically own electrical generation or transmission infrastructure such as a municipally owned power plant. Instead they sell the energy commodity to customers after purchasing it from a variety of sources. Under a CCA system, the existing utility company continues to provide distribution, metering and billing services and may also provide electricity services to certain customers. Currently 12 California communities have either begun or are exploring the feasibility of a CCA in their area, including Berkeley, Beverly Hills, the City and County of San Francisco, Emeryville, Los Angeles County, Marin County, Oakland, Pleasanton, Richmond, San Diego County, San Marcos, Vallejo and West Hollywood.

In addition to the communities using or considering the CCA option, the South San Joaquin Irrigation District (SSJID) has also applied to the San Joaquin County Local Agency Formation Commission to provide electric distribution services to three cities. If approved, the SSJID would try to purchase distribution facilities from PG&E or, if that fails, force the company to sell via an eminent domain ruling. To try

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[22] See http://www.pgecorp.com/aboutus/corp_gov/political_engagement/corp_contribution.shtml.

[23] http://ballotpedia.org/wiki/index.php/California_Proposition_16,_Supermajority_Vote_Required_to_Create_a_Community_Choice_Aggregator_%28June_2010%29

[24] http://www.followthemoney.org/database/StateGlance/ballot.phtml?m=678

to defeat the SSJID proposal, PG&E made a $908,623 contribution to Common Sense San Joaquin to pay for an analysis of the SSJID San Joaquin Local Agency Formation Commission (LAFCo) application. Common Sense San Joaquin is a project of the Coalition for Reliable and Affordable Electricity,[25] a group whose funders include PG&E.

According to its latest 10-K annual report filed with the Securities and Exchange Commission, PG&E's 2010 revenues from California electricity distribution were $10.64 billion, generated from 5.16 million customers, with 37 percent coming from residential customers (see table). Faced with the threat of losing market share to newly created municipal utilities or CCAs, the company spent approximately $42.93 million in support on Proposition 16 in 2010, as noted, and an additional $3.5 million in 2009. This is equivalent to 0.3 percent of its total revenue of $13.84 billion for the year. The addition of the contributions used to counter the SSJID proposal does not materially change this percentage.

PG&E 2010 Revenue – California Electricity Distribution

Type of Customer	2010 Revenues			Number of Customers
	Total ($b)	Per Customer	% of Total	
Residential	$3.94	$873	37%	4,510,000
Commercial	$4.15	$7,842	39	529,318
Industrial	$1.81	$1,440,000	17	1,254
Agricultural	$.75	$6,449	7	83,787
Other *				31,743
Total	$10.64			5,160,000

* public street and highway lighting and two other electric utilities

Source: 2010 PG&E Form 10-K

If Proposition 16 had passed, PG&E would have gained back the amount spent in support of the proposition in terms of 2010 revenue merely by retaining 49,175 residential customers, 5,474 commercial customers, 30 industrial customers or 6,656 agricultural or other customers for one year. The creation of a CCA does not immediately reduce a utility company's revenue in that location to zero, and the formation of a municipal power plant would probably require the municipality to purchase the generation and transmission equipment from the existing utility. Therefore, depending on the real rate of revenue loss, it could have taken the retention of additional customers or a longer period of time before the costs spent on the campaign would have been recovered.

From a straightforward economic perspective, PG&E's spending on Proposition 16 made sense for shareholders. The company saw a threat—the potential loss of revenue from CCAs or new municipal utilities—and spent less than one-half of 1 percent of 2010 revenue to proactively combat that risk. Even though Proposition 16 failed, shareholders could conceivably look at the $42.93 million in expenditures as a risk that, if it had paid off, could have easily paid for itself through retained revenues over the next several years. The limited competition in the utility market also would have helped to enhance PG&E revenues for the foreseeable future.

But economic return is only one of the risks associated with corporate political activity. Reputational risk, while harder to quantify, is certainly something that every company may take into account before engaging in the political arena. As a utility company that generates power through nuclear and fossil fuel powered plants, PG&E will never be the darling of environmental activists, although it has received praise from numerous environmental groups for its participation in the U.S. Climate Action Partnership[26] and its withdrawal from the U.S. Chamber of Commerce over that group's opposition to alternative

[25] See http://www.commonsensesj.com/content/about-common-sense-san-joaquin.

[26] "Fighting Climate Change," PG&E website (http://www.pge.com/about/environment/pge/climate/).

energy and greenhouse gas reduction efforts.[27] In addition, PG&E has been lauded for a 500 Megawatt solar power initiative that was announced in 2009 and approved in 2010.

Much of the public goodwill the company earned from these other efforts was tarnished by the company's support for Proposition 16. Media coverage focused on the sheer amount of money that the company spent[28] and since one of the selling points for the creation of CCAs is the proposition that they will help create a market for renewable energy, PG&E was portrayed as attempting to hurt or even destroy the market for alternative energy. The Sierra Club of California concluded, "PG&E's ballot initiative makes a mockery of its self-proclaimed leadership in clean energy and climate protection, places corporate interest above the public good, and makes it more difficult to confront global climate change."[29] Given the large disparity in funding between supporters and opponents of Proposition 16, critics also claimed that PG&E—which was overwhelmingly the largest supporter—was trying to buy an amendment to the California constitution for its own benefit.

The PG&E case highlights both the potential economic rewards and reputational risks presented by political spending. Clearly the company saw an economic threat to its business, but in the process of trying to head this off, it may have eroded some of its social license to operation. The company's existing policies do not provide for any explicit board oversight of political spending, one of the central demands of governance reformers. While it is not immediately obvious that the board would have made any different choices, the lack of disclosure about who within the company makes political spending decisions makes it difficult for shareowners to understand how the decision was made and for shareowners to hold those decision-makers accountable, either positively or negatively.

Procter & Gamble, Indirect Judicial Race Spending and Independent Expenditures

Shareholders and watchdog groups trying to pin down the exact scope of corporate political activity in the post-*Citizens United* era are faced with a confusing and sometimes opaque landscape of money and the various channels through which it flows. Even at a company such as Procter & Gamble, which has adopted many of the best practices championed by shareholder activists, a confusing mix of policies, exceptions and contributions made to unaccountable groups arises and can limit the transparency of corporate contributions.

Unlike most S&P 500 companies, Procter & Gamble has a stand-alone policy on corporate political activity that includes information about lobbying, corporate contributions and political action committee activity.[30] The company also discloses its contributions to ballot initiatives and issue advocacy campaigns, trade association dues used for political expenditures and contributions from the company's political action committee. This makes it compliant with most of the best practices promoted by governance reformers and company executives who promote good oversight and transparency.

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[27] "PG&E Leaves Chamber of Commerce," Press Release, Union of Concerned Scientists, Sept. 22, 2009 (http://www.ucsusa.org/news/press_release/pge-leaves-chamber-commerce-0287.html).

[28] See Lance Williams, "PG&E Outspending Opponents $511 to $1 on Prop. 16 Campaign," *Hufffington Post*, June 2, 2010, at http://www.huffingtonpost.com/2010/06/02/pge-outspending-opponents_n_597638.html; David R. Baker, "PG&E to Spend Millions to Pass Prop. 6," *San Francisco Chronicle*, Feb. 20, 2010, at http://articles.sfgate.com/2010-02-20/business/17948310_1_pg-e-electricity-municipal-utilities; and "PG&E's Prop. 16 Ad Spending Riles Some," KCRA.com, April 5, 2010, at http://www.kcra.com/r/23061373/detail.html.

[29] See http://www.sierraclubcalifornia.org/Elections/PGE%20initiative.html.

[30] See http://www.pg.com/en_US/company/global_structure_operations/governance/governance_political.shtml.

In its policy, Procter & Gamble clearly states that it participates in the political process "by providing financial support to selected state ballot initiatives and issue advocacy campaigns that have a direct impact on the business." The company goes on to state:

> Procter & Gamble has no plans to use corporate funds to support independent political expenditures to influence federal elections, nor to make contributions to trade associations for that purpose. Further, our policy is to not use corporate funds to support 527 organizations or candidates in states where it is legally permissible to do so.

Both statements indicate Procter & Gamble does not support candidates at either the federal or state level and the company's initial disclosures for political activity in 2010 appeared to back that up.[31] On its first disclosure of initiatives and issue advocacy expenses, the company listed four corporate contributions: US Global Leadership Coalition ($15,000), USA Engage ($15,000), United for Jobs and Ohio's Future ($80,000) and Partnership for Ohio's Future ($40,000). For each contribution, Procter & Gamble provided a brief description of each group and its primary area of interest, which few companies that disclose contributions provide. None of the initial descriptions included any information on candidate contributions by any of the listed groups.

But following a 2011 shareholder proposal filed by Northstar Asset Management, which requested that the company establish an advisory vote on corporate political contribution policies and contributions, Procter & Gamble issued an addendum to its proxy statement.[32] In the addendum, the company said that while its "general policy" was to not use corporate funds to support state or local candidates or to make contributions to other groups for that purpose, it did allow for "exceptions approved by our Public Policy Team."

According to Procter & Gamble, one such exception was made in 2010. The Partnership for Ohio's Future, part of a network of organizations created by the U.S. and Ohio Chambers of Commerce, "provided educational materials regarding Ohio's judicial elections and expressed support for two judicial candidates." According to documents filed with the Ohio Secretary of State in October 2010,[33] the Partnership for Ohio's Future spent $1.57 million on independent expenditures for two candidates on the ballot for the Ohio Supreme Court. Under Ohio law, the Partnership for Ohio's Future was not required to disclose the contributions, but it did so voluntarily. In addition, the group is not required to disclose its donors, since independent expenditures are exempted from the donor reporting requirements to which most electioneering communications are subject.

While the Partnership for Ohio's Future has only been in existence since 2006, in the 2010 report, *The New Politics of Judicial Elections 2000-2009*, the group was cited as one of the "top 10 Supreme Court spenders" during the 2007-2008 election cycle. During this period, the group spent $684,623 on independent television advertisements.

Although this since has been updated, the company initially described the Partnership for Ohio's Future as a 501(c)(4) group formed by the Ohio Chamber of Commerce whose purpose was "to push for public policies that lead to greater opportunities and a higher quality of life for Ohio citizens. The Partnership encourages the public to learn about the issues and elections that impact Ohio's economy." Procter & Gamble did not mention any candidate support or candidate advocacy provided by the group—although such lack of disclosure is not unusual and Procter & Gamble is one of the few companies that provides

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[31] See http://www.pg.com/en_US/downloads/company/political_involvement/2010_Ballot_Initiatives_9-1-11_v3.pdf.

[32] See http://www.sec.gov/Archives/edgar/data/80424/000008042411000018/proposalsupplement.htm.

[33] See http://www.ohiocitizen.org/money/2010/partnership.pdf.

any descriptive details about the recipients of its contributions, as noted above. In the company's updated disclosures, Procter & Gamble includes information about the group's candidate support.

Without the Partnership for Ohio's Future's voluntary disclosure of its independent expenditure spending, it is possible that Procter & Gamble shareholders would never have had the information to adequately identify how company funds were spent. The group had publicly disclosed the contributions almost a year before Proctor & Gamble's 2011 proxy statement, and well before the company's disclosures of 2010 corporate contributions were made, and yet Procter & Gamble made no mention of the candidate contributions until four days before the company's annual meeting on October 11, 2011. If the group had chosen not to make its independent expenditure spending public, the company's indirect support for candidates would have been concealed.

Additionally, without Procter & Gamble's decision to issue the supplement to its 2011 proxy statement, investors also would not have known that the Public Policy Team could make exceptions to the company's existing policies on corporate contributions. Procter & Gamble's policies as currently posted on its website make no mention of exceptions.

As was the case with contributions by **Target, Best Buy, Polaris Industries, Regis Corp., Securian Insurance** and **3M** to the independent expenditure committee Minnesota Forward in 2010, Procter & Gamble's contributions to the Partnership for Ohio's Future show how difficult it is to track this type of spending. Absent voluntary disclosure, investors have no way of knowing how their money may be used for electioneering by groups that receive company money—unless these groups make the information public either voluntarily or to comply with state law. As of this writing, only Alaska, Arizona, Colorado, Connecticut, Iowa, Minnesota, North Carolina and South Dakota have laws that require disclosure either of amounts, donors or other details relating to independent expenditures to a state supervisory board.

Research Approach

This section explains in detail the research approach we used, the indicators we researched for each company, and the sources of data we scoured to arrive at the conclusions presented in this report.

Governance: Si2 examined the practices of U.S. companies in the S&P 500 index as of July 1, 2011, looking first at the corporate governance of political spending. Si2's governance research is based on the best practices outlined in the Conference Board's November 2010 *Handbook on Corporate Political Activity*.[34] In brief, we examined:

- *How* companies decide whether to contribute to candidates and assess the strategic value of contributions and their overall political spending programs;
- *Who* makes spending decisions (at both the board and management level);
- *What process* companies follow to make these decisions;
- *What controls* exist to ensure these decisions reflect the best interests of companies and their shareholders; and
- Corporate *reporting* practices.

Spending: We also compiled for the entire index the publicly available spending records for these companies' contributions for federal lobbying, 527 political committees and state spending on candidates, parties and ballot initiatives, weeding out any identifiable political action committee spending to focus only on the amounts disbursed from corporate treasuries. The resulting figures provide a direct political spending footprint for each firm. We normalized these figures by revenue to determine a political spending intensity calculation for each company, showing how much each spent per dollar of revenue in the most recent fiscal year. This allows apples-to-apples comparisons across sectors and spending categories.

Sectors: The results of our findings are presented in this report, with a comparison of the data by industry sector and revenue tier. We used the following economic sectors established by the Global Industry Classification Standard (GICS):[35]

- Energy
- Materials
- Industrials (including the industries of Capital Goods; Commercial & Professional Services; and Transportation)
- Consumer Discretionary (Automobiles & Components; Consumer Durables & Apparel; Consumer Services; and Media & Retailing)
- Consumer Staples (Food & Staples Retailing; Food, Beverage & Tobacco; and Household & Personal Products)
- Health Care (Health Care Equipment & Services and Pharmaceuticals, Biotechnology & Life Sciences)

[34] The report is available at http://www.conference-board.org/press/pressdetail.cfm?pressid=4049, free of charge.

[35] The GICS system was developed by Standard & Poor's and MSCI Barra. See http://www.standardandpoors.com/indices/gics/en/us.

- Financials (Banks; Diversified Financials; Insurance; and Real Estate)
- Information Technology (Software & Services; Technology Hardware & Equipment; and Semiconductors & Semiconductor Equipment)
- Telecommunication Services
- Utilities

Revenue tiers: Si2 used a very basic revenue analysis, dividing up the companies into quintiles grouped by the revenue reported in their most recent annual financial statements, which makes clear the huge size of these companies and their vast resources. There are 492 U.S. companies in the index and their revenue ranges for the tiers was as follows:

- Tier 1: $418.95 billion to $21.6 billion
- Tier 2: $21.3 billion to $10.0 billion
- Tier 3: $9.9 billion to $5.4 billion
- Tier 4: $5.4 billion to $3.1 billion
- Tier 5: $3.0 billion to $681 million

Profile Compilation

Si2 tried to discern the broad picture of corporate involvement in campaign spending, including any form of support for entities active in political campaigns, not just direct contributions to candidates or parties. This year we added an initial examination of lobbying, which is highly regulated. Lobbying can be seen as the other side of the electoral money coin: the money that is used to influence politicians who earlier received cash for their campaigns to get into office in the first place. Last year we started with the CPA's database, which at the time held information on 180 large publicly traded U.S. companies,[36] which it shared with us. We then expanded our attention to include the entire S&P 500 index—research that we completed again in 2011; this allows us to show how the corporate governance of political spending has changed.

Instead of sending a detailed survey to companies as our primary research approach this year, we focused on carefully parsing the information companies make publicly available on their websites about the policies and spending. We sought answers to the questions noted below, many of which we also examined in 2010. (Indicators used in the analysis are highlighted.)

1. Policy and decision-making

- Whether the company has a **policy** and its **URL(s)**. We considered companies to have a policy if they mentioned anything about spending money in the political arena: either through a **political action committee** (PAC) or from **corporate treasury funds** ("corporate contributions").
    - The location of the policy: if it is a **stand-alone document** and/or if it is in the company's employee **code of conduct**.
    - If the policy mentions **lobbying**.

[36] The Center's database of companies and more than 50 "Political Transparency & Accountability Reports" can be accessed on its website at http://www.politicalaccountability.net.

- Whether the company discloses which of its officials are responsible for political spending decisions, including the **titles of the officials** and any details on their position within the corporation's chain of command.
- Which **officers** are involved in *recommending, approving and reviewing* political spending, at the following levels:
    - **Full board** or **board committee**
    - **CEO**
    - **Senior management** (and title)
    - **Line management**
    - **Internal** and/or **external counsel**
    - **Public affairs/government relations**
- The nature of disclosure about the **decision making and review process** for political spending; we captured the actual text from each company's stated policy for further analysis.
- If a company has a stated **policy not to spend** money in politics and what the specific prohibitions cover:
    - **Candidates**
    - **Parties**
    - **527 political committees**
    - **501(c)4 social welfare organizations**
- What **spending justification** a company provides, capturing the actual text of what companies say for additional textual analysis.

2. Oversight

- Whether there is explicit **board oversight** regarding political spending practices (either as stated in the spending policy or as indicated in a board committee charter)
- The **frequency of review**/oversight by the board and management—*semi-annual, annual* or *other*.
- The description of this **oversight process**.

3. Methods of Giving and Disclosure

We considered methods through which money from companies or their executives may make its way either directly or indirectly into the campaign coffers of political candidates and groups. We paid particular attention to any discussion of independent expenditures, since *Citizens United* removed all limits on the amounts that may be spent by companies or other groups to advocate for or against the election of specific candidates to political office at any level of government in the United States. These "independent expenditures" used in public communications leading up elections ("electioneering") may not be directly coordinated with a candidate but can have a substantial impact on the course of a campaign. The decision therefore has opened up a potential flood of new cash in federal elections, where such spending previously was forbidden. (State election law varies, as the Context section makes clear on p.

69). The legal interpretation of what constitutes coordination of theoretically independent expenditures with campaigns is far from settled, further focusing attention on this means of spending. [37]

We gathered information on the following methods of giving reported by companies:

- If the company has a **political action committee (PAC)**, its **name** and **when it was last active**.
- If the company contributes **corporate treasury funds** for any political activities.
- If the company spends money in campaigns through the use of independent expenditures:
  - What the company's **independent expenditures policy** says (capturing the full text).
- The disclosures a company makes on its website about political spending in the following areas:
  - **PACs** (we considered direct links to federal PAC reports available at the FEC to be web-site disclosure, but did not give credit for disclosure if the provided link was only to the FEC's main website).
  - **Any treasury spending** and specifically:
    - Whether **independent expenditures** are included;
    - Support for non-profit groups including **trade associations** and **501(4)s; and**
    - **Lobbying** (as with PACs, we considered direct links to the company's report on the website of the Senate Office of Public Records to be website disclosure, but did not give credit for disclosure if the provided link was only to the Senate website)

4. Indirect Giving

Two types of tax-exempt groups play important roles in campaign finance. Trade associations (with non-profit status under section 501(c)6 of the tax code) and social welfare organizations (with non-profit status under section 501(c)4 of the tax code[38]) both receive money from companies, although giving to the latter appears to be far more limited. Investor activists want companies to disclose how much of their contributions to these groups is used for political expenditures, since there are no legal requirements for disclosure of this information; they argue the contributions pose risks to companies.[39] We therefore examined the following:

[37] Many of the new "super PAC" independent expenditure political committees springing up in the wake of *Citizens United* are staffed by people with close ties to campaigns, raising questions about what "non-coordination" really means.

[38] The IRS explains that 501(c)4 groups are "operated exclusively to promote social welfare." Such an organization "must operate primarily to further the common good and general welfare of the people of the community (such as by bringing about civic betterment and social improvements)....Seeking legislation germane to the organization's programs is a permissible means of attaining social welfare purposes. Thus, a section 501(c)4 social welfare organization may further its exempt purposes through lobbying as its primary activity without jeopardizing its exempt status." But it "may be required to either provide notice to its members regarding the percentage of dues paid that are applicable to lobbying activities or pay a proxy tax." In addition, "The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c)4 social welfare organization may engage in some political activities, so long as that is not its primary activity." See http://www.irs.gov/charities/nonprofits/article/0,,id=96178,00.html. Additional information about IRS tax rules for political organizations appears on the Internal Revenue Service website at http://www.irs.gov/charities/political/article/0,,id=155034,00.html.

[39] Bruce F. Freed and Jamie Carroll, *Hidden Rivers: How Trade Associations Conceal Corporate Political Spending and Its Threat to Shoreholders*, Center for Political Accountability, 2006.
Available at http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932.

- If the company has articulated a **policy** about its payments to:
  - **Trade associations**
  - **Other tax-exempt groups**
- If a company **discloses**:
  - **Memberships**
  - **Payments** of corporate dues used by these groups for political purposes, sums which the groups must track and disclose to their donors (unless they elect to pay tax on these sums) to comply with Section 162(e)1 of the Internal Revenue Code.

5. Spending Data

For each of the companies, Si2 reviewed two public databases that aggregate information on political spending. The Center for Responsive Politics (www.opensecrets.org) collects and reports on federal PAC spending reported to the Federal Election Commission (FEC) as well as a wealth of additional information, including contributions and disbursements from political committees organized under Section 527 of the Internal Revenue Code.[40] The National Institute on Money in State Politics (www.followthemoney.org) aggregates data reported to state disclosure agencies about campaign spending. Si2 also looked at the information provided by Congressional Quarterly's CQ Moneyline website (http://moneyline.cq.com), which reports on a broad range of political spending, as well. CQ Moneyline makes available its proprietary database of campaign spending information via subscription, but we relied only on what is available to the public free of charge.

In 2010, Si2 also examined these data sources, but only tallied the different *categories* of spending. This year we collected all the spending records for contributions connected to companies in the study. The Center for Responsive Politics makes available on its website the files about these spending records. The National Institute on Money in State Politics also participated in our research process and ran queries on its substantial database of state spending information to provide a listing of all contributions likely connected to the study universe companies. Si2 reviewed all these datasets and compiled spending data as follows:

- **Federal Level**
  - **Federal lobbying** (as reported to the Senate Office of Public Records and aggregated by the Center for Responsive Politics) for 2009 through the first quarter of 2011. Just over 4,200 quarterly reporting records out of about 135,500 relate to companies in the study.
  - **527 political committees** (as reported to the Federal Election Commission and aggregated by the Center for Responsive Politics), which includes the two most common party-connected entities that receive corporate money—the Democratic Governors Association and the Republican Governors Association, for 2009 and 2010, with a few early 2011 reports. About 4,300 records out of about 168,000 come from companies in the S&P 500.

[40] So-called "527 groups" are created primarily to influence the nomination, election, appointment or defeat of candidates for public office. See 26 U.S.C. § 527 at http://www.law.cornell.edu/uscode/26/527.html.

- **State Level** – via PACs and corporate contributions (reported by individual campaign organizations in all the U.S. states, as aggregated by the National Institute on Money in State Politics), including 239,000 records since 2005 on contributions from companies and their PACs to:
    - Candidates
    - Parties
    - Ballot measure committees

  In conducting a gap analysis between what this information shows and the handful of comprehensive voluntary reports issued by companies, we found that the Institute's data generally understate state spending by companies, particularly when it comes to state and local level political committees (spending which also is not captured by the Center for Responsive Politics 527 database).

There is another significant blind spot in the spending record, which shareholder activists address in their disclosure campaigns. The lobbying data we examined only identifies the amounts companies contributed to their federally registered lobbyists and excludes lobbying and other political expenditures that may occur indirectly through contributions to trade associations and other politically active non-profit organizations. Still, the S27 and state level data include records for each contribution, including the recipient's name, party affiliation and election district where relevant—making an analysis of corporate political preferences possible at the national and state level, in considerable detail. Since this report is focused on the governance of spending, we only dip a toe in the water of the type of additional analysis that is possible using the data we have compiled. (Noted below are a number of avenues for further possible research.)

Profile Review

After gathering the data noted above for all 492 U.S. firms in the S&P 500, Si2 compiled governance and spending profiles and sent them to each of the companies, providing them with the opportunity to correct anything we got wrong. We also asked three sets of questions:

1. a. Do you support standardized corporate political spending disclosure in securities filings? Why or why not?
   b. Do you support a shareholder advisory vote on political campaign spending? Why or why not?
2. Does your company now make, or does it plan to make, any independent expenditures with corporate funds to support or oppose candidates for political office? At the federal or state level? Why or why not?
3. In the last year, has your company changed its oversight of indirect political spending – such as contributions to trade associations or other non-profit groups involved in political campaigns? Please explain.

Corporate feedback: Companies remain wary of discussing their policies and providing information beyond what they have already chosen to disclose on their websites, as we found last year. In each year, about three-dozen companies provided information in response to our request for information and not all respondents replied to all questions. The sample size is small, but comments provided by

respondents add useful detail to the overall findings we reached from our review of companies' published policies. Many of the companies asked that their responses to our questions not be attributed to them. Si2 thanks each of the respondents for their willingness to share their views on the current policy options being discussed in Washington to address political spending. Nearly all the statements attributed to individual companies in this report therefore come from information that has been posted on company websites.

Additional information on corporate perspectives comes from comments companies made at a seminar on the subject held by the Conference Board in mid-October 2011 in New York City. Working with the Center for Political Accountability, in 2011 the organization set up a political spending committee to define best practices in oversight and disclosure. Earlier, in fall 2010, the Conference Board released its *Handbook on Political Spending* that articulates the best practices standards that have shaped our research approach, as noted above. More information about the committee, whose members include representatives from **Campbell Soup, Exelon, Merck, Microsoft, Pfizer, Prudential Financial** and **Coca-Cola**—is on the Conference Board's website.[41]

[41] See http://www.conference-board.org/politicalspending/

Appendix I: Context

Avenues for Political Spending

Federal Campaigns

At the federal level corporate political contributions are governed by the Tillman Act of 1907, the Federal Election Campaign Act (FECA) of 1971, including its subsequent amendments in 1974 and 1979, and the Bipartisan Campaign Reform Act (BCRA) of 2002. However, the *Citizens United* ruling has thrown out many established limits on campaign spending and allows corporations to fund any type of political advertisement, including express advocacy advertisements for or against a particular candidate for federal office. However, as direct corporate contributions to federal candidates or campaigns are still prohibited, any corporate spending at the federal level must be done independently, with no coordination between the corporation and candidates or their campaign committees, hence the term "independent expenditures."

Hard/Soft Money: Direct contributions to federal candidates or their campaigns are known as "hard money." Despite the *Citizens United* ruling, the Tillman Act of 1907 still bars corporations from contributing money directly to federal candidates.

Soft money donations are those that are made to national or state political parties for party building or other activities not directly related to the election of a specific candidate or to non-profit 527 groups. Corporate soft money donations to national political parties are banned by BCRA, but state parties are allowed to collect up to $10,000 per donor for federal election activities.

527 committees: 527 groups are tax-exempt political groups. Any 527 group that advocates for or against a candidate must be registered as a "political committee" with the FEC (this includes all federal political action committees). All 527s that register as political committees are subject to FEC regulations.

Certain 527 groups may choose to not register as political committees because they do not advocate for or against a specific candidate and are therefore not regulated by the FEC. Despite the ban on advocating for or against a specific candidate, these groups typically design their advertisements to make their intentions clear to voters. Unregulated 527 groups have the right to raise and spend unlimited money to influence elections as long as they do not coordinate their actions with either a specific candidate or party. Corporate contributions to unregulated 527 groups are unlimited and need not be disclosed by a company. But the 527s must disclose to the Internal Revenue Service the names and addresses of contributors who give them more than $200, unless the 527 decides to pay taxes on the donation.

Political Action Committees: Federal Political Action Committees (PACs) are political groups that are formed to elect political candidates or to advance a particular political agenda, issue or legislation. Federal PACs are required to register with the FEC.

Corporations and unions are not allowed to contribute to federal PACs. However, they may provide administrative support (in the form of employees and administrative costs) to a PAC sponsored by the company. Solicitations for contributions to a company's PAC are limited to a restricted class of donors, which includes company executives and administrative personnel and their families, as well as stockholders and their families

501(c)4s: A 501(c)4 group is defined by the Internal Revenue Service as a social welfare organization. These groups are allowed to engage in political campaigns and elections that promote the election or defeat of a particular candidate and unlimited lobbying as long as that activity does not constitute their

primary activity. There are no restrictions on corporate contributions to these groups and the groups are not required to report a list of their donors on their annual financial reports (Form 990s) filed with the IRS.

Independent expenditure-only committees: The 2010 elections saw the rise of a new type of organization spending money on elections. A July 2010 FEC ruling approved the creation of independent expenditure-only groups ("super PACs") not bound by the limitations placed on federal PACs. Super PACs may receive unlimited donations from corporations, unions, trade associations, other groups or individuals and spend those amounts expressly advocating for or against federal candidates.

As independent groups, super PACs are not allowed to coordinate their activity with individual candidates or parties. But the 2010 elections showed how easily those rules can be subverted. During the 2010 elections, national political parties merely had to state publicly where they would be focusing their spending or what races they considered to be priorities and then independent groups could follow the party's lead with spending on advertising, electioneering or get-out-the-vote activities. Since there was no official coordination, these tactics were perfectly legal.

Unless registered as a 501(c)(4) group (which some of the largest independent expenditure-only groups have done), super PACs must provide a report to the FEC at least quarterly. The reports must provide the names of all donors as well as donation amounts and expenditures. However, quarterly-filing super PACs can raise and spend unlimited amounts of money in the final month before an election and not disclose these activities until well after the election.

State Campaigns

Hard/soft money: While recent legal developments have invalidated many state laws governing independent expenditures by corporations, state laws regarding hard money contributions to candidates and soft money contributions to parties have not been affected.

Laws on hard and soft money contributions by corporations vary from state to state. Corporations are prohibited from making hard money contributions to individual candidates in 22 states while another 22 states place limits on these contributions that range from $500 per candidate per election all the way up to $25,900. Four states do not place any limits on the amounts that corporations may donate to individual candidates.

As of October 2011, 13 states have no limits on the amount of corporate soft money that may be donated to state political parties, while 22 states prohibit it altogether. The remaining 15 states place some sort of limit on corporate contributions to state parties. Those limits range from $500 per election up to $30,200 per year.

PACs: Like contributions to candidates and other groups, PAC donation limitations in the states vary. State-level PAC contributions from corporations are prohibited in 21 states, while 12 states allow unlimited giving by corporations to PACs. All states that allow unlimited corporate contributions to PACs also allow unlimited PAC-to-PAC transfers of money. The remaining 17 states impose some limits that range from $500 per election up to $100,000 over a four-year period.

State judicial contests: Approximately 89 percent of all state judges are subject to elections and those justices preside over a large percentage of all cases heard in the United States. In 39 states, at least some of the judges are elected to the bench either through competitive elections or "retention" elections, which only feature the sitting judge.

Independent expenditures: As well as redefining the laws by which corporations may participate in federal elections, the *Citizens United* ruling essentially overturned laws in 24 states that limited or prohi-

bited corporate spending in state elections. As a result, 17 states have introduced or passed laws related to independent corporate spending. Most of these laws require independent groups to disclose amounts spent after reaching a certain threshold.

So far, Alaska, Arizona, Colorado, Connecticut, Iowa, Minnesota, North Carolina and South Dakota have passed laws that require disclosure either of amounts, donors or other details relating to independent expenditures to a state supervisory board. Iowa and Massachusetts also require that the CEOs of companies that fund political advertisements include an "approval message" in the advertisement. Tennessee has passed a law that defines all corporations making independent expenditures as political committees and therefore subject to existing regulations.

Other Political Activity

Trade associations: Most trade associations are considered non-profit groups by the IRS and are listed as 501(c)6 groups. Those groups must file an annual Form 990, disclosing their total dues received for the year and the amount of money spent on lobbying and political activity. Trade associations must also disclose to anyone paying dues the estimated amounts of those dues that will be used for lobbying and political activities unless the association chooses to pay the required tax on the spending, instead of passing that tax back to member companies.

Companies are not required to disclose their memberships in such associations and the associations in turn are not required to disclose their members. The recent judicial and FEC rulings have also opened the door for trade associations to make unlimited donations to independent expenditure groups or to expressly advocate for or against individual candidates or issues.

State ballot initiatives: Initiatives typically may be placed on the ballot after citizens collect a required number of signatures, allowing sponsors of the initiative to bypass the legislature and take lawmaking directly to the electorate. Corporate contributions to initiatives have no limits since there is very little regulation on the subject. According to the Ballot Initiative Strategy Center, 24 states and the District of Columbia allow for some type of ballot initiative.

In its 1978 decision *First National Bank of Boston v. Bellotti*, the U.S. Supreme Court upheld the right of corporations to spend money in state ballot initiatives or referendums, when it overturned a Massachusetts law that banned such spending unless the proposal materially affected "any of the property, business or assets of the corporation." In the opinion that overturned the law on First Amendment grounds, Justice Lewis Powell ruled that such prohibitions infringed on corporations "protected speech in a manner unjustified by a compelling state interest." A 1996 Montana law, passed by initiative, banning direct corporate contributions from the corporate treasury to initiative campaigns, also was struck down by the U.S. Court of Appeals for the Ninth Circuit in 2000. The justices in that case pointed to *Bellotti* as the precedent for their ruling. Later, the U.S. Supreme Court denied a subsequent petition by the State of Montana for review.

Lobbying: Lobbying is simply the act of trying to influence an elected official on a particular issue, usually through meetings or communications with an elected official or legislative staff. Lobbying of elected officials is protected by the First Amendment and anyone may do it. Professional lobbyists—who are frequently former elected officials, former members of their staffs or former government employees—are hired by all major industry associations (and some individual companies) to advance their particular interests, especially at the federal level. Many major U.S. corporations also have in-house lobbyists as part of company Government Relations or Government Affairs departments.

While anyone may lobby elected representatives, those who spend more than 50 hours lobbying or receive more than $6,000 for lobbying services from a single client within a six month period are required

to register with both the U.S. House of Representatives and the U.S. Senate. Lobbyists are subject to a number of regulations, the most recent of which is the Honest Leadership and Open Government Act of 2007. According to the Center for Responsive Politics, there are 11,674 unique, registered lobbyists who have actively lobbied the U.S. government in 2011 so far.

Many professional lobbyists and their firms make contributions to candidates, their campaigns and various PACs. Given the existing restrictions on gifts, food and travel, these donations may be seen as a loophole in the system. Instead of providing travel to a lobbyist-sponsored event (which would be illegal), the lobbyist simply donates the money for travel to a PAC, which may in turn arrange and pay travel expenses for the particular legislator.

Given the clarification in SEC interpretations discussed below, lobbying issues have become more of focus for shareholders in 2011, a trend that will grow in 2012.

Shareholder Campaigns and Corporate Responses

Investors who want to pressure companies for change have the option of initiating a shareholder proposal campaign. To propose a resolution, an investor must meet the ownership and subject matter requirements of the Shareholder Proposal Rule, which is administered by the Securities and Exchange Commission (SEC). If these conditions are met, companies must print proposals in their "proxy statements," which are made available to all investors in the company who then may vote; tallies are announced at or shortly following annual meetings. Resolutions focused on social policy issues rarely pass, but overall support levels have doubled in the last decade and the resolutions are an important barometer of investor sentiment on contentious public policy issues.

In 2011, investors had a wider array of political spending proposals to consider than in the past, as proponents marshaled discontent about the January 2010 U.S. Supreme Court *Citizens United* decision and filed many new proposals—increasing the total filed by half, to 97, not including another six proposals that did not appear in proxy statements that were presented from the floor of annual meetings. (Nearly all the 2010 proposals had been filed before the decision was issued.) The resolutions built on the work that has been coordinated since the 2004 proxy season by the Center for Political Accountability (CPA), a non-profit group that advocates for more political spending transparency. In addition to the standard CPA proposal, the 2011 proposals offered new twists about the various indirect ways corporate money makes its way into the political system (often via non-profit groups such as trade associations and "social welfare" organizations that are a growing source of campaign cash), suggesting in a few cases that shareholders be allowed to vote on company spending.

In a move that may signal an increase in political spending-related proposals, in 2010 and 2011 the SEC staff clarified its views about the admissibility of resolutions concerning lobbying. Previous resolutions had focused on lobbying on specific issues, such as tobacco advertising or climate change, and the staff had held that they were excludable from proxy statements on "ordinary business grounds." But in response to a broad resolution to **PepsiCo** from the National Legal and Policy Center in 2010, and a 2011 trade union lobbying proposal at **International Business Machines**, the staff said the companies could not exclude the proposals because they focused primarily on general political activities and did "not seek to micromanage the company to such a degree that exclusion of the proposal would be appropriate." The staff continued to allow companies to omit proposals that dealt with lobbying on particular issues.

In addition to proposals in proxy statements, the 2011 proxy season also saw a campaign containing half a dozen proposals spearheaded by Walden Asset Management that were offered for consideration from the floor of annual meetings. These proposals highlighted concerns Walden and others have about companies' relationships with the U.S. Chamber of Commerce, which spent heavily in the fall 2010 elec-

tion campaign and does not disclose the sources of its funding. (Two similar resolutions proposed earlier by Walden were included in proxy statements and also came to votes.)

Mainstream investors tend to look kindly on political spending proposals and gave most of the proposals high levels of support, including one of the five majority votes of the season for social and environmental issues, at **Sprint Nextel** (53.3 percent). The resolutions also prompted a wave of agreements between proponents and companies about more disclosure of spending and oversight mechanisms, which will come under intensified scrutiny as the 2012 Presidential election nears.

The CPA Campaign

The majority of the proposals on political spending continued to be coordinated by the Center for Political Accountability (CPA). The CPA's investor partners who sponsor the proposals include an array of public pension funds, socially responsible investing firms, religious groups and foundations. The standard resolution asked for semi-annual reporting on how companies govern their political spending and disclosure of what they spend, both directly in campaign contributions to candidates and political groups and indirectly through trade associations and other non-profit groups. It was reformulated and streamlined slightly in 2011 so that it asked only for the title, not the name, of company officials involved in political spending decisions. It also removed a former specific legal reference.

The standard CPA proposal requested that the company publish the following information on the company website, in semi-annual reports:

1. Policies and procedures for political contributions and expenditures (both direct and indirect) made with corporate funds.
2. Monetary and non-monetary contributions and expenditures (direct and indirect) used to participate or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, and used in any attempt to influence the general public, or segments thereof, with respect to elections or referenda. The report shall include:
    a. An accounting through an itemized report that includes the identity of the recipient as well as the amount paid to each recipient of the Company's funds that are used for political contributions or expenditures as described above; and
    b. The title(s) of the person(s) in the Company who participated in making the decisions to make the political contribution or expenditure.

Two companies targeted by the CPA because of trade association memberships (**ConocoPhillips** and **Sara Lee)** received a slightly different proposal focused on indirect political spending.

Votes: Thirty-four of the expected 35 votes have been tallied (one more is pending, at **Archer Daniels Midland** on Nov. 3) and average support for these proposals climbed to 33 percent, up from 30.5 percent in 2010. Eight were withdrawn after companies agreed to adopt the CPA's model code for governance and spending disclosure. Just three were omitted—on technical grounds at **Amazon.com** and **Comcast** and at **Ford Motor** because longtime shareholder advocate Evelyn Davis preempted the CPA proposal with a similar one of her own.

Eighteen of the proposals were resubmissions from 2010, as noted on the table. Most got about what they earned in 2010 or a little more. Substantial drops in votes occurred at **Express Scripts** (down to 29.6 percent from 42 percent in 2010) and **Goldman Sachs** where the company had changed its policy after the proxy statement was printed (13.8 percent, down from 42 percent), but big jumps occurred at **Valero Energy** (35.7 percent, up from 26.5 percent) and **Wellcare Health Plans** (42.5 percent, up from 23.3 percent).

Withdrawals and SEC action: Proponents withdrew eight of the CPA proposals after discussions with companies about their disclosure policies.

None of the substantive challenges lodged at the SEC by companies succeeded. **Boeing** argued the proposal was moot since it had changed its policies; it also said it could not disclose indirect spending by trade groups it supports since it might not know how such money is spent. **JPMorgan Chase** and **Goldman Sachs** contended the proposal was too vague about intervening in political campaigns and trying to influence the public. Finally, **Southwestern Energy** also said the proposal was moot given its policies. The SEC staff rejected all these assertions.

Center for Political Accountability Proposals in 2011

Company	Primary Proponent	Status/ Vote (%)
Allstate	K.C. Firefighters	37.0 ↺
Anadarko Petroleum	NYSCRF	38.1
A. Daniels Midland	Teamsters	11/3 mtg
AT&T	Domini Soc. Inv.	31.0
BB&T	LiUNA	32.3 ↺
Boeing	Newground Soc. Inv.	22.1 × ↺
Caterpillar	NYSCRF	34.7
CenturyLink	CWA	34.8
Charles Schwab	NYC pension funds	31.0 ↺
Citigroup	K.C. Firefighters	30.0 ↺
ConocoPhillips	N. Cummings Fndn	27.0 ↺
Coventry Hlth Care	NYC pension funds	44.3 ↺
CVS Caremark	Green Century	39.1 ↺
DTE Energy	NYC pension funds	27.5 ↺
EOG Resources	Mercy Investment	42.5
Express Scripts	K.C. Firefighters	29.6 ↺
FedEx	NYC pension funds	27.7
Goldman Sachs	Domini Social Inv.	13.8 × ↺
Halliburton	Trillium Asset Mgt	46.5 ↺
JPMorgan Chase	Domini Social Inv.	37.4 ×
Lorillard	NYSCRF	45.8
Lowe's	K.C. Firefighters	36.1
Nat'l Oilwell Varco	N. Cummings Fndn	35.2
Northrop Grumman	Mercy Investment	38.1
R. R. Donnelley	NYSCRF	48.7
Regions Financial	NYC pension funds	27.9 ↺
Sara Lee	Teamsters	13.0
Sears Holdings	NYSCRF	5.6
SW Energy	K.C. Firefighters	27.6 × ↺
Sprint Nextel	NYC pension funds	53.4 ↺
State Street	Trillium Asset Mgt	44.1
Valero Energy	N. Cummings Fndn	35.7 ↺
Wal-Mart Stores	K.C. Firefighters	13.3 ↺
WellCare Hlth Plans	Amalgamated Bank	42.5 ↺
Windstream	CWA	42.0
Eastman Kodak	Green Century	withdrawn
Limited Brands	NYSCRF	
Marriott Int'l	NYSCRF	
Massey Energy	LiUNA	
Molson Coors	NYSCRF	
Wells Fargo	K.C. Firefighters	
Yum Brands	NYSCRF	
Ameriprise Financial	LiUNA	
Amazon.com	Newground Soc. Inv.	omitted (b)
Comcast	Joseph F. Granata	omitted (b)
Ford Motor	Trillium Asset Mgt	omitted (i-11)

b – insufficient proof of stock ownership i-11 – duplicative × SEC challenge rejected ↺ resubmission
NYSCRF – New York State Common Retirement Fund
CWA – Communication Workers of America
Liuna – Laborers International Union of North America

Indirect Spending

In 2011, shareholder proposals increasingly focused on the ways in which companies can spend money indirectly in political campaigns, an unsurprising emphasis given recent legal developments that allow companies to spend more and disclose less. Companies that have adopted political contribution policies that do not address indirect spending have found themselves targeted by these proposals.

Several proposals made concerns about indirect flows of money into politics, including specially tailored CPA proposals at **ConocoPhillips** and **Sara Lee**. Socially responsible investing firms joined by the Tides and Nathan Cummings Foundations worked on proposals at companies that sit on the board of the U.S. Chamber of Commerce, in addition to targeting companies that have been involved in the political arena

Other Political Spending Proposals			
Company	**Proposal**	**Proponent**	**Status/Vote**
Indirect Spending*			
IBM ✗	report on political spending & trade groups	Walden Asset Mgt.	31.4
3M	report on political spending and potential impact	Trillium	35.8
Occidental Petroleum		Green Century	30.6
PepsiCo		Walden Asset Mgt.	11.0
Valero Energy		Unitarian Universalists	34.8
AT&T		Walden Asset Mgt.	withdrawn
Best Buy		Trillium	
JPMorgan Chase		Tides Foundation	
Pentair		Trillium	
Pfizer		Walden Asset Mgt.	
Tesoro		Nathan Cummings Fndn	
Target ✗		Walden Asset Mgt.	
United Parcel Service ✗		Walden Asset Mgt.	
Votes on Spending			
Avery Dennison	require shareholder approval of political spending	James W. Mackie	omitted (b)
Becton Dickinson			omitted (e-2)
Dominion Resources ✗			withdrawn
Exxon Mobil ✗			
FedEx	allow advisory vote on political spending	Northstar Asset Mgt	omitted (i-11)
Home Depot			5.0
Procter & Gamble			6.7
United Health Group		CT Retirement Plans	withdrawn
Wellpoint			
Lobbying			
Exxon Mobil	report on political spending and lobbying	LiUNA	23.6
Bank of America	report on lobbying	AFSCME	32.7 ×
CIGNA		Srs. Humility of Mary	withdrawn ✗
Citigroup		AFSCME	omitted (i-11)
ConocoPhillips			26.4
IBM			28.5 ×
Lockheed Martin			withdrawn
Occidental Petroleum			omitted (i-11)
Prudential Financial			8.0
Raytheon			25.6 ×
Individuals			
Citigroup	affirm political non-partisanship	Evelyn Davis	7.9 ↺
JPMorgan Chase			6.5 ↺
Ford Motor	disclose political contributions in newspapers		4.2
Pfizer			4.6
Bank of America	disclose prior government service		4.6 ↺
Verizon			11.6
Archer Daniels Midland	stop political spending	Marie Bogda	Nov. 3 mtg

b –insufficient proof ownership e-2 – submitted late × SEC challenge rejected ✗SEC challenge lodged ↺ resubmission

*In addition to the proposals listed in this table that appeared in proxy statements, Walden Asset Management proposed resolutions from the floor at 3M, ConocoPhillips, CVS Caremark, Eastman Kodak and JPMorgan Chase and withdrew a planned floor resolution at Pfizer. The floor resolutions did not appear in proxy statements but were included in the meeting agendas.

in other ways. All these resolutions used the same resolved clause, asking for a "comprehensive review of all political contributions and spending processes." The proponents wanted companies to scrutinize how their campaign spending might conflict with their stated public policy goals, in particular.**Votes:** Support was generally high, with all but **PepsiCo** getting more than 30 percent (it got just 11 percent there when the proxy advisory firm ISS recommended against it, in contrast to the others). Two votes were at companies—**Occidental Petroleum** and **Valero Energy**—that gave money to support a California ballot initiative (Proposition 23) that would have overturned the state's landmark climate change law. 3M had given money in 2010 to a political committee that supported unsuccessful Minnesota gubernatorial candidate Tom Emmer (R), who voiced opposition to gay rights while supporting business friendly initiatives; unlike three other Minnesota-based companies (see below), **3M** did not reach an accord with the proponents.

Walden used a slightly different formulation at **IBM**, asking for a "comprehensive review" of the company's direct and indirect political spending, but also zeroing in on the company's relationship with the U.S. Chamber. The proposal ended up earning 31.4 percent.

Withdrawals: In a striking development for a first-year effort, more than half of the new indirect spending proposals were withdrawn after the proponents were satisfied with discussions they had with companies. **Best Buy, Pentair** and **Target** all agreed to change their policies regarding indirect spending; all are based in Minnesota and each had given money indirectly to the Tom Emmer campaign through Minnesota Forward, a political committee. As noted above, in Target's case the contribution prompted a nationwide boycott from the Human Rights Campaign, the country's largest LGBT organization, which highlighted the contrast between Emmer's views and the company's gay-friendly policies. Proponents also were satisfied with their discussions at **AT&T** and **JPMorgan Chase**, and withdrew at **United Parcel Service** after the company clarified it does not make campaign contributions. **Tesoro**, which had helped bankroll Proposition 23 in California alongside Occidental and **Valero Energy**, agreed to change its policy and include more reporting and oversight in exchange for the withdrawal. Finally, **Pfizer** said it would institute a policy not to give via independent expenditures in elections.

Floor resolutions: At half a dozen companies, despite withdrawal agreements, the proponents also raised concerns about support for the Chamber of Commerce from the floor of the annual meeting, as allowed under Rule 14a-4 of the Shareholder Proposal Rule. These proposals were not included in proxy statements but they were official agenda items at meetings and prompted boards to respond to the issue publicly; all were voted down by large margins and Si2 is not including these special proposals in its tally of vote results given the different way in which they were raised. Walden Asset Management again took the lead in this effort, at **3M, ConocoPhillips, CVS Caremark, Eastman Kodak** and **JPMorgan Chase.** Walden withdrew the floor proposal at **Pfizer** after discussions with the company.

Advisory Votes on Spending

A new set of proposals has been inspired by the successful "say-on-pay" campaign that has culminated in a new requirement that allows shareholders to cast advisory votes on executive pay, a provision of the Dodd-Frank financial reform law enacted in 2010. Following this model, investors filed nine resolutions that requested shareholder input on political spending in 2011. Only two proposals went to a vote. The **Home Depot** and **Procter & Gamble** proposals only earned 5 percent and 6.7 percent, respectively, but they prompted considerable press coverage and may be a bellwether for further resolutions of a similar ilk in 2012. The Home Depot resolution asked that shareholders be provided with a chance to prospectively approve policies and expenditures for electioneering and to receive a retrospective report on such spending from the previous year. The proposal submitted at Procter & Gamble was similar,

but, unlike at Home Depot, did not limit those expenditures to only electioneering communications and instead included all political contributions.

Home Depot challenged the resolution at the SEC, arguing it was moot, dealt with ordinary business, and was too vague, but the SEC disagreed and said it must be included in the proxy statement. The proposal was omitted at **FedEx,** on the grounds that it was too similar to another proposal received first using the CPA disclosure formulation.

The Connecticut Retirement Plans withdrew a different, detailed resolution that called for retrospective ratification of all company political spending, including lobbying, in the previous year at **United Health Group** and **Wellpoint** after discussions.

Individual proponent James Mackie wanted a ban on political contributions unless they are approved by 75 percent of the outstanding shares, a very high bar. Two of his proposals were omitted on technical grounds (at **Avery Dennison** and **Becton Dickinson**) and he withdrew the other two (at **Dominion Resources** and **ExxonMobil**).

Lobbying

The American Federal of State, County and Municipal Employees (AFSCME) and a union took up the other side of the electoral coin and asked for reports on lobbying. They hit on a formulation that was acceptable to the SEC, which had turned back earlier proposals that mentioned "grassroots lobbying"—also commonly referred to as "astro-turfing"—as too imprecise. The new SEC position sets the stage for other resolutions on lobbying for 2012. Proponents have indicated to Si2 that they plan to submit about two dozen such proposals in 2012, but the final numbers for this campaign will not be known until late 2011.

Votes: AFSCME's proposal used language similar to the campaign spending resolution from the Center for Political Accountability, but substituted "direct lobbying and grassroots lobbying" for "political contributions and expenditures," and defined grassroots lobbying communication as a local, state or national communication "directed to the general public that (a) refers to specific legislation, (b) reflects a view on the legislation and (c) encourages the recipient of the communication to take action with respect to the legislation." It was voted on at five companies—**Bank of America, ConocoPhillips, IBM, Prudential Financial** and **Raytheon** and all but one, at Prudential, earned more than 25 percent support.

A hybrid proposal from the Laborers' International Union (Liuna) to **ExxonMobil** combined the language of the CPA proposal with that of the other union lobbying resolutions. It earned just under 24 percent.

Individuals

Longtime shareholder proponent Evelyn Davis filed three of her standard resolutions to six companies, noted in the table, earning between 4 percent and 12 percent support. The proposals asked companies to affirm political non-partisanship, disclose their political contributions in newspapers and disclose the previous government service of company employees.

For the second year in a row, Marie Bogda filed a political contribution proposal at **Archer Daniels Midland**; results from the Nov. 3 meeting were not available when this report went to press. In 2010, Bogda requested that the company ban the use of corporate funds for any election or campaign purposes. In the 2011 proposal, Bogda narrowed the requested prohibition down to only funds used for federal elections and campaigns.

Other Public Policy Resolutions

One proposal also went to a vote in 2011 from a proponent that wanted **Pfizer** to change its public policy positions. The National Legal and Policy Center (NLPC), a non-profit advocacy group based in Northern Virginia, asked companies to justify their public policy positions, asking for reports on how they identify and prioritize "legislative and regulatory public policy advocacy activities." The group believes government will be more ethical if it is smaller and said that "character, morality and common sense," not more laws or guidelines, are the core problem. It wanted the requested report to:

1. Describe the process by which the Company identifies, evaluates and prioritizes public policy issues of interest to the Company;
2. Identify and describe public policy issues of interest to the Company;
3. Prioritize the issues by importance to creating shareholder value; and
4. Explain the business rationale for prioritization.

The supporting statement made clear the proponents were unhappy with Pfizer's position and actions during the debate and passage of the Affordable Care Act during 2010. It received 3.8 percent support, just above the resubmission threshold. Four similar proposals by either the NLPC, a like-minded organization named the National Center for Public Policy Research (NCPPR) or David Ridenour (who is affiliated with the NCPPR) were omitted by the SEC as moot, duplicative of other proposals or dealing with ordinary business.

A proposal filed by individual investor Shelton Ehrlich, but presented by a representative of the NCPPR's Free Enterprise project, questioned the benefits of lobbying activities related to global warming at **Duke Energy**. The proposal was clearly targeted to highlight and oppose Duke Energy's support of proposed cap-and-trade legislation and received 6.5 percent support.

Other Campaigns to Change Corporate Behavior

In addition to the growing number of shareholder proposals on political contributions and lobbying, the *Citizens United* decision, combined with the massive amounts spent during the 2010 elections, has prompted increased interest across a broad spectrum of stakeholders and corporate watchdogs. These groups seek to enhance corporate governance policies and disclosure through direct engagement with corporations, media campaigns, increased public awareness and regulatory solutions.

The Conference Board: In 2010, the Conference Board, a non-profit business membership and research group, worked with the Center for Political Accountability to produce its Handbook on Corporate Political Activity: Emerging Corporate Governance Issues. In addition to research on corporate political activity, the Handbook provides companies with advice on managing and overseeing corporate political spending within a system of comprehensive enterprise risk management. The report argues that establishing an ethical corporate culture is an integral part of any company that wishes to effectively engage in the political arena since "A company grounded in an ethical culture will do more than comply with existing laws; it will also take steps that encourage directors senior managers, and other employees to hold their own and others' actions to well-articulated company standards."

Since the publication of the Handbook, the Conference Board has established a Committee on Corporate Political Spending to "explore the issue of using corporate treasury funds in election-related activity." The committee includes executives from **Campbell's Soup, Exelon, Merck, Microsoft, Pzifer, Prudential Financial** and **Coca-Cola** and is "dedicated to accountability, transparency, education, and engagement on issues of political activity." In addition to engaging various stakeholders on the issue, the committee has also stated that it intends to "develop a set of prevailing practices around corporate political spending, disclosure and accountability."

The CPA Model Code

The CPA has developed its Model Code of Conduct for companies, based on a 2007 survey of company codes it conducted. The Model Code of Conduct includes the policies articulated in the shareholder proposal and adds that:

- Political spending shall reflect the company's interests and not those of its individual officers or directors;
- The disclosures shall describe the political activities undertaken by 527 groups and trade associations which receive company funds. In the case of trade association payments, the disclosures will involve some element of pro-rating of the company's payments that are or will be used for political purposes;
- The board of directors or a committee of the board shall monitor the company's political spending, receive regular reports from corporate officers responsible for the spending, supervise policies and procedures regulating the spending, and review the purpose and benefits of the expenditures;
- All corporate political expenditures must receive prior written approval from the General Counsel or Legal Department;
- In general, the company will follow a preferred policy of making its political expenditures directly, rather than through third party groups. In the event that the company is unable to exercise direct control, the company will monitor the use of its dues or payments to other organizations for political purposes to assure consistency with the company's stated policies, practices, values and long-term interests;
- No contribution will be given in anticipation of, in recognition of, or in return for an official act;
- Employees will not be reimbursed directly or through compensation increases for personal political contributions or expenses;
- The company will not pressure or coerce employees to make personal political expenditures or take any retaliatory action against employees who do not; and
- The company shall report annually on its website about its adherence to its code for corporate political spending.

On October 20, 2011, The Conference Board hosted the 2011 Symposium on Corporate Political Spending. At the symposium, its political spending committee released its report, *Corporate Political Spending: Policies and Practices, Accountability and Disclosure*, which provides a review of issues confronting companies that are developing a comprehensive program for political spending. Additional topics addressed at the symposium included overviews of the current federal and state regulatory framework for corporate political spending as well as shareholder concerns and plans for 2012.

Baruch Index of Corporate Political Disclosure: The Robert Zicklin Center for Corporate Integrity, a part of Baruch College's Zicklin School of Business, has developed an index that rates S&P 100 companies using a weighted system of 57 indicators that measure corporate political activity at all levels and branches of government. The Index scores companies on a scale of zero to 100, with zero being the most opaque and 100 being the most transparent. Scoring for the Baruch Index takes into account many of the policies and procedures put forth in the Handbook on Corporate Political Activity and is based on:

1. Ease of access to relevant materials on the corporate website;
2. Existing policies, procedures and corporate governance structures are in place and disclosed; and
3. Disclosure of political contributions (including recipient information).

The Center for Political Accountability and the C-Z Political Disclosure Index: In addition to coordinating the shareholder proposal campaign, the CPA tries to persuade companies to voluntarily adopt a model disclosure and accountability policy for political contributions.

The CPA identifies as "Corporate Leaders," as of October 2011, a total of 90 S&P 500 companies that disclose and monitor their political spending. It also identifies **Aetna, Hewlett-Packard, Merck** and **Mi-**

crosoft as "Best in Disclosure" because they have "exceeded the common standard" and provided additional data beyond what the CPA requests. In an effort to highlight the need for increased disclosure of political contributions, in September 2011 the CPA and its partners sent an open letter to 423 companies "that have not embraced oversight and transparency."

In October 2011, the CPA and the Zicklin Center for Business Ethics of the University of Pennsylvania's Wharton School introduced their C-Z Index. It classifies companies according to their disclosure and governance policies and practices. Like the Baruch Index, the C-Z Index is based on the Handbook on Corporate Political Activity, co-authored by the CPA. C-Z Index rankings will be based on whether companies engage in independent political expenditures, the existence of well-defined policies governing political spending, decision-making and oversight and disclosure of political expenditures. The C-Z Index includes payments to candidates, 527 organizations, political committees, trade associations and 501(c)(4) advocacy groups under its definition of political spending. The CPA expects to add the entire S&P 500 to the index sometime in 2012.

Coalition for Accountability in Political Spending: Comprised of a group of state-level politicians and pension fund trustees, members of the Coalition for Accountability in Political Spending (CAPS) apply pressure on corporations to disclose their political spending, to rein it in, or stop it altogether. According to its website, www.saveourelections.com, CAPS uses a combination of engagement, pension fund activism, contracting reform and legislative action to accomplish its goals, which include:

- Work with institutional investors to promote policies supporting shareholder resolutions on corporate political spending;
- Expand the Coalition to include members from all regions of the country;
- Establish a bi-partisan leadership committee;
- Provide new model policies and resources to facilitate reforms through rule changes, new legislation and executive orders;
- Help introduce policy reforms in a least a dozen political jurisdictions;
- Serve as the national convener and leader for the groups working to curb the negative impacts of *Citizens United.*

California pension funds initiative: In June 2011, California Treasurer Bill Lockyear directed the California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS) to develop policies that support full disclosure of corporate political spending. According to the letters sent to CalPERS and CalSTRS, the policies are to "require publicly-traded companies to disclose all their campaign contributions, including contributions to trade associations and nonprofit organizations, and to require boards of directors to oversee all political contributions made by a company." The CalSTRS policy has been sent to the fund's Corporate Governance Committee for approval, while CalPERS placed the changes to its Global Principles of Accountable Corporate Governance on the agenda for its Investment Policy Subcommittee's meeting, which was about to occur at the time this report went to press.

A group of businesses, headed by the California Chamber of Commerce, has urged CalPERS not to approve the policy. According to those opposed to the proposed changes, the suggested policy "is an unfair and discriminatory mandate on corporate boards of directors, designed to chill the ability of businesses to defend themselves from political attacks by competitors, overzealous regulators, labor unions or no-growth advocates."

CalSTRS and CalPERS have more than $365 billion in combined assets. Their considerable holdings may cause companies without a disclosure policy in line with the fund's objectives to engage with them or face shareholder proposals at 2012 annual meetings.

Executives against political spending: On September 26, 2011, the Committee for Economic Development (CED), a non-profit, non-partisan business-led public policy organization comprised of more than 200 business executives and university presidents, released three reports (*Hidden Money: The Need for Transparency in Political Finance; After Citizens United: Improving Accountability in Public Finance;* and *Partial Justice: The Peril of Judicial Elections*) that "warn that the rollback of campaign spending and transparency reforms... presents a serious threat to jobs and the economy, public faith in the corporate sector, and the vitality of our democratic institutions."

In *After Citizens United: Improving Accountability in Public Finance*, the CED states its belief that corporate political activity is "an important matter of corporate governance" and that corporate political spending should be subject to board oversight and approval. The CED recommends the adoption of policies that include the disclosure of any political expenditures—not only by corporations, but also by trade associations. The report also warns of corporate contributions to third-party groups, since a corporation does not have control over how contributions may be spent. Such spending could open up a corporation to reputational risk and criticism - as was the case at Target with the Minnesota Forward controversy during the 2010 elections.

In August 2011, **Starbucks** Chairman and CEO Howard Schultz started a campaign that appealed to CEOs to quit making campaign donations until "a fair, bipartisan deal is reached that sets our nation on stronger long-term fiscal footing. " Subsequent public appeals by Schultz asked that campaign donations be withheld until "a transparent, comprehensive, bipartisan debt-and-deficit package is reached that honestly, and fairly, sets America on a path to long-term financial health and security." In the weeks that followed, more than 140 CEOs signed the pledge, including those from **Intuit, AOL, NASDAQ, Whole Foods, J.C. Penney**, and **Frontier Communications**. While the pledge did not specifically address the issue of corporate campaign contributions, the publicity surrounding Shultz's pledge has helped to move the issue of campaign contributions, especially those from high ranking executives, further into the spotlight.

Corporate Reform Coalition: In 2010 national public interest groups started getting together to articulate a response to *Citizens United*. By fall 2011, this activity had coalesced into what is now known as the Corporate Reform Coalition (CRC). Comprised of 72 members ranging from constitutional and corporate governance advocates to academics, investors and environmental activists, the coalition believes that the use of unlimited corporate funds in political races will give corporate lobbyists a new tool to further their agendas with lawmakers and that the fear of running against such well-funded opposition will make it hard for politicians to oppose corporate wishes. Therefore, the CRC is working "to limit the impact of the *Citizens United* decision by exposing corporate influence in our elections and bringing new accountability to corporate behavior via shareholder protection solutions." To that end, the group is pushing four corporate governance solutions:

- Corporate disclosure and shareholder approval of election spending in the states, with targeted advocacy around legislation in certain states.
- Campaigns around shareholder resolutions at S&P 500 corporations with direct consumer marketing to require disclosure of political spending.
- Corporate disclosure and shareholder approval of election spending in Congress, through advocacy for passage of the Shareholder Protection Act.
- Pushing the Securities and Exchange Commission to promulgate rules on corporate political spending.

Constitutional Amendment and other approaches: Public Citizen, the national non-profit group that bills itself as "the people's voice in the nation's capital," is urging the public to call for an amendment to the U.S. Constitution (the Free Speech for People Amendment) that would reverse the *Citizens United* decision completely and establish that First Amendment rights do not apply to for-profit corporations. MoveToAmend.org and FreeSpeechforPeople.org also are supporting an amendment. Public Citizen told Si2 this approach "is the ultimate solution to build off of the corporate governance solutions the CRC is advocating and other campaign finance initiatives like public financing."

On September 20, 2011, Representatives John Conyers (D- Mich.) and Donna Edwards (D-Md.) introduced legislation that would amend the Constitution to clarify the authority of Congress and the states to regulate the use of corporate funds for political activity. The proposed amendment says:

> `Section 1. Nothing in this Constitution shall prohibit Congress and the States from imposing content-neutral regulations and restrictions on the expenditure of funds for political activity by any corporation, limited liability company, or other corporate entity, including but not limited to contributions in support of, or in opposition to, a candidate for public office.
>
> `Section 2. Nothing contained in this Article shall be construed to abridge the freedom of the press.'.

As with the Shareholder Protection Act, which is discussed in more detail below, prospects for passage are dim in the current Congress, especially given the two-thirds majority requirement for approval. But concerned citizens still may appeal to their state governments to call for a Constitutional Convention without having to go through the U.S. Congress, although that method has never been used to amend the Constitution.

Recent Policy Developments

Proposed SEC disclosure mandate: Comprised of a group of ten leading law school professors, the Committee on Disclosure of Corporate Political Spending submitted a rulemaking petition to the SEC on August 3, 2011. Citing the evolution of disclosure requirements at the SEC, increased interest by shareholders in corporate political spending, increased voluntary disclosure, the need for corporate accountability and similar disclosure rules for other corporate information adopted by the SEC, the petition requests that the SEC "initiate a rulemaking project" that would increase the transparency of corporate political spending.

As evidence for increased interest in corporate political spending, the Committee cites a 2006 Mason-Dixon poll that found that 85 percent of shareholders felt that there was a lack of transparency in corporate political activity and that 57 percent of shareholders "strongly" believed that there was "too little transparency with respect to corporate spending on politics." Additionally, the Committee points to the increase in the number of shareholder proposals related to political spending during the 2011 proxy season. The Committee noted that political spending proposals outnumbered numerous governance proposals that have long received significant support from shareholders, including those relating to board declassification, majority voting, golden parachutes, and separation of the Chairman and CEO positions. According to the Committee's figures, half of all S&P 100 companies that had not already agreed to voluntary disclosure of corporate political spending had a political spending disclosure proposal appear on the proxy ballot.

To show the growth of voluntary disclosure among the largest U.S. companies, the Committee uses figures provided by the Center for Political Accountability to show how voluntary disclosure of corporate

political expenditures by S&P 100 companies has grown from nearly nothing in 2004 to almost 60 percent by 2011.

The Committee also believes that increased disclosure of corporate political contributions is "necessary for corporate accountability and oversight mechanisms to work." In particular, it cites the *Citizens United v FEC* decision and the U.S. Supreme Court's opinion that shareholders with adequate information about corporate political activity could adequately decide if the corporation was acting in the interest of making profits. Since companies are not required to disclose all corporate political contributions, the Committee believes that shareholders are not given the essential information required to make an informed decision and serve as the safeguard envisioned by the Supreme Court.

As October 2011, ten comment letters in connection with the petition had been posted on the SEC website. Seven of those letters were in support of the petition, including letters from the International Corporate Governance Network, VoterMedia.org, CorpGov.net, shareholder activist John Chevedden, Dr. Andrew Weiss, Dr. Neil Wollman, Dr. Michael Hadani, the Maryland State Retirement and Pension System and the Council of Institutional Investors. One letter from Keith Bishop, Attorney and Adjunct Professor of Law at Chapman University Law School, opposed the proposal. Additional letters in support of the petition were submitted by the Treasurer of the State of Oregon on October 6, 2011 and by 40 members of the social investment community on November 1, 2011, but neither is yet available on the SEC website.

In addition to the comment letters, 43 members of Congress (at the time of this publication) have also sent a Dear Colleague letter to SEC Chairman Shapiro urging the agency to act on the petition for political contribution disclosure.

Shareholder advisory vote: Increased interest in an advisory vote by shareholders on corporate political contributions is not limited to shareholder proposals. The idea is also an integral part of the Shareholder Protection Act of 2011 (H.R. 2517), which is sponsored by Rep. Michael Capuano (D-Mass.) and was introduced on July 13, 2011.

If enacted, H.R. 2517 would require companies to disclose their political expenditures and the recipients of those funds on a quarterly basis. Other requirements would include board oversight of political spending (including board approval of any expenditures in excess of $50,000) and shareholders' approval on estimated budgets for political spending in the next fiscal year. Companies that do not provide for the director vote listed above would be subject to delisting from U.S. exchanges. In addition, companies would also have to disclose the individual votes by board members authorizing political expenditures.

This bill was first submitted in 2010 as H.R. 4790. Despite strong opposition from the U.S. Chamber of Commerce, H.R. 4790 was approved by the House Financial Services Committee on July 29, 2010, but never went on to a vote in the full House of Representatives.

H.R. 2517 was immediately referred to the Subcommittee on Capital Markets and Government Sponsored Enterprises. Most observers believe it is unlikely that the Shareholder Protection Act 2011 will make it out of committee during the 112th Congress. Shareholder votes to approve corporate political expenditures have some similarities to amendments made to the United Kingdom's Companies Act in 2000. However, unlike the advisory votes requested in the United States, the Companies Act requires shareholders approval for political expenditures over £8,000 (approximately $12,440) as well as requiring companies to report all political expenditures over £2,000 (approximately $3,110) in the company annual report.

According to a study published in the University of San Francisco Law Review, U.K. company investors almost universally gave shareholder approval to political budgets. However, 49 companies stopped political spending completely and the budget requests were typically between £50,000 and £100,000

($78,500 and $153,000). Political spending by most U.S. companies, especially S&P 100 companies, is typically several times that amount annually. Whether the generally larger amounts spent by U.S. companies would be modified by an advisory vote remains to be seen.

As they did with the advisory vote on executive compensation, companies may initially argue that the results of votes against the proposed disclosures and budgets could be impossible to decipher. Since it would be a straight up or down vote, shareholders could conceivably decide to vote against such a proposal for several different reasons, some of which could be diametrically opposed. For instance, some might vote against because they do not believe in any corporate money should be spent in the political arena, while others might feel that the company is not adequately advocating for its positions and would like to see an increased budget.

Key legal decisions since *Citizens United*: While *Citizens United* continues to be the focal point for most discussions of corporate political activity, subsequent judicial rulings and a Federal Election Committee opinion have also had a dramatic effect on the flow of corporate money into the political process.

SpeechNow.org v. FEC—In March 2010, a federal appeals court ruled in *SpeechNow.org v. Federal Election Commission* that campaign contribution limits for independent organizations that use funds for independent expenditures are unconstitutional. The court struck down the $5,000 limitation on the amount individuals could donate to SpeechNow.org, an independent expenditure-only committee (or "super PAC") made possible by the *Citizens United* ruling. In another part of this ruling, the appeals court said the group also must register as a political committee with the FEC and disclose its donors, donation amounts and expenditures.

July 2010 FEC opinion—In a decision that broadened SpeechNow.org's impact, the FEC issued Advisory Opinion 2100-11 on July 22, 2010. The FEC said corporations, unions and other political committees also could make unlimited contributions to these new independent expenditure-only committees. The FEC opinion paved the way for the significant role super PACs played in the 2010 elections.

As a result of the recent rulings, super PACs, 501(c)4 social welfare and 501(c)6 trade associations, business leagues or chambers of commerce now may raise unlimited amounts from corporations, unions, other groups and individuals. They also may run advertisements expressly for or against federal candidates as long as their activities are not coordinated with any candidates, candidate committees or parties. Super PACs must file reports with the FEC at least quarterly that disclose a list of donors. However, groups that have non-profit tax status as 501(c)4 or 501(c)6 organizations are not required to disclose a list of members or donors.

Minnesota Citizens Concerned for Life, Inc. v. Swanson: On May 16, 2011, the Eighth Circuit Court of Appeals upheld a Minnesota law that requires groups that make independent expenditures to disclose all donors who have given them more than $100, explaining how the money is being spent. Also, during election years, businesses and independent groups must submit five separate disclosure reports; they also must report large donations within 24 hours in the three weeks leading up to the primary election and in the last two weeks before the general election. Those disclosure requirements led to the disclosure of donations to Minnesota Forward by **Target, 3M, Best Buy, Polaris Industries, Regis** and **Securian Insurance** during the 2010 election. The same attorney who filed the *Citizens United* case had filed the challenge for Minnesota Citizens Concerned for Life (MCCL) on the grounds that it violated the First Amendment.

But on July 12, 2011, the Eighth Circuit Court granted an en banc review, which vacated the prior ruling. Oral arguments for the en banc review were made on September 21, 2011. No opinion has been issued, but the Eighth Circuit may choose to strike down the law as unconstitutional. Such a decision could have a chilling effect on disclosure laws across the country.

Appendix II:
Company Policy Excerpts on Independent Expenditures

Consumer Discretionary	
Best Buy (allows)	"Direct corporate contributions to candidates and committees are prohibited at the federal level and in some states. However, corporations may make independent expenditures on behalf of candidates and committees. Thus, Best Buy may provide corporate funding to candidates and/or issue campaigns that align with the company's business objectives and public policy goals."
Ford Motor (bans)	"Ford Motor Company does not make contributions to political candidates or political organizations nor otherwise employ Company resources for the purpose of helping elect candidates to public office, even when permitted by law. Nor do we take positions for partisan political purposes—that is, specifically for the purpose of advancing the interest of a political party or candidate for public office. These policies remain unchanged, notwithstanding the U.S. Supreme Court's January 2010 decision that loosened restrictions on corporate independent expenditures."
Home Depot (Board approval)	"The Nominating & Corporate Governance Committee of the Company's Board of Directors must approve in advance any public advertisement directly or indirectly paid for by the Company that expressly advocates the election or defeat of a candidate in which Home Depot is identified specifically as an advocate of such election or defeat."
McDonald's (bans)	"In 2010, the United States Supreme Court ruled in Citizens United v. Federal Election Commission that U.S. corporations may not be prohibited generally from using their funds to pay for certain independently made partisan political advertisements and other political communications referred to as 'independent expenditures' and 'electioneering communications.' Notwithstanding the Supreme Court's decision, the Company has determined that it will not make any independent expenditure or pay for any electioneering communication, as those terms are defined by applicable law."
Target (allows)	"The Policy Committee reviews and approves any use of general corporate funds for electioneering activities or for ballot initiatives. This approval process applies whether the contribution is made directly to a candidate or party, or indirectly through an organization operating under Section 527 or 501(c)(4) of the U.S. Internal Revenue Code."
Consumer Staples	
Altria (may allow)	"Altria discloses all PAC and corporate political contributions made to candidates, political parties, PACs, caucus committees, and ballot measure committees; it also will disclose if any of the Altria companies make independent expenditures supporting or opposing political candidates."
Campbell Soup (bans)	"Notwithstanding the decision that the U.S. Supreme Court issued in 2009 in Citizens United v. Federal Election Commission, the Company has no intention of engaging in electioneering communications, i.e., expending corporate funds specifically to advocate the election or defeat of political candidates."
Colgate-Palmolive (bans)	"The company's policy is not to directly or indirectly support any candidates or parties."
General Mills (Board approval)	"Additionally, all direct contributions to independent political expenditure campaigns must be approved by the Company's Public Responsibility Committee."

Kimberly-Clark (apparent ban)	In response to the July 2010 CPA letter, the company said, "Given the modest level of political spending (by the company), we do not believe a written policy or regular report on these activities is warranted." It also said, "we do not contribute to trade associations or Section 527 organizations or the purpose of contributing to candidates, nor have we done any political advertising in our own name."
Kroger (bans)	"Despite the recent ruling by the Supreme Court, The Kroger Co. does not permit spending corporate funds to air advertisements or finance specific activities in favor or opposition to a particular candidate."
Procter & Gamble (bans)	"P&G has no plans to use corporate funds to support independent political expenditures to influence federal elections, nor to make contributions to trade associations for that purpose."
Energy	
ConocoPhillips (may allow)	"ConocoPhillips' policy is to not make independent expenditures itself. However, if a compelling business purpose exists, an exception to this policy may be granted with the consent of Government Affairs, business unit personnel and Legal. Approval of the Public Policy Committee is also required."
Exxon Mobil (bans)	ExxonMobil told Si2 it does not spend corporate money via independent expenditures in political campaigns
Financials	
American Express (bans)	"American Express does not spend corporate funds directly on electioneering communications, and it publicly discloses as detailed below any contributions to another organization that are used in connection with a political campaign."
American In'l Group (bans)	The company told Si2 its current temporary moratorium on political expenditures includes independent expenditures.
Citigroup (bans)	"Citigroup does not use corporate funds for independent expenditures."
Comerica (bans)	In response to the July 2010 Center for Political Accountability letter, the company said it "will not use corporate money to make independent political expenditures."
Goldman Sachs (bans)	"Goldman Sachs also does not spend corporate funds directly on independent expenditures, including electioneering communications."
JPMorgan Chase (bans)	"In the Citizens United Case, the United States Supreme Court extended the ability of corporations to make independent campaign expenditures at the federal level. The Firm has no plans to change our political contributions policies as a result of this decision."
Marsh & McLennan (bans)	"In the wake of the recent Supreme Court ruling in the Citizens United case involving corporate political speech, Marsh & McLennan Companies wants to take this opportunity to affirmatively set forth its plans moving forward. Specifically, Marsh & McLennan Companies has no plans to engage in the following kinds of political conduct: (1) directly paying for independent advertising or public communications that expressly support or oppose a federal political candidate; (2) communicating its view on specific candidates on its website, company e-mail, or in newsletters or other communications; (3) communicating a view on whether a candidate's voting record is in line with the company's view on issues; or (4) establishing a new federal political action committee in order to engage in so-called 'independent expenditures.'"
Morgan Stanley (bans)	"However, Morgan Stanley does not use corporate funds directly for independent political expenditures or electioneering communications as defined under federal law."

T. Rowe Price Group (apparent ban)	In response to the July 2010 CPA letter, the company said, "our firm has very limited formal involvement in the political process. The company does not have any present intentions to establish a PAC or to make any independent political expenditures. We understand the Center's concerns about the potential for undisclosed independent political expenditures, but considering our very limited level of corporate political involvement, the issue is not significant to our firm. We do not believe it would be appropriate at this time to implement a formal program to monitor the independent political expenditures of our trade associations."
UNUM Group (bans)	"Unum does not make, directly or indirectly, any independent expenditures or electioneering communications to advocate the election or defeat of federal candidates."
Wells Fargo (bans)	"Wells Fargo does not use company funds for any candidate campaign funds including candidate campaign committees, political parties, caucuses, or independent expenditure committees."
Health Care	
Aetna (apparent ban)	"In 2009, Aetna did not make or engage in any independent political expenditure activity as defined under federal election law."
Gilead Sciences (apparent ban)	"Recently, the U.S. Supreme Court ruled that independent corporate expenditures on behalf of federal candidates are permissible. We do not expect to make significant amounts of such expenditures in the near future."
Johnson & Johnson (bans)	"Johnson & Johnson does not make direct independent political expenditures."
Medco Health Solutions (bans)	"Notwithstanding the Supreme Court decision in Citizens United v. Federal Election Commission, Medco shall continue its practice of not using corporate funds to endorse or oppose a federal political candidate, and as such, Medco will not pay for any independent expenditure or electioneering communication as those terms are defined by applicable federal law."
Merck (current ban)	"Merck has not used corporate funds to make any direct independent expenditures on behalf of candidates running for public office and does not currently have plans to use independent expenditures as part of Merck's corporate political contributions program. Should a situation warrant Merck's participation in independent expenditures, we would be fully transparent as we are with all other political contributions. This includes making all legally required filings, including with the Federal Election Commission, as well as disclosing our contributions on our external website. Independent expenditures would receive the same scrutiny as all of our other corporate contributions. Merck provides an annual report on its corporate contributions to the Board of Directors and reviews its program with the Board Committee on Public Policy and Social Responsibility. Additionally, independent expenditures would require approval by Merck's Corporate Political Contributions Committee which is comprised of senior leaders representing Merck's major divisions."
Pfizer (bans)	"It is Pfizer's policy that 'Corporate Funds' may not be used for Independent Expenditures, in connection with any federal or state elections, even if Pfizer is otherwise permitted to make contributions. Independent Expenditures are defined under Federal law as expenditures 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 or its agents.'"

Industrials	
3M (allows)	"The U.S. Supreme Court ruled in 2010 that companies and labor unions may make expenditures that are not coordinated with candidates or political parties to express First Amendment protected views relating to federal or state elections. In September 2010, 3M contributed $100,000 to MN Forward, a Minnesota-based independent expenditure political committee that expressed its views regarding private sector job creation and economic growth in the 2010 Minnesota state elections. That contribution was properly reported by 3M and the recipient."
Cummins (bans)	"Cummins' current policies ban political contributions using corporate funds to candidates, political parties or independent expenditure campaigns."
General Electric (bans)	"GE has a longstanding practice against using corporate resources for the direct funding of independent expenditures expressly advocating for or against candidates in elections for public office. In 2010, the Public Responsibilities Committee adopted this practice as a formal policy."
Northrop Grumman (bans)	In response to the July 2010 CPA letter, the company said, "Northrop Grumman does not make direct independent expenditures for or against any federal candidate and we have no plans to do so in the future. Furthermore, any future decision to consider making federal independent political expenditures would require approval by our board of directors."
United Technologies (current ban)	"The U.S. Supreme Court determined in early 2010 that corporations may make unlimited expenditures for independent communications to the general public that expressly advocate the election or defeat of a clearly identified federal candidate. UTC has not made any such expenditure in the past, and has no present plans to spend corporate funds directly on such communications. The Federal Election Commission, which regulates such activity, is considering regulatory changes following this Supreme Court decision, and the U.S. Congress is considering changes in law. UTC may review its position depending on the outcome of these initiatives."
Information Technology	
Microsoft (bans)	"Beginning July 1, 2010, Microsoft will not pay for any independent expenditure or electioneering communication as those terms are defined by applicable law. Since July 1, 2010, Microsoft informed trade associations to which it pays dues or makes other payments that no Microsoft funds may be used to pay for any independent expenditures or electioneering communications as those terms are defined by applicable law."
Oracle (may allow)	The company includes in its political spending report "Oracle expenditures for express advocacy or for electioneering communications reportable under applicable campaign finance or ballot measure laws."
Xerox (bans)	Xerox told Si2 it "has a longstanding policy that corporate independent political expenditures are not permissible."
Materials	
Dow Chemical (may allow)	"Other than stated above, federal election law does not prohibit a corporation from making independent expenditures on behalf of candidates or from making contributions to political organizations and other tax-exempt organizations that engage in voter registration, get-out-the-vote and other non-federal political activities. Such contributions may not be solicited, however, by any national party committee, federal elective officeholder or federal candidate, or any affiliate or agent thereof."

Du Pont (may allow)	The company's definition of political spending which it discloses "includes all payments made to (i) individual candidates, (ii) party committees; (iii) Political Action Committees ("PACs"); (iii) Leadership PACs; (iv) ballot issue groups (state or federal); or (v) any 527 organizations. It also refers to independent expenditures that expressly advocate a candidate's election or defeat, or payments that have to be reported as electioneering communications under federal or state campaign finance law. This term does not apply to money spent on lobbying or to charitable donations."
Weyerhaeuser (may allow)	"In 2010, Weyerhaeuser did not utilize corporate funds to support any independent expenditures. Under circumstances when corporate funds are used for independent expenditures, all transactions will be disclosed and transparent, on our annual report of all political donations."
Telecommunication Services	
Sprint Nextel (bans)	In response to the July 2010 CPA letter, the company said, "we do not have any plans to make independent political expenditures in the upcoming federal elections. Not only would these divert corporate resources from other priorities, they could potentially alienate our customers....We also do not intend to make independent political expenditures through a trade association as we rarely share common priorities with those groups."
Utilities	
Edison International (may allow)	"In addition to Edison International PAC's federal campaign contributions and other permitted company contributions made to state candidates, the EIX companies may make expenditures to support or oppose candidates, so long as the expenditures are not made in cooperation or consultation with, or at the request of, any candidate."
Exelon (may allow)	"...the Citizens United decision handed down by the United States Supreme Court in January 2010 has eliminated limits on independent expenditures by Exelon and its subsidiaries for advertisements to support or oppose the election of a candidate for public office in federal and state elections. During the Reporting Period, Exelon and its subsidiaries did not make any independent political expenditures in support of or in opposition to a candidate or political party."
Southern (allows)	"Additionally, Southern Company, but not its subsidiaries, is permitted under this policy to use corporate funds to make independent expenditures, and to contribute to organizations making independent expenditures, at the federal, state or local level as permitted by law."

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The Sustainable Investments Institute (Si2) is a non-profit membership organization founded in 2010 to conduct impartial research and publish reports on organized efforts to influence corporate behavior. Si2 provides research that enable investors to make informed, independent decisions on contentious public policy issues at their portfolio companies. Si2's main funding comes from a consortium of the largest endowed colleges and universities and other leading institutional investors.

For more information, please contact:

Heidi Welsh
Executive Director
21122 Park Hall Road
Boonsboro, MD 21713
P: 301-432-4721
heidi@siinstitute.org
www.siinstitute.org

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For more information, please contact:

Jon Lukomnik
Executive Director
IRRC Institute
One Exchange Plaza
55 Broadway, 11th Fl.
New York, NY 10006
P: 212-344-2424
F: 212-344-2474
info@irrcinstitute.org
www.irrcinstitute.org

Statement Concerning S.2219

The Democracy is Strengthened by Casting Light on Spending in Elections

"DISCLOSE" Act of 2012

Submitted to the Senate Committee on Rules and Administration

For a Hearing on March 29, 2012

By Professor Richard Briffault

I am Vice-Dean and Joseph P. Chamberlain Professor of Legislation at Columbia Law School, where I am also Executive Director of the Legislative Drafting Research Fund. Much of my academic work has focused on campaign finance law, particular the question of disclosure. My recent publications concerning campaign finance disclosure include *Nonprofits and Disclosure in the Wake of* Citizens United, 10 ELEC. L.J. 337 (2011); *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL OF RIGHTS J. 983 (2011); *and Campaign Finance Disclosure 2.0*, 9 ELEC. L.J. 273 (2010).

The DISCLOSE Act of 2012 is a major step forward in addressing the most important challenge for our campaign finance disclosure laws – the surge in independent spending by 501(c) groups, Super PACs and other organizations that are not currently subject to effective disclosure requirements. The Federal Election Campaign Act ("FECA") is reasonably effective in securing the reporting and disclosure of contributions to and spending by federal candidates, political party committees, and political committees that only contribute to candidates. However, the law is not well-designed to obtain effective disclosure from organizations that participate in federal elections by spending to support or oppose candidates but that do not formally coordinate with candidates in ways that the law treats as coordination. This was not a significant problem when, as was the case until recently, independent spending played a relatively modest role in the campaign finance system. However, in the last two election cycles independent spending has emerged as a substantial force in federal elections.

In the 2010 congressional elections, independent spending amounted to an estimated $305 million, or roughly four and one-half times the total of independent spending in the preceding non-presidential election in 2006. In the current election cycle, independent groups have already spent nearly $100 million, and the primary season is barely half over. In the current Republican presidential nomination contest, in many state caucuses and primaries independent committees created to support a specific candidate have spent as much if not more than the candidates' own campaign committees. Such nominally independent groups have also been active participants in a number of Senate and House primary races, and they have already spent significant sums on this fall's general elections.

Spending by these independent groups poses significant challenges for our disclosure system. First, the law as it currently stands fails to obtain proper disclosure of the identities of the wealthy individuals and firms funding these organizations. 501(c) organizations are not

considered to be political committees within the meaning of federal election law and so they are not subject to any general requirement that they publicly disclose their donors. They are required to report their campaign spending when it crosses the statutory threshold level, but the Federal Election Commission ("FEC") requires disclosure of the identity of their contributors only when a contributor specifically earmarks his or her contribution for a particular campaign expenditure. Not surprisingly, such earmarking rarely if ever occurs. Super PACs are political committees and, thus, are subject to FECA's reporting and disclosure requirement. But if a Super PAC accepts a large contribution from a 501(c) organization, a shell corporation, or limited liability corporation (LLC) it need report only the name of the 501(c), the shell corporation, or LLC which is nominally the donor. It is under no obligation to identify the individuals or business corporations which are the true sources of those funds.

With donations to Super PACs or 501(c)'s subject to no dollar caps, and with specific individuals and corporations making multi-hundred-thousand, million, and even double-digit million dollar donations to electorally active 501(c)'s and Super PACs, the failure to disclose the identities of the individuals and firms who are actually paying for this spending is an enormous loophole in our disclosure laws.

So, too, the independent spending that triggers federal reporting and disclosure requirements is too narrowly defined. Federal political committees and other organizations active in federal elections are required to report when they spend above a statutory threshold on "independent expenditures" and on "electioneering communications." "Independent expenditure" is defined as an expenditure "expressly advocating the election or defeat of a clearly identified candidate." An "electioneering communication" is a broadcast, cable or satellite communication that refers to a clearly identified candidate for federal office and is made within sixty days before a general election or thirty days before a primary election or caucus and is targeted to the electorate the candidate seeks to represent.

Both of these definitions fail to cover significant amounts of electoral spending. Independent expenditures may aid or oppose a candidate without using the language of express advocacy, and electioneering communications are increasingly aired many months before the relevant election, not just within thirty or sixty days before.

S. 2219 makes significant strides toward closing these gaps in our disclosure laws. The requirement that a covered organization – defined to include corporations, labor unions, 527 organizations, and 501(c) organizations other than 501(c)(3)'s – promptly report campaign-related disbursements above $10,000, defined to include transfers to other organizations for campaign activities, will not only shed more light on the campaign activities of these organizations, but will make it possible to tell when a 501(c) organization is funding a Super PAC. The requirement that such disclosure include reporting the names and addresses of donors of more than $10,000 to the covered organization – other than donors who have restricted their contributions to non-electoral purposes – will enable the public to learn who are the individuals who are behind the 501(c)'s, including those who use the 501(c) to veil their donations to a Super PAC. The stand-by-your-ad provisions will also make it easier for the

voting public to know who is behind the organizations and who is paying for the ads of organizations that are electioneering with respect to federal elections.

Limiting disclosure of the identity of donors to those who give $10,000 or more appropriately targets the major contributors funding 501(c) and Super PAC activity. It is worth noting that under current law an individual may donate no more than $2500 to a specific federal candidate per election, and no more than $5000 to a candidate for use in both a primary and general election. $10,000 is the ceiling on what a married couple can give a candidate for the two elections combined. The threshold for reporting the names and addresses of donors to covered organizations thus properly takes as a floor the maximum amount a couple can give to a candidate in one election cycle. A donor who gives more than the maximum federal campaign law allows a couple to give a candidate for a primary and general election combined may be treated as the type of major campaign player whose contributions ought to be disclosed.

S. 2219 also admirably provides an exclusion from disclosure for donors that do not wish to fund the covered organization's campaign-related work. 501(c) organizations, such as a 501(c)(4) "social welfare" organization, may be engaged in a mix of charitable, public education, policy-oriented, lobbying, and electoral activities. Although some (c)(4)'s appear to have been created with electoral politics as a major focus, others really do devote most of their efforts to more traditional social welfare activities, with any campaign participation only a minor part of their work. A donor may give to support an organization's charitable work, with no intention of having her funds used to support campaign-related activities. S. 2219 exempts those donors from disclosure when they restrict their funds to non-election purposes, and the recipient organization honors that restriction.

S. 2219 also properly expands the scope of the type of campaign activity that triggers the duty to disclose. The temporal component of the definition of "electioneering communication" would be for presidential elections, 120 days before the first nominating primary or caucus, and for other federal elections, the calendar year in which the election occurs (with special rules for special elections). This wisely recognizes how early spending and campaigning for federal elections now begins. Finally, the definition of "independent spending" is expanded to go beyond the so-called "magic words" of express advocacy to include language which is the "functional equivalent of express advocacy.'

These and other provisions of S. 2219 advance important public values and are surely constitutional. Starting with its landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), nearly four decades ago, the Supreme Court has consistently upheld disclosure laws. The Court explained that disclosure promotes three important public interests: informing the voters, deterring corruption and the appearance of corruption, and promoting compliance with and enforcement of other campaign laws. The voter information value is particularly important. Disclosure, the Court explained, "allows voters to place each candidate in the political spectrum more precisely than is often possible on the basis of party labels and campaign speeches." By informing voters about the sources of a candidate's funds, it "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office." 424 U.S. at 67. Requiring independent committees to disclose their

donors "increases the fund of information concerning those who support the candidates" and "helps voters to define more of the candidates' constituencies." *Id.* at 81. Disclosure, thus, "further[s] First Amendment values by opening the basic processes of our federal election system to public view." Id. at 82.

The Court reaffirmed the First Amendment value of disclosure in *Citizens United v. FEC,* 130 S.Ct. 876 (2010). Even as it struck down the ban on corporations and unions using treasury funds to pay for electioneering communications, the Court, by an 8-1 vote, upheld the application of federal disclosure and disclaimer laws to those very same corporate-funded electioneering communications. As the Court explained, "[t]he 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 differ speakers and messages." *Id.* at 916.

Subsequently, the Court renewed its support for disclosure in *Doe v. Reed,* 130 S.Ct. 2811 (2010), when it rejected the claim that it is unconstitutional to apply Washington State's Public Records Act – which makes public records available for public inspection and copying – to the names and addresses of the individuals who signed a petition to subject a law to a referendum. Although not a campaign finance case, *Doe* drew expressly on two central themes of the Court's campaign finance jurisprudence – that the public records law "is not a prohibition of speech, but instead a *disclosure* requirement [that] ' . . . do[es] not prevent anyone from speaking," and that such disclosure laws are subject to a lower standard of review than the strict scrutiny applied to burdensome restrictions on First Amendment activity. *Id.* at 2818 (emphasis in original), 2820 n.2.

The provisions of S. 2219 advance the voter-information, anti-corruption and ant-appearance of corruption, and law-enforcement goals of disclosure laws, and are surely constitutional. The voting public has an interest in knowing who are the major funders of organizations engaged in significant amounts of campaign-related communications As the Court explained in *Buckley* knowing who is providing the funds being used to support or oppose candidates "helps voters to define more of the candidates' constituencies." This will also help the voters appraise what are ostensibly independent messages and decide how much weight to give those messages when considering how to cast their ballots. Requiring the disclosure of donations above the level of the limits on donations to candidates advances the anti-corruption and appearance of corruption goal by letting the voters know which donors could potentially have great influence with which candidates. And requiring full disclosure of the campaign-related activities of 501(c) organizations will enable more effective enforcement of the provisions of the Internal Revenue Code requiring these organizations to be devoted primarily to charitable and not political activities.

The expansion of the definitions of "electioneering communication" and "independent expenditure" plainly fall within the contours of the Supreme Court's recent decisions. The plaintiffs in *Citizens United* claimed that their ads were not electoral at all but commercial, as they were intended not to affect votes but to persuade viewers to buy *Hillary: The Movie*, a film they had prepared of then-Senator Hillary Clinton in anticipation of her 2008 run for president.

As a result, the plaintiffs contended that the federal disclosure laws could not be applied. The Court, however, said it did not matter that the ads for the movie did not use the language of electoral express advocacy: "Even if the ads pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." 130 S.Ct. at 915. Similarly, the Court upheld the application of federal disclaimer requirements to those ads, finding that disclaimers advance the substantial public interest in voter information: "At the very least, disclaimers avoid confusion by making it clear that the ads are not funded by a candidate or political party." *Id.*

The specific language in S. 2219's definition of "functional equivalent of express advocacy" comes straight from Chief Justice Roberts's opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007), in which he explained that regulation could go beyond express advocacy and reach the "functional equivalent of express advocacy" but that an ad could not be treated as the "functional equivalent of express advocacy" when it failed to "mention an election, candidacy, political party, or challenger" and did not "take a position on a candidate's character, qualifications, or fitness for office." S. 2219 uses precisely the standard Chief Justice Roberts articulated in determining when a communication is the functional equivalent of express advocacy. Importantly, the bill relies solely on the content of the communication, and is, thus, consistent with the Chief Justice's admonition to focus solely on the content of the communication and avoid any use of context or effort to determine the intent of the speaker *See id.* at 471-74.

To be sure, there are no Supreme Court cases addressing the broader temporal period for the definition of "electioneering communication." The prior, narrow 30/60 day rule, however, was adopted when one of the central purposes of adding the electioneering communication provision to FECA was to extend the prohibition on spending corporate and union treasury funds in federal election campaigns. With *Citizens United* having struck down that spending restriction, the sole purpose of the regulation of "electioneering communication" now is disclosure. And disclosure, the Court has repeatedly held, places only a modest burden on individual rights, advances First Amendment values, and is supported by multiple public interests, particularly voter information.

The only real question is whether starting the electoral period earlier serves those public values. Given the extensive evidence from news reports, observation of television commercials, and FEC filings that campaign spending now starts long before the election it is intended to effect, the extension of the period in which broadcast expenditures that refer to candidates are treated as electioneering for purposes of disclosure is presumptively constitutional.

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Nonprofits and Disclosure in the Wake of *Citizens United*

Richard Briffault

ABSTRACT

Few campaign finance cases have drawn more public attention than *Citizens United v. Federal Election Commission*. Although *Citizens United* was expected to unleash the electoral activities of business corporations, its immediate consequences more directly involved nonprofit organizations. Like *Citizens United* itself, most of the cases challenging and seeking to curtail campaign finance regulation have been brought by nonprofit corporations, particularly advocacy organizations tax-exempt under section 501(c)(4) of the Internal Revenue Code, and section 501(c)(6) trade associations and chambers of commerce. Moreover, most of the corporate spending in the 2010 congressional elections involved nonprofits. Given the anecdotal evidence that many business corporations interested in electoral activity are reluctant to do so directly and publicly and prefer to channel their money through intermediary organizations, nonprofit (c)(4)s and (c)(6)s in the post-*Citizens United* regime play a key role as vehicles for collecting, pooling, and spending business corporation funds to influence elections. This article examines the implications of *Citizens United* for the campaign activities of nonprofits under federal and state campaign finance laws, with particular attention to disclosure laws. Part II provides the legal and factual background for *Citizens United* and summarizes its holding and implications. Part III discusses other significant campaign finance law developments concerning the pooling of corporate and individual funds in nonprofit intermediaries. Part IV then focuses on current federal and state efforts to require nonprofits engaged in election spending to provide greater information concerning their donors. Part V concludes.

I. INTRODUCTION

FEW CAMPAIGN FINANCE CASES have drawn more public attention than *Citizens United v. Federal Election Commission*.[1] In holding that corporations have a constitutionally protected right to engage in unlimited spending in support of or opposition to candidates for elected office, the Court invalidated a sixty-year-old federal law—and comparable laws in two dozen states—and overturned two prior Supreme Court decisions.[2] This was probably the most controversial Supreme Court campaign finance action since *Buckley v. Valeo*[3] ushered in the era of modern campaign finance jurisprudence thirty-four years earlier. The significance of *Citizens United* and its consequences for campaign finance law and practice have been debated by lawyers, political scientists, politicians, and the general public ever since.

Although *Citizens United* has been seen as unleashing the electoral activities of business corporations, its immediate consequences have more directly involved nonprofit organizations. Indeed,

Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School.

[1] 130 S. Ct. 876 (2010).
[2] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); McConnell v. FEC, 540 U.S. 93 (2003) (in part).
[3] 424 U.S. 1 (1976).

nonprofits have long been central actors in the development of the Supreme Court's jurisprudence dealing with the campaign finance activity of corporations. The *Citizens United* decision grew out of an action brought by a nonprofit corporation tax-exempt under section 501(c)(4) of the Internal Revenue Code.[4] Most of the Supreme Court's earlier corporate campaign finance cases involved nonprofit corporations.[5] In the months after *Citizens United* most litigation challenging and seeking to further limit campaign finance regulation was instituted by nonprofit organizations, particularly right-to-life organizations tax-exempt under 501(c)(4), other (c)(4) advocacy organizations, and 501(c)(6) trade associations and chambers of commerce.[6]

Moreover, most of the corporate spending in the 2010 congressional elections involved nonprofits.[7] The most publicized development in the last election cycle was the formation or rise to new prominence of a number of 501(c)(4) organizations—such as American Crossroads Grassroots Political Strategies (GPS), Americans for Job Security, American Future Fund, and Americans for Prosperity[8]—as well as the United States Chamber of Commerce.[9] These organizations take donations from business corporations and individuals and use those funds to pay for campaign ads. Given the anecdotal evidence that many business corporations interested in electoral activity are reluctant to do so directly or publicly and prefer to channel their money through intermediary organizations, a key role of nonprofit (c)(4)s and (c)(6)s in the post-*Citizens United* regime may be to provide the vehicles for collecting and pooling business corporation funds to pay for independent expenditures supporting or opposing candidates.

The principal focus of both legislative and litigation efforts since *Citizens United* has been disclosure, that is, the publicizing of the names and affiliations of the individuals and firms financing campaign activity. Much of the current public controversy over the electoral role of nonprofits has focused on the lack of disclosure of the identity of the donors to these nonprofits.[10] Current reform efforts have aimed at (i) requiring the disclosure of donors to organizations—such as (c)(4)s and (c)(6)s—whose primary activity is not electoral but that undertake independent expenditures, and (ii) requiring that the names of the principal funders of significant independent expenditure ads appear in the body of the ads themselves. The main congressional response to *Citizens United* in 2010 was the DISCLOSE Act which, as the name suggests, was concerned mostly, albeit

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[4] *See* Citizens United v. FEC, 530 F. Supp. 2d 274, 275 (D.D.C. 2008). According to its Web site, "Citizens United is an organization dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens." *See* http://www.citizensunited.org/about.aspx.

[5] *See, e.g.*, FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007); FEC v. Beaumont, 539 U.S. 146 (2003); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986); FEC v. National Right to Work Committee, 459 U.S. 197 (1982).

[6] SpeechNow.Org v. FEC, 599 F.3d 686 (D.C. Cir. 2010); Center for Individual Freedom v. Madigan, 735 F. Supp. 2d 994 (N.D. Ill. 2010); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010); Michigan Chamber of Commerce v. Land, 725 F. Supp.2d 665 (W.D. Mich. 2010); National Organization for Marriage v. McKee, 723 F. Supp. 2d 245 (D. Me. 2010); Cerbo v. Protect Colorado Jobs, Inc., 240 P.3d 495 (Colo. App. 2010); Minnesota Concerned Citizens for Life, Inc. v. Swanson. 741 F. Supp. 2d 1115 (D. Minn. 2010); and South Carolina Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708 (D.S.C. 2010).

[7] *See, e.g.*, Eliza Newlin Carney, *Brave New World of Political Spending for Nonprofits*, NATIONAL JOURNAL, Mar. 15, 2010. See also Kenneth P. Vogel, *Crossroads Hauls in $8.5M in June*, POLITICO, June 30, 2010; Michael A. Memoli and Tom Hamburger, Conservative Group Kicks Off $4.1-million Election Ad Campaign, LATIMES.COM, Aug. 16, 2010; Ralph Z. Hallow, *Pro-GOP Nonprofits Kick in Millions*, WASHINGTON TIMES, Aug. 19, 2010. To be sure, nonprofits were actively involved in electioneering well before *Citizens United*. *See, e.g.*, Bart Jensen, *Nonprofits Wield Some Serious Campaign Cash*, CQ POLITICS, Mar. 8, 2009; Elizabeth Wasserman, *Nonprofits Walk Fine Line on Political Activity*, MSNBC, July 25, 2008, http://www.msnbc.msn.com/id/25838144/print/1/displaymode/1098/.

[8] *See*, e.g., Jim Rutenberg, Don Van Natta, Jr., and Mike McIntire, *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 11, 2010; Matt Viser, *Donor names stay secret as nonprofits politick*, BOSTON.COM, Oct. 7, 2010; *Americans for Prosperity's Big-Bucks Attack Ads*, WASHINGTON POST, Sept. 28, 2010; Felicia Sonmez, *Who is Americans for Prosperity?* WASHINGTON POST, Aug. 26, 2010; T.W. Farnam and Dan Eggen, *Interest-Group Spending for Midterm Up Fivefold from 2006; Many Sources Secret*, WASHINGTON POST, Oct. 4, 2010.

[9] *See*, e.g., Dan Eggen and Scott Wilson, *Obama Continues Attack on Chamber of Commerce*, WASHINGTON POST, Oct. 11, 2010.

[10] *See, e.g.*, *Clean and Open Elections*, N.Y. TIMES, Oct. 6, 2010; Mike McIntire, *The Secret Sponsors*, N.Y. TIMES, Oct. 2, 2010; Michael Luo and Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010; T.W. Farnam, *Despite Supreme Court Support, Disclosure of Funding for 'Issue Ads' has Decreased*, WASHINGTON POST, Sept. 15, 2010.

not exclusively, with disclosure.[11] The DISCLOSE Act was extremely complex and controversial. Although it narrowly passed the House of Representatives,[12] it was filibustered to death in the Senate and never enacted.[13] However, in 2010 at least eight states passed new campaign finance disclosure laws, and many others debated disclosure law changes.[14]

Although the Supreme Court has sustained disclosure laws, disclosure raises questions concerning the First Amendment rights of those subject to disclosure obligations and of those whose names would be disclosed. The opponents of campaign fiuance regulation, having succeeded in knocking down or paring back other laws, are now aiming their fire at disclosure requirements. By one count, in the months after *Citizens United* campaign finance opponents brought legal challenges to the disclosure laws of nine states.[15] Although these have generally not succeeded, more expansive disclosure will surely trigger new litigation.

This article examines the implications of *Citizens United* for the campaign activities of nonprofits under federal and state campaign finance laws, with particular attention to disclosure laws. Although federal tax law is a crucial part of the regulatory environment for nonprofit electoral activities, this article will not address tax law questions, but will focus solely on campaign finance law. Part II provides the legal and factual background for *Citizens United* and summarizes its holding and implications. Part III discusses other significant campaign finance law developments concerning the pooling of corporate and individual funds in nonprofit intermediaries for the purpose of supporting electoral advocacy and the disclosure of the donors who may be financing the campaign spending of nonprofits. Part IV then focuses on current federal and state efforts to require nonprofits engaged in election spending to provide greater information concerning their donors. Part V concludes.

II. *CITIZENS UNITED*

A. The legal backdrop

The movement to limit corporate participation in electoral politics began in the 1890s, in tandem with the rise of corporate spending in elections. Congress banned corporate contributions to federal candidates in 1907; by 1928, twenty-seven states had banned all corporate contributions and an additional nine barred contributions from certain categories of corporations, such as banks, public utilities, and insurance companies.[16] The federal contribution ban was extended to independent corporate spending—accompanied by an analogous restriction on contributions and expenditures by labor unions—by the Taft-Hartley Act of 1947. So, too, before *Citizens United*, roughly two dozen states prohibited corporate spending in support of or opposition to election candidates.[17] Although some of these laws targeted specific categories of corporations—again, typically, banks, insurance companies or utilities—most referred to "corporations" generally and did not specifically exempt nonprofit corporations.[18]

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[11]H.R. 5175, 111th Cong. (2010). The acronym stands for Democracy is Strengthened by Casting Light on Spending in Elections.

[12]The measure passed the House on June 24, 2010, by a vote of 219–206.

[13]*See* Dan Eggen, *Senate GOP Blocks Measure to Require Greater Disclosure*, WASHINGTON POST, Sept. 24, 2010, A6. The vote on the cloture motion to end debate and bring DISCLOSE to a vote was 59–39, or one vote shy of the 60 votes needed the end the filibuster.

[14]National Conference of State Legislatures, "Life After *Citizens United*," Aug. 10, 2010, http://www.ncsl.org/default.aspx?tabid=19607.

[15]Tara Malloy, *Lawsuits from Maine to Hawaii Seek to Block Public's Right to Know*, CAMPAIGN LEGAL CENTER BLOG, Oct. 5, 2010.

[16]EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 127–28 (Duke Univ. Press 1928).

[17]*See* State Laws Affected by *Citizens United*, National Conference of State Legislatures, http://www.ncsl.org/default.aspz?tabid=19607.

[18]The limits on corporate and union election spending typically contained several exceptions. Federal campaign law, for example, frees corporations and unions to spend without limit on so-called "internal communications"—that is, campaign messages from the corporation to its shareholders and executive and administrative personnel and their families (and unions to their members), and on nonpartisan voter registration and get-out-the-vote drives. A corporation or union could also use corporate or union resources—usually referred to as "treasury funds"—to establish and pay the administrative expenses of a "separate segregated fund to be utilized for political purposes," 2 U.S.C. § 441b(b)(2)(C). Such a separate, segregated fund is usually known as a political action committee or PAC. A corporation could pay the costs of soliciting donations—from shareholders, executive and administrative personnel and their families, or under certain circumstances from all corporate employees and their families—to the PAC. The PAC could then use those donations to make contributions or undertake independent spending supporting or opposing candidates. Under federal law, PAC independent spending is not subject to a dollar limit, but an individual's contribution to a PAC is capped at $5000 per year. However, recent decisions indicate that cap may not be applied to donations that fund independent expenditures only. *See infra* at pp. 346–48. A PAC is entirely controlled by the corporation or union that creates it, which can determine which candidates the PAC supports and how much money it can spend with respect to each of those candidates.

The ban on the use of corporate treasury funds in election campaigns is based on the idea that corporations pose a special problem for democracy. The aggregation of wealth symbolized by the corporate war chest, the fear that huge economic resources would be translated into political power, and the concern that shareholders' funds would be diverted to the political goals of unaccountable corporate managers were all driving forces behind the early twentieth century focus of campaign finance regulation on corporations.

Since the Supreme Court's 1976 decision in *Buckley v. Valeo*,[19] however, our campaign finance jurisprudence has been framed around the First Amendment's protection of speech and association, and has dismissed the idea that unequal campaign spending and enormous differences in the wealth available for election activity are problems that can be addressed by limits on spending. *Buckley* held that campaign finance activity is protected by the First Amendment; that campaign expenditures—that is, spending aimed at communicating views on electoral issues to the voters—are the highest form of campaign finance activity; that restrictions on campaign expenditures are subject to strict judicial scrutiny; and that campaign spending cannot be limited in order to equalize either the spending of or support for candidates or more generally the efforts of individuals, interest groups, or organizations to influence the electorate. *Buckley* also held that contributions, although constitutionally protected, are a lower order of speech than expenditures since contributions do not literally communicate the views of the donor but are more a "symbolic expression of support."[20] Moreover, the Court found that contributions present the danger of corruption and the appearance of corruption. As a result, limits on contributions could be constitutional. But the Court held that corruption concerns could not justify limits on *spending* by individuals, organizations, or interest groups in support of or opposition to a candidate if the spending were undertaken independently of the candidate benefited. With the anticorruption justification unavailable and equality flatly rejected as a basis for limiting campaign spending, *Buckley* struck down the Federal Election Campaign Act's (FECA's) limits on independent spending.[21]

Buckley did not address any of the older restrictions on corporations or unions, but its First Amendment framework and its outright rejection of independent spending limits did not bode well for the future of those laws. Indeed, the Supreme Court's first post-*Buckley* case suggested they would soon be on their way out. In *First National Bank of Boston v. Bellotti*,[22] decided just two years after *Buckley*, the Court struck down a Massachusetts law banning corporate spending in support of or opposition to ballot propositions. Such electioneering, said the *Bellotti* Court, "is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation than from an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source, whether corporation, association, union, or individual."[23]

Bellotti might well have sounded the death knell for the federal and state bans on corporate campaign spending but for two factors. First, the Massachusetts law dealt only with ballot proposition elections, not candidate elections. The Court left open the possibility that candidate elections might present different concerns, noting "[r]eferenda are held on issues, not candidates for public office" so that the "risk of corruption perceived in cases involving candidate elections...simply is not present in a popular vote on a public issue."[24] Second, unlike federal law,[25] the Massachusetts law did not authorize a corporation to create a political action committee (PAC), the device a corporation may use to solicit, collect and pool individual contributions from its directors, executives, and shareholders and then spend on campaign activity. Arguably, by enabling campaign spending by the people affiliated with a corporation a PAC takes the sting out of the ban on the use of corporate treasury funds. Still, *Buckley* and *Bellotti* together suggested serious constitutional doubts about the special regulation of corporations.

Those doubts would not become doctrine until more than three decades later, however. Shortly after *Bellotti* the Court shifted gear and gave much

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[19] 424 U.S. 1 (1976).

[20] *Id.* at 21.

[21] The Court also invalidated limits on a candidate's use of personal wealth for his or her own campaign and limits on a candidate's total campaign spending. Neither could be justified by the anti-corruption concern. *See id.* at 51–57.

[22] 435 U.S. 765 (1978).

[23] *Id.* at 777.

[24] *Id.* at 790. *See also id.* at 788, n. 26.

[25] *See* note 18, *supra*.

greater weight to the longstanding congressional and state concerns about corporations—even in cases involving nonprofit corporations—than *Bellotti* suggested was likely. In *Federal Election Commission v. National Right to Work Committee (NRWC)*,[26] the Court upheld a federal law that tightly restricted the ability of a nonprofit ideological corporation to solicit donations to its PAC. Under FECA, "a corporation without capital stock" may solicit only its "members," but NRWC also sought to solicit nonmembers for financial support. The Court found that the government's interest in "ensur[ing] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests'" justified the restrictions on corporate campaign contributions, the requirement that corporations act through PACs, and the accompanying restrictions on PAC solicitations.[27] The Court linked corporate war chests to *Buckley*'s concern about the corrupting effects of large financial contributions, and accepted Congress's "judgment that the special characteristics of the corporate structure require particularly careful regulation."[28] The Court said nothing about the fact that NRWC was a nonprofit. It acknowledged that federal law "restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated." But it concluded that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared...and there is no reason why" the governmental interest in preventing both actual corruption and the appearance of corruption "may not be accomplished by treating unions, corporations, and similar organizations differently from individuals."[29] The corporate form mattered, even when the corporation in question was not a business corporation but a nonprofit. The Court distinguished *Bellotti* as a referendum case.[30]

Four years later, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*,[31] the Court expanded on *NRWC*'s finding that the corporate form provides a special justification for regulation—that "concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas."[32] But in *MCFL* the nonprofit nature of the corporation mattered. MCFL "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." It had "no shareholders or other persons affiliated so as to have a claim on its earnings," and it did not accept contributions from business corporations or labor unions so that it would not be a "conduit[] for the type of direct spending that creates a threat to the political marketplace." Thus, "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL."[33] Moreover, unlike *NRWC*, *MCFL* was an independent spending case, not a contributions case. The Court distinguished *NRWC*, noting "[w]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."[34]

Four years later in *Austin v. Michigan Chamber of Commerce*[35] the Court upheld a state law prohibiting corporate independent spending in support of or opposition to candidates. Like *NRWC* and *MCFL*, *Austin* emphasized the special nature of the corporate form—"the unique state-conferred corporate structure that facilitates the amassing of large treasuries." As the resources available to a corporation reflect the economically motivated decisions of investors and customers, corporate spending raises the prospect of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." As a result, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."[36] Even though it was a nonprofit, the Michigan Chamber of Commerce could not take advantage of the *MCFL* exception as most of its funding came from business corporations, so there was a danger that it could serve as a conduit for business

[26] 459 U.S. 197 (1982).
[27] *Id.* at 207.
[28] *Id.* at 209–10.
[29] *Id.* at 210–11.
[30] *Id.* at 210 n.7.
[31] 479 U.S. 238 (1986).
[32] *Id.* at 257.
[33] *Id.* at 263–64.
[34] *Id.* at 259–60.
[35] 494 U.S. 652 (1990).
[36] *Id.* at 660.

corporation political spending.[37] Moreover, *Austin* reiterated that when a legislature acts to address the problems posed by corporate wealth it need not limit itself to wealthy corporations but could address all entities that "receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process."[38]

In a pair of cases decided in 2003, the Court continued to find that Congress could treat corporations—including nonprofit corporations—as posing special problems requiring more stringent regulation. In *FEC v. Beaumont*,[39] a case brought by North Carolina Right to Life, Inc., a 501(c)(4) nonprofit advocacy corporation, the Court held that nonprofits were not entitled to an *MCFL*-type exemption from the federal prohibition of corporate campaign contributions. The Court reiterated the language from its prior cases concerning the dangers of war chests accumulated due to the special advantages that go with the corporate form. *Beaumont* also added the concern that corporate donations could be used to evade the limits on individual donations to candidates and parties. *Beaumont* acknowledged that "advocacy corporations are generally different from traditional business corporations" but held that they present many of the same concerns posed by business corporations, including the use of significant state-created advantages to amass considerable resources and the possibility they could be conduits for individual contributions above the limits on individual contributions.[40]

Finally, *McConnell v. FEC*[41] upheld the extension of the federal ban on corporate and union independent spending to a new category of campaign activity known as "electioneering communication." This provision turned less on the nature of the corporation (or union) and more on another key campaign finance law issue—how to determine when political activity is sufficiently election-related that it can be subject to campaign finance regulation. In addressing FECA's provisions dealing with limits on and disclosure of expenditures, *Buckley* considered statutory language that defines an expenditure as spending undertaken "for the purpose of...influencing" the nomination or election of federal candidates. The Court found that when applied to spending by entities other than candidates, political parties, or organizations with the major purpose of electing candidates, FECA's language was vague and overly broad, with the potential to regulate non-electoral political speech. To avoid these constitutional concerns, *Buckley* interpreted FECA to apply only to "express advocacy"—that is, "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate"[42] The Court gave as examples of express advocacy language words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'."[43] These became known as the "magic words" of express advocacy. All other activity came to be known as "issue advocacy," even though it need not involve the discussion of issues. *MCFL* subsequently applied the express advocacy standard to the prohibition on corporate expenditures.[44] The express advocacy/magic words standard exempted many campaign messages from coverage. An advertisement could warmly praise or sharply criticize a candidate for office, but so long as it avoided literally calling on voters to elect or defeat that candidate it would be treated as issue advocacy, not express advocacy. Even discussion of a candidate's character, personality, or private life was issue advocacy so long as there was no call to vote for or against that candidate. As a result, the express advocacy standard proved extremely easy to evade. With most campaign professionals recognizing that many of the most successful election ads by candidates relied on more subtle pitches than literally calling on voters to vote a certain way, the express advocacy standard assured that the vast majority of election ads placed by campaign participants other than candidates would be exempt from campaign finance regulation.

In the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress responded by defining a new category of campaign speech—"electioneering communications"—for purposes of the ban on corporate and union campaign expenditures as well for determining the scope of disclosure. "Electioneering communications" consist of (i) broadcast, cable or satellite communications (ii) that refer to a clearly identified candidate, (iii) are targeted on

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[37] *Id.* at 661–65.
[38] *Id.* at 661.
[39] 539 U.S. 146 (2003).
[40] *Id.* at 159–60.
[41] 540 U.S. 93 (2003).
[42] 424 U.S. at 80.
[43] *Id.* at 44 n. 52.
[44] 479 U.S. at 248–50.

that candidate's constituency, and (iv) are aired within thirty days before a primary or sixty days before a general election in which that candidate is running. *McConnell* upheld BCRA's electioneering communication provisions. The Court found that "*Buckley*'s magic-words requirement is functionally meaningless" and that as a result "*Buckley*'s express advocacy line...has not aided the legislative effort to combat real or apparent corruption."[45] The Court agreed that the new standard avoided vagueness and was properly tailored to regulate campaign messages. The Court rejected facial challenges to the extension of both disclosure requirements and the ban on corporate and union expenditures to electioneering communications.

McConnell also reiterated the constitutionality of Congress's prohibition on corporate and union campaign spending, finding that "Congress's power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law."[46] Picking up on a theme previously articulated in *Austin*, the Court noted that since a corporation could spend through its PAC, the prohibition on the use of treasury funds was not an absolute ban on corporate election spending; the PAC provides a corporation with "constitutionally sufficient opportunities to engage in express advocacy."[47]

The twenty-year period from *NRWC* to *McConnell* of Supreme Court affirmation of special restrictions on corporations (and unions) began to change sharply in 2007. That year, the Court decided *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*),[48] which effectively undid much of *McConnell's* affirmation of BCRA's extension of the ban on the use of corporate and union treasury funds to electioneering communication. *WRTL* agreed with *McConnell* that Congress could regulate spending beyond the magic words of express advocacy, but held that Congress could not apply the corporate spending ban beyond communications which were the "functional equivalent of express advocacy," which would occur "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[49] *WRTL* did not quite go back to the "magic words" test but the decision meant that Congress could not regulate much beyond the "magic words" either. The Court also broke with the idea that the availability of the PAC gives corporations a constitutionally sufficient outlet to speak: "PACs impose well-documented and onerous burdens, particularly on small nonprofits."[50]

WRTL indicated that with the departure of Justice O'Connor—who had been a coauthor of *McConnell*—and her replacement by Justice Alito, the majority of the Court was far more skeptical of campaign finance restrictions and far more willing to find campaign finance laws violative of the First Amendment. *McConnell* had upheld BCRA's restrictions on corporate electioneering communications by a narrow 5–4 vote. By *WRTL*, the Court's views on campaign finance had switched to 5–4 in the opposite direction.

B. The decision: Corporate spending

Citizens United grew out of an action brought by a conservative advocacy nonprofit organization, tax-exempt under section 501(c)(4), to obtain an exemption from the ban on corporate electioneering communications for a film it had made, *Hillary: The Movie*, when Senator Clinton was running for the Democratic nomination for president. The film was not itself an electioneering communication, as it was released in theaters and on DVD but not broadcast or distributed by cable or satellite, which is a statutory prerequisite for "electioneering communication" status. However, Citizens United also wanted to distribute the film through video-on-demand (VOD) available to digital cable subscribers. Distributing the film on cable, and television broadcasts of ads promoting the film, which mentioned Senator Clinton by name, is electioneering communication within the statute if aired in any state within thirty days before a primary election in which Senator Clinton was a candidate.

There were a number of arguments that might have won Citizens United an exemption from the electioneering communication restriction without invalidating the ban on corporate electioneering. The movie could have been treated as not the functional equivalent of express advocacy—but both the

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[45] 540 U.S. at 193–94.
[46] *Id.* at 202.
[47] *Id.*
[48] 551 U.S. 449 (2007).
[49] *Id.* at 469–70.
[50] *Id.* at 477 n.9.

district court and the Supreme Court found that the film's consistent and pervasive criticism of Senator Clinton's fitness for president eliminated that option. Citizens United could have been granted an *MCFL*-type nonprofit exemption. Although, unlike MCFL, Citizens United accepted "a small portion of its funds from for-profit corporations,"[51] the *MCFL* exception could have been expanded. Indeed, a number of courts had held that the exception was available for nonprofits that receive a modest share of their total funding from for-profit corporations.[52] Citizens United's expenses for *Hillary: the Movie* could have been treated as falling within the press or media exclusion from the definition of "electioneering communication" as Citizens United was in the regular business of making ideological films. Indeed, six months after the Supreme Court's decision the FEC issued an advisory opinion finding that Citizens United's production, distribution, and marketing costs for its films fit within the media exemption.[53] Alternatively, an exemption for VOD spending could have been created as VOD involves viewer requests to receive a communication rather than a sponsor's bombardment of the viewer with an unsought message, so that VOD "has a lower risk of distorting the political process than do television ads."[54]

The five-justice majority on the Supreme Court was not sidetracked by these Citizens-United-specific issues and instead addressed the fundamental constitutional question underlying the corporate spending prohibition. By a vote of five to four, the Court determined that both the prohibition on the use of corporate or union treasury funds to pay for electioneering communications and the older prohibition on the use of corporate and union treasury funds to finance independent expenditures for express advocacy violate the First Amendment. In so doing, the Court overturned both *Austin* and the relevant portion of *McConnell*.

The Court emphasized that "First Amendment protection extends to corporations" including the political speech of corporations. Citing *Bellotti*, it noted that the argument that the First Amendment is not available because corporations are not "natural persons" had long been rejected.[55] The Court also rejected the argument it had accepted in *McConnell* that due to the availability of the PAC option the prohibition on the use of corporate and union treasury funds was not really a ban on corporate speech but only a channeling device: "The law before us is an outright ban." Requiring that political spending be directed through a PAC imposed "burdensome" administrative costs so that the possibility of creating and using a PAC was not a constitutionally sufficient means for enabling corporate or union independent spending.[56]

The Court then considered and rejected a number of possible justifications for barring corporate election spending. First, it dismissed *Austin*'s anti-distortion rationale—the idea that corporate wealth amassed in the marketplace and unrelated to support for the corporation's political ideas distorts the electoral process: "It is irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas.'...All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech."[57] The Court treated the anti-distortion argument as little more than a variant on the egalitarian argument for limiting individuals' independent spending that it had rejected in *Buckley*.[58]

Second, the Court denied that corruption concerns could support a prohibition on corporate independent spending. The Court underscored the distinction, central to campaign finance jurisprudence since *Buckley*, between contributions and expenditures. *NRWC's* reference to "the influence of political war chests funneled through the corporate form" could be dismissed because *NRWC* "involved contribution limits" and not expenditures. An independent expenditure—that is, one that has not been prearranged or coordinated with a candidate—simply and categorically does not present a corruption danger. Even if an independent

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[51]130 S. Ct. at 887.

[52]*See, e.g.*, Center for Individual Freedom, Inc. v. Ireland, 613 F. Supp. 2d 777, 778 (S.D.W. Va. 2009) (4.4% of revenues from business corporations); North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 714 (4th Cir. 1999) (up to 8%); Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129, 130 (8th Cir. 1997) (exemption available even if nonprofit "engages in minor business activities or accepts insignificant contributions from business corporations").

[53]FEC Advisory Opinion 2010-08 (June 11, 2010).

[54]130 S.Ct. at 890–91.

[55]*Id.* at 899–900.

[56]*Id.* at 897.

[57]*Id.* at 905.

[58]*Id.* at 904.

expenditure wins the spender "influence over or access to elected officials," that is not corruption so that the anti-corruption concern cannot justify a spending ban.[59]

The Court also summarily dismissed an argument it had accepted in *Austin* that the corporate spending ban protects the interests of dissenting shareholders. Shareholder protection was rejected as both overinclusive—the statute did not exempt nonprofits or single-shareholder corporations—and underinclusive, given the temporal and media limits on the definition of "electioneering communication."[60]

Citizens United did not address bans on corporate campaign contributions. The Court distinguished *NRWC* as a contributions case; made much of the contribution/expenditure distinction in its discussion of the anti-corruption rationale for regulation; and did not mention *Beaumont*—which had upheld the application of the ban on corporate contributions to nonprofit corporations—at all. As a result, the federal and many state laws banning corporate campaign contributions—including campaign contributions by nonprofits—remain valid, as least for now. If the corporate contribution prohibitions continue to stand, then similar bans on corporate coordinated expenditures—that is, expenditures undertaken in cooperation with a candidate or party—should hold up as well as the Court has held that coordinated expenditures may be regulated as contributions. To be sure, *Citizens United*'s rejection of the idea that corporate campaign spending is more dangerous than spending by individuals does raise questions about the constitutionality of a complete ban on corporate and union contributions, as opposed to the dollar limits on contributions applicable to individuals and non-corporate and non-union associations. Still, the complete ban might be sustained under the secondary rationale put forward in *Beaumont*—that it is necessary to prevent circumvention of the limits on individual contributions that might result if an individual who has given the maximum permitted amount uses a corporation as a conduit for giving additional money.[61] As *Beaumont* noted, "nonprofit advocacy corporations are...no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals."[62] As this article was going to press two circuit courts of appeals have held that even after *Citizens United*, *Beaumont* continues to be good law and provides sufficient support for laws banning corporate contributions to candidates.[63]

C. The decision: Disclaimer and disclosure requirements

Citizens United had also challenged the application to *Hillary: the Movie* of BCRA's disclaimer and disclosure provisions. The disclaimer measure requires that any electioneering communication funded by anyone other than a candidate include a statement that the ad is not authorized by a candidate and that the spender is responsible for its content. The ad must also display the funder's name and address or Web site address. The disclosure provision requires that anyone who spends more than $10,000 on electioneering communications in a calendar year must file with the FEC a statement identifying the person making the communication, the amount spent, the election at which it was directed, and the names and addresses of certain contributors. The Court upheld the application of the disclaimer and disclosure provisions to the movie and to the television ads promoting the movie. In so doing, the Court emphasized the value of disclosure. Not only is disclosure "a less restrictive alternative to more comprehensive regulations of speech,"[64] disclosure provides voters with information relevant to their voting decisions, and so is entirely consistent with, indeed, supportive of, the First Amendment:

> 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

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[59] *Id.* at 908–11.
[60] *Id.* at 911.
[61] 539 U.S. at 155.
[62] *Id.* at 160.
[63] *See* Minnesota Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304, 316–18 (8th Cir. 2011); Thalheimer v. City of San Diego, 645 F.3d 1109, 1124–26 (9th Cir. 2011); *cf.* Green Party of Connecticut v. Garfield, 616 F.3d 189, 199 (2d Cir. 2010) (*Beaumont* still good law). *But see* United States v. Danielczyk ___ F.Supp.2d ___, 2011 WL 2161794 (E.D. Va. 2011), ___ F.Supp.2d ___, 2011 WL 2268063 (motion for reconsideration denied) (finding *Beaumont* undermined by *Citizens United* and striking down application of federal corporate contribution ban to a business corporation).
[64] 130 S. Ct. at 915.

> decisions and give proper weight to different speakers and messages.[65]

The Court determined the voter informational purposes of the disclaimer and disclosure laws would be served by applying them not just to the movie but to the ads, even though the ads were arguably commercial—aimed at selling a product—and not political. "At the very least, the disclaimers avoid confusion by making clear that the ads were not funded by a candidate or political party."[66]

The Court also addressed an issue implicitly raised by *WRTL*'s limiting definition of "electioneering communication." *WRTL* had dealt with the use of "electioneering communication" to extend the ban on the use of corporate and union treasury funds on campaign expenditures—now invalidated by *Citizens United*. But BCRA also extended federal disclosure requirements concerning election spending from express advocacy to electioneering communications. Did *WRTL*'s gloss limiting electioneering communication to "the functional equivalent of express advocacy" apply to disclosure, too? If so, at least the *Hillary* ads might have been exempted from the disclosure requirement. But the Court expressly "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." Disclosure doesn't burden political speech in the same way that spending limits do, and it also serves to inform the voters. "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."[67] As a result, electioneering communications as broadly defined in the statute may be subject to disclosure.

Although *Citizens United* confirmed that corporations that engage in election spending may be subject to disclosure, actually obtaining effective disclosure has proven difficult in practice. There is considerable evidence that business corporations prefer not to spend in their own names but, instead, to act through nonprofit intermediaries, such as (c)(4) advocacy organizations or (c)(6) trade associations and chambers of commerce.[68] This can facilitate the pooling of funds from many like-minded corporate donors and the hiring of political strategists to determine where those funds can be used to the greatest political effect. Under current law, it may also make it possible for the corporations actually funding the nonprofit nominally engaged in campaign spending to avoid disclosure. So, too, the federal disclaimer requirement is focused on the entity formally sponsoring a campaign ad. It must disclaim that it is affiliated with a candidate or party and identify itself. But with many current speakers actually nonprofits with anodyne names—American Crossroads, Americans for Prosperity, the American Future Fund—the disclaimer provides little information to voters about who is really paying for the ads. Indeed, as will be discussed in the next Part, legal developments since *Citizens United* have actually made it easier for electorally active corporations to avoid disclosure. Even as the *Citizens United* Court assured the public that "modern technology makes disclosure rapid and informative,"[69] so that disclosure would be an effective response to any corporate spending that might be unleashed by the Court's decision, federal campaign law as currently interpreted enables many of the nonprofit corporations that sponsor campaign ads to avoid disclosure of their donors.[70]

III. THE RISE OF INDEPENDENT SPENDING THROUGH NONPROFIT INTERMEDIARIES AND THE CHALLENGE FOR CURRENT DISCLOSURE LAWS

A. Invalidation of limits on donations for independent expenditures

Under campaign finance law, expenditures enjoy the highest level of First Amendment protection;

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[65] *Id.* at 916.
[66] *Id.* at 915.
[67] *Id.*
[68] *See, e.g.*, Michael Luo and Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010 ("most prominent, publicly traded companies are staying on the sidelines"; for those corporations that participate, "[a]lmost all of then are doing so through 501(c) organizations, as opposed to directly sponsoring advertisements themselves"); Peter H. Stone, *Campaign cash: The independent fundraising gold rush since "Citizens United" ruling*, CENTER FOR PUBLIC INTEGRITY, Oct. 4, 2010, http://www.iwatchnews.org/2010/10/04/2470/campaign-cash-independent-fundraising-gold-rush-citizens-united-ruling ("Many corporations seem inclined to give to groups that are allowed by tax laws to keep their donations anonymous.").
[69] 130 s. ct. at 916.
[70] *See, e.g.*, Jim Ruternberg, et al., *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010; T.W. Farnam, *Disclosure of "issue ad" Funding is on the Wane*, WASHINGTON POST, Sept. 16, 2010.

expenditure restrictions are subject to strict judicial scrutiny; and, with *Citizens United*, there is currently no accepted justification for limiting or prohibiting campaign expenditures. Contributions, on the other hand, are less protected; restrictions on contributions are subject to less stringent review; and contributions may be limited to prevent corruption or the appearance of corruption. What, then, of contributions that are used to finance independent expenditures, e.g., where donor A gives to spender B who takes out an ad calling for the election of candidate C? Can A's donation to B be subject to contribution limits? Can such a limit be supported by the anticorruption justification?

Surprisingly, this issue had not been squarely faced until recently. Since 1974, FECA has imposed monetary limits on individual donations to political committees, including noncandidate, nonparty committees such as PACs. In 1981, in *California Medical Ass'n v. FEC (CalMed)*,[71] the Court upheld application of the limit to a donation by a trade association to its own PAC, emphasizing that the limit was necessary to avoid circumvention of the limits on individual donations to candidates. The key fifth vote was provided by Justice Blackmun who, in a concurring opinion, indicated that the result would be different if the PAC undertook only independent expenditures and did not make contributions to candidates.[72] That same year, in *Citizens Against Rent Control (CARC) v. City of Berkeley*,[73] the Court also held that donations to committees formed to support or oppose ballot propositions may not be limited because spending in ballot proposition elections poses no question of corruption. But it has only been in the last few years that the lower federal courts and the FEC have determined that donations to pay for independent expenditures in candidate elections cannot be limited.

In 2008 in *North Carolina Right to Life, Inc. v. Leake*,[74] the Fourth Circuit held that a North Carolina law limiting donations to political committees could not, constitutionally, be applied to committees that engage only in independent expenditures. In 2009, in *Emily's List v. FEC*,[75] a panel of the United States Court of Appeals for the District of Columbia Circuit struck down multiple FEC regulations dealing with political committees that both contribute to federal candidates and make independent expenditures. The court held that the FEC could require such a committee to pay for its contributions to candidates and parties and the associated administrative costs with so-called "hard money," that is, funds that are subject to federal dollar limits and source prohibitions (e.g., no corporate or union money). But the court determined that the First Amendment bars the FEC from imposing such restrictions on the sources or amounts of donations used for "generic get-out-the-vote efforts and voter registration activities," that is activities not promoting a specific candidate or party.[76] Similarly, political committees could not be required to use only hard money to pay the costs of advertisements that merely "refer" to candidates.[77]

Then, in March 2010, the D.C. Circuit, sitting en banc, held in *SpeechNow.org v FEC*[78] that the federal statutory limit on donations to political committees could not, consistent with the First Amendment, be applied to committees that make only independent expenditures. Relying on *Citizens United*'s determination that there is no anti-corruption interest in limiting independent expenditures,[79] the court concluded there is no anti-corruption interest in limiting contributions to committees that make only independent expenditures. The following month a Ninth Circuit panel followed suit, holding that a city ordinance imposing a monetary cap on contributions to independent expenditure committees violates the First Amendment.[80]

The FEC declined to seek Supreme Court review of *SpeechNow* and instead followed it with two important advisory opinions authorizing political committees that intend to make only independent expenditures to accept unlimited donations. In *Club for Growth, Inc.*[81] the Commission agreed that the Club for Growth—a 501(c)(4) organization which already had a PAC that made campaign contributions—could set up another committee that would make only independent expenditures. That independent expenditure committee could accept unlimited donations, could solicit and accept

[71] 453 U.S. 182 (1981).
[72] *Id.* at 203.
[73] 454 U.S. 290 (1981).
[74] 525 F.3d 274 (4th Cir. 2008).
[75] 581 F.3d 1 (D.C. 2009).
[76] *Id.* at 16.
[77] *Id.* at 17.
[78] 599 F.3d 686 (D.C. Cir. 2010).
[79] *Id.* at 693.
[80] Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010).
[81] A.O. 2010-10 (July 22, 2010).

donations from the general public, and could solicit and accept unlimited donations even if earmarked for independent expenditures concerning specific candidates. In addition, the Club's president could serve as treasurer both of the PAC that makes contributions and of the independent expenditure committee, provided he pledges the two committees will not coordinate. In *Commonsense Ten*,[82] issued the same day, the Commission confirmed that an independent expenditure committee could accept unlimited donations from corporations and unions as well as individuals.

Technically, these cases and FEC advisory opinions deal only with "political committees," that is, organizations whose major purpose is electoral and, accordingly, are required to register with the FEC and abide by the organizational, record-keeping, and reporting rules applicable to such committees. But the principle that an organization that engages only in independent expenditures and does not make contributions to candidates or parties may accept contributions in unlimited amounts seems generally applicable to all politically active organizations. Indeed, the day after the two FEC advisory opinions were released, a federal district court in Michigan, in a case brought by the Michigan Chamber of Commerce, held that after *Citizens United* Michigan's prohibition on corporate campaign contributions cannot constitutionally be applied to corporate contributions to a committee that makes only independent expenditures.[83]

Thus, although many laws on the books, like FECA itself, may include provisions limiting contributions to organizations that make independent expenditures or barring corporations from doing so, the emerging doctrine is that contributions to organizations that make only independent expenditures may not be limited. Even if an organization makes both contributions and expenditures, if the funds for the two activities are carefully separated, the organization can accept uncapped contributions for its independent spending, including from business corporations. In any event, there appears to be nothing to prevent such an organization from setting up two affiliated committees—one that makes contributions and one that makes only independent expenditures—and soliciting and collecting unlimited contributions for the latter. Or, considered from the perspective of the donors, multiple individuals, multiple corporations, or multiple corporations and individuals may, without monetary limit, pool their funds in nonprofit organizations that finance independent expenditures—and, of course, those independent expenditures may not be subject to a monetary limit either.[84]

B. Limited disclosure of donations used to pay for electioneering

Federal law requires that any person who spends more than $10,000 on electioneering communications in a calendar year must, within 24 hours, file with the FEC a report that *inter alia* includes the names and addresses of all persons "who contributed an aggregate amount of $1000 or more to the person making the disbursement" since the start of the preceding calendar year.[85] The Supreme Court upheld the application of this provision to a nonprofit (c)(4) in *Citizens United*, but the Court did not address which donors to the organization would be subject to disclosure.

This provision was adopted concurrently with BCRA's ban on corporate and union electioneering communications and so the disclosure measure did not address disclosure by corporations or unions. When *WRTL* relaxed the electioneering communication restriction, the issue arose as to how to apply the contributor disclosure requirement to corporations and unions, which are not formed for or primarily engaged in electoral activity, and receive

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[82]A.O. 2010-11 (July 22, 2010).

[83]Michigan Chamber of Commerce v. Land, 725 F. Supp. 2d 665 (W.D. Mich. 2010).

[84]The one decision that arguably cuts the other way is the Supreme Court's action in October 2010 in the *Family PAC* litigation. A Washington state law put a $5,000 limit on an individual contribution to a political committee in the final three weeks before a general election. The law was challenged by a conservative advocacy group seeking to play a role in ballot measure campaigns in the state. A district court struck the restriction down in September 2010, but on October 5, the Ninth Circuit granted a stay for the rest of the 2010 election period. On October 12, the Supreme Court declined to vacate the stay. Family PAC v. McKenna, 131 S.Ct. 500 (2010). The state defended the restriction on late donations as essential to effective disclosure in ballot proposition campaigns. Noting that $45 million in contributions had been raised for ballot campaigns in the state as of October 9, the state also contended that the law did not operate as a limit on ballot proposition spending. The law does seem to be in tension with *CARC*'s invalidation of dollar limits on contributions to ballot proposition campaign committees. However, the Ninth Circuit stay and the Supreme Court's denial of the application to vacate may reflect a judicial reluctance to upset election laws on the eve of an election rather than a view of the merits of the restriction.

[85]2 U.S.C. § 434(f).

funds from sources—shareholders, customers, members, "or in the case of a non-profit corporation, donations from persons who support the corporation's mission"[86]—that do not necessarily intend to fund electioneering. Accordingly, after *WRTL*, the FEC adopted a regulation limiting the disclosure of donations only to those "made for the purpose of furthering electioneering communications."[87]

In 2010, a closely divided FEC declined to require an independent committee to disclose its donors when the donations were not made *expressly* "for the purpose of furthering the electioneering communication that is the subject of the report." The case involved Freedom's Watch, Inc., a nonprofit advocacy corporation that spent $126,000 on electioneering communication ads in a Congressional special election in the spring of 2008. Freedom's Watch filed the required electioneering communication report concerning its spending but did not disclose any donors. Indeed, Freedom's Watch did not disclose any donors for any of its 2008 electioneering communications because it contended all the donations it received were to support the organization's general purposes, and none were earmarked for specific electioneering communications.[88] Three members of the FEC concluded that under those circumstances Freedom's Watch was under no duty to disclose its donors; only two commissioners thought that disclosure was required. As a result, the complaint brought against Freedom's Watch because of its failure to disclose its donors was dismissed. Although not a formal ruling of the commission, *Freedom's Watch* indicates that under the current FEC at least, a nonprofit corporation that accepts donations not specifically earmarked for electioneering communications is under no federal election law requirement to disclose the identities of its donors or the amounts donated. Indeed, *Freedom's Watch* effectively protects even those donations given for the purpose of electioneering communications generally so long as the donor has not indicated that it wants its funds used in a particular contest.

Freedom's Watch involved the FEC's interpretation of its own regulations. It is not a constitutional case; it does not affect state disclosure laws or even limit the ability of the FEC to adopt new regulations that would require the disclosure of donations used to pay for electioneering communication. However, the decision and the FEC rule it construes point to what is a central disclosure question resulting from *Citizens United*: whether and how to require the disclosure of the identities of the corporations and wealthy individuals who finance electioneering communications through contributions to nonprofit intermediary organizations that are not primarily electoral and take funds for a mix of both electoral and nonelectoral purposes.

IV. NONPROFITS AND DISCLOSURE IN THE WAKE OF CITIZENS UNITED

In the post-*Citizens United* world, disclosure is the principal[89] campaign finance law issue for nonprofits that engage in electioneering activity. The press has beaten a steady drumbeat of stories and editorials describing the lack of disclosure of the donors to the nonprofits that spent tens and hundreds of thousands of dollars—and tens of millions in the aggregate—in 2010's House and Senate races.[90] According to one account, just 93 of the 202 organizations that engaged in independent spending during the 2010 midterm election cycle disclosed their donors.[91] *Citizens United* and the post-*Citizens United* decisions of the lower federal

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[86]FEC, Electioneering Communications: Final Rule and Transmittal to Congress, 72 Fed. Ref. 72899, 72911 (Dec. 26, 2007).
[87]11 C.F.R. § 104.20(c)(9).
[88]M.U.R. 6002, In the Matter of Freedom's Watch (complaint dismissed and file closed on Apr. 27, 2010).
[89]As contributions may be limited but expenditures cannot be, the other significant regulatory issue is the determination of when an organization's expenditure may be deemed sufficiently coordinated with a candidate or political party that it may be regulated like a contribution.
[90]*See Secret Campaign Money*, WASHINGTON POST, Oct. 12, 2010; Jim Rutenberg, Don Van Natta, Jr., and Mike McIntire, *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 11, 2010; Eugene Robinson, *Midterm Campaigns, Brought to You by...?* WASHINGTON POST, Oct. 5, 2010; Kenneth P. Vogel, *Secret Donors Fuel Crossroads Media Buy*, POLITICO, Oct. 5, 2010; T.W. Farnam and Dan Eggers, *Interest-Group Spending for Midterm up Fivefold from 2006; Many Sources Secret*, WASHINGTON POST, Oct. 4, 2010; Mike McIntire, *The Secret Sponsors*, N.Y. TIMES, Oct. 2, 2010; Mike McIntire, *Hidden Under Tax-Exempt Cloak, Political Dollars Flow*, N.Y. TIMES, Sept. 23, 2010; Michael Luo and Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 20, 2010; T.W. Farnam, *Disclosure of "Issue Ad" Funding Is on the Wane*, WASHINGTON POST, Sept. 16, 2010; T.W. Farnam, *Despite Supreme Court Support, Disclosure of Funding for "Issue Ads" Has Decreased*, WASHINGTON POST, Sept. 15, 2010.
[91]*See* Bill Allison, *Daily Disclosures*, THE SUNLIGHT FOUNDATION (Oct. 18, 2010), http://blog.sunlightfoundation.com/taxonomy/term/independent-expenditures/.

courts such as *SpeechNow.Org* confirm that reporting and disclosure requirements—including disclaimer rules—can be applied to the election-related expenditures of nonprofits and other independent organizations, even though those expenditures may not be limited.

Disclosure raises important constitutional issues. Even though disclosure does not limit spending, the Supreme Court has found that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[92] As a result, disclosure requirements are subject to a heightened standard of review—not the strict scrutiny that applies to spending limits, but an "exacting scrutiny" which requires that disclosure have a "substantial relation" to a "sufficiently importantly" governmental interest.[93] *Buckley* recognized three "sufficiently important" governmental interests, one of which is "provid[ing] the electorate with information." The Court concluded that disclosure of those who pay for independent spending has a "substantial relation" to that interest "because it increases the fund of information of those who support candidates."[94] Although the Court has determined that independent spending raises no danger of corruption, "the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters define more of the candidates' constituencies."[95] But disclosure of those who pay for political communications that are not about candidates cannot be so justified.

Recent legislative efforts to increase disclosure of spending by, and especially of donors to, nonprofit organizations—and recent and pending litigation challenging disclosure laws—have focused on three issues. First, when is an advertisement or other public communication sufficiently election-related that it can be subject to campaign finance rules? This continues the express advocacy/issue advocacy/electioneering communication thread elaborated by the Supreme Court in *Buckley*, *McConnell*, and *WRTL*. Second, under what circumstances can Congress or the states require the disclosure of the identities of donors to organizations engaged in election-related speech? For multi-purpose organizations that engage in a mix of legislative lobbying, voter education, public advocacy, and electioneering, this involves addressing both constitutional and practical concerns in deciding whether a donor can be treated as contributing to the organization's electioneering activity. Third, when can organizations, particularly nonprofit firms, that take out campaign ads be required to identify their principal donors *in their ads* instead of or in addition to simply listing those names in a report filed with the campaign finance regulator?

A. Definition of electioneering message

A central campaign finance law issue is what sort of communication can be treated as an election-related message that can be regulated. As already discussed, (i) *Buckley* initially embraced a narrowing "express advocacy" requirement; (ii) Congress expanded that in BCRA to include "electioneering communication;" (iii) *McConnell* sustained that broader definition; and (iv) *WRTL* held that the First Amendment required that "electioneering communication" be sharply pared back to the "functional equivalent of express advocacy" in a case involving the prohibition of the use of corporate and unions treasury funds to pay for express advocacy. Left unaddressed in *WRTL* was whether the First Amendment limited disclosure to the "functional equivalent of express advocacy." Several lower courts held that *WRTL* did not narrow the scope of disclosure requirements,[96] and *Citizens United* resolved that issue conclusively. Disclosure and disclaimer requirements can be required beyond the "functional equivalent of express advocacy" and at least as far as the "electioneering communication" defined in BCRA.[97]

However, there are still limits on what can be deemed electioneering even just for purposes of disclosure. In 2010, a federal district court invalidated a portion of Maine's law requiring an organization to register as a political committee if it spends more than $5,000 a year "for the purpose of

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[92]Buckley, 424 U.S. at 64.
[93]*Id.* at 64–66.
[94]*Id.* at 81.
[95]*Id.*
[96]*See, e.g.*, Koerber v. FEC, 583 F. Supp. 2d 740 (E.D.N.C. 2008); Ohio Right to Life Society, Inc. v. Ohio Elec. Comm'n, 2008 WL 4186312 (S.D. Ohio 2008); Human Life of Washington, Inc. v. Brumsickle, 2009 WL 62144 (W.D. Wash. 2009). *But cf.* Center for Individual Freedom, Inc. v. Ireland, 613 F. Supp. 2d 777, 799–800 (S.D. W. Va 2009) (finding that West Virginia law defining "electioneering communication" was even broader than BCRA and therefore not "narrowly tailored").
[97]*See, e.g.*, Center for Individual Freedom v. Madigan 735 F. Supp. 2d 994 (N.D. Ill. 2010).

promoting, defeating *or influencing in any way* the nomination or election of any candidate to political office."[98] The court found that "influencing in any way" was unconstitutionally vague and struck it down; however, the United States Court of Appeals for the First Circuit subsequently reversed, reinstated the "influencing" phrase, and determined that the entire provision is constitutionally acceptable.[99] A pre-*Citizens United* decision struck down West Virginia's definition of "electioneering communication" because it applied not just to broadcast media but to mass mailings, telephone banks, billboard advertisements, newspapers, and magazines. The court determined that under *WRTL* the state bore a heavy burden of proving that it had an interest in requiring disclosure beyond the broadcast media covered by BCRA, and it followed the Fourth Circuit's *Leake* decision in treating BCRA's definition of "electioneering communication" as the outer limit of regulation, even just for disclosure. However, the court garbled *WRTL*'s narrow tailoring requirement for anti-corruption regulation with the more relaxed standard of review applicable to disclosure.[100] *Citizens United* undermines this decision.[101] Indeed, a federal district court in *South Carolina Citizens for Life, Inc. v. Krawcheck* relying on *Citizens United* found that South Carolina could include telephone banks, direct mail, and any paid advertisements "conveyed through an unenumerated medium that cost more than five thousand dollars" in its statutory definition of electioneering communications subject to disclosure. The court agreed that South Carolina could apply a slightly wider pre-election period than does BCRA, when it held that the state could regulate messages identifying state candidates disseminated within 45 days before a primary, even though BCRA had adopted a 30-day window.[102]

As these cases indicate, the principal new electioneering definition issues involve (i) the regulation of nonbroadcast media and (ii) the expansion of the pre-election period. The North Carolina reform law adopted in 2010 defines "independent expenditure" to include "mass mailing" and "telephone banks,"[103] and West Virginia's law includes newspapers, magazines, and other periodicals.[104] In the DISCLOSE Act, the House of Representatives sought to extend the statutory pre-general-election period from 60 days to 120 days[105]—in other words, to treat as electioneering communications those ads that mention candidates (including incumbent officeholders) as early as July of an election year. This would cut fairly deeply into the year, including periods when Congress will almost surely be in session. This does, however, reflect the political reality that significant electioneering activity, particularly at the state level, may involve nonbroadcast media, and that general election campaigns, particularly at the federal level, seem to start earlier and earlier.

It is difficult to predict how these measures would fare in court. Although they do not bar speech, reporting and disclosure requirements do impose a burden on speech. With respect to the reporting of electioneering communications, the burden—saving for the moment the question of the reporting of the identities of donors—is fairly modest. Typically, an independent expenditure filing lists the name and address of the spender, the amount and date of the expenditure (above a threshold level), the recipient of the disbursement, the election affected, and the candidates supported or opposed. These are not particularly onerous obligations;[106] certainly they are much less so than the PAC organizational and reporting requirements discussed in *Citizens United*. And, as in *Citizens United*, these expansions of the definition of the spending subject to disclosure advance the public's "interest in knowing who is speaking shortly before an election"—although the long pre-election period proposed in DISCLOSE does push out the envelope of "shortly before."

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[98]National Organization for Marriage v. McKee, 723 F. Supp. 2d 245, 254 (D. Me. 2010)(emphasis added).

[99]National Organization for Marriage v. McKee, 649 F.3d 34, 64–67 (1st Cir. 2011).

[100]Center for Individual Freedom v. Ireland, 613 F. Supp. 2d at 799–808.

[101]The court, however, recently reaffirmed its decision. *See* Center for Individual Freedom, Inc. v. Tennant, ___ F. Supp. 2d ___, 2011 WL 2912735 (S.D.W.V. July 18, 2011), at *21–*25.

[102]South Carolina Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708 (D.S.C. 2010).

[103]North Carolina Session Law 2010-170, section 1, amending G.S. § 163-278.6.

[104]W. Va. H.B. 4647. This provision of the West Virginia law has been invalidated as overbroad. *See* Center for Individual Freedom, 2011 WL 2912735, at *26–*29.

[105]DISCLOSE Act, Section 202 (amending 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa)).

[106]*See* Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 788-89 (9th Cir. 2006).

The expansion of the media regulated from broadcast to print, mailers, and telephone banks should pass muster, provided the laws target mass mailings, general circulation newspapers and periodicals, etc., rather than more individualized communications, and there is an appropriate regulatory threshold, such as dollars spent, or volume of messages sent, to avoid regulating individual or small group activity.[107] The expansion of the regulatory period may be more questionable, since it seems likely to pick up considerable grass-roots legislative lobbying as well as electioneering. Much might turn on the facts of specific cases, such as the length of the legislative session, or the content of the ads so regulated.

B. Donor disclosure

Citizens United confirms that nonprofits that engage in independent electioneering can be required to disclose the identities of the donors who finance those electioneering messages. But can such disclosure be obtained from an organization that is primarily non-electoral and engages in both electoral and non-electoral activities? Can it be required to disclose all donors who give above a certain dollar threshold? Or, can it be required to disclose only the names of those who give expressly for the purpose of financing electioneering—which, as *Freedom's Watch* suggests, may mean no disclosure at all. Is there some intermediate position for distinguishing electoral from non-electoral donors to organizations that combine electoral and non-electoral activities?

Recent legislation and legislative proposals suggest four possible strategies for obtaining disclosure of those who pay for campaign ads: (i) widen the definition of the "political committee" subject to reporting and disclosure requirements; (ii) provide standards for determining whether a particular donation was given for an electoral purpose; (iii) encourage or require nonprofits to create electoral activity accounts that would be the sole source of electoral activity and require the disclosure only of donors to those accounts; (iv) presume that unless a donor, above a dollar threshold, has asked that her donation not be used for political purposes, her money is one of the sources for electioneering and require its disclosure. These alternatives are discussed more fully below.

(1) Definition of political committee. Many election laws provide that if an organization's activities are sufficiently election-related, it will be regulated as a "political committee." This typically involves registering with the FEC for federal political committees or with the appropriate state agency for a committee active in state elections, and providing certain basic information, such as the name and address of the organization and its principal officers; maintaining a designated bank account; maintaining and retaining for a period of time certain financial records; and filing reports concerning expenditures made and contributions received including the names and addresses of donors who give above a threshold amount. The specific administrative, organizational, and reporting requirements vary from jurisdiction to jurisdiction; even within a state, recordkeeping and reporting requirements may vary with the level of election-related activity of the organization.

The central question for determining whether an organization is to be regulated as a political committee is what is the threshold level of electoral engagement that triggers regulation? Can the threshold be purely quantitative (e.g., electoral spending above a dollar amount)? Or does it have to be qualitative, that is, does electoral activity have to be "the" or even "a" "primary" or "major" purpose of the organization?

In *Buckley*, the Supreme Court considered FECA's reporting and disclosure requirements. The Court stated that the requirement that "political committees" disclose their expenditures could raise vagueness issues since the law defines a political committee only in terms of whether it receives $1,000 in contributions in a calendar year or makes $1,000 in expenditures in a year so that the term "could be interpreted to reach groups engaged purely in issue discussion."[108] Noting that two lower courts had interpreted the statute more narrowly, the Court stated that "[t]o fulfill the purposes of the Act" the words "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[109]

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[107] *But see* Center for Individual Freedom, Inc. v. Tennant, supra (invalidating West Virginia's extension of its electioneering communication disclosure requirement to newspapers).
[108] 424 U.S. at 79.
[109] *Id.*

It is not clear whether the Court meant to limit the duty to register as a political committee to groups or organizations whose predominant activity is electoral. That is how *Buckley* interpreted FECA, which continues to be so read in determining whether an organization is a political committee under federal election law. But it is less clear whether this is a constitutional mandate binding the states or potential future federal legislation. *Buckley*'s statement is certainly much less clearly constraining than the Court's determination that "expenditure" requires express advocacy.

Some courts have held that the major purpose test is constitutionally mandatory. The Fourth Circuit said so most emphatically in 2008 in *North Carolina Right to Life, Inc. v. Leake* when, relying heavily on *Buckley*, it struck down as unconstitutionally vague and overbroad a North Carolina law that defined political committee to include an organization that "has *a* major purpose to support or oppose the nomination or election of one or more clearly identified candidates." *Leake* concluded that "the major purpose" threshold was necessary to avoid having "political committee burdens...fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate." It reasoned that "[p]ermitting the regulation of organizations as political committees when the goal of influencing elections is merely one of multiple 'major purposes' threatens the regulation of too much ordinary political speech to be constitutional."[110]

Other courts, however, have disagreed with *Leake*. The Colorado courts have upheld that state's law imposing political committee registration and reporting requirements on groups that have only "a"—not "the"—major purpose of influencing elections.[111] The Ninth Circuit has similarly ruled that registration and reporting requirements can be applied to a group that has as "one of its primary purposes" supporting or opposing political campaigns.[112] For these courts, an organization that devotes significant effort, as measured by its expenditures, to election activity can be required to register as a political committee even if election activity is not its predominant or leading activity. Indeed, some courts have upheld state laws that simply use a dollar spending threshold to determine whether a spender is a political committee.

Thus, in 2011 the First Circuit upheld Maine's law requiring an organization to register as a political committee if it spends more than $5,000 in a year "for the purpose of promoting, defeating...the nomination or election of a candidate to political office,"[113] and a federal district court in Illinois rejected a challenge to that state's law that imposed registration and reporting requirements on a nonprofit organization that accepts contributions, makes contributions, or makes expenditures of more than $5,000 a year or behalf of or in opposition to candidates for public office and a lower $3,000 a year threshold for organizations other than nonprofits that engage in such activities.[114] The district court in the Maine case had pointed out that the "major purpose" requirement for political committee regulation "would yield perverse results, totally at odds with the interest in 'transparency' recognized in *Citizens United.*" According to that court, the major purpose test would have the effect of covering a small organization with just a few thousand dollars that spends most of its money on election ads while excluding a "megagroup" that could spend over a million dollars if that was not its major purpose."[115] The First Circuit subsequently affirmed, finding that *Buckley*'s "major purpose" language was merely an "artifact of the Court's construction of a federal statute."[116]

Of course, even if "major purpose" is not required, there are limits on just how far a state can go in treating a group as a political committee. The Tenth Circuit has twice rejected as unconstitutional state laws that base political committee status on a dollar threshold of election spending unconnected to the organization's total spending, although in those cases the dollar thresholds were

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[110]525 F.3d 274, 286–89 (4th Cir. 2008). *Cf.* FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 391–92 (D.C. Cir. 1981).

[111]Independence Inst. v. Coffman, 209 P.3d 1130 (Colo. App. 2008), *cert. denied*, 130 S.Ct. 625 (2009); Cerbo v. Protect Colorado Jobs, Inc., 240 P.3d 495 (Colo. App. 2010).

[112]Human Life of Washington, Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010). *See also* Alaska Right to Life Committee v. Miles, 441 F.3d 773, 786–94 (9th Cir.), *cert. denied*, 549 U.S. 886 (2006) (upholding Alaska law requiring "nongroup entity" to satisfy registration, reporting and disclosure requirements if it wishes to make independent expenditures).

[113]National Organization for Marriage v. McKee, 649 F.3d 34, 58–59 (1st Cir. 2011).

[114]Center for Individual Freedom v. Madigan, 735 F. Supp. 2d 994, 997–1000 (N.D. Ill. 2010).

[115]National Org. for Marriage v. McKee, 773 F. Supp 2d at 264.

[116]National Org. for Marriage v. McKee, 649 F.3d at 59.

quite low—$200 and $500—and the court did not insist that electoral activity be "the" major purpose in order for an organization to be subject to regulation.[117]

Citizens United does not shed much light on the question of how much electoral activity is needed to treat an organization as a political committee; or, rather, it may be said to point in two different directions. On the one hand, the Court's endorsement of disclosure, especially the voter "interest in knowing who is speaking about a candidate,"[118] suggests that disclosure requirements may reach broadly to inform the public about an organization active in electoral politics even if influencing elections is not its one major or primary purpose. In contrasting regulations that promote public information with those that limit or prohibit speech, *Citizens United* indicated a greater receptivity to requirements that promote disclosure than *Leake* was willing to acknowledge.

On the other hand, in dismissing the government's argument that the ban on the use of corporate treasury funds did not really restrict corporate speech because corporations could speak through their PACs, *Citizens United* emphasized the "burdensome" nature of the "extensive regulations" applicable to PACs.[119] Indeed, the Court went to some effort to list the obligations accompanying PAC status—including "appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report change to this information within 10 days"[120]—as well as the monthly reports the PAC has to file with the FEC. To that extent, *Leake*'s concern with the burdens of regulation is reflected in *Citizens United.*[121] However, *Citizens United*'s discussion of the burdensomeness of political committee status was in the context of a requirement that corporate and union campaign spending be channeled through a PAC. To the extent that committee registration is mandated simply for voter information and general law enforcement requirements, the Court might be less troubled.

The standard for determining when an organization becomes a political committee thus involves balancing the public's interest in knowing which organizations are paying for electoral ads (and the donors behind those organizations) against the burdens on speech that even basic organizational, registration, and recordkeeping requirements may impose. Combining the two strands of *Citizens United,* it seems likely that the Court's concern for effective disclosure might lead it to uphold a relatively broad definition of when an organization is deemed sufficiently electoral that it must register as a political committee and file the requisite reports. But the degree of scrutiny of the political committee definition might turn on just how much of a burden the organizational and reporting requirements place on speech.

An example is the D.C. Circuit's holding that SpeechNow.org was required to comply with the organizational and reporting requirements applicable to federal political committees even though donations to SpeechNow.org could not be subject to dollar limitations. In upholding the application of the organizational and reporting requires to an independent-expenditure-only committee, the court emphasized that SpeechNow was already subject to reporting requirements for its independent expenditures so that "the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal." The court therefore concluded that "the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, [do not] impose much of an additional burden upon SpeechNow."[122]

So, too, the federal district court upheld Maine's political committee definition in part because the state's "disclosure, registration, and recordkeeping requirements are not unconstitutionally burdensome."[123]

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[117] *See* Colorado Right to Life Committee, Inc. v. Coffman, 498 F.3d 1137 (10th Cir. 2007); New Mexico Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. 2010).

[118] 130 S. Ct. at 915.

[119] *Id.* at 897.

[120] *Id.*

[121] A district court in the Fourth Circuit recently correctly noted that "the issue of the major purpose test as it relates to political committee designation" was not addressed in *Citizens United,* so that "the Fourth Circuit's analysis on the issue...has not been altered." South Carolina Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d at 720.

[122] 599 F.3d at 697. SpeechNow's petition for certiorari in the Supreme Court challenging the D.C. Circuit's disclosure ruling was denied. Keating v. FEC, 131 S.Ct. 553 (2010).

[123] 723 F. Supp. 2d at 263, *aff'd*, 649 F.3d at 58–59 NN. 29, 32.

> It is not unusual to require a corporation doing business in the state to identify its organizational form, provide a name and address, and identify a treasurer and principal officers. Here, in addition, [a political committee] must identify its primary fundraisers and decisionmakers and state which Maine candidates or committees it supports or opposes, hardly a huge burden.[124]

The Ninth Circuit's treatment of Washington State's political committee law is also instructive. The state imposes two levels of registration and reporting requirements. Organizations that raise and spend less than $5,000 per year and do not accept more than $500 from any single donor are required only to appoint a treasurer, establish a bank account in the state, and file a statement of organization with the state's Public Disclosure Commission. Only political committees that spend or receive above those thresholds are required to regularly report on their contributions, expenditures and funds on hand. The court concluded that these burdens are "minor," not "unduly onerous," and "substantially related to the government's interest in informing the electorate."[125]

Still, even the more expansive political committee cases have dealt primarily with a committee's duty to register, follow certain organizational forms (like have a treasurer), and keep certain records. It is less clear whether such an organization, which is only partly electoral, can be forced to disclose all of its donors. The Maine law required the disclosure of "only contributions and expenditures *for* the promotion or defeat of a candidate (and transfers to other PACs)."[126] A recently enacted West Virginia law requires the disclosure by independent spenders or donors of $250 or more "whose contributions were made *for the purpose of furthering* the expenditure."[127] Colorado similarly now requires disclosure of a donation above a dollar threshold "that is given *for the purpose of making* an independent expenditure."[128] The problem with purposive tests like these is that—as the *Freedom's Watch* non-enforcement decision demonstrates—they can be easily evaded by organizations that solicit, or donors who give, to support a group's efforts generally without earmarking their funds for electioneering.

This is, of course, the same problem that arises if a jurisdiction does not try to regulate organizations that engage in electioneering as political committees but instead simply seeks reporting of independent expenditures and electioneering communications and disclosure of major donors—in other words, those that follow the approach of the federal statute construed in *Citizens United* and *Freedom's Watch*.

(2) Defining "for the purpose". North Carolina's disclosure law requires that organizations that undertake independent expenditures or electioneering communications disclose the identities of donors who gave "to further" those activities. But instead of limiting the disclosure obligation to donors who so earmark their funds, North Carolina provides four criteria for determining whether a donor gave for an electoral purpose, only one of which is express earmarking. In addition, a donation will be deemed in furtherance of electioneering (i) if it was expressly solicited for an electoral purpose; (ii) if the donor and the spending organization "engaged in substantial written or oral discussions regarding the donor's making, donating, or paying for" an independent expenditure or electioneering communication;" or (iii) if the donor knew or had reason to know of the recipient's intention to make an independent expenditure of electioneering expenditure.[129] This test gives some meaning to the notion of purpose even if the "discussion" factor seems a little cumbersome and the "reason to know" factor a little vague. Similar language was upheld by the Ninth Circuit, which agreed that California could require that a "contribution" be subject to disclosure when "the donor knows or has reason to know that the payment will be used to make a political contribution or expenditure."[130] Still, it is not clear how a court would handle a solicitation that indicated that contributions would be used for a mix of purposes including, but not limited to, electoral advocacy. It is uncertain if this law will

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[124] *Id.*
[125] Human Life of Washington, Inc. v. Brumsickle, 624 F.3d at 1013–14.
[126] McKee, *supra*, 723 F. Supp. 2d at 263 (emphasis added).
[127] W. VA. CODE § 3-8-2 (emphasis added).
[128] COLO. REV. STAT. ANN. § 1-45-107.5 (emphasis added).
[129] N.C. GEN. STAT. ANN. §§ 163-278.12, 163-278.12C.
[130] California Pro-Life Council, Inc. v. Randolph, 508 F.3d 1172, 1181 (9th Cir. 2007).

provide for effective disclosure or will draw a constitutional challenge on vagueness grounds. The North Carolina approach does seem to get at what "for the purpose" means, but it could be difficult to apply in specific cases.

(3) Campaign activity accounts. Another approach, reflected in the DISCLOSE Act, Colorado's newly adopted law concerning independent expenditures, and in Minnesota's new law dealing with corporate spending,[131] is to have the politically active nonprofit set up an account dedicated to campaign activity and to require disclosure only of donors to that account. The DISCLOSE Act would have encouraged a politically active nonprofit organization to set up a Campaign-Related Activity Account (CRAA), which, if established by voluntary action of the covered organization, would be the sole source of the funds used for campaign-related activity. If a nonprofit set up such an account and made it the sole vehicle for its campaign activities, only donations of $6,000 or more to that account would have to be disclosed.[132]

The DISCLOSE Act's CRAA superficially resembles a PAC, but it differs in two significant ways. First, the CRAA is optional. The nonprofit does not have to use it. Second, there is no limitation on the size of the donation to such an account. As a result, unlike a PAC it would not limit the funds available for campaign spending. The CRAA itself presents no constitutional difficulty. If a nonprofit sets up a CRAA, then the problems of separating those donors who give for electoral purposes and those who do not and of disclosing the major donors financing electioneering are solved. Only CRAA funds would be used for electioneering and all CRAA donors above the threshold would have to be disclosed. Of course, as proposed, the CRAA was voluntary.

Colorado appears to take a stronger approach. Its law provides that "any person"—defined to include corporations and labor unions—that "accepts any donation that is given for the purpose of making an independent expenditure or expends any money on an independent expenditure" over $1,000 in a calendar year "shall establish a separate account" for that purpose; all donations accepted by that "person" for independent expenditures shall be deposited in that account; and—here's the key point—"any moneys expended for the making of the expenditure shall only be withdrawn from the account."[133] The law then provides disclosure will be limited to donors to the independent expenditure account, and "no discovery may be made of information relating to the person's general donors."[134]

The Colorado law tightly links up the electoral use of the funds, donor intent, and public disclosure. In so doing, it resolves the *Freedom Watch* problem of evasion of "for the purpose" since it provides an incentive to the recipient organization to identify donations as for an electoral purpose. Of course, by requiring that only donations to a nonprofit's independent spending account can be used by the nonprofit for electioneering, the Colorado law may be said to place a limit on the amount of money the nonprofit can spend on elections, and so may be subject to constitutional challenge. But there are good arguments that can be made in its support. The law protects the interest of donors to mixed electoral/nonelectoral organizations in not having their donations used for electoral activity unless they affirmatively indicate that intention. Unlike the former federal ban on the use of corporate treasury funds for electioneering, the Colorado law does not bar the nonprofit from using its resources to engage in electioneering, but it recognizes that a nonprofit's resources come from voluntary donations and so empowers the donors to determine whether their donations will be used in elections. There is no cap on the amount of donations to the account, nor on the nonprofit's freedom to solicit funds for the account. The Colorado law resembles the "shareholder protection" rationale for the corporate spending ban rejected in *Citizens United*, but, unlike the now-unconstitutional law, it permits willing donors to give their funds in unlimited amounts to the nonprofit to be used for electoral purposes. The Colorado law also avoids the administrative burdens that concerned the *Citizens United* Court; instead of imposing the full organizational requirements of a PAC on such an account it

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[131]MINN. STAT. ANN. §§ 10A.12 et seq.

[132]DISCLOSE Act, 111th Cong., 2nd Sess., H.R. 5175, Sec.213, proposing to amend Title III of the Federal Election Campaign Act of 1971, by adding new section 326, "optional use of separate account by covered organizations for campaign-related activity."

[133]Colorado, 67th General Assembly, 2nd Reg. Sess., S.B. 10-203, adding new 1-45-103.7 to the Colorado Revised Statutes.

[134]COLO. REV. STAT. ANN. § 1-45-107.5 (7).

essentially treats the account as a mere bookkeeping device.

(4) Presumption of electoral purpose. The DISCLOSE Act would have provided for (i) disclosure of donations to nonprofits earmarked for electoral use; (ii) disclosure above the high $6,000 threshold of donations to the optional CRAA; and (iii) a mechanism for donors to nonprofits to provide that their funds will *not* be used for electoral purposes; but (iv) if a nonprofit did not create a CRAA and did undertake independent expenditures or electioneering communications, then all donations of $600 or more would be subject to disclosure unless a donor expressly directs that his or her donation not be used for electoral purposes. In other words, for organizations that do not take the CRAA option but do engage in electoral spending, donors above the $600 threshold would be disclosed unless they take affirmative steps to exclude their donation from the organization's electoral activities. In effect, the electoral purpose of such donations would be presumed.

It is not clear if this would be constitutional. On the one hand, *Citizens United* articulates a public "interest in knowing who is speaking about a candidate." On the other hand, it is not clear that a donor who gives to a multi-purpose but not primarily electoral organization, and who has not indicated one way or the other her views as to whether the funds can be used for electoral purposes, is "speaking about a candidate." Arguably, this goes beyond the "constructive knowledge" that donations will be used for electoral activity that has been upheld in some other cases. In addition, it seems problematic to apply a much higher disclosure threshold for donations expressly given for campaign-related activity than for donations not expressly so given.

The $6,000/$600 differential thresholds for disclosure appears to reflect Congress's belief that it could not mandate CRAAs, so the higher threshold for disclosure of donations to the CRAA would serve as a carrot for organizations to create them. But it seems hard to justify greater disclosure of funds arguably given for a mix of electoral and non-electoral purposes than for those that are earmarked for a campaign-related activity account.

Moreover, there are good arguments that a mandatory CRAA would pass constitutional muster. The CRAA respects the constitutional concern of limiting disclosure to those who support electoral activity. It provides a good mechanism for protecting the interest of donors in determining whether their funds are used for electoral purposes. Further, it assures public disclosure of funds given for that electoral purposes without falling afoul of *Citizens United*'s prohibition of spending limits. Should Congress return to the nonprofit donor disclosure question, mandating CRAAs for organizations such as (c)(4)s and (c)(6)s that rely on donors for their funding would make sense.

C. Disclaimers/attribution provisions

Citizens United upheld the current BCRA provision requiring that a televised electioneering communication funded by anyone other than a candidate include a disclaimer that the independent organization (and not a candidate) "is responsible for the content of this advertising." The required statement must be made in a "clearly spoken manner" and be displayed on the screen in a "clearly readable manner" for at least four seconds. It must also state that the communication is not authorized by a candidate and must display the name and address (or Web site) of the person or group that paid for the ad.[135] The problem for many reformers is that telling viewers that "Citizens United," "Americans for Prosperity," or the "American Future Fund" is responsible for the content of the ad doesn't tell them much. It certainly doesn't tell them who Citizens United or Americans for Prosperity or the American Future Fund are.

Thus, a recurring theme in the reform legislation taken up since *Citizens United* has been to force greater disclosure of the identities of the donors contributing to organizations that engage in independent expenditure or electioneering communications in the body of their ads. Rather than relying on voters—or more plausibly the media, bloggers, public interest organizations, or competing interest groups—to ferret out and publicize the donor information from campaign finance filings with federal or state regulators, these measures would make the identities of the principal donors immediately apparent in the ads. Although still sometimes referred to under the rubric of disclaimer measures—because they involve disclaiming that a

[135] 130 S.Ct. at 913–14.

candidate has paid for the ad—these laws are probably better referred to as attribution measures.

The most prominent and complex of these provisions was in the DISCLOSE Act, which sought to require that a radio or television independent expenditure or electioneering communication paid for by a nonprofit organization include a "significant funder disclosure statement" or a "Top Five Funders list" in the ad.[136] The determination of whether a donor is a "significant funder" would vary according to both the size of the donation and the degree to which the donor specifies the campaign use of the money so provided. Thus, if a nonprofit engaged in independent spending or electioneering communication, and received one or more donations of $100,000 or more from an individual or another organization, and those donations specify that they are to be used for a "specific" independent expenditure of electioneering communication, then the person (including an organization) that provides the largest such donation would have to appear in the radio or TV ad. If the significant funder is an individual, the donor would have to give his/her name and home city and state and say "I helped to pay for this message and I approve it." If the significant funder is an organization, then a representative of the organization would have to appear in the ad, give his or her name and title, provide the name and location of the principal office of that organization, and state that the organization helped pay for the ad and approves of it.

If there were donors who gave more than $100,000 and no one of them directed that it be used for a specific ad, but one or more of them specified that it be "used for campaign-related activity with respect to the same election or in support of the same candidate" as addressed in the ad, then the largest such donor would be the "significant funder" who would have to make the individual or organizational "significant funder" statement. If no donors fell into that category, but there were donors of $10,000 or more who gave simply for the purpose of being used for campaign-related activity or in response to a solicitation to funds for campaign-related activity—but not earmarked for a specific ad, election, or to discuss a specific candidate—then the largest such donor would have to make the significant funder disclaimer.

If no donors fell into any of the preceding categories, then the largest donor of more than $10,000 in unrestricted funds would have to make the significant funder disclosure statement. If no donor gave more than $10,000, the "top five funders" provision would apply. The names and addresses of the five persons (two in the case of a radio ad) who provided the largest payments of any type in an aggregate amount equal to or greater than $10,000 that would have to be reported as for independent expenditures or electioneering communication would also have to be included in the ad.

Although this extremely complex measure has not become law, a number of states have adopted more streamlined requirements intended to get the names of the principal funders of independent electioneering messages into those ads. For example, Alaska requires that when a campaign ad is taken out by a "person other than an individual or candidate," the ad must identify the name, and city and state of residence, or the principal place of business, of the sponsor's three largest contributors.[137] If the ad has a "video component," then the list of top three donors must be read aloud. Connecticut's new law provides that in the case of a TV or Internet video ad paid for by a section 501(c) or a section 527 organization,[138] the ad must visibly display the statement: "The top five contributors to the organization responsible for this advertisement" followed by a list of the five people or entities making the largest reportable contributions during the preceding twelve months.[139] A radio ad by a section 501(c) or section 527 organization must include a similar audio statement, and the narrative by a robocall by a 501(c) or 527 must include a message

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[136] 111th Cong., 2d. Sess., H.R. 5175 at §§ 211, 214.

[137] AK. STAT. § 15.13.090.

[138] Section 527 is the provision of the Internal Revenue Code expressly designed for electoral organizations, that is, an organization "organized and operated primarily for the purpose of directly or indirectly accepting contributions for making expenditures" to "influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization." 26 U.S.C. §§ 527(e)(1), (2). An organization that qualifies for section 527 status does not pay income tax on donations it receives to be used for electoral purposes provided it complies with disclosure requirements. Donations to 527 organizations are not treated as gifts taxable to the donors under the federal gift tax law. Candidate campaign committees, political party committees, and political action committees typically qualify for section 527 status for tax purposes, but the term "527 organization" is most commonly used to describe only independent committees. See generally Richard Briffault, *The 527 Problem...and the Buckley Problem*, 73 GEO.WASH. L. REV. 949, 955–56 (2005).

[139] CONN. GEN. STAT. § 9-621(h)(2).

indicating "the top five contributors responsible for this telephone call are...."[140] North Carolina now requires the disclosure of the top five donors within the preceding six months to the sponsor of a print ad that is an independent expenditure or electioneering communication.[141] Television or radio ads must include a disclaimer spoken by the chief executive or principal decision maker of the sponsor, and "[i]f the sponsor is a corporation that has the purpose of promoting social, educational, or political ideas," the ad must also include a legible list for TV or an audible statement for radio indicating that the viewer or listener "may obtain additional information on the sponsor and the sponsor's donors from the appropriate board of elections" including the statement "for donor contact [name of the board of elections with whom information filed]."[142]

The current federal disclaimer law[143] was adopted as part of BCRA in 2002; it was sustained with virtually no discussion in *McConnell,*[144] and *Citizens United* summarily rejected Citizens United's challenge to the application of that law to the ads for *Hillary.* It is surprising that the Court has given so little attention to the constitutional issues raised by forced disclosure of the sponsors of an ad in the body of the ad itself. Indeed, the case against the disclaimer requirement is easy to make. The information the disclaimer is said to provide is usually already available or could be made available when the sponsor of an ad reports its expenditure to the FEC or the appropriate state regulator. Moreover, the disclaimer directly intrudes into the sponsor's message; as a result it can distract the audience's attention from that message. For radio and TV ads, it consumes precious (and expensive) on-air seconds.[145] Of course, the case for the disclaimer is also straightforward and strong. The disclaimer makes disclosure of the identity of the sponsor more effective by bringing it home to the voter as she listens to, watches, or reads an ad. Moreover, as *Citizens United* points out, a disclaimer/attribution requirement can help dissipate the confusion as to whether an ad that discusses a candidate was sponsored by a candidate, party, or independent organization.

The post-*Citizens United* disclaimer laws and proposals, however, go further than the measure sustained in *Citizens United.* Some would require not simply that a representative of the sponsoring organization take responsibility for the message, but that the funders (or senior officers of corporate funders) of these organizations appear personally, or that their names and addresses be listed in the ad. Again, these requirements just repeat already-disclosed, or otherwise-disclosable, information; take up space in, intrude on and potentially distract from the organization's message; and focus greater attention on the top contributors, particularly, in the case of the DISCLOSE Act, the significant funder who must actually appear personally in the ad.

The two post-*Buckley* cases in which the Supreme Court struck down disclosure requirements[146]—*McIntyre v. Ohio Elections Commission*[147] and *Buckley v. American Constitutional Law Foundation (ACLF)*[148]—are relevant but not exactly comparable.[149] *McIntyre* involved anonymous leaflets an individual composed and printed on her home computer and placed on cars parked in the lot of a middle school at the time of a meeting concerning a proposed school tax levy. The Court struck down the Ohio law banning the distribution of anonymous literature which McIntyre had violated because "in the case of a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."[150] By the same token, "compelled self-identification" on a "personally crafted statement" struck the Court as "particularly intrusive" and likely to chill political speech by ordinary citizens.[151] The new disclaimer laws and proposals, on the other hand, focus on sophisticated broadcast and other mass

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[140]CONN. GEN. STAT. § 0-621(h)(3),(4).
[141]N.C. GEN. STAT. § 163-278.39(a)(7),(8).
[142]N.C. GEN. STAT. § 163-278.39A(b)(5)–(7), (c)(5)–(6).
[143]2 U.S.C. § 441d(d)(2).
[144]540 U.S. at 230–31.
[145]The DISCLOSE Act did provide an exemption from the significant funder and top five funder disclosure requirements for ads that are of such short duration, that those statements "would constitute a hardship" to the sponsor; the Connecticut and North Carolina laws also provide for exemptions for short ads.
[146]This is in addition to cases, such as *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), in which an organization can win an as-applied exemption from an otherwise valid disclosure law on a showing that disclosure would expose donors to threats, harassment, and reprisal.
[147]514 U.S. 334 (1995).
[148]525 U.S. 182 (1999).
[149]For a general overview of the Court's campaign finance disclosure jurisprudence, *see* Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELEC. L. J. 273, 279–286 (2010).
[150]514 U.S. at 348–49.
[151]*Id.* at 355.

media ads and on "significant funders" whose names might mean something to viewers, who are unlikely to be chilled by the disclaimer, and who are subject to disclosure anyway.

ACLF is closer. In that case, the Court struck down a requirement that referendum petition circulators wear identification badges stating their names and indicating whether they were paid or volunteers. The Court concluded that the badges imposed a significant burden on political activity given the reluctance of potential circulators "to face the recrimination and retaliation that bearers of petitions on 'volatile' issues sometimes encounter." Moreover, they provided the public with no new information since a circulator was already required to give her name in an affidavit filed with the state when she submits the signatures she has collected. That much less intrusive form of disclosure satisfied the public's informational interest.[152] As in *ACLF*, there are less intrusive means of obtaining the names and addresses of the significant funders and/or top contributors. However, unlike in *ACLF* the new disclaimer laws and proposals apply only to mass media activity and so do not threaten the contributors whose names are so disclosed with the personal discomfort of "volatile" encounters with other individuals.

The Supreme Court has accepted the principle of disclaimer/attribution requirements, notwithstanding the interference with the ad sponsor's message. The issue posed by these laws is whether the important public purpose of making disclosure more effective can justify including the names of top contributors in an ad and, in the most extreme case, requiring the most significant funder to appear personally in the ad (or to have a top executive appear if the funder is an organization). Requiring nonprofits to include the names of their top funders in their ads could pass constitutional muster. With many electorally active nonprofits operating under nondescriptive names, the statement that a particular nonprofit paid for an ad may not actually tell the voters "who is speaking about a candidate."[153] Many electorally active nonprofits are operating in effect as pools of electorally active firms or wealthy individuals. If an individual firm or person were to pay for an independent expenditure or electioneering communication directly, that sponsor would have to make the necessary disclaimer. But if those firms or individuals pool their funds and channel their expenditures or communications through an intermediary organization with an anodyne name, the disclaimer does not disclose their role. Thus, extending the disclaimer to include the most significant funder or the top three to five donors is consistent with the principle supporting disclaimer, subject to the limitation that the required list not be so long or time-consuming as to unduly eat into the campaign message.

But it is hard to see what justifies mandating that "an unobscured, full-screen view" or a "voice-over accompanied by a clearly identifiable photograph or similar image" of the individual "significant funder" or the CEO of an organizational significant funder appear in a television ad, as the DISCLOSE Act would have required.[154] Given that most funders probably are not celebrities, it is not clear that showing the funder's picture gives the voter more information than the funder's name. Putting the significant funder personally in the ad may be a way of making the funder take responsibility for the content of the ad, but the significant funder is not a candidate, not necessarily the head of the nonprofit sponsor, and need not even be the source of a majority of the funds used to pay for the ad. The requirement seems more likely to have the effect—if not the intent—of discouraging large donations, which would be unconstitutional.

V. CONCLUSION

It is unclear just how much *Citizens United* may be said to have unleashed corporate and union campaign spending. Given the narrow definition of election-related speech subject to limitation that the Court had embraced previously, considerable corporate campaign spending was permissible before the *Citizens United* decision. Certainly, corporations and unions that wanted to participate in campaigns could have found a way to do so. Nevertheless, *Citizens United* removed certain legal uncertainties that might have held certain firms back.

Moreover, *Citizens United* may have contributed to the appellate court and FEC rulings that have made it easier for corporations to pool their funds

[152]525 U.S. at 197–200.
[153]Citizens United, 130 S.Ct. at 915.
[154]DISCLOSE Act, *supra* note 132, at sec. 214 (proposed new subsection(e)(6) to be added to 2 U.S.C. § 441d).

with each other and with wealthy individuals in intermediary organizations, including nonprofit (c)(4)s and (c)(6)s. This enables them to combine their financial strengths; hire skilled political professionals to help them hone their messages and direct their funds to the races where they are likely to be strategically significant; and, overall, magnify their electoral impact. It also enables them to avoid disclosure under current campaign finance law.

But *Citizens United* also confirmed the constitutionality of applying disclaimer and reporting and disclosure requirements to the electioneering activities of politically active nonprofits. Indeed, *Citizens United* embraced a fairly broad definition of election-related communications for purposes of disclosure and so strongly endorsed the idea of disclosure that it has been used by lower courts to sustain state laws that define election-related activity even more broadly than does federal law.

Thus, *Citizens United* simultaneously created the situation which has given rise to an intense media and public outcry for more disclosure concerning the sources of funds for the nonprofits that have been so active in the current election cycle, while also signaling that more expansive laws requiring the disclosure of those donors may be constitutional. Although Congress has failed to take up the challenge of enacting more effective disclosure measures, a number of states have adopted more forceful disclosure laws and it is likely that more states—and, possibly, a future Congress—will do so.

These laws will surely raise questions about the definition of election-related spending, whether a donation to a multi-purpose nonprofit that combines electoral and non-electoral activity is subject to disclosure, and whether to extend disclaimer/attribution requirements to include the disclosure of the identities of the significant funders or top contributors supporting the electoral activities of nonprofits. None of these questions have clear answers. *Citizens United* supports a broader definition of election-related spending, but there are still limits and some laws may press against those limits. There is precious little precedent concerning the scope of disclaimer or attribution requirements. And the law governing the disclosure of donors outside the context of political committees—and determining what organizations can be treated as political committees—is particularly murky. Much will turn on the specific laws and regulations adopted and on the outcome of the challenges likely to be brought against them. The one thing that seems certain is that there will be extensive and ongoing debate concerning the content and scope of the campaign finance disclosure laws as they apply to the nonprofit organizations that have emerged post-*Citizens United* as a leading vehicle for independent spending and electioneering communications.

Address correspondence to:
Richard Briffault
Columbia Law School
435 West 116th Street
New York NY 10027

E-mail: brfflt@law.columbia.edu

LEAGUE OF WOMEN VOTERS®
OF THE UNITED STATES

Statement by
Elisabeth MacNamara, President
League of Women Voters of the United States
on
The DISCLOSE Act of 2012, S. 2219
for the
Senate Rules Committee

March 29, 2012

The League of Women Voters strongly supports S. 2219, the DISCLOSE Act of 2012, which would restore transparency to U.S. elections by requiring complete disclosure of spending on big-money advertising in candidate elections.

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 700 communities and in every State, with more than 140,000 members and supporters across the country.

One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local and federal levels for more than three decades.

We are deeply concerned about the current state of political financing in our nation. Rather than focusing on the concerns of voters, too often campaigns and candidates focus heavily on raising funds. And too often, they raise those funds from sources that seek and receive special access, special consideration and special treatment once the candidate is elected to office.

There is corruption in our political system. It is the corruption of government that comes from special interest financing of elections, and it is the corruption of democracy that comes when a few very loud voices, funded by incredible sums of money, are allowed to overwhelm and drown out other voices during elections.

But there is yet a third form of corruption – the corruption that comes when the voters are deprived of the information they need to make informed decisions about the candidates seeking their votes. Secret funding in elections is anathema in a democracy.

1730 M STREET, NW, SUITE 1000, WASHINGTON, DC 20036-4508
Phone 202-429-1965 - Fax 202-429-0854
Internet http://www.lwv.org. E-mail: lwv@lwv.org

In its ruling in *Citizens United v. Federal Election Commission*, the Supreme Court opened the floodgates for big-money special interests in our elections. Corporations and unions can now make unlimited secret expenditures seeking to elect or defeat candidates. And they can make unlimited secret contributions to other entities that seek to elect or defeat candidates. This is unacceptable in a representative system, and we hope and trust that the *Citizens United* decision will itself be overturned, limited or corrected.

Right now, however, the most important thing we can do to preserve the integrity of our electoral process is to increase transparency and let the sunlight shine in. Disclosure of corporate, union and individual spending in our elections is the key to allowing voters to make their decisions. S. 2219 accomplishes that fundamental purpose.

The DISCLOSE Act 2012 is carefully crafted to require disclosure by outside groups of large campaign contributions and expenditures – those over $10,000 – and includes a valuable "stand-by-your ad" provision for ads run by such groups. It requires outside groups to certify that their spending is not coordinated with candidates and, very importantly, covers transfers of money among groups so that the actual sources of funds being spent to influence federal elections will be known.

S. 2219 focuses only on disclosure and does not contain elements from previous legislation such as barring campaign spending by government contractors.

The DISCLOSE Act 2012 builds on requirements already approved by the Supreme Court. In fact, the Court pointed in the direction of enhanced disclosure when it said that disclosure is important to "providing the electorate with information." It also supported disclaimer requirements "so that the people will be able to evaluate the arguments to which they are being subjected." We couldn't agree more.

Voters deserve and need to know the sources of funding for election advertising so they can make informed decisions. Secret campaign money has no place in America's democracy simply because it undermines the role of the voter and corrupts the election process. Voters have a right to know -- whether it is a corporation, union, trade association, or non-profit advocacy group making unlimited political expenditures and influencing elections.

Candidates, too, have a need for disclosure of the sources of independent expenditures. There is a danger that the candidates' own voices will be drowned out by huge outside spending, and that a last-minute onslaught of untrue charges from secret spenders will alter the outcome of an election without the candidate being able to challenge the sources or to hold them accountable in any way. It is in the interest of candidates to speak in their own voices and control their own messages so that the voters can make informed decisions, rather than having unknown and unaccountable spenders distort the candidates' views and the voters' responses.

It is especially important to candidates, as it is to voters, that outside spenders certify, as is required by S. 2219, that they are truly independent of candidacies. Otherwise, a candidate risks having his or

her opponent direct or influence unlimited secret spending against the candidate. And the voter risks voting for someone who has hidden his or her campaign tactics and funding sources from the public.

The League of Women Voters is also concerned that campaign finance reform legislation in general and disclosure legislation in particular seems increasingly to be decided in Congress on party-line votes. As an organization that takes its nonpartisanship seriously, we hope that the DISCLOSE Act of 2012 will receive the careful and thoughtful consideration it deserves. The League understands that not everyone agrees with our views on this subject, but open and honest debate will better serve our country than the pursuit of partisan political power on such a fundamental issue as our election processes.

Fair and clean elections, determined by the votes of American citizens, should be at the center of our democracy. Congress must act quickly and enact the DISCLOSE Act of 2012.

DEPARTMENT OF POLITICAL SCIENCE

David M. Primo
Associate Professor of Political Science and
Business Administration

SCHOOL OF
ARTS & SCIENCES
UNIVERSITY of ROCHESTER

March 30, 2012

The Honorable Lamar Alexander
Ranking Member
The United States Senate Committee on Rules and Administration
305 Russell Senate Office Building
Washington, DC 20510

Dear Senator Alexander:

In light of your hearing on S.2219, the DISCLOSE Act, I wanted to offer for inclusion in the record the attached study on campaign finance disclosure laws. This study utilizes a survey of voters to demonstrate that disclosure laws do not provide the informational benefits that advocates claim. Survey respondents were uninterested in campaign finance disclosure information, and moreover, the viewing disclosure information had virtually no impact on voter knowledge, once other types of information available to voters, such as a "voter guide," were taken into account. I hope that you will find this information useful as you consider the merits of the DISCLOSE Act.

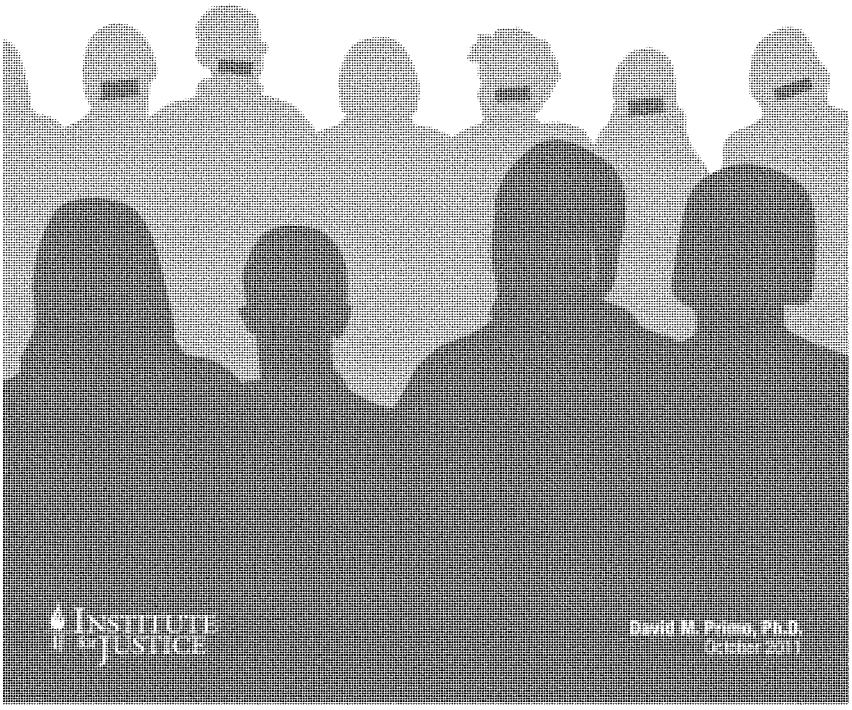
Sincerely,

David M. Primo

318 Harkness Hall · Rochester, NY 14627-0146
585.273.4779 · 585.271.1616 *fax* · david.primo@rochester.edu

FULL DISCLOSURE

HOW CAMPAIGN FINANCE DISCLOSURE LAWS FAIL TO INFORM VOTERS AND STIFLE PUBLIC DEBATE



FULL DISCLOSURE

HOW CAMPAIGN FINANCE DISCLOSURE LAWS FAIL TO INFORM VOTERS AND STIFLE PUBLIC DEBATE

INSTITUTE for JUSTICE

David M. Primo, Ph.D.
October 2011

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Executive Summary

Disclosure, proponents claim, produces a better functioning democracy: By requiring groups that advocate for or against issues on the ballot to reveal their funding sources and how they spend their money, voters gain valuable insights into the issues themselves and make more informed voting decisions. Even better, they say, it is a policy that comes with few costs; it is "merely" disclosure.

But what if these claims are wrong? In fact, as this report shows, the research on the effects of mandatory disclosure for ballot issue campaigns finds exactly that. Disclosure does little to help voters and imposes substantial costs on those wishing to participate in democratic debate.

To assess the informational benefits of disclosure, this report uses an experiment to test whether disclosure improves voters' knowledge of where interest groups stand on a ballot issue. Results reveal it does not:

- Voters have little interest in disclosure data. Among 15 information sources a subset of participants could choose to view—12 newspaper articles, a voter guide and two campaign ads—those referencing disclosure data were by far the least viewed.
- Viewing disclosure information had virtually no impact on participants' knowledge, but viewing the voter guide did.

These results show that voters would be just as capable of voting in ballot issue elections if no disclosure of contributions and expenditures were required. In a society where information about politics is everywhere, any additional benefit from disclosure laws is close to zero.

Moreover, earlier research has established that disclosure burdens would-be speakers with cumbersome and complicated red tape and puts them at risk for legal sanctions (or worse) for mistakes. Research also shows that loss of privacy and fear of retribution for backing a controversial position deter contributions to ballot issue campaigns.

Surprising as it may seem, the current regime of government-forced disclosure does virtually nothing to improve public discourse on ballot issues. Indeed, disclosure stifles debate by making it harder for people to organize and participate in the process. If, as even disclosure proponents agree, the goal is a freer, more robust democratic process, lifting burdensome disclosure laws is the place to start.

Introduction

Imagine that you had to send a government official a note each time you did something political, whether it be attending a rally, volunteering on a campaign, posting to a blog or even conversing with friends over drinks. Now imagine that this information would be made public by the government. Would your conversations with friends change? Would your other political activities change? For many of us, the answer would be yes.

Of course, in most cases you can volunteer on a political campaign without registering with the government. You can talk with friends without registering with the government. But when you decide to spend money on politics, whether by contributing to a candidate or a group or even collaborating with like-minded individuals on political activities, everything changes. You often are required to file complicated forms with the government. Your personal information, including your home address and employer, is likely to be posted on the Internet in handy searchable databases. The release of this information has led to lost jobs, vandalism and even violence.[1]

You might think there would be a good reason for collecting this information, but in the case of ballot issues, the justification is surprisingly thin. In the case of contributions to the campaigns of candidates for office, the U.S. Supreme Court has determined that the fear of actual or perceived corruption justifies the disclosure of contributions to candidate campaigns.[2] In the case of ballot issue campaigns, however, the "candidate" is a policy position, and no such anti-corruption rationale exists.

Those who want to justify disclosure for ballot issue campaigns instead rely on other rationales, claiming that voters can make better decisions if they know who supports these campaigns. Disclosure is thought to be the most straightforward way to learn this information. If you know that Pepsi contributed funds to fight the "Ban Soft Drinks" ballot issue, the argument goes, you are now better-positioned to determine where you stand on the measure.

Another, related rationale is that the government must protect voters from misleading information in campaigns. For instance, disclosure proponents would argue that Pepsi should not be able to anonymously create a "shadowy" group with a name like Support Children's Health that advocates against the "Ban Soft Drinks" initiative. Disclosure laws allegedly prevent voters from being duped by an ad about the health benefits of soft drinks paid for by Support Children's Health.

The fundamental premise of disclosure laws is that information about who contributes and spends money for political purposes can only benefit society, improving voter knowledge and holding individuals and groups accountable for their speech. With rare exception, the benefits of disclosure laws are viewed as so self-evident that data pointing to those benefits seems unnecessary.

But, as is so often the case when someone claims something is "self-evident," there is in fact no evidence to support the benefits of disclosure.

This pattern should be familiar to observers of campaign finance law: The benefits of campaign finance reform are taken to be self-evidently large, when in reality they often approximate zero. Meanwhile, the costs are assumed to be nonexistent when in reality they are substantial. This is true of public financing for campaigns, a reform which does little to improve competitiveness or faith in government and can, as in the case of the recently overturned Arizona "Clean Elections" law, impinge on speech in an unconstitutional manner.[3] And it is true of disclosure laws for ballot issue campaigns, the topic of this study.

This report is a lesson in contrasts. While the costs of disclosure have been established, the benefits of disclosure have always been *assumed* to exist. But when actual research on the benefits of disclosure is considered, the picture that emerges is very different.

This report is organized into two main parts. The first part discusses several studies demonstrating the *costs* of campaign disclosure.

DISCLOSURE FACTS

RED TAPE BURDENS AND DETERS SPEECH

An experiment where 255 people were asked to complete disclosure forms for a grassroots ballot issue campaign found:

93% Did not know citizen groups had to file government paperwork to speak about a ballot issue

0 People correctly completed the forms

41% Tasks on forms were correctly completed

89% Said red tape and threat of legal penalties for mistakes would deter political activity

Source: Milyo, J. (2007). Red tape: Strangling free speech and political debate. Arlington, VA: Institute for Justice.

It then shows that in a society where information about politics is everywhere, the informational *benefits* of disclosure laws are close to zero. The bottom line: The results do not favor the continuation of disclosure laws for ballot issues.

The Burdens of Disclosure

Red Tape

Campaign finance disclosure laws place burdens on individuals who work together to speak out on a ballot issue. If they spend all but a minimal amount or receive virtually any contributions (monetary or in-kind) in support of their efforts, they enter a byzantine world of complicated paperwork and onerous regulations. Unless they are experts in campaign finance law, or can afford to hire one, these would-be speakers run the risk of making errors that could cost them thousands of dollars and lead to damaging lawsuits.

University of Missouri economist Dr. Jeffrey Milyo demonstrated just how confusing these regulations can be. Milyo asked 255 ordinary citizens to complete the paperwork required to speak as a group on ballot issues in one of three states—Colorado, California or Missouri.[4] Participants included non-student adults aged 25 to 64 in Columbia, Mo., as well as graduate and undergraduate students at least 20 years of age at the University of Missouri.

Milyo surveyed participants in advance of the experiment to gauge their knowledge of disclosure requirements. Only seven percent of the respondents were aware that groups of citizens had to file forms with the government to speak as a group on a ballot issue. In other words, citizens wishing to participate in the political process may unwittingly break the law and expose themselves to government fines, government lawsuits and even lawsuits from political opponents.

This threat is not hypothetical. Six residents of Parker North, Colo., banded together in 2006 to oppose the annexation of their neighborhood

into a nearby town. They, like the 93 percent of those surveyed in Milyo's study, were unaware that their loose collaboration required them to register as an "issue committee." Supporters of the annexation, seeing an opening thanks to Colorado's campaign finance disclosure laws, sued these residents for failing to register and keep track of their spending on materials like poster board and markers.[5]

Milyo's experiment shows that compliance with disclosure laws is challenging even for citizens who are aware of them. Milyo presented the 255 participants with a scenario for a group called "Neighbors United." This fictional group received a few contributions—some large, some small, some anonymous, some named, some monetary and some non-monetary—and made only one expenditure. This pattern realistically replicates that of a small group of like-minded citizens as opposed to a large interest group. The experiment was not designed to set the participants up for failure. It asked them to do no more than would be expected of a typical citizen participating in a ballot issue campaign.

Yet fail they did. Overall, the mostly college-educated respondents completed just 41 percent of tasks correctly. Respondents had trouble reporting non-monetary contributions, such as a discount given by a T-shirt maker, as well as handling anonymous donations and aggregating contributions by donor. Only one participant asked to complete the Missouri forms realized that a campaign event resulting in $15 of contributions requires the filing of a statement providing details about the event.

In a subsequent debriefing, nearly all participants expressed frustration with the forms—"Worse than the IRS!" wrote one respondent—and a sizable majority believed that knowledge of the red tape associated with disclosure would deter citizens from participating in the political process.

These results are consistent with a basic tenet of economics: When something is taxed, you get less of it. Disclosure laws that burden citizens with confusing reporting requirements and the

DISCLOSURE STORIES

RED TAPE TIES UP FLORIDA CITIZEN GROUP

By Paul Sherman, Institute for Justice staff attorney

Should grassroots groups of citizens have to comply with campaign finance laws that the U.S. Supreme Court has held are unconstitutionally burdensome for corporations like General Motors and unions like the AFL-CIO?

For too many groups, that is the reality of political participation, as Nathan Worley, Pat Wayman, John Scolaro and Robin Stublen learned when they joined together to oppose an amendment to the Florida Constitution in 2010.

The target of their concern was Amendment 4, which was popularly known as the "Hometown Democracy Amendment." Amendment 4 would have required that municipalities that adopt or amend their local comprehensive land-use plan submit the changes to a referendum of the voters.

Nathan, Pat, John and Robin thought Amendment 4 was an affront to property rights that would stifle economic growth in Florida—and they wanted other voters to hear that view. So the group decided to pool their resources and run ads on their local talk radio station, urging the public to vote against the amendment. But, thanks to Florida's campaign finance laws, such spontaneous political expression is all but impossible.

For Nathan and the others, going forward with their plans would have triggered a mountain of red tape, because under Florida law, anytime two or more people get together to advocate the passage or defeat of a ballot issue and raise or spend more than $500 for the effort, they become a fully regulated "political committee."[1]

What does this entail? First, Nathan and the others would have to register with the state and establish a separate bank account.[2] Then the group could run its ads, but it would have to keep meticulous financial records and report all activity.[3] And unlike most states, Florida does not place any lower limit on contributions and expenditures that have to be reported—even a one-cent contribution must be separately itemized, including the contributor's name and address, and reported to the state.

Wading into such a complicated area can be dangerous and the penalties can be severe. If Nathan and the others speak without complying with the law, they can face civil or criminal fines of up to $1,000 per violation and even up to one year in jail.[4]

As Pat Wayman said, "These laws make politics inaccessible to common citizens; you need to hire an attorney to make sure you don't get in trouble with the government. We shouldn't have to file any paperwork, or hire accountants or campaign finance lawyers, just to exercise our First Amendment rights."

Rather than remain silent, Pat and the others have chosen to fight back. In October 2010 they filed a federal lawsuit to strike down Florida's burdensome campaign finance laws, relying on a 2010 Supreme Court decision that held that similar laws were unconstitutionally burdensome for corporations and unions.[5]

1 Fla. Stat. § 106.011(1).
2 Fla. Stat. §§ 106.03(1)(a), .021(1).
3 Fla. Stat. §§ 106.06(1), .06(3), 07(4)(a).
4 Fla. Stat. §§ 106.19, .265.
5 *Citizens United v. FEC*, 130 S. Ct. 876, 897–98 (2010).

DISCLOSURE STORIES

REPORTING ERRORS BRING CRUSHING FINES

By Paul Sherman, Institute for Justice staff attorney

In 2002, Carolyn Knee volunteered her time and energy to campaigning for a local ballot issue that would allow San Francisco to break its ties with power company Pacific Gas & Electric Co. Knee had been a legal assistant for 25 years, but had no experience with campaigning or with campaign finance laws, so she hired an accountant to help her with the bookkeeping.

Five years later—with the election over and the ballot issue she championed defeated—the records from Knee's now-defunct ballot issue committee were subject to a random audit. Despite having hired an accountant and making her best effort to comply with the law, the audit discovered several reporting errors. As a result, Knee, a retiree living on a fixed income, found herself threatened with over $26,000 in fines.

Knee is not the first to be hit with exorbitant fines by the Fair Political Practices Commission (FPPC), the agency charged with enforcing California's campaign finance laws. Nor is she likely to be the last. California's campaign finance laws are so complex that errors—and fines—are practically inevitable.

The FPPC itself reached this conclusion in a 2000 study titled "Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act of 1974 in California."[1] As part of that report the FPPC conducted an experiment that asked individuals with different levels of campaign experience to fill out campaign finance disclosure forms. As in Milyo's experiment (see page 4), participants performed miserably. The FPPC found that "[e]ven participants with backgrounds in campaigns" could not fill out the forms "without making multiple mistakes."[2]

Thankfully, Knee was ultimately able to settle the charges against her by paying a $267 fine. Not everyone gets off so easy. In 1995, Californians Against Corruption was slapped with an $808,000 fine for reporting errors—at that point the largest fine in the agency's history—despite having spent only $103,091 in support of a recall campaign.[3]

Although Knee escaped financial ruin, her experience was enough to convince her not to get involved in political campaigns in the future. As she said, "I would never do this again. It totally discourages grassroots" campaigns.[4]

1 Lucas, S. S. (2000). Overly complex and unduly burdensome. Retrieved December 23, 2006 from http://www.fppc.ca.gov/pdf/McPherson.pdf.

2 Lucas, 2000, p. 69.

3 Doherty, B. (1996). Disclosure flaw. Retrieved August 2, 2011 from http://reason.com/archives/1996/03/01/disclosure-flaw.

4 Witherell, A. (2007). The ethics of ethics. Retrieved August 2, 2011 from http://www.sfbg.com/2007/07/03/ethics-ethics.

specter of fines and lawsuits are a de facto tax on speech. Cumbersome reporting requirements represent a very real threat to political participation.

Fear Factor

Disclosure laws place a second set of burdens on citizens. Individuals who contribute to ballot issue campaigns will have their name, address and often their employer reported publicly for donations above a certain (typically very low) threshold.[6] For somebody who is publicly active in politics, this requirement may be a minor nuisance. But for somebody who wants to support a cause privately, government-forced disclosure may present a significant barrier.

Such privacy concerns are heightened by easy access to information on the Internet. Beyond the information directly available from the government, several websites aggregate donors' identities and contributions in ways that harness the latest technology. The Huffington Post's Fundrace site uses Google Maps so viewers can see who in their neighborhood has made political contributions.[7] There is now even a program that scans e-mail inboxes and then "allows you to see the political contributions of the people and organizations that are mentioned in the e-mails you receive."[8]

Concern about privacy comes not just from political views being revealed, but also from personal contact information being posted online. Gigi Brienza learned that lesson the hard way when a simple campaign donation landed her on the target list of a domestic terrorist group (see sidebar p. 7).

Disclosure laws, in other words, make it much more difficult for people to support policy positions anonymously. Even if they do not fear retaliation, they may simply desire the same privacy for contributions that their vote receives at the ballot box.

This "fear factor" acts as another tax on participation and may lead citizens to forgo giving to ballot issue campaigns. When Dr. Dick Carpenter of the University of Colorado and the

Institute for Justice asked survey respondents whether disclosure of their name and address would lead them to think twice about contributing, about 60 percent said that it would.[9] When asked why, respondents cited retaliation fears more than any other reason except a general desire for privacy.[10]

Support for disclosure laws generally varies depending on whether the question is framed as the disclosure of other people's information or one's own, what Carpenter dubs the "disclosure for thee, but not for me" phenomenon.[11] Eighty percent of voters favored the disclosure of contributors' identities,[12] but only 40 percent favored disclosure of their contributions if *their* name and address is revealed, and even fewer—just 24 percent—favored disclosure if their employer is revealed.[13] Respondents expressed concern that their job could be in jeopardy or that they could face retaliation from a union for voting on "another side" of the issue.[14]

In the abstract, then, citizens may favor disclosure, but when the consequences of disclosure are personalized, their opinions change dramatically. If we are concerned about disclosure's impact on political participation, what matters is not whether people like the idea of disclosure in the abstract, but whether it causes them to participate less. Carpenter's survey and the experiences of people like Gigi Brienza suggest that it does.

Purported Benefits of Disclosure

Turning to potential benefits, campaign finance disclosure laws for ballot issues, unlike for candidate campaigns, cannot be justified on corruption or appearance of corruption grounds, since by definition ballot issue campaigns are about issues, not candidates. The justification for these laws, if provided, relies almost exclusively on the purported *informational* benefits of disclosure. This section reviews these claims and shows why there is good reason to doubt them. The next section presents new results from an experiment

DISCLOSURE STORIES

SINGLE CONTRIBUTION EXPOSES DONOR TO THREATS

By Paul Sherman, Institute for Justice staff attorney

It is well known that campaign finance disclosure can lead to retaliation for making contributions to unpopular candidates or causes. What is less widely recognized is that campaign finance disclosure can lead to other types of harassment that are unrelated to a donor's political views—and even more dangerous.

Consider Gigi Brienza. In 2004 she attended a speech given by then-presidential candidate John Edwards. She was inspired by his message and decided to make a $500 political contribution to his campaign.

Two years later, she found herself the target of an animal-rights terrorist group. And, according to the FBI, campaign finance disclosure made it possible.

Brienza was targeted by a group called Stop Huntington Animal Cruelty (SHAC). SHAC's mission is to put an animal-testing laboratory called Huntington Life Sciences out of business by any means necessary—legal or illegal. SHAC does not just target Huntington, it also targets employees at companies that do business with Huntington, companies like pharmaceutical manufacturer Bristol-Myers Squibb, where Brienza worked at the time.

Because Brienza's contribution to Edwards' campaign was greater than $200, federal law required that her name, address, occupation and employer be disclosed on the website of the Federal Election Commission (FEC), where that information was accessible to anyone with an Internet connection. This was enough to put Brienza and about 100 of her colleagues in SHAC's crosshairs.

Using the FEC's database, SHAC was able to search campaign finance records for the home addresses of people who worked for companies affiliated with Huntington. SHAC used this disclosure data to generate a list of "targets," which it posted under the ominous heading "Now you know where to find them."

Luckily, Brienza was never attacked, and many of SHAC's leaders were subsequently arrested. But her experience demonstrates that, particularly in the Internet era, there are social costs to disclosure that go far beyond partisan political retaliation. The abuse of disclosure data by groups like SHAC is a threat that cannot be predicted or protected against, except by citizens restricting themselves to making contributions smaller than the legal threshold for disclosure.

Sadly, this is what Brienza now feels compelled to do. After recounting her story in *The Washington Post* she concluded, "If I am moved to write a check [in the future], I will limit my contribution to $199.99: the price of privacy in an age of voyeurism and the cost of security in an age of domestic terrorism."[1]

1 Brienza, G. (2007). I got inspired. I gave. Then I got scared. Retrieved August 2, 2011 from http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902264.html

DISCLOSURE FACTS

FOR THEIR OWN CONTRIBUTIONS, PEOPLE PREFER PRIVACY

A survey of more than 2,000 citizens in six states with ballot issue disclosure laws found:

80% Favor disclosure of contributors to ballot issue campaigns

40% Favor disclosure of *their own* name and address if they contribute to a ballot issue campaign

24% Favor disclosure of their employer if they contribute to a ballot issue campaign

60% Would "think twice" about contributing to an issue campaign if their name and address is revealed

Source: Carpenter, D. M., II. (2007). Disclosure costs: Unintended consequences of campaign finance reform. Arlington, VA: Institute for Justice.

that further challenges the conventional wisdom on disclosure.

Do Voters Want Disclosure Information?

Voters can obtain disclosure-related information in one of two ways. They can access a government or private database, typically now web-based, and review contributions and expenditures. Or they can obtain disclosure information indirectly from the media, campaigns and other "opinion leaders" or "elites." A newspaper, for instance, may report on which interest groups have spent funds in support of or opposition to a ballot issue.

There is good reason to question whether voters would ever access this information directly from state disclosure websites. Voters have an incentive to be "rationally ignorant," gathering very little information in making voting decisions. Anthony Downs,[15] who first developed this idea, noted that political information gathering is time-consuming, so people will do it only if the benefits outweigh the costs. As Downs found, for most voters gathering information is typically not worth the cost in time spent.[16]

The idea of "rational ignorance" is not a comment on the intelligence or open-mindedness of voters. It simply acknowledges that people have many demands on their time, and for many, spending time researching political issues may not top the list. So they make a voting decision based on what they already know.

Thus, the notion that a voter will sit down at a computer and search databases for information on interest groups strains credulity. It is no surprise, then, that the Carpenter survey found that less than half of respondents claimed to have awareness of disclosure laws and only a third claimed to know where to access disclosure information.[17]

Since direct acquisition of disclosure information is unlikely, the second means of information acquisition—"information entrepreneurs"—is the typical focus for reformers.[18] Information entrepreneurs include the news

media, think tanks and other groups that disseminate information. Certainly the news media reports on campaign finance disclosure, and of course candidates and interest groups reference campaign finance information in advertising. But how prevalent, really, is this kind of activity for ballot issues? The answer, according to a review of campaign information in Colorado's 2006 ballot issue election, is not much.

Only 4.8 percent of newspaper articles, editorials and letters to the editor; think tank and nonprofit material; state-produced documentation; and campaign-generated documentation referenced disclosure information. That figured dropped to 3.4 percent in the two weeks leading up to the election.[19]

This finding is not an anomaly. Professor Raymond La Raja examined articles for state-level campaign finance from 194 newspapers covering all 50 states from 2002 to 2004. He found that each newspaper averaged only about three stories per year regarding campaign finance.[20] And less than 20 percent of those stories fell into the category of "analysis"—the category that would provide information about contributors to campaigns.[21]

These studies establish that information about who contributes to ballot issues and other statewide races is not, in fact, used extensively by information entrepreneurs in communicating with voters. The experiment reported below complements this research by directly assessing voters' interest in and use of disclosure-related information in the form it is most likely to be acquired—from elites. The results of the experiment buttress the above findings by showing that voters do not demand disclosure information.

Does Disclosure Help Voters Vote?

In a second claim, disclosure advocates assert that "improving voter competence is the most persuasive rationale" for disclosure laws regarding ballot issues.[22] One legal scholar writes that "the real role of disclosure is voter information, not corruption-deterrence," arguing, "[i]nformation about the contributions to and

DISCLOSURE STORIES

DISCLOSURE ABETS POLITICAL INTIMIDATION

By Paul Sherman, Institute for Justice staff attorney

Like many people, professor of law and former congressional candidate James L. Huffman had always assumed that public disclosure of political contributions was a good thing. But Huffman's opinion changed when he ran for office as the Republican nominee for U.S. Senate in Oregon in 2010. As Huffman put it, "The reality is that public disclosure serves the interests of incumbents running for re-election by discouraging support for challengers."[1]

How does it work? By giving incumbents the power to intimidate even small-dollar donors:

> A challenger seeks a contribution from a person known to support candidates of the challenger's party. The potential supporter responds: "I'm glad you're running. I agree with you on almost everything. But I can't support you because I cannot risk getting my business crosswise with the incumbent who is likely to be re-elected."[2]

Huffman is not the first political challenger to experience firsthand how disclosure can chill political participation to the benefit of incumbent candidates. In 2008, West Virginia Attorney General candidate Dan Greear voiced similar concerns during his campaign to unseat incumbent Attorney General Darrell McGraw, noting, "I go to so many people and hear the same thing: 'I sure hope you can beat him, but I can't afford to have my name on your records. He might come after me next.'"[3]

Incumbent candidates are not the only ones who use disclosure information to retaliate against their political opponents. The 2008 federal elections saw the creation of "Accountable America," a group that pledged to "confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions."[4]

Unfortunately, legal standards adopted by the U.S. Supreme Court do little to protect against political retaliation. The Court has held that individuals and groups may be exempt from disclosure only if they first demonstrate a "reasonable probability" that disclosure "will subject them to threats, harassment, or reprisals from either Government officials or private parties."[5]

But as Supreme Court Justice Clarence Thomas has observed, this supposed protection is "a hollow assurance."[6] In practice, it is almost impossible to meet the "reasonable probability" standard unless a group or individual has already suffered retaliation. The result, as Justice Thomas notes, is "a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection."[7]

1 Huffman, J. L. (2011). How donor disclosure hurts democracy. Retrieved August 2, 2011 from http://online.wsj.com/article/SB10001424052748704415104576250503491062220.html.

2 Huffman, 2011.

3 Strassel, K. A. (2008). Challenging Spitzerism at the polls. Retrieved August 2, 2011 from http://online.wsj.com/article/SB121754833081202775.html.

4 Luo, M. (2008). Group plans campaign against G.O.P. donors. Retrieved August 2, 2011 from http://www.nytimes.com/2008/08/08/us/politics/08donate.html.

5 *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010).

6 *Citizens United*, 130 S. Ct. at 982 (Thomas, J., concurring in part and dissenting in part).

7 *Id.* (internal quotation marks omitted).

DISCLOSURE FACTS

MEDIA MAKE LITTLE USE OF DISCLOSURE INFORMATION

4.8% Newspaper articles, nonprofit material and government and campaign publications on issues in 2006 Colorado election that referenced disclosure information

3 Average number of stories on state-level campaign finance per year per newspaper in study of 194 newspapers nationwide from 2002 to 2004

Sources: Carpenter, D. M., II. (2009). Mandatory disclosure for ballot-initiative campaigns. *Independent Review*, 13(4), 567-583; La Raja, R. J. (2007). Sunshine laws and the press: The effect of campaign disclosure on news reporting in the American states. *Election Law Journal*, 6(3), 236-249.

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expenditures by groups supporting or opposing a measure can be quite helpful in understanding the likely consequences of what may be a difficult-to-parse measure."[23]

More simply, the argument is that ballot issues can be confusing and voters may have limited knowledge about the issues being considered. So knowing the identities of supporters, thanks to disclosure, can provide voters "cues" or "shortcuts" as to how to vote, especially if the "right" information is disclosed.[24]

For example, if voters know that the Sierra Club or the NRA backs a measure, this provides information about its impact, even if voters do not know much else. For cues like these to be useful, proponents argue, three things must be true. First, voters must correctly associate the group with a viewpoint—the Sierra Club with a pro-environment view and the NRA with a pro-Second Amendment view. Second, the group must be viewed as credible. Finally, voters must know the groups backing or opposing a measure in time to affect their decisions.[25]

So far, this is a plausible story. However, in the leap from cues to government-forced disclosure, the story runs into trouble. For disclosure advocates, the state is justified in casting a wide disclosure net because we cannot know in advance which groups that contribute to campaigns will provide useful cues.[26] All must be disclosed, because some of the information could be useful to voters.

There are several problems with this claim. First, notice that cues will be most helpful from organized interest groups with well-known or easily discovered viewpoints. Such groups typically work to promote their views in the media and directly to voters, so they provide cues for voters *without disclosure*. Second, and related, there is a wealth of information available to voters other than campaign finance records. It is not clear that mandatory disclosure adds to that. Third, a lot of disclosure information will provide no useful cues at all, most especially the identities of individual donors unknown to most people.

So the real question is not whether cues are helpful—some may be—but whether *mandatory disclosure* adds useful information beyond what would be available in a world without these laws. In the language of economics, what are the *marginal benefits* of disclosure? That is the question my experiment is designed to answer. But earlier research and three examples give reason to doubt disclosure's marginal benefits.

Insurance Reform in California: Cues Do Not Require Disclosure

Political scientist Arthur Lupia has conducted the seminal statistical work in the area of voter cues on ballot issues.[27] Lupia surveyed voters on five ballot measures dealing with insurance reform in California. He found that knowing the positions of the insurance industry or trial lawyers on the measures enabled voters to vote as if they knew more about the measures than they actually did.[28]

This suggests that cues are sometimes useful, but it does not speak to the marginal benefits of disclosure. Although Lupia's research is often used to justify campaign finance disclosure laws, the positions of trial lawyers and the insurance industry on these propositions would presumably be easy for media and other elites to discern without disclosure of campaign contributions or spending. And it is from these sources that less informed voters are likely to be getting their information.

In fact, the California Ballot Pamphlet for 1988, which contained pro and con statements for the five ballot issues discussed in Lupia's study and a description of the law's impact, provided a wealth of information for voters, whether they read it themselves or received the information indirectly from opinion leaders.

Since California, like all ballot issue states, provides disclosure data, many of the pro and con arguments in the pamphlet referenced this data. Importantly, however, the disclosure information provided little *additional* information for voters beyond the other information in the pamphlet. For example, in the "Argument for Proposition 100," advocates claim that competing propositions on the ballot were written by insurance companies. In a rebuttal, opponents noted that Proposition 100 was written by trial lawyers. Opponents also mentioned that trial lawyers were funding Proposition 100 efforts, but this information is superfluous once we know that opponents of Proposition 100 align it with trial lawyers. Overall, then, the *marginal* benefits of disclosure information are probably close to zero in Lupia's study.

Land Development in Florida: Flood of (Non-disclosure) Information

Turning to a more recent example, consider Amendment 4 from Florida's 2010 ballot. This ballot issue dealt with land development issues. Disclosure advocates argue that disclosure is necessary because, otherwise, voters would be ignorant about where interest groups stand on the issue and would be unable to use this information to make informed voting choices.

But consider the results of a search for {"Amendment 4" Florida} using Google's search engine. Clicking links based on this search, I learned that a group created by the Chamber of Commerce, Vote No on 4, built a coalition of 320 members, 4,000 volunteers and 15,000 Facebook fans in opposition to the ballot issue.[29] I also learned that the Florida Chapter of the American Planning Association opposed the ballot measure.[30] A follow-up search of {"vote no on 4" and coalition members} led me to discover that Realtors opposed the ballot measure. Realtors were not shy about their opposition, engaging in several grassroots efforts, such as passing out stickers and posting yard signs.[31]

From looking at the website of one interest group involved in the Amendment 4 debate, Florida Hometown Democracy, I learned that the Audubon Society of the Everglades endorsed the amendment, as did Clean Water Action, Friends of the Everglades, the Sierra Club of Florida, FL Public Interest Research Group (Florida PIRG) and the Save the Manatee Club.[32] To be listed as an endorser on this website, a group or individual

DISCLOSURE STORIES

INSTEAD OF RESPONDING TO OPPONENTS, FILE A CAMPAIGN FINANCE COMPLAINT

By Steve Simpson, Institute for Justice senior attorney

Whether disclosure laws provide any useful information to voters is questionable. But the laws are clearly effective at one thing: arming political rivals with a weapon they can use against their opponents.

Most states allow citizens to file complaints against those they think have violated campaign finance laws. In some states, private citizens can actually prosecute alleged violators in court. This may sound like an effective enforcement mechanism, but as Colorado political strategist Floyd Ciruli once testified, "[A]nyone can use [campaign finance complaints] strategically to create an issue" in a political campaign.[1]

Indeed, David Flagg, the investigations manager for the Florida Elections Commission, estimates that 98 percent of the complaints the Commission receives are "politically motivated."[2] According to Flagg, campaign finance complaints are often filed by individuals seeking "to punish their political opponent" or to "harass that person or otherwise divert their attention from their campaign."[3]

That happened in Colorado in 2006 when a group of neighbors opposed the annexation of their neighborhood into the town of Parker (see page 4). After becoming annoyed at the group's comments in the local paper, proponents of the annexation filed a complaint against the group alleging violations of disclosure laws.[4] As one of the proponents later explained, "We did that action because those [annexation opponents] refused to debate us."[5]

California has one of the most onerous private complaint provisions in the country. The law not only allows private parties to file and prosecute complaints against others, it provides a financial incentive to do so by allowing complainants to keep a portion of the fines assessed for violations.

According to election law expert Robert Stern, who worked for the California Secretary of State and the Fair Political Practices Commission, private complaints were often baseless or brought to give one competitor in an election an advantage.[6] As a result, in June 2000, a bipartisan commission appointed by the governor of California recommended reforming the state's private enforcement provision because it could be used for political gain or to silence speech.[7]

Disclosure laws are complicated, making mistakes more likely, especially for people who lack the experience of political professionals. With private complaint provisions on the books, the costs of making a mistake often become prohibitive. The result, ironically, is that disclosure laws whose avowed purpose is to inform voters may actually end up silencing speech.

1 Deposition of Floyd Ciruli in *Sampson v. Coffman*, Case No. 06-1858, Dist. of Colo. (Oct. 4, 2007), at 37:19–39:1.

2 Deposition of David Flagg in *Worley v. Browning*, Case No. 4-10-423, No. Dist. of Fla. (April 18, 2011), at 19:6–15.

3 Flagg Dep. at 16:16–18:2.

4 Deposition of Patsy Putnam in *Sampson v. Coffman*, Case No. 06-1858, Dist. of Colo. (April 19, 2007), at 45:10–20, 79:15–80:6.

5 Solomon, B. P. (2010). Colorado campaign finance law ruled unconstitutional by Tenth Circuit Court of Appeals. Retrieved August 2, 2011 from http://www.huffingtonpost.com/2010/11/09/us-10th-circuit-court-of-_n_781187.html.

6 Deposition of Robert Stern in *Sampson v. Coffman*, Case No. 06-1858, Dist. of Colo. (Sept. 26, 2007), at 36:4–37:11.

7 Lucas, S. S. (2000). Overly complex and unduly burdensome. Retrieved December 23, 2006 from http://www.fppc.ca.gov/pdf/McPherson.pdf.

simply filled out a form giving consent. A financial contribution was *not* required.[33]

All of this information came from press releases or statements on the websites of groups involved in the initiative and was *not* related to government-forced disclosure. Yet, from these simple searches that took minutes to perform, I learned that environmentalists and interests opposed to development were on one side of the issue, and development supporters were on the other.

This flood of information available to voters and elites about the supporters and opponents of Amendment 4 without recourse to disclosure raises a fundamental question: To the extent that voters use the support and opposition of interest groups as cues to determine how to vote on a ballot issue, what *additional* benefit does knowing who contributed financial resources to the debate provide, *above and beyond what is already available without disclosure*? The answer is not much.

Ballot Issues in Colorado: "Information Entrepreneurs" May Not Translate Disclosure Information Into Useful—or Any—Cues

As part of a study of ballot issues in Colorado, discussed earlier in this report, Carpenter used two databases, LexisNexis and ProQuest, to gather all news media sources mentioning issues on the 2006 Colorado general election ballot. He also searched for mentions of ballot issues from think tanks and nonprofit organizations and did a general Internet search to discover other sources of information, including the state's voter guide. All told, from January 1 through November 7, 2006, voters had access to more than 1,000 pieces of information that dealt with ballot issues. Recall that only a tiny fraction of this information—less than 5 percent—is disclosure-related.

It is difficult to understand how this result can be squared with claims that disclosure is "vital" for voters in the ballot issue process. Is that tiny fraction of information *so* important that without it, the other 95 percent of information

is not helpful? Do the 320 editorial references to ballot issues not help voters enough? Do the 577 news article mentions leave out key pieces of information? Do the state's voter guide, think tank publications and campaign-generated material fail to inform?

Moreover, research shows that even when media outlets make use of disclosure, they do not do so in ways that are likely to provide voters with useful information. La Raja's study of candidate campaigns showed that, while "better" disclosure laws produce fewer stories focused on the "horse race" for money, "better" disclosure laws have little effect on the prevalence of analysis stories, including those that provide information about campaign contributions.[34] Some research even shows that people who are better educated—and therefore are more likely to read newspapers—do *worse* than less-well-educated respondents in estimating various aspects of campaign finance, including the amount of money raised in campaigns.[35]

If the news media rarely reports disclosure information, if "better" disclosure laws do not make for better reporting, and if those who read newspapers more actually know less about campaign finance, it is hard to see how disclosure is making voters more informed.

On top of that, cues may not be all that valuable for the average voter. Research on information processing in campaigns has found that heuristics (or short-cuts to decision making) help experts make "better" decisions, but do little for political novices.[36] Others express skepticism about cues, noting that people often lack sufficient baseline knowledge to use them effectively.[37]

Even supporters of disclosure stop short of a full-throated defense of the cue-based argument. One writes, "[M]ore study is required before we can reach conclusions about whether cues actually improve voter competence or work sometimes unexpectedly to undermine it."[38] Another expresses skepticism that more information is always better in disclosure: "[M]ore encompassing and stringent disclosure laws could, paradoxically, undermine…its voter-education value. Voters are unlikely to be able to process ever-increasing amounts of campaign finance information."[39]

Contrast this with the wealth of truly useful *non-disclosure* information available from my simple Google searches on Florida's Amendment 4. They turned up not only information about who was on which side of the issue, but also why. These interest groups were eager to explain the issue to voters as they saw it.

Would Voters Be Misled Without Disclosure?

Disclosure advocates' third claim is that disclosure keeps voters from being misled by "shadowy" interests. The essence of this claim is that so-called "veiled political actors" sometimes try to hide their financial support for or against a ballot issue. Disclosure advocates outline four concerns with such "veiled" interests:

1) They try to hide behind "patriotic or populist sounding names…so that voters will incorrectly assume that these groups support issues likely to be aligned with their interests."

2) They may be created to disguise "notorious" entities that fear voter backlash.

3) Organizations with broad name recognition and established credentials may be used as vehicles for other interests not normally associated with the organizations.

4) "Veiled" groups may want to hide funding that is coming primarily from out-of-state sources, since knowledge of significant out-of-state-funding could serve as a "cue that the issue is not necessarily in the best interests of the state or its citizens."[40]

What links together these four points is the notion that voters are being deceived *in ways that affect the voting decision* when they receive

information from groups hiding their financial support. The lack of information, or erroneous information, about who is backing a particular message may improperly alter how campaign information is processed. But, again, it is important to consider the role of such groups in a world without disclosure.

First, it need not be the case that decisions always improve due to the disclosure of funding sources behind ballot issues. A focus on the messenger may distract from the message.[41] Just because an interest is from out-of-state, for instance, does not necessarily imply that the position it espouses will not benefit voters. After all, a ballot issue may have been proposed by a well-organized interest that seeks significant benefits at a very high cost to unorganized taxpayers. If an opposing interest is out-of-state or "notorious" but has worthwhile information to share, it might have greater impact without the baggage associated with the interest group name or location.

In other words, when voters have biases for or against a particular group, anonymously provided information may be the better bet for effective information transmission about a ballot issue. A rule against anonymity disadvantages such groups, and the perspective they wish to share, in public debate.

Second, the media and opposing interests have an incentive to call into question statements by "veiled political actors," so such groups hardly get a free pass. In a world without government-forced disclosure, those groups that choose not to share the identities of financial supporters run the risk that opponents and voters will question their motives. The give-and-take of the political process and the watchdog role of the press exist even in a world with anonymous speech. Thus cues similar to those supposedly provided by disclosure would still be available.

For instance, suppose that a group called Californians for the Environment (CFE), secretly funded by a business that pollutes significantly, advocates against a ballot issue that would limit pollution. The Sierra Club or similar group would be very likely to call the CFE's motivations into question. The actions of the Sierra Club would provide a cue to voters here, and it is difficult to see what marginal benefits would exist for most voters from knowing that the CFE is funded by the polluting business, given the statement by the Sierra Club.

Moreover, donors may reveal their identities under pressure from others. For instance, nearly immediately after the onset of media scrutiny, Ed Conard identified himself as the funder of a corporation named W. Spann LLC that in turn contributed $1 million dollars to a "super PAC" supportive of presidential candidate Mitt Romney.[42]

A world without government-forced disclosure does not mean a world without information—or even a world without voluntary disclosure on the part of many groups. Thus, we come back to the central question: Does mandatory disclosure yield any *marginal benefits*, given all the other information available about ballot issues? That is the focus of my experiment.

Assessing Disclosure's Marginal Benefits

To examine the marginal benefits of disclosure, I designed an experiment where participants had the chance to vote on a ballot issue, but different groups were given access to different information about the issue. This design allowed me to assess three aspects of voter behavior in ballot issue campaigns. First, are voters interested in information about ballot issues? Second, and related, are voters interested in *disclosure* information? Third, does viewing disclosure information improve the ability of voters to identify the positions of interest groups on a ballot issue, once the other information they access is taken into account?

Recall that a central claim of disclosure advocates is that disclosure information provides

voters with valuable "cues" that will help them vote. But, if this information does not help voters better identify the positions of interest groups, it can hardly help them decide how to cast their ballot.

Research Method

Harris Interactive, a leading survey research firm, administered an online survey of 1,066 registered voters in Florida between October 14 and 25, 2010.[43] The survey featured a hypothetical ballot issue that respondents were told could appear on the ballot in Florida.[44] This ballot issue was based on an actual measure that appeared on Colorado's ballot in 2006. All respondents were presented with explanatory introductory text, followed by the text of the initiative, which addressed tax issues and illegal immigration.[45]

Then, respondents were randomly assigned to one of three groups, A, B or C.[46] Group A was immediately provided with the opportunity to vote yes, no or unsure on the ballot issue. Groups B and C were prompted as follows:

> Before being asked how you would vote on this issue if it were on the ballot in Florida, you will be given the opportunity to review information regarding the ballot issue. You can review as much or as little of it as you would like. Once you have finished reviewing this information, please click the forward arrow button below. You will then be asked how you would vote on this measure if it were on the ballot in Florida.

Groups B and C were then presented with headlines that linked to a series of newspaper articles, as well as links to a voter guide and two advertisements.[47] When a respondent clicked on any link, the entire document appeared on the screen.

Figure 1: Information Available to Groups A, B and C

LINKS AVAILABLE	GROUP A	GROUP B	GROUP C
Newspaper Articles and Editorials (no disclosure information)			
Floridians to Determine Fate of Wage Deduction For Illegal Aliens		●	●
Amendment 32 Targets Illegal Employers		●	●
Endorsements: Statewide Initiatives		●	●
Focus on IDs Questioned		●	●
Yes on 32: Voters Can Send a Message on Immigration		●	●
Amd 32 May Sound Good But It Is Full of Loopholes		●	●
Approval Urged on Immigration Issue		●	●
Ballot Issues Can Mislead		●	●
Amendment 32 Called Gesture		●	●
Overview of Miami Herald Positions on Statewide Issues		●	●
Voter Guide		●	●
Campaign Ads			
Yes on 32 (Defend Florida Now)		●	●
No on 32 (Color of Justice)		●	●
Newspaper Articles and Editorials (with disclosure information)			
Elite Donors Fuel Ballot Initiatives			●
Immigration Measures Make Ballot			●
	None	13 links mentioning 8 interest groups	15 links mentioning 13 interest groups

Figure 1 illustrates the information available to groups B and C. Group B was given access to 10 newspaper articles (randomly selected from those in the Colorado ballot issue study)[48], a voter guide based Colorado's and fictitious ads from two interest groups. Group C could access

the same information as Group B, plus two additional newspaper articles containing information that was almost surely obtained by the reporter through campaign finance disclosure (e.g., the amount of a particular contribution).[49]

Note that one-sixth of the articles available to Group C are disclosure-related. This far exceeds the prevalence of disclosure-related articles in a typical campaign[50] and therefore biases the study in favor of finding positive informational effects of campaign finance disclosure.

Thirteen interest groups and their positions on the ballot issue were mentioned in these documents. The names of the groups were usually fictitious but typically based on real groups in other states. As shown in Figure 1, Group B's documents mentioned eight of these groups, while those in Group C could view documents mentioning an additional five.

Once individuals in groups B and C were done reviewing this information, they were prompted to vote on the ballot issue. After voting, respondents were prompted as follows:

> Below is a list of groups that have taken or could take a position on this ballot issue. Based on your existing knowledge of the issue, as well as any information obtained during this survey, please assess the likely position of each group on this ballot issue.

For each group, the respondents were asked to indicate whether the group supported the initiative or opposed the initiative. Respondents could also indicate that they were unsure about the group's position.

Little Interest in Information, Particularly Disclosure Information

The first result of the experiment is that respondents with access to information about the ballot issue viewed very little of it. About 40 percent of respondents in groups B and C chose not to view any information at all. About 35 percent of those in groups B and C viewed one to three items. Of those who did view information, about half viewed at least one news article, and about 30 percent viewed the voter guide—the most popular single item. Respondents in groups B and C behaved virtually identically on all of these dimensions. Table 1 provides further details on the number of items viewed.

Since for most ballot issues voters have to make a greater effort to access information about the issue than in a survey setting, these results most likely overestimate the extent to which voters gather information about a ballot issue.

When we break down these actions further, we learn that campaign finance information, in particular, is not of much interest to respondents. Table 2 displays the percentage of respondents who viewed each item, by group. Of all items accessible by members of Group C, the two articles that contained campaign finance disclosure information were the least viewed. Since these articles were randomly inserted into the article list for each respondent, this effect is almost surely not due to placement of the articles.

One of these articles was headlined, "Elite Donors Fuel Ballot Initiatives," which clearly suggests that the story will discuss well-known donors. This is one of the most striking findings of the study. Respondents preferred to read any other material—another news article, a voter guide or an ad—rather than an article featuring campaign finance information. It is also telling that virtually no respondents, only about one percent, accessed only disclosure-related information.

Put another way, voters' "revealed preferences"—preferences shown through actions, not words—are for information that is not based on mandatory disclosure. As with the Carpenter survey, people may say they like information produced from disclosure, but their actions tell a different story. Moreover, respondents who read the "Elite Donors" article read three times more stories than those who did not (5.9 vs. 1.9), suggesting that voters who access campaign finance information are the least likely to need it to make informed choices.

Table 1: Survey Respondents View Very Little Information about Ballot Issues

		GROUP B (N=347)	GROUP C (N=345)
TOTAL ITEMS	0	39.5%	38.7%
	1	15.4%	16.5%
	2-3	18.1%	20.7%
	4 or more	27.0%	24.1%
	Average viewed	2.5	2.3
TOTAL NEWS ARTICLES	0	52.1%	49.5%
	1	16.6%	18.6%
	2-3	17.8%	19.6%
	4 or more	13.5%	12.3%
	Average viewed	1.6	1.5
VOTER GUIDE	Yes	32.2%	31.8%
	No	67.8%	68.2%
CAMPAIGN ADS	0	68.5%	70.9%
	1-2	31.5%	29.1%

Notes: Group B was provided access to no campaign finance information. Group C had access to this information. Figures, except for averages, are in percentages and sum to 100 within group for each category. Calculations are based on weighted figures.

Table 2: Survey Respondents are Not Interested in Articles Referencing Disclosure-Related Information

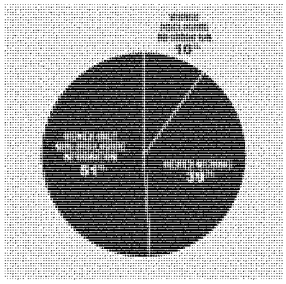
	GROUP B (N=347)	GROUP C (N=345)
NEWSPAPER ARTICLES AND EDITORIALS		
Floridians to Determine Fate of Wage Deduction For Illegal Aliens	13.7%	16.8%
Amendment 32 Targets Illegal Employers	20.5%	10.8%
Endorsements: Statewide Initiatives	15.0%	13.2%
Focus on IDs Questioned	16.3%	13.0%
Yes on 32: Voters Can Send a Message on Immigration	13.5%	17.4%
Amd 32 May Sound Good But It Is Full of Loopholes	16.6%	12.7%
Approval Urged on Immigration Issue	15.3%	10.5%
Ballot Issues Can Mislead	17.5%	15.3%
Amendment 32 Called Gesture	12.6%	14.9%
Overview of Miami Herald Positions on Statewide Issues	17.8%	11.3%
ARTICLES WITH DISCLOSURE INFORMATION		
Elite Donors Fuel Ballot Initiatives	n/a	6.9%
Immigration Measures Make Ballot	n/a	7.7%
VOTER GUIDE		
Voter Guide	32.2%	31.8%
CAMPAIGN ADS		
Yes on 32 (Defend Florida Now)	26.5%	26.8%
No on 32 (Color of Justice)	28.4%	25.6%

Notes: Group B was provided access to no campaign finance information. Group C had access to this information. Figures are the percentage of respondents in each group who viewed a given item. Calculations are based on weighted figures.

Figure 2 sums up the first two findings for Group C: Overall, nearly 40 percent of those with the opportunity to view information viewed none, while only 10 percent viewed disclosure information.

These results may explain why research by Carpenter and La Raja found that the media does not often supply voters with campaign finance information.[51] Perhaps voters simply do not demand it.

Figure 2: Viewing Choices of Group C: Little Interest in Disclosure Information



Virtually No Marginal Benefit from Disclosure

Now let's see how participants did in identifying the positions of interest groups. The simplest way to compare the success rates of groups A, B and C is to compare the average number of interest groups correctly identified by each group. Examining all 13 interest groups, respondents in A and B were virtually identical, correctly identifying an average of 4.8 interest groups. Respondents in Group C, who had access to disclosure-related information, correctly identified 5.7 out of 13 interest groups.

Seven groups are mentioned in disclosure-related articles, and of these seven groups, five are mentioned only in disclosure-related articles. Examining the seven interest groups mentioned in disclosure-related articles, respondents in Group A correctly identified 2.7 interest groups, with B respondents identifying 2.6 interest groups, and Group C members identifying 3.2 interest groups correctly.

Examining the five interest groups mentioned *only* in disclosure-related articles, the associated figures are 2.0, 1.8 and 2.3 for groups A, B and C, respectively. The general pattern, then, is that groups A and B look similar, with Group C having slightly more success.

These results are hardly an advertisement for disclosure laws. Still, disclosure proponents could say that Group C respondents were the best in identifying interest groups, and since Group C members were the only ones with access to disclosure-related information, it must be disclosure that is producing the results. This turns out to be incorrect.

The reason is simple. While only members of Group C had access to disclosure information, not all of them actually viewed it—in fact, most did not. To isolate the effect of viewing disclosure information, you have to account for differences in viewing behavior.[52]

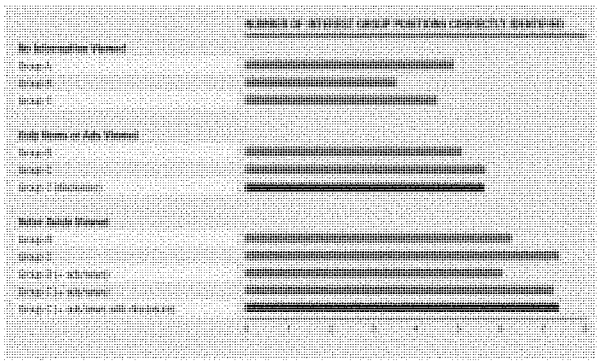
To do this, we can separate members of each group by the kind of information they viewed. In so doing, a very clear pattern emerges: Respondents who viewed the voter guide, regardless of what other information they viewed, did the best in identifying the positions of interest groups. Viewing disclosure information, by contrast, had virtually no impact.

In Figure 3, the first set of bars represents respondents who viewed no information. On average, they correctly identified 4.5 out of 13 groups. The second set of bars represents respondents who viewed only news or ads, and not the voter guide. They correctly identified 5.4 out of 13 groups. The third set of bars represents respondents who viewed the voter guide and possibly other information. They correctly identified 6.7 groups. These differences are almost surely not due to chance. In the language of statistics, they are statistically significant.

Moreover, note how imperceptible an effect disclosure information has on the success of Group C members, once the other information they view is taken into account. The two darker bars in Figure 3 refer to Group C members who viewed some disclosure-related information. They sometimes do slightly better, and sometimes slightly worse, than respondents who viewed comparable non-disclosure-related information, but these differences are trivial. In addition, the same pattern emerges if we look only at how well respondents identified interest groups only mentioned in disclosure-related articles.

In short, once you look at news, ads or, most importantly, the voter guide, there are virtually no informational benefits from looking at disclosure-related data. If there are no informational benefits from disclosure-related data, then logically this data cannot have an effect on voter competence. And since improvements in voter competence are the primary justification for disclosure laws, the case for disclosure is considerably weakened by these findings.

Figure 3: Interest Group Position Identification by Information Viewed: Voter Guide, Not Disclosure, Makes the Difference



What is the explanation for the minimal effect of articles referencing campaign finance disclosure information on the ability of respondents to correctly identify interest groups? First, it may be that news articles simply do not convey information in a manner conducive to recalling the positions of interest groups. Second, and related, the voter guide, which focuses just on the issues and not on other aspects of a campaign, such as the "horse race" (i.e., who is winning and who is losing), may provide voters with sufficient information to infer the location of many interest groups.

Regardless of the explanation, the results of the experiment should be no surprise, given everything we already know: Disclosure-related information is of little benefit for voters in ballot issue campaigns.[53]

Conclusion

The effects of campaign finance disclosure in ballot issue campaigns have not been extensively studied, in part because it is often taken as self-evident that disclosure must have positive informational consequences. This report, however, has established that voters would be just as capable of voting in ballot issue elections if no disclosure of contributions and spending were required. The evidence discussed here includes research conducted by other social scientists, my own original research, and even a simple Internet search. The key findings include:

- Voters' actions reveal that they are not interested in information about who contributes to ballot issue campaigns or the spending patterns of those campaigns.
- Disclosure information does little to help voters once all the other information available to them in a ballot issue campaign is taken into account.
- This lack of informational benefits is in contrast to the very real costs—in money, in time and in some cases personal safety—disclosure laws impose on citizens who wish to speak out regarding ballot issues.

These findings provide strong justification for jettisoning mandatory disclosure laws for ballot issue campaigns. So, what would a world without mandatory disclosure for ballot issues look like? Disclosure advocates fear a world of underground groups secretly controlling ballot issue campaigns and voters hamstrung by a lack of information about where interest groups stand on these issues. This report suggests otherwise.

There is wealth of information about ballot issues, and interest group positions on these issues, readily available to voters without recourse to disclosure information. This could be why voters are uninterested in disclosure information and why the media covers it rarely compared with other stories on ballot issues. Moreover, interests have an incentive to reveal their positions voluntarily, in part because if they do not, opposing interests will call their motives and identities into question.

Most importantly, Americans would *benefit* from the elimination of mandatory disclosure rules. Grassroots campaigns would be freed from burdensome red tape and the threat of legal sanctions for political activity. That means more participation and more debate. People would feel freer to give to their favorite causes without fear of unwanted exposure (or worse).

Surprising as it may seem, the current regime of government-forced disclosure does virtually nothing to improve public discourse on ballot issues. Indeed, disclosure stifles debate by making it harder for people to organize and participate in the process. If, as even disclosure proponents agree, the goal is a freer, more robust democratic process, lifting burdensome disclosure laws is the place to start.

Endnotes

1 McKinley, J. (2008, November 12). Theater director resigns amid gay-rights ire. *New York Times*, p. C1; McKinley, J. (2009, January 19). Marriage ban donors feel exposed by list, *New York Times*, p. A12.

2 See *Buckley v. Valeo*, 424 U.S. 1 (1975), for an articulation of the anti-corruption rationale for disclosure.

3 For an overview of the research on the failings of public financing laws, see Primo, D. M. (2010). What does research say about public funding for political campaigns? Retrieved July 14, 2011 from http://www.ij.org/about/3466.

4 Milyo, J. (2007). Red tape: Strangling free speech and political debate. Arlington, VA: Institute for Justice.

5 http://www.ij.org/index.php?option=com_content&task=view&id=1251&Itemid=165.

6 See Milyo, 2007, for details.

7 http://fundrace.huffingtonpost.com/.

8 https://inbox.influenceexplorer.com/.

9 Carpenter, D. M., II. (2009). Mandatory disclosure for ballot-initiative campaigns. *Independent Review*, 13(4), 567-583.

10 Carpenter, 2009, pp. 575-576.

11 Carpenter, D. M., II. (2007). Disclosure costs: Unintended consequences of campaign finance reform. Arlington, VA: Institute for Justice, p. 13.

12 A nearly identical proportion of Californians offer support for disclosure in the abstract (Baldassare, M., Bonner, D., Petek, S., & Shrestha, J. (2011). PPIC statewide survey: Californians and their government. San Francisco, CA: Public Policy Institute of California). However, unlike the Carpenter study, Baldassare et al. did not examine whether respondents' preferences change if the question is personalized.

13 Carpenter, 2009, p. 572.

14 Carpenter, 2009, p. 576.

15 Downs, A. (1957). *An economic theory of democracy*. New York: Harper Collins. In discussing candidate campaigns, Downs identifies two types of voters, strong partisans and those who are roughly indifferent between candidates of two parties. He points out that strong partisans are unlikely to change their vote as a result of new information. On the other hand, voters who view the two parties as nearly identical are not going to gain significant benefit from one party's candidate winning over another's.

16 These effects are exacerbated by the fact that the likelihood that a voter's ballot changes an election outcome is virtually zero. For the classic treatment of this issue, see Riker, W. H., & Ordeshook, P. C. (1968). A theory of the calculus of voting. *American Political Science Review*, 62(1), 25-42.

17 These figures are almost certainly inflated. Respondents on surveys often overstate their knowledge.

18 Garrett, E., & Smith, D. A. (2005). Veiled political actors and campaign disclosure laws in direct democracy. *Election Law Journal*, 4(4), 295-326. Garrett and Smith point to the role of "information entrepreneurs" in helping voters digest disclosure-related information, arguing that "disclosure statutes are vital to this endeavor... Mandatory disclosure statutes can be crafted so that they provide relevant information in a timely fashion and thereby allow information entrepreneurs to bring data to the voters' attention" (p. 297).

19 Carpenter, 2009, p. 576.

20 La Raja, R. J. (2007). Sunshine laws and the press: The effect of campaign disclosure on news reporting in the American states. *Election Law Journal*, 6(3), 236-249, p. 242.

21 La Raja, 2007, p. 243

22 Garrett and Smith, 2005, p. 296.

23 Briffault, R. (2010). Campaign finance disclosure 2.0. *Election Law Journal*, 9(4), 273-303, pp. 290 and 289.

24 Garrett and Smith, 2005, p. 297.

25 Garrett and Smith, 2005, p. 297.

26 Garrett and Smith, 2005, p. 325.

27 Lupia, A. (1994). Shortcuts versus encyclopedias: Information and voting behavior in California insurance reform elections. *American Political Science Review*, 88(1), 63-76.

28 Knowledge of the insurance industry's positions had a stronger effect than knowledge of trial lawyers' positions.

29 http://freemarketflorida.org/press-releases/399/.

30 http://www.onevoiceforflorida.com/forums/thread/b5f7678b-14cd-4ef0-afb9-a0486f7bea0e.

31 http://web.archive.org/web/20101231053537/http://www.floridarealtors.org/NewsAndEvents/article.cfm?id=250071.

32 http://floridahometowndemocracy.com/supporters_1.

33 http://floridahometowndemocracy.com/_data/files/EndorsementForm.pdf.

34 La Raja, 2007, p. 243. "Better" is measured using grades compiled by the Campaign Disclosure Project based on the "content and comprehensiveness" of the laws, the quality of electronic filing, the accessibility of the information, and "online contextual and technical usability" (La Raja 2007, 240).

35 Ansolabehere, S., Snowberg, E. C., & Snyder, J. M., Jr. (2005). Unrepresentative information: The case of newspaper reporting on campaign finance. *Public Opinion Quarterly*, 69(2), 213-221.

36 Lau, R. R., & Redlawsk, D. P. (2006). *How voters decide: Information processing during election campaigns*. New York: Cambridge University Press. Generally, the authors assert that "heuristics are definitely not the saving grace for the apathetic American voter. They have no broad, across-the-board ameliorative effect on the quality of the vote decision" (p. 252). The authors go on to state that heuristics can never eliminate "the role of political interest, experience, and knowledge" (p. 252) in explaining voter competence (what they term "correct voting").

37 Kuklinski, J. H., & Quirk, P. J. (2000). Reconsidering the rational public: Cognition, heuristics, and mass opinion. In A. Lupia, M. D. McCubbins, & S. L. Popkin (Eds.), *Elements of Reason: Cognition, Choice, and the Bounds of Rationality* (pp. 153-182). New York: Cambridge University Press. For further reading, see Delli-Carpini, M. X., & Keeter, S. (1996). *What Americans know about politics and why it matters*. New Haven, CT: Yale University Press. A recent experiment by political scientist Cheryl Boudreau argues for a "Gresham's Law of Political Communication" in which less credible sources of information crowd out the more credible sources of information, particularly for unsophisticated subjects. See Boudreau, C. (2011). Gresham's law of political communication: How citizens respond to conflicting information. Retrieved July 15, 2011 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017977.

38 Garrett, E. (2003). Voting with cues. *University of Richmond Law Review*, 37, 1011-1048.

39 Briffault, 2010, p. 276. Briffault goes on to argue that instead, disclosure information should be "more like Census data or income tax returns, with the focus for the most part not on the activities of individual donors and more on the behavior of demographic or economic aggregates."

40 Garrett and Smith, 2005, pp. 305-306.

41 For an interesting discussion on this point, see Samples, J. (2010). The DISCLOSE Act, deliberation, and the First Amendment. Retrieved July 15, 2011 from http://www.cato.org/pubs/pas/pa664.pdf.

42 http://www.reuters.com/article/2011/08/09/us-campaign-finance-romney-idUSTRE77802R20110809.

43 Data for this survey were collected by Harris Interactive Service Bureau (HISB). HISB was responsible for data collection, and I was responsible for the survey design and all data analysis. All of the analyses below adjust for variations in demographics and party affiliation between sample subgroups, as well as between the sample and adult population in Florida. I expand on the analyses presented here in an academic paper, the current version of which can be found at http://www.rochester.edu/College/PSC/primo/experimentdisclosure.pdf.

44 All respondents were asked to provide demographic information, as well as party affiliation. Respondents were also asked seven informational questions designed to assess their political sophistication and knowledge. These questions are based on questions asked in the National Science Foundation-supported National Election Studies.

45 The introductory text read:

> Voters in Florida are able to vote directly on issues that appear on election ballots, in what are referred to as ballot issues. (These ballot issues are also referred to as initiatives and referenda.) Please read the following text of a ballot issue that could be considered in Florida, as it has been in other states.

The ballot issue text read:

> Shall state taxes be increased one hundred fifty thousand dollars annually by an amendment to the Florida constitution that eliminates a state income tax benefit for a business that pays an unauthorized alien to perform labor services, and, in connection therewith, prohibits certain wages or remuneration paid to an unauthorized alien for labor services from being claimed as a deductible business expense for state income tax purposes if, at the time the business hired the unauthorized alien, the business knew of the unauthorized status of the alien unless specified exceptions apply and, to the extent such a payment was claimed as a deduction in determining the business' federal income tax liability, requires an amount equal to the prohibited deduction to be added to the business' federal taxable income for the purpose of determining state income tax liability?

46 There were 374 respondents in group A, 347 in group B and 345 in group C.

47 The headline links to newspaper articles were randomly ordered for each respondent to eliminate any effects based on the order in which the articles appeared.

48 Carpenter, 2009.

49 In addition, the ads that Group C viewed included the words "paid for by" in front of the interest group name instead of a link to an interest group's website, which Group B's ads displayed. This is a distinction without a

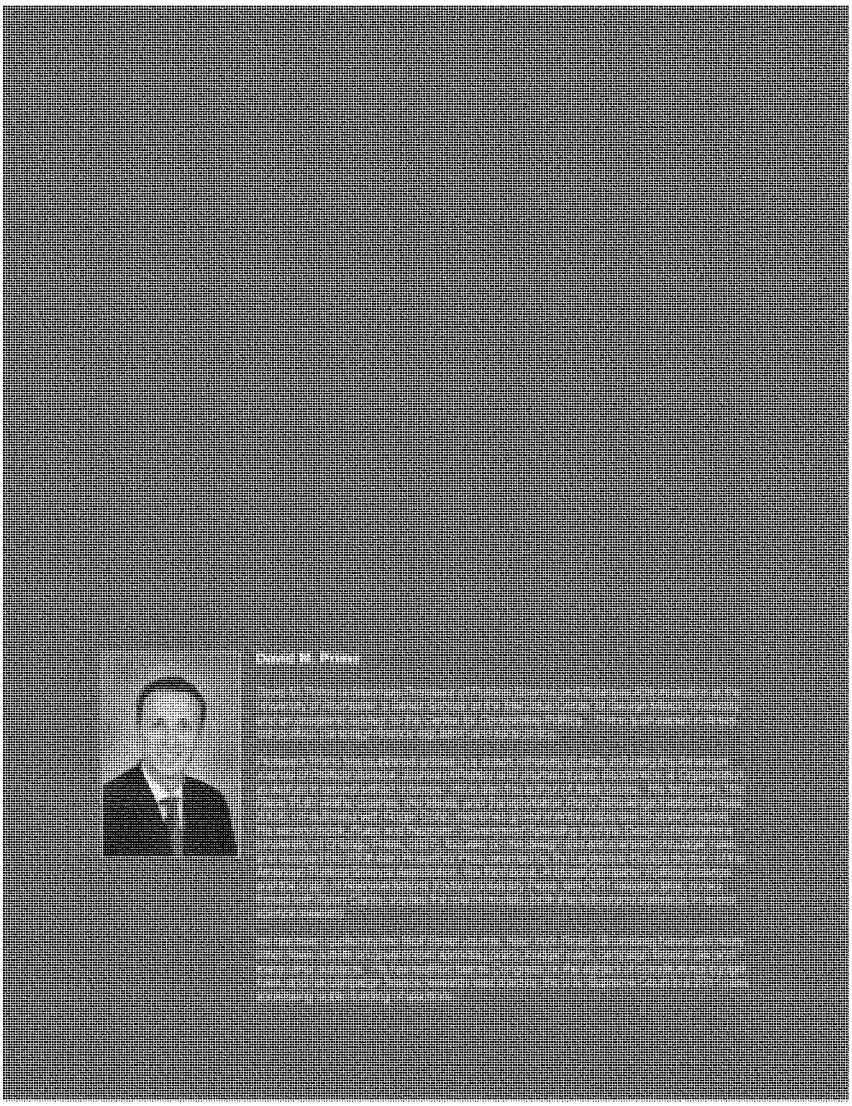
difference, and it was imposed simply to eliminate any reference to campaign finance for Group B.

50 Carpenter, 2009.

51 Carpenter, 2009; La Raja, 2007.

52 Technically, since this was an experiment in which participants were randomly assigned into groups, we might only be concerned about the differences between groups based on assignment. However, participants' exposure to information was not determined simply by group assignment but also by their behavior once in the group (i.e., whether they read information provided). Therefore, it is important to control for differences in "dosages" in addition to group assignment. An easy analogy is medical drug experiments. In clinical trials for a new drug, researchers ideally try to randomly assign participants into at least two groups. One group receives the drug and another receives a sugar pill, but participants do not know which group they are in. By randomly assigning participants into groups, any differences between them can be traced to the drug. The intuition is that any differences among the groups should be "washed away" by random assignment. However, some may forget to take the drug. Others may take too much. So, researchers often adjust their estimates to account for the behavior of participants. The same principle applies to this survey. While individuals were randomly assigned into groups, which had varying access to information, it was up to individuals to decide what information they would view.

53 A critic might argue that my study does not satisfy the requirement of "external validity," meaning that voters in an actual ballot issue campaign would not behave as respondents in my survey did. External validity is always a concern in any experiment, but in this instance, my study probably *overstates* the effect of disclosure-related information. Disclosure-related articles are disproportionately represented in the information given to Group C members, compared to a real-world setting. Moreover, the information about the ballot issue is at the fingertips of respondents—no searching required. Finally, respondents are being asked to focus in particular on this ballot issue and are not distracted by the other campaigns that somebody in the "real world" would be. If respondents in this experimental setting are not reading disclosure-related ballot issue information, why should we expect that voters in an actual campaign environment would do so?




The Institute for Justice

Testimony of Professor John C. Coates IV

John F. Cogan, Jr. Professor of Law and Economics

Harvard Law School

Before the

Committee on Rules and Administration

United States Senate

on

The DISCLOSE Act of 2012

Chairman Schumer, Ranking Member Alexander, and members of the Committee, I want to thank you for inviting me to provide written testimony on the DISCLOSE Act of 2012. In the interest of time and space, my testimony will be brief. My bottom line views are that the bill would be in the best interests of both the country and of the corporations, unions, and other organizations to which it would apply.

The basic importance of transparency and accountability in a democracy need no defense or justification. Disclosure may generate a response, including criticism, but running that risk is part of what it means to be a courageous citizen, and it is a risk that US law has long insisted individuals bear. It is past time for those who control corporations and other organizations to show the same courage.

The best available data, moreover, is inconsistent with claims that disclosure of political activity harms corporations. For evidence, please see my report, *Fulfilling Kennedy's Promise*, available here: http://ssrn.com/abstract=1923804. In that report, my co-author (Taylor Lincoln) and I find that industry-adjusted price-to-book ratios of the 80 companies in the S&P 500 that had adopted policies calling for disclosure of election activities were higher than for other companies in 2010. Those data are inconsistent with strong claims that disclosure is harmful for companies, and are consistent with the idea that well-managed companies responsive to shareholder concerns – such as political activity – are more highly valued than other companies.

As all are aware, the importance of disclosure of corporate political activity was dramatically increased by the Supreme Court's decision in *Citizens United*. In an article that has been accepted for publication and is forthcoming in the peer-reviewed *Journal of Empirical Legal Studies*, I find that corporate political activity by large companies increased significantly after that decision, and that the increased activity intensified the negative relationship between that politics and corporate value. The working version of that article can be found here: http://ssrn.com/abstract=1973771.

If any members or their staffs have questions, I would be happy to explain my results or answer questions regarding disclosure of corporate political activity more generally at their convenience.

Fulfilling Kennedy's Promise: Why the SEC Should Mandate Disclosure of Corporate Political Activity

First Draft: July 27, 2011

John C. Coates IV
John F. Cogan, Jr. Professor of Law and Economics
Harvard Law School

Taylor Lincoln
Research Director of Public Citizen's Congress Watch division

Abstract

The Supreme Court's Citizens United decision to let corporations spend unlimited sums in federal elections was premised on a pair of promises: Corporations would disclose expenditures, and shareholders would police such spending. Those promises remain unfulfilled: of $266 million spent by outside groups in 2010, half was spent by groups that revealed nothing about their funders, double the total spending by outside groups in 2006. The best chance to fulfill those promises may now rest with the SEC. Contrary to consensus views, SEC action may benefit owners of affected firms. We estimate industry-adjusted price-to-book ratios of 80 companies in the S&P 500 that have policies calling for disclosure of electioneering. After controlling for size, leverage, research and development, growth and political activity, we find disclosing companies had 7.5 percent higher ratios than other S&P 500 companies in 2010. Our data are inconsistent with claims that disclosure is harmful, and are consistent with the idea that well-managed companies responsive to shareholder concerns tend to be valued more highly than other companies.

JEL Classifications: D72, G32, G34, G38, K22, K23

Fulfilling Kennedy's Promise:

Why the SEC Should Mandate Disclosure of Corporate Political Activity

September 2011

Harvard Law School

Acknowledgments
This report was written by John Coates, Professor of Law and Economics at Harvard Law School, and Taylor Lincoln, Research Director of Public Citizen's Congress Watch division.

About Harvard Law School
Harvard Law School is the oldest continuously operated law school in the United States, with approximately 1,900 students from more than 70 countries around the world. Its faculty includes more than 100 full-time professors and more than 150 visiting professors, lecturers on law, and instructors, with a range and depth of expertise, in all fields of legal scholarship and practice. Its faculty are leaders in their fields, setting the debates in legal theory and policy; opening up new lines of inquiry; and working out solutions to real-world problems.

About Public Citizen
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The Supreme Court's decision in *Citizens United v. FEC* to permit corporations to spend unlimited sums to influence federal elections was based in large part on the rationale that corporations would disclose their political expenditures and that shareholders would police the wisdom of such spending.

But no effective disclosure requirement was in place at the time of the decision, and subsequent efforts to close the gap through legislation have been rebuffed. Meanwhile, to the extent that shareholders might even learn of their corporation's political spending, the law currently gives them only limited ability to compel changes.

Now, the best chance to fulfill the Supreme Court's promises of disclosure and shareholder participation might rest with the Securities and Exchange Commission (SEC). The SEC could require full disclosure of corporate political spending by publicly traded companies, and could facilitate action by shareholders to sign off on such spending.

The twist, we suggest, is that such an action by the SEC might prove to be a favor to the owners of the affected corporations. Despite reflexive opposition to compulsory disclosure of political spending from many self-appointed advocates of the business community, preliminary data suggest that such a requirement might benefit corporate valuations or, at the least, pose no threat of a detrimental effect.

A. Background: The Rise and Fall of Political Disclosure from 2000 to 2010

For decades, conservatives who opposed most forms of campaign-finance regulation argued for a system of unlimited spending with full disclosure. For example, as controversy swirled over the national political parties' use of unregulated "soft money" during the 1990s, conservative columnist George Will proposed boiling down campaign finance regulation to just "seven words: no cash, full disclosure, no foreign money."[1]

Similarly, the *Wall Street Journal* opined in 2000: "Our view is that the Constitution allows consenting adults to give as much as they want to whomever they want, subject to disclosure on the Internet."[2]

[1] George Will, "Let's Play 20 Questions," *Newsweek*, March 15, 1999.
[2] "McCain's Future," *Wall Street Journal* editorial, March 10, 2000. As quoted in Norman Ornstein, "Full Disclosure: The Dramatic Turn Away from Campaign Transparency," *The New Republic*, May 7, 2011.

Congress in 2002 passed the Bipartisan Campaign Reform Act (BCRA), commonly known as McCain-Feingold. The law prohibited "soft money" contributions to the national political parties (*e.g.*, contributions from corporations and unions, and those exceeding contribution limits), and it prohibited outside groups (groups that aren't candidate or party committees) from using corporate or union money to pay for broadcast ads that mentioned a candidate in the run-up to a federal election.[3] This "electioneering communications" provision was meant to stop evasions of the soft money ban. To ensure compliance, the law required independent organizations to disclose, within 24 hours, not only the costs of these "electioneering communications," but also their funding sources. In 2003, in *McConnell v. FEC*, the Supreme Court by a 5-4 vote upheld nearly all parts of BCRA, including the electioneering communications provision.[4]

In a challenge to the restrictions on electioneering communications, a nonprofit group called Wisconsin Right To Life Inc. in 2004 sought to broadcast corporate-financed advertisements during the 60-day window that would ask viewers to call Sen. Russ Feingold (D-Wis.) and urge him not to filibuster judicial nominations. In 2007, in a major reversal of *McConnell*, the Supreme Court handed Wisconsin Right to Life a 5-4 victory.[5] The Court ruled that any ad that could "reasonably be interpreted as something other than an appeal to vote for or against a specific candidate" must be viewed as an "issue" ad rather than an election-related ad, and therefore could not constitutionally be prohibited in the run-up to an election even if funded with corporate money.[6]

In the wake of *Wisconsin Right to Life*, ads depicting candidates in the 30- and 60-day windows were still subject to disclosure requirements. But the FEC soon watered those requirements down. The FEC issued rules that required groups making electioneering communications to continue disclosing the amount of an expenditure, but that only required them to reveal the sources of money financing the communications in instances in

[3] The law banned corporate- or union-funded "electioneering communications," which it defined as ads broadcast in the 30 days before a primary or the 60 days before a general election that mentioned or otherwise depicted a candidate and were targeted at the candidate's voters but stopped short of urging the audience to vote for or vote against a candidate. Ads that did urge the audience to vote a certain way were plainly deemed as "express advocacy," for which contribution limits, a ban on the use of money from corporate or union treasuries, and other requirements pertaining to federally regulated electioneering expenditures applied.

[4] *McConnell v. Federal Election Commission*, 540 U.S. (2003).

[5] *Federal Election Commission v. Wisconsin Right to Life Inc.*, 551 U.S. 449 (2007).

[6] *Ibid.*

which a donor earmarked a contribution to be used for an ad. Such earmarking is rare in practice.[7]

In January 2010, in *Citizens United v. FEC*, the Supreme Court went even further, holding that corporations[8] could spend unlimited funds from their treasuries to pay for campaign ads. The decision overturned at least 60 years of established law prohibiting corporations from making independent expenditures to influence federal elections.[9] Justice Anthony Kennedy, the decision's author, justified permitting corporate electioneering in large part on the expectation that the funders of the ads would be disclosed.

"A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today," Kennedy wrote in *Citizens United.*[10] "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." Furthermore, Kennedy asserted, "Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits,

[7] See 11 C.F.R. § 104.20(c)(9). The Federal Election Commission (FEC) ruled that groups were only required to disclose the funders of electioneering communications in cases in which they received contributions specifically earmarked for electioneering purposes. Because very few donors to political groups earmark their contributions for a specific campaign ad, this rule opened the door for trade associations and other outside groups to run ads without disclosing their funders.

[8] *Citizens United v. Federal Election Commission*, 558 U.S. (2010). The Court also purported to free up unions to spend unlimited funds from their treasuries to pay for campaign ads, but unions are subject to restrictions beyond those at issue in *Citizens United*, which effectively give workers represented by unions an individual "opt out" from such expenditures. Those restrictions remain in force, although they may come under attack in the wake of *Citizens United*. See Benjamin Sachs, From Employees to Shareholders: Political Opt-Out Rights after *Citizens United*, Working Paper, August 2011.

[9] Direct corporate contributions in federal elections had been banned since the Tillman Act (1907). The Tillman Act was eventually subsumed under the Federal Corrupt Practices Act of 1925. In 1943, Congress temporarily extended the ban on corporate contributions to labor unions as well under the War Labor Disputes Act. Large labor unions had evolved through the New Deal as another vehicle capable of amassing large sums of money that could be used for political purposes. In the 1944 elections, labor unions responded to the War Labor Disputes Act by diverting that money to independent expenditures (rather than contributions) on behalf of their favored candidates. To close this loophole, Congress enacted the Taft-Hartley Act of 1947 to clarify that both campaign contributions and expenditures by corporations and unions were prohibited by law. The legislative history indicates that some members of Congress believed both contributions and expenditures had already been prohibited by the Tillman and Federal Corrupt Practices Acts. The Federal Election Campaign Act of 1971 (FECA), as subsequently amended, incorporated the Taft-Hartley Act's long-standing provision against corporate and union campaign contributions and expenditures, which was reconfirmed once again by Congress in BCRA.

[10] *Citizens United v. Federal Election Commission*, 558 U.S. (2010).

and citizens can see whether elected officials are in the pocket of so-called moneyed interests."[11]

But, as noted above, by the time *Citizens United* was issued, comprehensive disclosure rules had already been nixed by the FEC in the wake of the *Wisconsin Right to Life* decision. Kennedy may have assumed that corporations would broadcast ads in their own name, *e.g.*, "Coca-Cola endorses Smith." But in reality the vast majority of third-party electioneering advertisements have historically been broadcast by third party entities – such as trade associations and ad hoc front groups – that collect money from other sources and generally keep their funders secret. In short, *Citizens United* presumed the existence of disclosure rules that do not exist.

B. The Aftermath of Citizens United: Undisclosed Electioneering Spending and Unsuccessful Attempts to Close the Gap

The sources of about half the money spent in the first post-*Citizens United* election cycle were kept secret. Of $266.4 million spent by outside groups to influence the 2010 elections, $135.6 million was spent by groups that did not reveal any details about their funders.[12] In 2010, the undisclosed portion of independent spending alone was almost *double* the $68.9 grand total of spending by outside groups in 2006, the previous mid-term election cycle.[13] Non-disclosing groups included the U.S. Chamber of Commerce, which was the top spender, at over $31 million. Other top spenders identified themselves only as "Americans for Job Security," the "American Action Network" or the "American Future Fund."[14]

Efforts before and after the 2010 elections have sought to close the disclosure gap, but each met with vigorous opposition, mostly along party lines. The DISCLOSE Act would require organizations to reveal the identity of any donor behind a campaign ad giving $1,000 or more. The measure passed the then-Democratic House of Representatives but in September 2010 fell one short of the 60 votes needed to overcome a Republican filibuster in the Senate.

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[11] *Ibid.* Note: Although elements of Kennedy's phraseology (*e.g.*, "effective disclosure has not existed before today" ... "disclosure of expenditures *can* provide shareholders with the information needed" [emphasis added] .... "shareholders *can* determine whether their corporation's political speech advances the corporation's interest" [emphasis added]) did not technically assert that mechanisms to compel disclosure actually existed at the time of the decision, the implication of his words was that such systems were in place.

[12] "Disclosure Eclipse: Nearly Half of Outside Groups Kept Donors Secret in 2010; Top 10 Groups Revealed Sources of Only One in Four Dollars Spent," Public Citizen, Nov. 18, 2010.

[13] *Ibid.*

[14] *Ibid.*

The Shareholder Protection Act would require companies to obtain shareholder approval of their political budgets and to disclose the details of their political spending. The bill was approved by the House Financial Services Committee in 2010, but the congressional session ended before the full House had considered it. It was reintroduced in July 2011.

Meanwhile, President Obama has contemplated issuing an executive order that would require government contractors to disclose the money they spend to influence elections. But the draft executive order has been attacked by the U.S. Chamber of Commerce and other business groups and to date has not been issued.[15]

Conservatives and GOP leaders, having received in *Citizens United* what they long sought (unlimited corporate spending on elections), appear to have lost their appetite for disclosure. They have roundly attacked each of the proposals to fill the disclosure gap – effectively repudiating Justice Kennedy's promise of disclosure in *Citizens United.*

Some of the criticism of reform proposals has been substantive. Many congressional Republicans argued that the DISCLOSE Act would have imposed more onerous requirements on corporations than unions and that it would have gone beyond the core mission of ensuring disclosure.[16] The corporations versus unions claims were specious. Corporations and corporate-backed trade groups would have needed to disclose more than unions only because they typically receive a larger portion of their funding from donors giving more than $1,000. Both corporations and unions would have been able to keep the identities of contributors giving less than $1,000 confidential. The second complaint was more accurate: in addition to requiring disclosure, the bill would have prohibited government contractors and foreign entities from making expenditures to influence federal elections. But DISCLOSE Act opponents did not offer alternative bills that would have closed the transparency gap while addressing their concerns.

In an editorial published on Election Day 2010 the *Wall Street Journal* celebrated the post-*Citizens United* era with an editorial titled "Campaign-Finance Reform, RIP: This Year's Gusher of Spending Has Made Far More Races Competitive." Then the *Journal* began to back

[15] See, *e.g.*, "Coalition Letter to President Obama on the Draft Executive Order," May 16, 2011. Available at http://www.uschamber.com/issues/letters/2011/coalition-letter-president-obama-draft-executive-order.
[16] See, *e.g.*, George F. Will, "Let Us Disclose That Free-Speech Limits Are Harmful," *Washington Post*, July 11, 2010.

away from its prior pro-transparency stance. "These columns have long supported disclosing political contributions as part of a larger deregulation that allowed any American to give as much as he wants to any candidate," the paper wrote.[17] "Lately, however, as we've watched Democrats and liberals attack Target Corp. and other businesses for donating to independent groups, we wonder if even disclosure is wise."

But in exchange for "a wholesale repeal of all campaign-finance limits and putting the Federal Election Commission out of business," the *Journal* allowed, "we're willing to compromise."[18]

C. Research Shows That Greater Political Activity By Corporations Is Strongly Associated with Lower Shareholder Value

During all of these legal and political developments, a common assumption by many participants in the debates over corporate political activity – including participants on both sides of the issues – has been that regardless of whether such activity is good for the country, it is certainly good for the shareholders of the active corporations. Why else would corporations want to get involved in politics? Counter to those widespread perceptions, however, research in several past and ongoing studies suggests that companies seeking an advantage through lobbying and campaign activities may not be doing their shareholders any favors. Rather, corporate political activity overall may reflect the interests of the managers of the companies, or on a risk-adjusted basis may be less beneficial than other purposes to which shareholder funds could be put.

One of the authors of this paper (Coates) has found that, both before and after *Citizens United*, corporate political activity was associated with lower corporate value. Specifically, among the S&P 500 – which accounts for 75 percent of the market capitalization of publicly traded companies in the U.S. – firms active in politics, whether through company-controlled political action committees, registered lobbying, or both, had lower price/book ratios than industry peers that were not politically active. This was true in every election cycle from 1998 to 2004.[19] It became even more pronounced after the *Citizens United* decision, in the 2010 elections, when politically active firms had, on average, a 24 percent lower

[17] "Campaign-Finance Reform, RIP: This Year's Gusher of Spending Has Made Far More Races Competitive," *Wall Street Journal*, Nov. 2, 2011.
[18] *Ibid.*
[19] John C. Coates IV, "Corporate Governance and Corporate Political Activity: What Effect Will Citizens United Have on Shareholder Wealth?" Harvard Law and Economics Discussion Paper No. 684, 2010. Available at http://ssrn.com/abstract=1680861.

price/book ratio than their industry peers.[20] This difference can be found before and after controlling for other factors that have previously been found to affect firm value, including recent profits, sales growth, leverage, and size. In addition, while political activity generally correlates negatively with general measures of shareholder rights and power, it continues to be associated with lower shareholder value even after controlling for shareholder rights of a general nature. That is, even among companies with poor shareholder rights, firms that are more politically active tend to have lower valuations than less active firms.

In an unrelated study, Rajesh Aggarwal and co-authors[21] found that companies that made soft money donations to parties or donations to Section 527 committees from 1991 to 2004 (accounting for roughly 11 percent of the universe of U.S. publicly traded firms) tended to be large, slowly growing firms that had more free cash than other firms but spent less on research and development or business investments. Their donations were negatively correlated with long-term firm-specific stock market performance. Aggarwal *et al.* also found that better corporate governance – including better board structure, lower CEO compensation, and the presence of large shareholders to monitor corporate behavior – tended to be associated with less political activity. But, as with Coates's research, the negative relationship between political activity and shareholder returns persisted even after controlling for more general corporate governance factors, suggesting that policies limiting or disclosing political activity could further improve shareholder value.

Many academic studies have found that political activity (particularly lobbying) can produce tangible policy benefits for corporations, ranging from tax subsidies to changes in trade policy. One recent study (Cooper and others),[22] for example, found that companies sponsoring PACs making donations to more candidates in the period of 1979 to 2004 had on average higher stock returns than industry peers in the following year, although companies with PACs that simply made larger donations did not generate such excess returns.

The methods for measuring companies' valuations and levels political activity are sufficiently varied that it is not surprising that different researchers would arrive at

[20] John C. Coates IV, "Corporate Political Activity, Corporate Governance and Corporate Value Before and After *Citizens United*." Working paper.
[21] Rajesh K. Aggarwal, Felix Meshke, and Tracy Wang, "Corporate Political Donations: Investment or Agency?" Working Paper, January 2011. Available at http://ssrn.com/abstract=972670.
[22] Cooper, Michael J., Huseyin Gulen, and Alexei V. Ovtchinnikov, "Corporate Political Contributions and Stock Returns," *Journal of Finance*, 2010 (65: 687-724).

different conclusions on the benefits or harms of companies choosing to enter the political arena. Cooper *et al.*, for instance, chose to focus on stock returns. We believe that price/book ratios provide a better insight into the market's view of a company's value.

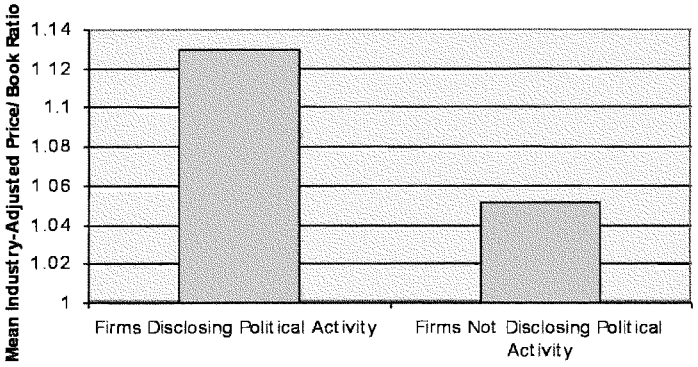
But even if, on balance, one determined that the body of research shows that political activities do slightly benefit companies, we would argue that such activities nonetheless fail to benefit most investors most of the time. Institutional investors hold more than 75 percent of the equity in the 1,000 largest publicly traded companies in the United States. The individuals holding shares in institutional funds have diversified holdings. To the extent that corporate political activity is at best a zero-sum game, even investors who may realize small advantages from their holdings in one company would be as likely as not see their gain cancelled out elsewhere.

D. Politically Active Companies That Voluntarily Disclose Their Activities Experience Higher Valuations Than Similarly Active Companies That Do Not

What about disclosure? Is it true that companies that disclose their political activities are worse off for doing so? To answer this question, we analyzed the market valuations and other financial aspects of 80 S&P 500 companies that have adopted policies calling for disclosure of their electioneering activities.[23] In particular, we compared the price/book ratios of those companies with similarly sized S&P 500 companies in the same industries. (Price/book ratios are commonly used valuation metrics that are more stable than year-to-year earnings. Price/book ratios reflect the market's evaluation of whether a company as currently managed is using shareholder resources well, compared to similar firms.) Because many factors influence price/book ratios, we controlled for company size, leverage, research-and-development activities, and three-year sales growth, as well as whether the companies had PACs that made donations in 2010. The final variable, whether companies had active PACs, is necessary because companies without active PACs do not tend to have political disclosure policies. As discussed in Section C, above, companies that are politically inactive tend to have higher price/book valuations than companies that are politically active. Therefore a non-disclosing politically inactive firm could be expected to have a higher valuation than a disclosing politically active firm. Our inquiry seeks to compare the performance of politically active firms that disclose their activity with that of politically active firms that do not disclose.

[23] About 85 companies have adopted some variation of a policy provided by the Center for Political Accountability in which they have pledged to disclose electioneering activities. Available at http://www.politicalaccountability.net/index.php?ht=d/sp/i/869/pid/869.

We found that companies with policies calling for political disclosure had a 7.5 percent higher industry-adjusted price/book ratio than other firms as of year-end 2010. This difference is statistically significant at conventional (95 percent) levels – meaning that it is only 5 percent likely that our results are due to random fluctuations in our data, assuming we have included appropriate control variables.[24] Figure 1 depicts our findings:



Given data limitations, we cannot claim that disclosure policies *cause* the higher price/book ratios. We only claim that they these policies are correlated in the S&P 500, and the companies that have adopted pro-disclosure policies are, on the whole, more valuable. Moreover, since we cannot observe some political activities (*e.g.*, undisclosed donations to trade groups), we cannot be sure we have controlled for all politically active in the S&P 500 in our regressions. Nevertheless, the data from 2010 are inconsistent with the idea that disclosure policies harm politically active companies as a general matter, and they are consistent with the idea that well-managed companies responsive to shareholder concerns tend to be more highly valued than other companies.

[24] In this analysis, we used the existence of active PACs as the barometer for whether a firm was politically active because this report concerns the proposal for disclosure of political activity in an electioneering context. The Coates studies cited above used the existence of PACs *or* federal lobbying activity as the barometer. The core finding of this section, that disclosing firms experience higher valuations than non-disclosing firms, holds if PACs and/or lobbying activity are used to control for political activity, but the correlations are weaker than those for active PACs alone.

E. The Securities and Exchange Commission Should Give Shareholders the Right to Sign off on Political Budgets; Require Publicly Traded Companies to Disclosure Their Political Expenditures

The voluntary disclosures that provided the basis for our analysis are encouraging. They show that forward-thinking directors and managers of large and successful businesses share the view that shareholders, no less than the public, deserve to know how their funds are being spent in the political arena. These voluntary disclosures, however, are not a complete policy solution. Voluntarily adopted disclosure policies are often inconsistent, making comparisons difficult or impossible; are sometimes incomplete, making it hard to track the full range of a company's complementary political activities; and generally lack reliable enforcement mechanisms to ensure compliance. For the typical diversified shareholder, moreover, the important question is whether corporate political activity overall is valuable, so voluntary disclosure by a small fraction of public companies will never provide meaningful information.

Congress should adopt laws giving shareholders the right to sign off on corporate political spending budgets and mandating board approval of such budgets and activities, similar to laws that have been adopted in the United Kingdom. But in the current U.S. political climate, congressional action may not be forthcoming. The Securities and Exchange Commission can and should fill this void by adopting mandatory disclosure requirements for corporate political activity.

In *Citizens United*, the Court assumed that shareholders would oversee corporate political spending. The Court's assumptions were off base in at least two key ways:

- First, because no comprehensive requirement for disclosure exists (and Congress has not implemented one), ordinary shareholders have no more prospect than members of the general public of learning about their corporation's political activities. This is especially significant because most corporate-funded political activities are carried out by trade associations or front groups that keep their donors secret. Such third party groups were the largest sponsors of political ads in 2010.[25]

[25] Michael M. Franz, "The Citizens United Election? Or Same as it Ever Was?" The Forum, Vol. 8, Issue 4, 2010, Table 1.

- Second, even if shareholders are fully apprised of their corporation's political spending, they lack the power to do anything about it besides passing non-binding resolutions. The Shareholder Protection Act introduced last year and again this year by Rep. Michael E. Capuano (D-Mass.) and Sens. Robert Menendez (D-N.J.) and Richard Blumenthal (D-Conn.) would give shareholders the power to approve corporations' political budgets and mandate detailed disclosure of corporate political expenditures, but the bills face an uphill battle in Congress.

The Securities and Exchange Commission should issue rules that ensure comprehensive disclosure of political activities by publicly traded companies and facilitate shareholder efforts to adopt bylaws requiring that managers get their sign-off on political budgets.

- On disclosure. The SEC should require publicly traded companies to disclose to shareholders and the public their expenditures used for political purposes, including donations to trade associations that help finance electioneering and/or lobbying activities. The SEC rule should require companies to obtain from their trade associations an enumeration of the amount of their contributions used for non-deductible political activities (defined broadly as lobbying and electioneering) as well as details on the amount of money used specifically for electioneering. Electioneering expenditures could be calculated relatively simply by taking the amount the third party group spent on activities recognized by federal election law, such as on "independent expenditures" and "electioneering communications."

  Distinguishing between electioneering and lobbying spending is important because electioneering activities are most likely to alter the national political landscape. Electioneering spending is also most apt to breed corruption, which can run in both directions – politicians can corrupt corporate officials as much as the reverse. The Supreme Court carved out a special place for the regulation of electioneering spending in the wake of the Watergate scandal, and the single aspect of *Citizens United* that buoyed traditional campaign finance law was the Court's endorsement of disclosure.

- On shareholder sign-off. The rules should stipulate that shareholders have the right to use the company's proxy statement to propose and (if approved by a majority of shareholders) to adopt by-laws requiring that any publicly traded company's political spending budget – including electioneering and lobbying expenditures – be approved by a majority vote of all shareholders in advance of any political spending.

Such a requirement would be similar to that adopted in the United Kingdom in a series of amendments to its Companies Act in 2000 and 2006. Research suggests that the UK's laws have not prevented corporate political activity, but have modified corporate behavior, reducing political expenditures at a number of companies, and limiting such expenditures by publicly held companies relative to privately held firms,[26] which are not funded with "other people's money."[27]

F. Conclusion

Isolating the effects of better disclosure on companies' valuations is challenging for many reasons, including the enormous array of other factors that influence valuations and – somewhat paradoxically – the lack of full disclosure by the vast majority of large publicly traded companies. But the arguments for requiring comprehensive disclosure are sound. First, the limited available data show that better disclosure does not reduce shareholder value, and instead appears to run together with better valuations among comparable large public companies. Second, shareholders of publicly traded companies have a right, at a minimum, to know how the companies in which they are invested are attempting to influence public policy.

Efforts to encourage voluntary disclosure by large companies are admirable and deserve credit for publicizing the issue. But long-term benefits of voluntary disclosure regimes are limited. A compulsory system is needed. There are many arguments for why both the public and shareholders have grounds to demand disclosure, but perhaps none is so compelling as the language in the Supreme Court decision that unleashed the torrent of undisclosed spending in the 2010 elections that will no doubt accelerate in 2012.

Justice Kennedy's opinion in *Citizens United* attempted to point the way towards a grand compromise, albeit on the terms laid out by opponents of campaign-finance regulation. Corporations would be allowed to spend unlimited sums to influence federal elections. In exchange, the public (and shareholders) would be able to monitor the corporate electioneering activity that the decision allowed. Only half of this promise has been fulfilled. It's up to the Securities and Exchange Commission to make good on the other half.

[26] See Ciara Torres-Spelliscy and Kathy Fogel, "Shareholder-Authorized Corporate Political Spending in the U.K.," Working Paper, May 24, 2011. Available at http://ssrn.com/abstract=1853706.
[27] Louis Brandeis, "Other People's Money – And How the Bankers Use It," 1914.

Corporate Politics, Governance, and Value Before and After *Citizens United*

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John C. Coates IV
John F. Cogan, Jr. Professor of Law and Economics
Harvard Law School

Abstract

This paper explores corporate politics, governance and value in the S&P 500 before and after *Citizens United*. In regulated and government-dependent industries (e.g., banking, telecommunications), political activity is nearly universal, and uncorrelated with measures of shareholder power, managerial agency costs, or value. But 11% of CEOs in 2000 who retired by 2011 obtained political positions after retiring, and in a majority of industries (e.g., apparel, retail), political activity is common but varied, and correlates negatively with measures of shareholder power (concentration, rights), positively with signs of managerial agency costs (corporate jet use by CEOs), and negatively with shareholder value (industry-relative Tobin's q). The negative politics-value relationship is stronger in firms making large capital expenditures, suggesting that politics may lead firms to pursue value-destroying projects, and the relationship is also stronger in regressions with firm and time fixed effects, which rule out many potential omitted variables. After the exogenous shock of *Citizens United*, corporate lobbying and PAC activity jumped, in both frequency and amount, and firms that were politically active in 2008 had lower value in 2010 than other firms, consistent with politics at least partly causing and not merely correlating with lower value. Overall, the results are inconsistent with politics generally serving shareholder interests, and support proposals to require disclosure of political activity to shareholders.

Corporate Politics, Governance, and Value
Before and After *Citizens United* *

In *Citizens United*, the Supreme Court relaxed constraints on the ability of corporations to spend money on elections. In so doing, it rejected a shareholder-protection rationale for restrictions on spending, in part on the ground that shareholders are generally capable of defending their own interests through "corporate democracy."[1] Another possible if unstated reason for the Court's rejection of shareholder protection as a basis for restrictions on corporate political activity (***CPA***) is that there has been surprisingly little research focused on the relationships among CPA, corporate governance, and corporate value. This paper explores those relationships in the S&P 500 before and after *Citizens United.*

The paper finds that before and after *Citizens United* the data are consistent with companies engaging in a mix of shareholder-oriented and non-shareholder-oriented political activity. In regulated industries (e.g., banking, telecommunications) and in government-dependent industries (e.g., defense), political activity is nearly universal, and does not strongly correlate with measures of shareholder power, managerial agency costs, or value. In these industries, at least, where business strategy or revenues are directly linked to political decisions, it seems hard to imagine that shareholders of any given firm would benefit from unilateral political disarmament.

But the same intuition does not extend to most large public companies. A review of the career paths of a sample of CEOs in 2000 points to another possible motivation for CPA: more than one in ten ex-CEOs later obtain political positions, including Cabinet-level appointments. This finding suggests that the extent or nature of the political activity of firms managed by those CEOs – as well as by other CEOs who have not yet left their CEO positions, or who died while CEO, or left under a cloud of scandal – could have at least partly been influenced by personal ambitions. In the majority of industries (e.g., apparel, retail, equipment), political activity is common but varied, and it correlates negatively with measures of shareholder power (shareholder concentration and shareholder rights), positively with signs of managerial agency costs (corporate jet use by CEOs), and negatively with shareholder value (industry-relative Tobin's q). The negative value-politics relationship is particularly strong for firms making large capital expenditures, and is stronger in firm fixed-effects regressions than in cross-sectional regressions.

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[1] 130 S. Ct. 876, 558 U.S. [ ] (2010) at 46 (quoting *Bellotti*, 435 U. S. 765, 794 & n. 34). The Court also asserted that the laws at issue in the case were poorly tailored to the goal of shareholder protection. For a critique of the Court's legal and institutional analysis on that and other points, see Coates 2010a.

The causal relationships between political activity and value likely run in both directions: politics may be one route for a troubled or stumbling firm to pursue to regain profitability, even as politics may distract senior managers and result in business investments that lack focus or are poorly fitted to a firm's core business strategy. Consistent with this possibility, large capital expenditures have different effects depending on whether the firm making the investments are politically active – politically active firms making expenditures have lower value than other firms; politically inactive firms making expenditures have higher value. As a further test of whether the causal arrow runs at least in part from politics to value, *Citizens United* is examined as an exogenous shock to aggregate CPA. Although *Citizens United* changed the law only for "independent expenditures," registered lobbying and PAC activity by corporations jumped in 2010, in both frequency and amount, particularly at firms that were already politically active in 2008, consistent with the well-established prior finding that different modes of CPA act as complements. Firms that were politically active in 2008 ("treatment" firms) had sharply lower industry-relative value in 2010 than other firms ("control" firms). Because pre-2010 declines in corporate value could not plausibly cause the Supreme Court to rule as it did, the relative decline in value at politically active firms after the decision is most simply explained by politics at least partly causing, and not merely correlating with, lower value.

These results are inconsistent with a simple theory in which CPA can be presumed to serve the interests of shareholders. The results in the politics-value regressions with firm and time fixed effects rule out many potential omitted variables by focusing on the relationship between same-firm changes in politics and changes in value. While unobserved characteristics of firms or managers change over time in tandem with changes in both political activity and value, the combination of the findings – relating to CEO careers, the relationships between firms and shareholder power, firms and signs of managerial agency costs, and value and politics, the industry-based differences in those cross-sectional relationships, and the results before and after *Citizens United* – are collectively difficult to explain with a model in which managers deploy firm resources solely to pursue firm or shareholder interests, at least in the largest US public companies.

The results have limits. No study of corporate politics can reflect an idealized controlled random double-blind study, in which randomly selected sample of companies were prohibited from engaging in politics, while otherwise identical companies were not. Even if lawmakers were inclined to try to conduct such a study, and even if corporate political resistance did not defeat efforts to do so, the holding of *Citizens United* makes it legally impossible by labeling CPA as shareholder "speech" protected by the First Amendment. The strength of the politics-value relationship is such that the correlations cannot be interpreted in a naïve way, with (for example) political expenditures being treated as the sole direct cause of lower corporate value. The near-universality of political activity in heavily regulated and government-dependent industries makes it difficult to study politics-value relationships in the very industries where the interests of managers, shareholders, and the polity are strongest.

With those caveats, the findings make it more plausible that CPA commonly reflects broader agency problems at large public companies. Together with the likelihood that unobservable

political activity is also harmful to shareholder interests (perhaps even more so), the findings provide support for those engaged in efforts to respond to the legal shock to the shareholder-manager relationship at large public companies represented by *Citizens United*. The cumulative effect of the findings adds support for proposals to require disclosure of such activity to shareholders.[2] If Congress, states, or the SEC adopt rules attempting to give shareholders more information or more authority in the political sphere, the evidence presented here should help demonstrate that such legislation serves as a legitimate and compelling purpose separate from the anti-corruption and other purposes that have traditionally justified campaign finance laws. Contrary to the Supreme Court's stated assumption,[3] shareholders were not able to protect themselves from misuse of corporate funds for political purposes prior to *Citizens United*, and the risk of such misuse has increased as a result of the decision.

Part I briefly (a) describes the US Supreme Court's decision in *Citizens United*, and (b) reviews relevant literatures on (1) corporate governance and its relationship to shareholder value, as measured in the corporate governance literature, and (2) CPA. Part II develops hypotheses to be tested, and describes the data used to test the hypotheses. Part III summarizes data on ex-CEO involvement in politics, corporate governance, CPA, and shareholder wealth. Part IV relates the data on CPA to the data on corporate governance and value. Part V summaries the empirical results and discusses possible interpretations and implications for law and policy. The paper then briefly concludes.

1. Legal Context and Prior Literatures

1.1. Citizens United

In *Citizens United*, the US Supreme Court decided that laws barring corporations (and unions) from making "independent" political expenditures (such as buying television ads supporting a candidate) were unconstitutional under the First Amendment.[4] Those laws banned corporations from actively campaigning in elections on behalf of politicians in the period from World War II through 2010. As a result, they curtailed the amount of money that corporations could spend on election activity, and constrained (though they did not eliminate) the ability of corporations to influence campaigns through contributions.

Given that the studies summarized below have established that different kinds of political activity are complements, the logical implication of *Citizens United* would be to increase all kinds of political activity by corporations. *Citizens United* generated a great deal of commentary and controversy. To date, however, few studies have examined the extent to

[2] See http://sec.gov/rules/petitions/2011/petn4-637.pdf (August 3, 2011 petition for rulemaking on disclosure of corporate political spending).

[3] See text accompanying note 1 supra.

[4] Throughout, the word "independent" is in quotes to reflect the fact that the "independence" of such expenditures is difficult to observe and is likely absent in many instances. For example, "Restore our Future" is a nominally "independent" political action committee (***PAC***) created by three former aides to Mitt Romney, is dedicated to "getting Romney elected president," and received a $1 million donation from a privately held company (W Spann LLC) formed in March 2011 that promptly dissolved after making its donation. President Barack Obama's former Deputy Press Secretary formed a PAC, Priorities USA, to back President Obama's re-election bid. Isikoff 2011.

which CPA changed in the 2010 elections, relative to prior periods, nor whether the cross-sectional correlates of that activity changed after the decision.[5] In particular, no study has yet to examine the relationship between corporate value and political activity in 2010, in absolute terms, or relative to prior years.

1.2. Corporate political activity: channels and regulations

Before *Citizens United*, corporations were barred from donating corporate funds directly to candidates, and they continue to be barred from doing so.[6] Before *Citizens United*, corporations were permitted to establish political action committees (***PACs***), and they may still do so. Corporations could not (and still cannot) simply channel corporate funds through the PACs they establish ("connected" PACs) to candidates.[7] Instead, corporate officials must solicit donations to their connected PACs from corporate managers, employees and shareholders. However, corporations could and can continue to pay the fund-raising costs of their PACs, which can amount to a significant share of the nominal budget of the PACs – effectively, they shoulder the substantial fund-raising burden for the political candidates to which the PACs contribute.

Before *Citizens United*, corporations were also largely unconstrained from lobbying – that is, engaging in efforts to present information and otherwise persuade lawmakers, once elected, to pursue particular policies – and they may still do so. Nevertheless, pre-*Citizens United* laws limited the ability of corporations to influence the choice of lawmakers by voters, and (since lawmaker time and attention is a limited resource) limited the effectiveness of past lobbying efforts. As discussed below, the complementary relationship between lobbying and election activity is established in the literature on CPA.

All studies of CPA are challenged by the fact that only certain kinds of CPA are required to be disclosed, even by public companies. If Exxon hires a registered lobbyist or lobbying firm to act as such, the lobbyist and/or firm must disclose that fact, but nothing requires Exxon to disclose the fact that it may hire a law or public relations firm (not registered as a lobbyist) that engages in activities that are essentially political in nature, and would be identified as "lobbying" in ordinary speech.[8] Books, television ads or appearances, op eds, pamphlets, Congressional testimony, efforts to stimulate "grassroots" letter writing campaigns, and public comments on proposed regulations, and all lobbying activities by those whose lobbying activities constitute less than 20 percent of the time engaged in services are all arguably exempt

[5] One recent study finds (among other things) that in 2010 and 2011 utilities spent the most on politics, that 5% of the firms in the S&P 500 disclosed a relationship with 501(c)(4) firms, 14% disclosed how much of their dues to trade associations are used for political purposes, and 20% disclosed direct political spending. IRRC 2011.

[6] A recent court decision that the First Amendment permits corporations to make the same direct contributions as individuals in federal elections, U.S. v. Danielczyk, 788 F. Supp. 2d 472 (E.D. Va. May 26, 2011), has been appealed to the same appeals court that recently rejected a similar attempt to strike down a state law banning corporate contributions, see Preston v. Leake, 2011 U.S. App. LEXIS 22520 (4th Cir. Nov. 7, 2011).

[7] See Federal Election Commission Campaign Guide for Corporations and Labor Organizations (Jan. 2007), available at http://www.fec.gov/pdf/colagui.pdf (last visited Nov. 26, 2011).

[8] 2 USC § 1602 (definitions of lobbying activities and related terms).

from the legal definition of "lobbying contacts," depending on the facts. Lobbying disclosure laws are also largely unenforced (Fried 2011).

Even contributions and election expenditures are exempt from disclosure if carefully funneled through "conduits," i.e., "independent" organizations. While those organizations might be subject to a disclosure requirement if they in turn make contributions to candidates,[9] nothing in the disclosure regime requires a public company that donates money to, for example, a commonly controlled but formally independent non-profit to disclose those donations to the public, or to force the non-profit to disclose to the public the identity of its donors if the non-profit or political committee limits its activities to "independent" election expenditures. Neither FEC nor SEC rules, nor state laws, permit shareholders of public companies to demand such information in any direct way.[10] Top spenders in 2010 included Crossroads GPS, a non-profit organized by Karl Rove that prominently notes on its website:

> Any person or entity that contributes more than $5,000 to a 501(c)(4) organization must be disclosed to the Internal Revenue Service on Form 990. However, the IRS does not make these donor disclosures available to the public. Crossroads GPS's policy is not to provide the names of its donors to the general public.[11]

As a result, the sources of half the money spent in the first post-*Citizens United* election cycle were kept secret. Of $266.4 million spent by outside groups to influence the 2010 elections, $135.6 million was spent by groups that did not reveal any details about their funders.[12] In

[9] A "political committee" – including any corporation or other organization that raises or spends more than $1,000 on, and has a "major purpose" of, influencing federal elections – must register with the Federal Election Commission (FEC), and disclose specified information, including direct contributions to candidates, and committees making direct contributions must disclose the identity of their donors and are subject to limits on both the size of their contributions and the size of donations they receive from others. Federal Election Campaign Act, 2 USC §§ 431-55; SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. Mar. 26, 2010); Buckley v. Valeo, 424 U.S. 612 (1976) (adding "major purpose" qualification to definition of "political committee"). The subset of non-profit organizations permitted under the Internal Revenue Code to engage in political activities (prominently, organizations under IRC §§ 501(c)(4) and 527) are required to disclose large donors to the Internal Revenue Service, but not to the public or the FEC, unless the donations are made specifically "for the purpose of furthering electioneering communications." 11 CFR § 104.20. Broadcasters must keep records and make available for public inspection the identity of purchasers of election ads, but these records do not include the sources of the purchasers' funds. 47 USC § 315; 47 CFR § 73.1943.

[10] It is possible for a shareholder to propose a bylaw that would require disclosure by a public company of corporate political expenditures, but such a bylaw would face challenges as to its legality under state law, and if the shareholder wanted to try to get other shareholders to vote for the bylaw, the shareholder would have to either incur substantial expenses to solicit proxies, or face legal challenges under the SEC's Rule 14a-8, which permits shareholders under certain circumstances to include such bylaws in a proxy statement paid for by the company, but only if the bylaw does not concern "ordinary business" of the corporation and is not otherwise in conflict with state corporate law, and the shareholder could expect to face challenges to its ability to include a shareholder resolution relating to disclosure of political activity under Rule 14a-8 unless (as is now typical for active institutional shareholders) the resolution were non-binding.

[11] https://www.icontribute.us/crossroadsgps (visited October 29, 2011). On Rove's involvement in Crossroads GPS, and its role in the 2010 elections, see Franz 2010.

[12] Public Citizen, Disclosure Eclipse, Nov, 18, 2010. A large amount of expenditures have been made by "super PACs," new political committees set up in the wake of *Citizens United* and specifically designed to solicit unlimited sums from unlimited sources (including corporations) and spend the funds on "independent" election

2010, such "dark money" was almost double the $68.9 grand total of spending by outside groups in 2006, the previous mid-term election cycle. Six of the top seven spending "independent" groups in the 2010 election cycle kept their donors secret. These included the U.S. Chamber of Commerce, the top spender, at over $31 million. Other top spenders identified themselves only as "Americans for Job Security," the "American Action Network" or the "American Future Fund."

As a result, the control and funding of many organizations active in politics was and remains uncertain. Any research claiming to have assessed the aggregate amount of political activity by businesses or corporations should be viewed skeptically. Nevertheless, for purposes of this paper, the effect of there being potentially very large unobservable political activity by corporations is to make it harder for any relationships that might exist among CPA, corporate governance, and value to be detected.

In addition, the fact that political activities act as complements allows us to infer the effects of *Citizens United* on unobservable political activity by reference to observable political activity. While we cannot know with precision which firms exploited the new "independent" election expenditure channel opened by the Supreme Court, we can estimate the average relationship between the newly permitted activities (mostly carried out through conduits) and shareholder value, by reference to which firms were active prior to the decision and could thus be expected to be most likely to exploit the new channel. Empirically, this mode of inference is taken up in Part 4 below.

1.3. Corporate political activity: what counts as evidence that it "works"?

Extensive research in management, political science, and economics explore the causes and the narrow consequences of corporate political activity. Many studies have established that different types of CPA are complements. For example, Ansolabehere et al. 2002 and Schuler et al. 2002 find a strong complementarity between lobbying and PAC activity, with over 86% of all contributions coming from firms with both a lobbyist and PAC. Contributions buy access, and lobbying exploits access to affect policy.[13] These findings are confirmed with the data analyzed below.

What does this research say about whether CPA "works" – that is, whether it produces benefits for corporations and their shareholders? Many studies find evidence that interest groups exchange money and/or information for political benefits of various kinds, such as trade barriers,[14] reduced or easier regulatory inspections,[15] and lower tax rates, although these results are sometimes sensitive to particular specifications and samples.[16] Firms withhold

expenditures, including television and other media. See Center for Responsive Politics, Outside Spending, available at www.opensecrets.org/outsidespending (last visited Nov. 26, 2011).

[13] E.g., Wright 1990, Austen-Smith 1995, Tripathi et al. 2002.

[14] E.g., Goldberg and Maggi 1999.

[15] E.g., Gordon and Hafer 2005.

[16] E.g., Richter et al. 2009; but cf. Drope and Hansen 2008.

contributions from officials who vote against their interests.[17] Researchers focusing on specific issues or industries have found evidence of influence via lobbying or other political activity.[18] Event studies have revealed that US equity markets are affected by the control of Congress (Jayachandran 2006) and policy platforms (Knight 2006).

In that sense, it seems clear that CPA "works" – indeed, this is the common intuition behind most efforts to regulate CPA: CPA needs regulation because it affects laws and regulations. However, separate lines of research suggest that CPA does not necessarily "work" for shareholders. A number of studies present evidence that CPA represents a form of managerial "consumption" good – consistent with the possibility that it is pursued at the expense of shareholders (see, for example, Ansolabehere et al. 2003, surveying numerous prior studies). Brasher and Lowery 2006 find publicly held companies are more likely to engage in lobbying than otherwise similar non-public companies, although they do not develop the potential role of agency costs in explaining their finding, and Kim 2008[19] includes one governance variable in modeling the determinants of CPA, and finds that weak shareholder rights correlate positively with the propensity to lobby and to sponsor a PAC, and with lobbying expenditures. These findings are consistent with the findings reported below.

Which of the two effects is more important, on average, for most public companies? Is the effect of CPA on political outcomes in line with corporate interests, or does CPA align more with the interests of corporate managers than corporate shareholders? Two recent studies have produced contrasting results on this broader question. Cooper et al. 2010 found that companies sponsoring PACs making donations to more candidates in the period 1979 to 2004 had on average higher stock returns than industry peers in the following year, although companies with PACs that simply made larger donations did not generate such excess returns. Although Cooper et al. control for industry effects in the first-stage of a model (as a predictor of PAC contributions), they do not do so in their second-stage model (as a predictor of returns), nor do they interact their dependent variables or partition their sample by industry, so that one cannot tell if their overall results are driven by the minority of firms in heavily regulated or government-dependent industries.

In contrast, Aggarwal et al. 2011 found that that companies that made soft money donations to parties or donations to Section 527 committees from 1991 to 2004 (accounting for roughly 11 percent of the universe of U.S. publicly traded firms) tended to be large, slowly growing firms that had more free cash than other firms but spent less on research and development or business investments. They also found that corporate donations were negatively correlated with long-term firm-specific stock market performance.[20] This paper reaches findings that are more

[17] E.g., Jackson and Engel 2003 (China policy) and Franca 2001 (NAFTA policy).

[18] E.g., Schuler 1996 (steel), Kroszner and Stratmann 1998 (financial services), and de Figueiredo and Tiller 2001 (communications). See also Fisch 2005 (case study of FedEx).

[19] The author of that study graciously shared his data from 1998-2004, included in the sample tested below.

[20] Aggarwal et al. 2011 also found that better corporate governance – including better board structure, lower CEO compensation, and the presence of large shareholders to monitor corporate behavior – tended to be associated with less political activity. See also Hadani & Schuler 2011, Hadani 2011, which produce findings more compatible with Aggarwal et al. 2011 and this paper than with Cooper et al.

compatible with Aggarwal et al. – corporations engage in a mix of shareholder-oriented and non-shareholder-oriented, but the predominant, or average, effect is negatively related to shareholder value.

Finally, a number of studies have reached findings on the firm- and industry-level correlates of CPA (see Hillman et al. 2004 for a survey).[21] Consistent with intuition, ongoing CPA in the US is more common for firms that are larger,[22] older,[23] more regulated, and more dependent on government purchases.[24] These correlations are reflected in the research design below.

1.4. Corporate governance

Corporate governance research is vast, multidisciplinary and largely siloed. For surveys, see, for example, Shleifer and Vishny 1997 and Bischoff 2009. Yet few strands of this literature – whether in accounting, law, business, management, or economics – have focused on CPA.[25] Instead, the focus in corporate governance has been agency theory (Jensen and Meckling 1976).

Specifically, research has attempted to analyze and test the extent and how corporate managers (or dominant shareholders) act in ways that harm or fail to benefit shareholders (or minority shareholders). For example, Berle and Means 1932 posited that shareholder dispersion would increase managerial slack, enabling managers to obtain greater private benefits. Gompers et al. 2003 show that firm-specific shareholder-friendly corporate governance provisions – corporate charters, bylaws, and executive contracts – correlated positively in the 1990s with firm value (as measured by industry-adjusted price/book ratios, often referred to as ***Tobin's Q***[26]).[27] Bebchuk et al. 2010 show the correlation between governance provisions and corporate value (measured by industry-adjusted book/price ratios) persisted and even grew through 2008.[28] This paper also uses Tobin's Q as its primary proxy for shareholder value.

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[21] See also Potters and Sloof 1996, which surveys empirical studies in the public choice, economics, and political economy literatures on political activities of interest groups, including corporations.

[22] E.g., Hansen and Mitchell 2000.

[23] E.g., Baron 1995, where firm age is interpreted as a proxy for "experience" or "reputation."

[24] E.g., Hart 2001. Firms also match industry-competitors' political activity. Grier et al. 1994.

[25] Bischoff 2009 reviews 141 corporate governance articles published 1997 to 2009 and finds none focused on CPA. A few studies argue that ownership and control structures emerge in response to political pressures, or vice versa, but they rely on country- and not firm-level data. E.g., Roe 1994; Roe 2003; and Morck et al. 2005.

[26] This ratio is calculated following Kaplan and Zingales 1997, calculated as [BVA+MVCE-BVCE-DT] / BVA, where BVA is book value of assets, MVCE is current common stock market capitalization – that is, stock prices – BVCE is book value of common equity, and DT is the book value of deferred taxes.

[27] Tobin's idea was to relate an asset's market value to its replacement value, Tobin and Brainard 1977, but the market value of a firm's assets is not readily observable, and may diverge from book value (as when a firm's assets include significant intellectual property). Nevertheless, when comparing firms in the same industry in the same period, these divergences are unlikely to bias the results, and it has become customary to refer to the ratio described in note 24 as Tobin's Q and to use it as an indicator of firm value, e.g., Demsetz and Lehn 1985; Morck et al. 1988; McConnell and Servaes 1990; Lang and Stulz 1994; La Porta et al. 2002; Cremers and Ferrell 2011; Bebchuk et al. 2009; Core et al. 2006; Bebchuk et al. 2010.

[28] *Accord* Cremers and Ferrell 2011 and Giroud and Mueller 2011.

Related strands of corporate governance research have focused on particular aspects of corporate behavior. Yermack 2006 shows that firms that pay for corporate jets for their CEOs underperform market benchmarks and experience stock price drops upon announcement when jet use is disclosed, and that jet use correlates with personal CEO characteristics, such as long-distance golf club memberships. This paper examines whether jet use correlates with CPA.

The empirical study of the causes and effects of corporate governance practices all face design problems (for example, Listokin 2008). It is plausible that corporate governance is set in anticipation of corporate performance, making the direction of causality difficult to establish with certainty.[29] Still, prior studies establish that governance provisions are reliable correlates of performance and value, and shift the burden of proof to those who believe such provisions are epiphenomenal. The goal of this paper is to do the same with respect to corporate political activity, where currently even basic disclosure rules do not exist.

Among the few corporate legal scholars to address CPA, Brudney 1981 defended restrictions on CPA from a shareholder perspective, noting that early US corporations were limited in their activities by charter restrictions that would effectively have forbidden CPA, and defending a rule requiring a supermajority of (or even unanimity among) shareholders under the First Amendment. *Citizens United* and potential legislative responses have stimulated a few papers focusing on CPA. Bebchuk et al. 2010 argue that public company shareholders are more vulnerable to managerial agency problems in the CPA context than in other contexts, and argue for new legislative default rules (which shareholders could opt out of) requiring disclosure and prior shareholder approval of CPA. Gilson and Klausner 2010 worry that CPA risks involving public companies in polarizing debates and shareholder votes and argue for shareholder approval requirements so as to minimize the potential costs of such debates.[30]

[29] Cremers and Ferrell 2011 argue the direction of causality runs from governance to value because (1) the relationship only appeared after a Delaware Supreme Court allowed boards to resist takeovers, *Moran v. Household* 500 A.2d 1346 (Del. 1985), and (2) because cross-sectional variation in that relationship is consistent with theory on how firms impede takeovers.

[30] See also Fisch (2005) (case study of political activity by Fedex); Coates and Lincoln 2011 (study of disclosure policies voluntarily adopted by S&P 500 firms and the correlation between those firms and corporate value); IRRC 2011 (same); Regan 1998 (essay on corporate speech and civic virtue); Winkler 2007 (legal analysis of corporations under the First Amendment) and 2004 (history of ban on corporate donations to federal elections).

2. Hypotheses and Samples

2.1. Hypotheses

As noted above, research on CPA has previously found that firms that are heavily regulated or dependent on government expenditures are more likely to engage in CPA. Even firms that themselves not heavily regulated or government-dependent, but which operate in industries comprised primarily of firms that have these characteristics, are likely to have business strategies that are interwoven with government affairs. These prior findings lead to the following hypothesis, which can be confirmed in the S&P 500 in the period leading up to and following *Citizens United*:

> ***Hypothesis 1 (H1)***: CPA is most common in heavily regulated or government-dependent industries.

If corporate managers could be trusted to spend corporate money on political activity that would benefit shareholders, then *Citizen United's* relaxation in the constraints on corporate political activity might still be of concern to voters generally, because rent seeking beneficial to shareholders might harm taxpayers or consumers, for example. But at least one would not worry about any additional burden of such activity on capital formation or the economic benefits that flow from well-governed public companies. Unfortunately, managers cannot always be wholly trusted with other people's money, and as reviewed above, corporate governance provisions consistently correlate negatively with shareholder wealth. The literature on corporate governance suggests that agency problems are more acute when shareholders are weak, because in those companies managers can pursue their own interests more freely than in other companies. If CPA is harmful to shareholders, then:

> ***Hypothesis 2 (H2)***: Managers of companies with weak shareholders – those who are more dispersed or have fewer rights – will be more likely to engage in CPA.

Prior research suggests that CPA may represent a form of managerial perquisite – a "consumption good" for those who control the CPA – that is, managers. CPA could represent, in this view, pursuit of a pet project that is at best unrelated to shareholder interests, and at worst could actively harm them. Managers might have personal political goals – ideological in nature – that could diverge from the net political interests of shareholders, particularly given that politics can affect a range of issues on which widely dispersed shareholders are unlikely to agree. CEOs inclined to consume perquisites of one kind are more likely to consume perquisites of another kind; alternatively, boards that are more willing to let CEOs consume perquisites of one kind will be more tolerant of consumption of other perquisites. One type of perquisite previously studied – use of a corporate jet for personal travel – is likely to correlate with a CEO's use of corporate funds to pursue personal goals more generally, including CPA. If CPA is harmful to shareholders, then:

> ***Hypothesis 3 (H3):*** CEOs who use corporate jets for personal travel – which correlates with harm to shareholders – are more likely to engage in CPA.

Most tangibly, corporate managers may have their own personal political ambitions – to run for office or obtain appointed offices such as cabinet posts or ambassadorships. Jon Corzine, ex-CEO of Goldman Sachs, became Senator and then Governor of New Jersey; Dick Cheney, ex-CEO of Halliburton, became Vice President; George H. W. Bush, ex-president and chairman of Zapata Petroleum, became President; and Herman Cain, ex-CEO of Godfather's Pizza, became chair of the board of the Federal Reserve Bank of Kansas City, then president of the lobbying organization for the restaurant industry, then a Republican political candidate. Managers' personal political goals could be furthered if the companies they control engage in political activities, using shareholder funds. This suggests the following hypothesis:

> ***Hypothesis 4 (H4):*** CEOs who anticipate seeking post-CEO political positions will be more likely to engage in CPA while in office as CEO.

The foregoing analysis also suggests that the influence of agency costs on CPA will be most easily observable ***outside*** of heavily regulated and government-dependent industries. That is because shareholder-oriented CPA would be common in those industries, reducing the variation across firms in CPA that would allow for differences in the correlation between CPA and shareholder power to be detectable. If CPA serves shareholder interests, as is intuitive in heavily regulated or government-dependent industries, but requires effort or risk-taking by managers, it might even correlate positively with shareholder power and negatively with managerial excess in those industries.

> ***Hypothesis 5 (H5)***: CPA's relationships with shareholder power and managerial excess are weakest (or even reversed) in heavily regulated or government-dependent industries, and strongest in other industries.

If the foregoing analysis were correct, one would also expect that CPA would be most likely at firms where CEOs lack strong incentives to maximize shareholder wealth more generally. As a result, CPA should be more common at firms with lower shareholder wealth, when compared to other firms in the same industry, but that relationship should attenuate or even reverse in heavily regulated or government-dependent industries.

> ***Hypothesis 6 (H6)***: CPA correlates negatively with industry-relative measures of shareholder value.

> ***Hypothesis 7 (H7)***: CPA's relationship with corporate value is weakest (or even positive) in heavily regulated or government-dependent industries, and most strongly negative in other industries.

Even if H6 were true, it would not necessarily mean that CPA itself causes lower shareholder value – it might simply correlate with lower value, because of unobserved firm or manager characteristics, or CPA might be caused by lower value, as managers attempt to lobby their way back to profitability, such as by erecting barriers to competition. How might CPA actually cause harm to shareholder interests? The aggregate amounts that companies spend on CPA are large in absolute terms (see Part 4.3.2 below and IRRC 2011), but disclosed CPA expenditures

are small relative to their assets, revenues and even earnings, on average. If CPA were simply a waste of money, but had no effects beyond out-of-pocket costs, it should not significantly affect shareholder interests.

However, CPA shaped by managers' personal interests may produce larger negative effects on firm value through indirect channels. One is strategy. Business schools have long taught that a corporate strategy is best if focused – composed of a small number of elements (e.g., Porter 1980, 1985, 1996), easily communicated, understood and implemented by middle managers and employees. Outside of heavily regulated and government-dependent sectors, CPA may dilute a firm's strategic focus, and distract and degrade managerial performance, particularly if managers' personal goals affect CPA. A second indirect channel is large new investments. If manager-influenced CPA affects a firm's choice of large projects, those projects may be less aligned with shareholder interests than would otherwise be the case.

While strategy dilution is difficult to observe across heterogeneous firms, project selection can be partly observed in the form of capital expenditures. Again, one would not expect CPA to reduce the value of capital expenditures to shareholders by as much (or at all) in heavily regulated or government-dependent industries, where CPA can generally be expected to affect project choice. The implication of the foregoing analysis is that firms that are both engaged in CPA and making large capital expenditures are more likely to be making poor project choices, and reducing shareholder value, than firms not so distracted or influenced by CPA.

> ***Hypothesis 8 (H8):*** Outside of heavily regulated and government-dependent industries, capital expenditures correlate positively with industry-relative shareholder value at firms not engaged in CPA, and less positively (or even negatively) with value at firms engaged in CPA.

Finally, what about *Citizens United*? If prior findings that various forms of CPA are complements are correct, the decision should have increased CPA overall, and also increased the extent of the activity. These increases should be particularly evident in industries in which CPA is least likely to be of benefit to shareholders.

> ***Hypothesis 9 (H9):*** CPA overall increased after *Citizens United*, particularly in industries that are not heavily regulated or government-dependent, and the levels of expenditures on CPA increased more at firms that were already politically active in 2008.

In addition to increasing CPA, *Citizens United* was a largely unexpected and exogenous shock to the restraints on CPA.[31] As a result, it created a natural experiment in which can better test

[31] The parties to *Citizens United* (including the Deputy US Solicitor General) initially argued the case before the Supreme Court as a narrow decision applicable to the plaintiff in the case – a small advocacy non-profit specifically formed to engage in political activity. While the case was expected to have implications for campaign finance law more generally, it was not expected to have the sweeping legal effects it did. The Supreme Court chose to ask the parties to return to the Court and *reargue* the case on the broader grounds that it was ultimately based – that is, that a 50-year-old ban on independent election expenditures by all corporations, for-profit and non-profit alike, was unconstitutional. See http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-205.htm (last visited Nov. 30, 2011).

the effects of CPA on shareholder value. Because CPA of various kinds are complements, the relaxation of constraints on CPA in *Citizens United* made it more likely that firms already engaged in CPA would continue to do so, at higher levels, in both observable ways (as in H9) and in unobservable ways (through conduits and "independent" expenditures). Those firms, in effect, can be viewed as "treatment" firms for purposes of the quasi-experiment. The change in the politics-value relationship from before to after the decision (2008 to 2010) can be compared to the change in that relationship for other firms (which are the "control" firms for purposes of the quasi-experiment), and the difference in differences (before and after *Citizens United*, treatment vs. control) will represent the estimated impact of politics on value. If managerial agency costs are a principal driver of CPA, on average, that impact is expected to be negative.

> ***Hypothesis 10 (H10):*** Relative to other firms, firms engaged in observable CPA prior to *Citizens United* will experience declines in value after *Citizens United*, relative to firms not so engaged.

2.2. Sample

The foregoing hypotheses are tested on a sample of data on companies in the S&P 500 in the years 1998 to 2004, as well as in 2008 and 2010, the elections immediately before and after *Citizens United*. For lobbying, the unit of observation is a firm-year; for PAC donations, the unit of observation is a firm in a two-year election cycle (for example, 1997 and 1998, 1999 and 2000, etc.), using firm-year data for the second-year in the cycle. For a subsample consisting of all sample firms in 2000, the post-2000 careers of all CEOs were reviewed to determine whether the CEOs obtained political positions after their tenure as CEO.

By construction, both samples consist of large publicly held firms and, as shown below (and in prior research), CPA correlates with firm size. The strength of the relationships reported below is likely to fall as one beyond this sample.[32] However, the S&P 500 represents a large fraction of US public company market capitalization, corporate revenues and assets, and economic activity, and is of independent interest, whether the results here can generalize beyond the firms studied.

[32] Kerr et al. 2011 study a broader sample of companies and find that lobbying is much less common in smaller public firms than in larger public firms. Cf. Drope and Hansen 2006 (finding that the tendency of researchers to study large firms does not bias the picture of CPA overall).

2.3. Variables measuring shareholder power

Shareholder power is measured in two ways. First, ownership dispersion is measured by the logged number (***LNCSHR***) of record stockholders for a given company, as reported by Compustat.[33] The more shareholders, the harder it is for them to overcome collective action problems, and the weaker shareholders are, and the less able they are to protect their own interests against diversion of value by managers (directors and officers). Second, several measures of shareholder rights commonly used in the corporate governance literature are used. Data on the most widespread measure – the "G-index" from Gompers et al. 2003, based on corporate provisions tracked by IRRC (now RiskMetrics) are taken from IRRC via the WRDS website.[34] IRRC ceased reporting all components of the "G-index" in 2007, so a subset is used, consisting of 13 data items available for all sample years. These items are coded as 0 or 1 and summed (***Q_GINDEX*** – "Q" for quasi). Another measure, the ***E_INDEX***, based on six provisions, is constructed as described in Bebchuk et al. 2009, following Coates 2000. Each measure is constructed such that higher scores indicate *fewer* shareholder rights.

2.4. Firm and industry variables

As in the corporate governance literature, firm value is measured with the log of median-industry-adjusted "Tobin's Q" see note 26 above, or ***LOGRELQ***. For industry adjustments, Fama's 48-industry groups are used. LOGRELQ equals the log of the ratio of the firm's Q and the industry's median Q. As in prior research, Q is defined as market value of assets over book value of assets, where market value of assets is approximated as the book value of assets plus the market value of common stock less the book value of common stock less the balance sheet value for deferred taxes. The regression analyses below also include proxies customarily included in empirical models of CPA and Tobin's Q, set out in Appendix A.

2.5. Variables measuring corporate political activity

Data on PAC and lobbying activity from the "Open Secrets" website,[35] which has a search engine and summaries of data from the Federal Election Commission (PAC contributions) and U.S. Senate (lobbying) websites. For 1998-2004, these data are derived from Kim 2008 and spot-verified by reference to the Federal Election Commission (FEC) website; for 2008 and 2010, they are derived directly from Open Secrets and spot-verified by reference to the FEC website.

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[33] The true item of interest is beneficial ownership, but data on the number of beneficial owners for most companies is not available, because the SEC does not require it to be disclosed, even though companies have the data. Nevertheless, interviews with proxy solicitors confirm that the number of record owners is a noisy but correlated proxy for beneficial ownership, and in a separate paper (Coates 2010b), I find that the number of record owners is correlated with a number of merger and acquisition practices (such as contract terms) with which theory suggests ownership dispersion should be correlated.

[34] http://wrds.wharton.upenn.edu.

[35] http://www.opensecrets.org.

Two variables measure the propensity of firms to engage in CPA: **LOBBY_YN** is a dummy set to one if the firm participated in lobbying in a given year; **CONTRIBUTE_YN** is a dummy set to one if the firm's PAC contributed in the prior two-year election cycle. Two variables measure the extent of participation: **LOBBYAMOUNT** is the amount in $000s (and **LOGLOB** is logged amount) of annual lobbying expenditures by the firm (inflation-adjusted), **CONTRIBUTEAMOUNT** is the amount in $000s (and **LOGCONTRIBUTE** is the logged amount) of total PAC contributions sponsored by the firm to federal candidates over the prior two-year cycle (inflation-adjusted). Each participation variable is the log of the observed value plus 0.001, to preserve zero observations in the sample.

2.6. Variables evidencing managerial excess

Data reflecting the possibility of managerial excess consist of two variables: (1) **CEOJETPOS**, a dummy set to one if the firm reports that the CEO used a corporate jet, and (2) **CEOJETVAL**, the reported value of that such jet use, both derived for years prior to 2004 from Yermack 2006 and for 2009 from GMI.

3. Summary statistics

Table 1 sets forth summary data. Most of the S&P 500 is politically active, with 71% engaged in annual lobbying on average, and 70% sponsoring PACs making donations. For the S&P 500, consistent with prior research, the two types of CPA are complements: the correlation coefficient of lobbying activity and PAC contributions is 0.5, and the correlation among lobbying and contribution amounts is 0.6. S&P 500 firms spent roughly six times more on lobbying than their PACs give in contributions. The distribution of both kinds of CPA is right-skewed (4.2 and 2.9) and kurtotic (29.6 and 23.6), and logged amounts are much closer to a normal distribution (skew of -0.3 and -0.6, kurtosis of 1.7 and 1.6).

[Table 1 about here]

A third of firms are in heavily regulated industries. The average share of revenues derived from government expenditures was 6%, with 4% of sample firms were in industries deriving more than 25% of total revenues from government expenditures. Summary statistics for the EINDEX are comparable to those reported in prior research, as is the shape of the distribution of the Q_GINDEX compared to the full GINDEX in prior research. In this large company sample, the median firm had 16,800 record shareholders, and only a few (between one and 15, depending on the year) had few enough record owners (<300) to be able to "go dark" – that is, deregister with the SEC.

In the period through 2003, 23% of companies reported that their CEOs used corporate jets in the period, representing an average of $71,700 worth of value to the CEO for those CEOs who used jets. Reported jet use for personal travel by CEOs was significantly higher in 2009, with 35% of firms reporting their use, at an average cost to the firm of $121,145 for those CEOs who used corporate jets. It should be noted that the GMI data for 2009, which are derived from proxy statements, are not strictly comparable to the Yermack jet data from the pre-2004 period, as the SEC modified its disclosure rules for perquisites in 2006 (SEC 2006).

4. Data analysis

4.1. Univariate and bivariate analyses

The hypotheses developed in Part 2 are first tested with two sets of simple univariate and bivariate analyses. First, evidence regarding industry effects is presented, to demonstrate that – consistent with past research – CPA in the current sample is strongly correlated, in intuitive ways, with industry groupings that reflect the intuition that CPA may be most shareholder-oriented where government is already crucial to business success – in heavily regulated and government-dependent sectors. Second, relationships among four sets of variables of interest are depicted: CPA, shareholder power, CEO perquisite consumption (in the form of corporate jet use) and CEO career concerns (in the form of post-CEO political appointments).

4.1.1. Industry effects and CPA

Figure 1 shows that firms in industries that are heavily regulated or dependent on government expenditures are, as predicted, more likely to engage in political activity (with tick-bars showing 95% confidence intervals). "Government dependent" are firms in those industries with a GOVSHARE of at least 25%. "Heavily regulated" firms are those in industries identified in Appendix A.

[Figure 1 about here]

Consistent with H1, few firms in those industries do not engage in observable political activity, and this was true before and remains true since *Citizens United*. By contrast, in other industries, political activity is common, but more varied, and less common than in heavily regulated or government-dependent industries.

4.1.2. Shareholder power and CPA

Overall, the pairwise Spearman rank correlation coefficient between LOGCSHR and LOBBY_YN is 0.38, and between LOGCSHR and LOGCONTRIBUTE it is 0.43. More shareholders makes shareholder coordination harder, weakens shareholders, strengthens managers, and at firms with more shareholders, political activity is more common, consistent with H2. One might worry that these correlations are driven solely by firm size, which past research has shown is correlated with both CPA and shareholder dispersion. To show the relationship between CPA and shareholder dispersion is not simply an artifact of firm size, Figure 2 graphs the percentage of firms engaged in lobbying, broken down by both a firm's asset size and its number of record shareholders. Both factors increase CPA: across asset size quartiles, CPA increases, but it also increase within each size quartile as shareholder dispersion increases. Qualitatively similar results hold for PAC contributions.

[Figure 2 about here]

Shareholders are weak if dispersed, but they can also be weak if they have few legal rights. Shareholder power on each dimension is distinct – in fact, they are negatively (if weakly) correlated, with a correlation coefficient between LOGCSHR and each of EINDEX and Q_GINDEX of -0.07 ($p<.000$). This makes examining the relationship between shareholder rights and CPA of interest for two reasons: first, it is of independent interest, given prior research on the relationship between shareholders rights and shareholder value; and second, if the same relationship exists between CPA and shareholder power on both dimensions, it is more likely to be real, and not a spurious relationship driven by some other factor that happens to correlate with either measure of shareholder power on its own.

Figure 3a graphs CPA incidence for firms with different E-INDEXes (with tick-bars showing 95% confidence intervals). Figure 3b is the same graph for only firms in heavily regulated industries. Graphs of CPA against the Q_INDEX (not shown) are similar. For the full sample, firms with high E-INDEX scores (weaker shareholder rights) are more likely to engage in CPA than firms with lower scores, and the relationship is nearly monotonic across the E-INDEX, with sharper changes at the ends of the index. Consistent with H2, the negative relationship between shareholder rights and CPA is apparent. The differences are highly statistically significant, with p-values below 0.0001 for both an analysis of variance and ranksum test, which easily reject the null hypothesis that CPA does not vary by EINDEX, but consistent with H2.

[Figures 3a and 3b about here]

However, for firms in heavily regulated industries, where CPA has an intuitive link to shareholder value, no relationship between CPA and shareholder rights is apparent, consistent with H5. Where CPA is most intuitive for shareholders, the degree of alignment between manager and shareholder interests caused by strong shareholder rights is unrelated to CPA.

4.1.3. CPA and CEO use of corporate jets

In both the pre-2004 period, using data from Yermack 2006, and in 2010, using data from GMI, firms whose CEOs use corporate jets are significantly more likely than other firms to engage in political activity, consistent with H3. Figure 4a shows the relationship between CPA and one marker of potential CEO excess – the use of a corporate jet by the CEO, at the expense of the firm (with tick-bars showing 95% confidence intervals) – for the period covered by the Yermack 2006 data. Figure 4b is the same graph for only firms in heavily regulated industries, for the same period.

Outside the heavily regulated industries, the difference in lobbying propensity in 2010 is striking: 88% for firms the CEOs of which used corporate jets for personal use in 2009, vs. 66% for other CEOs, a difference is that statistically significant ($p<.00001$, with a 95% confidence interval for the difference of -32% to -12%). If jet use is a proxy for CEOs who are more apt to take actions that are not in shareholder interests, or for boards willing to allow CEOs to take such actions, the positive correlation between jet use and CPA suggests that CPA may also not be in shareholder interests, just as the negative correlations between shareholder power and CPA does.

[Figures 4a and 4b about here]

As with shareholder rights, the relationship between CPA and signs of managerial excess is not present in heavily regulated industries. Consistent with H5, lobbying is very common in those industries, whether or not the CEO uses a corporate jet. Even if jets are signs of managerial excess generally, CPA is not intuitively contrary to shareholder interests where regulation is heavy, so one would not expect jet use to correlate with CPA, and it does not.

4.1.4. CEOs' subsequent personal political careers

In Part 2, it was hypothesized that CEOs and other managers of public companies might have personal interests in directing their companies to engage in political activity, separate and apart from shareholder interests in such activity, and famous examples of ex-CEOs who had gone into politics were noted. Here, more systematic evidence of this potential source of managerial agency problems with respect to CPA is developed. Table 2 presents data on all CEOs (n=438) in the overall sample described in Part 3, who were all in office as CEOs in 2000.

[Table 2 about here]

As shown in Table 2, most (n=298) of those CEOs had retired by 2011. Of those retired CEOs, over 11% were appointed or nominated to political office between the time of their service as CEOs and 2011. "Office" for this purpose only included positions with authority, and not advisory positions, or such politically influenced recognitions as medals or knighthoods – if that broader mix of political rewards were counted, the number of CEOs receiving post-retirement political rewards roughly doubles in the sample. In the subsample were John W. Snow, ex-CEO of CSX, who became Treasury Secretary; and John E. Bryson, ex-CEO of Edison International, and Carlos Gutierrez, ex-CEO of Kellogg, both of whom became Commerce Secretaries. Also among the group were Carly Fiorina, ex-CEO of Hewlett-Packard, who was nominated as a Republican candidate for US Senate; Charles Price, ex-president and chairman of American Bancorporation, who became U.S. Ambassador to the United Kingdom; and William Donaldson, ex-CEO of Aetna, who became Chair of the SEC. The possibility of CPA being motivated by CEO political ambitions is illustrated by the fact that among the firms in the subsample of CEO careers reviewed, the odds that a CEO obtained post-CEO political employment were significantly higher for CEOs of firms that engaged in lobbying prior the CEO leaving the company (15% vs. 3%, $p<0.05$), consistent with H4.

These results likely understate the degree to which the prospect of future political careers ignite or shape CPA, for at least three reasons. First, the subsample only includes CEOs, while other, lower-level managers may also expect to obtain private political career benefits if their firms are involved in politics. Government-affairs specialists as well as general counsels and public relations officers can develop personally valuable relationships by directing firm resources in particular political directions.[36] Corporate lobbying is often outsourced to lobbying firms that

[36] Ten percent of a sample (n=50) of departing general counsels at Fortune 500 companies not promoted within their firm moved into a government job within a year of their departures. Coates 2011.

provide employment and support for former corporate managers entering the political arena. Second, political activity can pay off in other ways for corporate managers. Private equity firms employ former politicians and former corporate managers that developed relationships with government officials while serving as managers (e.g., George H.W. Bush, Arthur Levitt). Third, many CEOs and managers may have political interests but never act on them, because they leave office amid scandal, or because they become ill or die before they have the opportunity. In the subsample reviewed was Bruce Karatz, ex-CEO of Kaufman & Broad Home, who was convicted of mail fraud, and both Maurice "Hank" Greenberg (AIG's ex-CEO) and his son Jeffrey Greenberg (ex-CEO of Marsh & McLennan), each of whom lost their jobs because of probes by then-New York Attorney General Eliot Spitzer.

A full exploration of the relationship between CPA and CEO political careers would require a separate paper. Nevertheless, the evidence presented here is consistent with H4, and in combination with the evidence reviewed above, on the relationship between CPA and shareholder power and managerial agency costs, it seems clear that CPA represents a mix of shareholder-oriented and non-shareholder-oriented activity. In the next part, regression analysis is used to examine how robust the politics-governance relationships is, the extent of the non-shareholder-oriented political activity in the S&P 500, and whether the non-shareholder-oriented political activity has an observable relationship with value.

4.2. Regression analyses

In this section, two sets of relationships are modeled with multiple regression analysis: (1) the relationship between measures of CPA and shareholder power, and (2) the relationship between CPA and corporate value, as measured by industry-relative Tobin's Q, including its direct relationship in cross-sectional regressions, its relationship over time in firm fixed-effects regressions, and its relationship before and after *Citizens United*.

4.2.1. Shareholder power and CPA

Tables 3 and 4 set forth regression results for CPA in the S&P 500. Each table reports results for logistic models of participation in CPA – that is, whether a firm engages in any lobbying, or sponsors a PAC that made any contributions.[37] Table 3 presents models of lobbying. Table 4 presents models of PAC contributions. In each, shareholder power is proxied by both shareholder dispersion (LNCSHR) and shareholder rights (E_INDEX). Qualitatively similar untabulated results are found using other measures of shareholder rights (Q_GINDEX).

[Tables 3 and 4 about here]

[37] Models of the extent of participation -- that is, of the ***amount*** of lobbying expenditures or PAC contributions – were also estimated, and qualitatively similar results were found, in both OLS and Tobit models. These results are available from the author, but are not tabulated because they are subject to classic selection effects, because no natural subsets of variables can be omitted to achieve identification for use in a Heckman selection model, and because the inverse Mills ratio from first-stage selection models for each type of participation that include all regressors are, not surprisingly, highly correlated (>0.95) with regressors in second-stage spending models.

In the simple regressions without other explanatory variables (column (1) of Tables 3 and 4), each of the shareholder power variables correlates strongly with the propensity to lobby or have a PAC donate. More shareholder rights are less likely to engage in CPA, and when shareholders are more dispersed, firms are more likely to engage in CPA. When other explanatory variables are added (column (2) of Tables 3 and 4), the shareholder power variables retain or increase their significance – in both economic and statistical terms. Both LOGCSHR and the E-INDEX are strongly related to lobbying propensity, even after controlling for other factors (such as industry and size) that also correlate with CPA, consistent with H2.

Ideally, the robustness of the foregoing results would be tested with firm fixed effects regressions, which would measure the relationship between changes in CPA at one firm as it changes shareholder rights. However, while S&P 500 firms change shareholder rights not infrequently,[38] the changes are minor: the median change in the EINDEX in the sample period is one; and only 5% of the changes are greater than one, amounting to only one percent of the observation years in which the index could change. Ownership dispersion is also stable for a given firm from year to year, with 64% of firms changing by less than 1% on average per year. In a prior paper (Coates 2010c), extreme changes in the G_INDEX were found to correlate in a fixed effects model with some measures of CPA for the period 1998 to 2004, but the correlations were of modest statistical significance, and they do not extend into the 2008 and 2010 period.

4.2.2. *CPA and corporate value*

Prior research has established that stronger shareholder rights correlate with higher Tobin's Q. The prior section presented evidence that CPA correlates negatively with shareholder power. It is then natural to ask if these two relationships are connected? That is, does CPA itself correlate negatively with Tobin's Q, before or after controlling for shareholder power? Table 5, and Figure 5, which is based on Table 5, present evidence that CPA does correlate negatively with corporate value, consistent with H6.

[Table 5 and Figure 5 about here]

Panel A of Table 5 shows that LOGRELQ is higher for firms that do not engage in lobbying and for firms that do not sponsor PACs making contributions, consistent with H6. These findings hold after including the standard set of explanatory variables used in prior research on Tobin's Q, as listed in the table. Consistent with the univariate and bivariate analyses above, the relationship between CPA and corporate value is markedly different for firms in heavily regulated industries, consistent with H7. For those firms, the sign on the CPA variables is reversed, and in the models with controls the positive coefficient on the interaction term is larger than that on CPA, suggesting that CPA improves corporate value for such firms.

[38] The observed values for the G- and E-INDICES change only every two years, because IRRC publications from which the data on which the indices were released only every other year. In those years, 36.5% of the firms experienced changes in their G-INDEX, consistent with a range of annual change of between 18.3% and 36.5%, and 20.7% experienced changes in the E-INDEX, consistent with a range of annual change of between 10.3% and 20.7%.

Panel B of Table 5 presents the results of firm fixed effects regressions, which model the relationship between changes in CPA and changes in Tobin's Q. These models rule out the possibility that unobserved but fixed firm characteristics can account for any observed correlation between CPA and corporate value. The results for lobbying are nearly identical to those in Panel A, including both the direction and magnitude of the coefficients for firms in and out of heavily regulated industries. The results on PAC donations, by contrast, differ from those in Panel A. With respect to PAC donations, there may be unobserved firm characteristics that are important to the relationship to value. There are fewer observations for PAC donations, however, since they are only observed in election years, and as a result the fixed effects regressions in Panel B for PAC donations are less precisely specified than those Panel A.

4.2.3. *Corporate value and the interaction of CPA and capital expenditures*

Part 2 of this paper hypothesized that one channel for value destruction through CPA was capital expenditures. Panel C of Table 5 presents the results of an OLS regression, similar to that presented in Panel A, that substitutes an interaction term between the CPA variables and CAPEX_ASSETS for the CPA variables on their own. In effect, the models split capital expenditures (scaled by firm assets) into those conducted by politically active firms and other firms. In each regression, heavily regulated firms are excluded, to minimize the need for further interaction terms, which are collinear with the variables of interest. In each case, the results are striking: capital expenditures by politically inactive firms are – consistent with prior research – a positive contributor to shareholder value, but capital expenditures by politically active firms not only produce less value, but substantially erode the generally positive effect of such investments on average industry-relative value, consistent with H8.

4.3. CPA and corporate value after *Citizens United*

A final question is whether the relationship between CPA and corporate value changed after *Citizens United*. One cannot model the effects of the decision precisely, since many things changed between 2008 and 2010 in addition to the *Citizens United* decision. Nevertheless, one can see if there were gross changes between those two elections, whether the value-politics relationships found above persisted, diminished or increased after the case, and, most importantly, whether the value-politics relationship changed in different ways for firms that were politically active prior to the decision than for firms that were not.

4.3.1. Increases in the propensity to engage in political activity after Citizens United

Figure 6 shows that the frequency of lobbying increased from 69% to 74% between 2008 and 2010 among firms in the S&P 500 outside of heavily regulated industries. There was a more modest increase in heavily regulated industries, from 85% to 87%. The frequency of PAC donations also modestly increased, from 82% to 83% in heavily regulated industries, and from 54% to 58% in other industries. These trends are confirmed in an unreported regression of lobbying propensity, similar to those presented in Table 3, in which the odds ratio on 2010 is 1.60, with a 95% confidence interval of 1.01 to 2.52. *Citizens United* ushered in more CPA, consistent with H9.

4.3.2. *Increases in cash spent on political activity after* Citizens United

In real terms, the amount of lobbying expenditures and PAC donations also increased: nominal lobbying expenditures per firm increased by about 10%, and PAC donations by about 15%, both well above the inflation rate, and nearly double the trend from 1998 to 2008. In heavily regulated industries, lobbying expenditures also increased about 10%, while PAC donations declined by about 10%. Lobbying expenditures remained many times larger than PAC donations, and more firms were engaged in both kinds of CPA. As a result, the net change in CPA among S&P 500 firms after *Citizens United* was strongly positive. The total disclosed cash flows represented by the two types of CPA increased ~15%, by $107 million in nominal dollars, from $689 million in 2008 to $796 million in 2010. *Citizens United* spurred increases in CPA that were well above inflation and about 60% higher than the 1998 to 2008 trend, consistent with H9.

In addition, data from 2010 confirm the degree to which various political channels are complements. Even though *Citizens United* only relaxed rules on unobservable "independent" expenditures, firms that were already politically active in 2008 – either through a PAC or by lobbying – increased their observable lobbying expenditures by more than 10% (by $252,000 to $2.4 million in 2010, on average), while firms that were inactive in 2008 only engaged in a modest $30,000 of lobbying expenditures, on average. Since they were inactive in 2008, such firms could not have reduced their expenditures below zero, so the increase in lobbying by such firms is less telling than the fact that it is more than an order of magnitude lower than the increase in previously politically active firms.

4.3.3. *Difference-in-differences:* Citizens United *as a quasi-experiment*

How did the value-politics relationship change in the 2010 elections, relative to the pre-*Citizens United* period? A final measure of the relationship between corporate politics and corporate value is the change following *Citizens United* in shareholder value at firms that were politically active before *Citizens United*, relative to the same change at firms that were not politically active, in each case measuring shareholder value (as above) relative to other firms in the same industry. Table 6 presents the results of a conventional difference-in-difference estimator with the following specification:

$$(1) \quad LOGRELQ_{it} = \beta_0 + \beta_1 \mathbf{X}_i + \beta_2 (POSTCITIZENS \times CPA_{i\,2008}) + \beta_3 CPA_{it},$$

where $LOGRELQ_{it}$ is the firm i's industry-relative Tobin's Q, a, in year t; i indexes firms; t indexes years; **X** denotes the same vector of conventional firm and industry characteristics used in Table 5 to control for apolitical factors influencing firm value; *POSTCITIZENS* is a dummy equal to 1 for observations in year 2010, after *Citizens United*; $CPA_{i\,2008}$ is a dummy equal to one if firm i engaged in lobbying or made PAC contributions in 2008; and CPA_{it} is a dummy set to one if firm i engaged in lobbying or made PAC contributions in year t. The coefficient of interest is β_2, on the interaction term between firms politically active in 2008 and the observation of firm value in 2010, after *Citizens United*.

[Insert Table 6 about here]

Because *Citizens United* was unexpected (see note 31 above), firms were unlikely to have changed their pre-*Citizens United* political activities in anticipation of the decision. A firm's post-*Citizens United* industry-relative value cannot plausibly have caused its pre-*Citizens United* political activity, which eliminates the possibility of reverse causation that may be present in the models presented in Table 5. The specification in Table 6 also does not have the serial autocorrelation problem identified in Bertrand Duflo and Mullainathan 2004, as there is only one period of post-*Citizens United* CPA data currently available. In addition, the model includes robust standard errors clustered by firm, and the results are qualitatively similar if one drops all observations prior to 2008, leaving only one pre- and one post-*Citizens United* observation for each firm (see id., at 252).

The model rules out potential confounding factors by including (for example) industry controls, which absorb any industry-driven changes in shareholder value between 2008 and 2010, such as may have been induced by debates over health care or financial reform. Industry effects are also absorbed because the dependent variable is a firm's industry-relative Q ratio, which compares the firm's value to other peer firms in the same industry. The model eliminates the possibility that the results are caused by some unobservable feature of firms that affects politically active and inactive firms in similar ways, or which changed at similar rates across firms over the sample period, or which is industry-specific, or is otherwise absorbed by other controls in the model, such as firm size, leverage, and accounting profitability.

The results of the difference-in-difference model in Table 6 are consistent with the results presented above. Firms that were politically active in 2008 experienced a significant decline in shareholder value in 2010, relative to firms that were politically inactive in 2008. The 95% confidence interval indicates a decline of up to 15% in industry-relative shareholder value, centered at 8%, and for the model with controls, all values in the interval are below zero.

The difference-in-difference in value for politically active firms of -0.08 is both economically meaningful and plausible, dramatically reducing the average increase in firm value in 2010 (from the post-crash lows of 2008) of +0.12. In 2010, LOGRELQ of sample firms ranged from –0.7 to 1.7, with a mean of 0.14. In sum, firms that were politically active in 2008 experienced a 75% lower increase [(0.12 – 0.08) / 0.12] in industry-relative market valuation during the market recovery in 2009 and 2010, as compared to politically inactive firms, consistent with H10, and (as suggested by evidence presented above) such firms being less focused, more apt to waste resources, and more distracted by political activities.

5. Summary and Interpretations

In sum, the data are consistent with the hypotheses outlined in Part 2. Among S&P 500 firms:

- Corporate political activity is most common in heavily regulated or government-dependent industries.
- CPA 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%) of large firm CEOs who gain post-CEO political office.
- CPA's relationships with shareholder power and managerial agency costs are weakest (or even reversed) in heavily regulated or government-dependent industries, and strongest in other industries.
- 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.
- CPA overall increased after *Citizens United*, particularly in industries that are not heavily regulated or government-dependent, and particularly at firms that were previously politically active, consistent with different political channels serving as complements.
- CPA interacts negatively with capital expenditures, such that capital expenditures correlate with higher shareholder value, on average, at politically inactive firms, but do not do so at politically active firms.
- Firms that were politically active in 2008 experienced an average 8% lower increase in their industry-relative shareholder value 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.

In combination, these results are inconsistent with a simple theory in which corporate political activity generally serves the interests of shareholders. It seems likely that politics and shareholder value influence each other, with lower value inducing politically inflected strategic gambles, and political engagements diluting strategic focus and inducing wasteful, politically inflected investments. On the one hand, if the sole explanation for the value-politics

relationship was that firms facing difficulties were turning to politics as a shareholder-oriented business strategy, one would not also find the correlations between CPA and shareholder power and managerial agency costs. On the other hand, the strength of the politics-value relationship is such that the correlations cannot be interpreted in a naïve way, with (for example) lobbying or PAC expenditures being treated as the sole cause of lower corporate value.

Firms run by poor or self-serving managers might have lower value than other firms even if all corporate political activity were banned. But there are plausible ways in which the availability of corporate political activity could further reduce corporate value, and do so in ways that do not simply reflect the out-of-pocket costs of lobbying or the costs of running a PAC. Corporate politics could fit into a good corporate strategy – and this likely explains why nearly all firms in heavily regulated or government-dependent industries engage in politics, and why those that do have no lower (and possibly higher) value than those that do not.

But politics like war is hard to predict, even for experts (Tetlock 2005). Significant corporate commitments – such as large capital expenditures – the value of which turn on accurately predicting or influencing political outcomes – will entail significant risks, even in the best of circumstances. For firms without a clear strategy, particularly those with managers that lack a strong shareholder orientation, the costs of politics could extend far beyond direct costs to include opportunity costs of manager time, distraction and confusion for middle managers and employees, the risks of consumer backlash, and the risks that politically contingent operational investments turn sour. Future research could attempt to test these ideas by examining whether the value-politics correlation found here is related to other indicators of poor corporate strategy (such as acquisitions the value of which depend on politics), or to operational behavior that could be the channel through which political activity produces poor results.

Even without that research, however, the possibility that political activity often runs counter to shareholder interests – whether as symptom or cause or both – is made more plausible by the finding here that the negative value-politics relationship is strongest among firms in industries where politics has the least obvious potential advantage for shareholders, by the finding that political activity also correlates strongly with other proxies for managerial agency costs, and the finding that politically active firms making large capital expenditures have significantly lower value than inactive firms making similarly sized capital expenditures. Most tellingly, the value of politically active firms diverged downward relative to inactive firms after the unexpected decision in *Citizens United*, even as political expenditures in already active firms increased. These findings make it plausible that corporate political activity commonly reflects broader agency problems at large public companies, and that the negative value-politics relationship is at least partly caused by politics.

The cumulative effect of the findings adds support for proposals to require disclosure of such activity to shareholders. If Congress, states, or the SEC adopt rules attempting to give shareholders more information or more authority in the political sphere, the evidence presented here should help demonstrate that such legislation serves as a legitimate and compelling purpose separate from the anti-corruption and other purposes that have traditionally justified campaign finance laws. Contrary to the Supreme Court's stated assumption, shareholders were

not able to protect themselves from misuse of corporate funds for political purposes prior to *Citizens United*, and the risk of such misuse has increased as a result of the decision.

6. Conclusion

This paper has explored the relationships among corporate political activity, corporate governance, and corporate value in large public companies before and after *Citizens United*. It has found that observable corporate political activity (lobbying and PAC donations) increased sharply after *Citizens United*, particularly at firms that were already active in politics, despite the fact that the only direct effect of the legal decision was to permit "independent expenditures," and did not directly change the law governing lobbying or corporate PACs. This finding is consistent with prior research showing that all forms of corporate politics are complements, and is a reminder that legal decisions can have many unintended and unexpected consequences.

This paper has also found that both before and after *Citizens United*, corporate politics correlates strongly with both corporate governance and corporate value. Specifically, in industries that are not heavily regulated or government dependent, political activity is associated with weaker shareholder power, greater signs of managerial agency costs, and lower corporate value. The value-politics relationship is strongest for firms making large capital expenditures, suggesting one channel through which politics make lead to value-destroying investments. The precise extent and means by which politics may induce poor performance remains a topic for future research, but at a minimum the findings here reinforce the case that shareholders have a legitimate interest in obtaining better information about corporate politics.

Even if political activity were a mere "symptom" of a more serious underlying disease for a given company, and not, as the difference-in-difference results suggest at least a partial cause, shareholders could use that symptom as a guide for where they should invest time and resources in improving corporate governance more generally – but only if disclosure laws are revised to reveal the symptom. Without disclosure reforms, the fact and extent of political activity will remain only partly revealed, with past and prospective investors having to infer the condition of the corporate patient from superficial and often misleading features, such as short-term recent stock-price performance, of the kind that lulled investors into thinking that all was well with Enron and Lehman Brothers until it was too late for them to do anything other than sell into an already plunging market.[39] If, as seems likely, corporate politics outside of heavily regulated or government dependent industries often reflects the personal interests of corporate managers, rather than a shareholder-oriented strategy, then shareholders may do well to try to curb corporate politics lest it disrupt or distract their companies from pursuing legitimate shareholder ends.

[39] Compare Chief Justice Roberts, during reargument in *Citizens United*, "to your [the U.S. Government's] shareholder protection rationale, isn't it extraordinarily paternalistic for the government to take the position that shareholders are too stupid to keep track of what their corporations are doing and can't sell their shares or object in the corporate context if they don't like it?" Transcript of Oral Argument (Sep. 9, 2009) at 58.

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Table 1.

Summary Statistics

Firms in S&P 500 (data from 1998-2004, 2008, and 2010 unless otherwise noted)

	Mean or % positive	Median	St. dev.	Min	Max	N
LOBBY_YN	72.5	--	44.6	0	1	4316
CONTRIBUTE_YN	68.6	--	46.4	0	1	2899
LOBBYAMOUNT	1147.5	217.2	2505.3	0	45460.0	4316
CONTRIBUTEAMOUNT	240.9	56.6	485.2	0	4941.0	2899
Q_GINDEX	6.2	6.0	1.9	1	11	4359
EINDEX	2.4	2.0	1.3	0	6	4359
C_BOARD	53.9	--	49.8	0	1	4359
CSHR	74.9	16.8	222.6	.001	4675.2	3812
INSIDER_OWN	13.1	6.0	15.2	0	1	1863
BLOCK_OWN	16.4	14.4	13.1	0	58.6	1782
CEOJETPOS (1998 to 2003 only)	22.9	0	42.0	0	1	1275
CEOJETVAL (1998 to 2003 only)	16.4	0.0	41.1	0	360.0	1275
CEOAIRCRAFT (2009 only)	34.7	0.0	47.6	0	1	478
CEOAICRAFTEXPENSE (2009 only)	42.1	0.0	101.2	0	1198.1	478
ASSETS	34629.8	8874.5	122657.2	396.0	2264909.0	3924
EMPLOYEES	44.9	19.0	92.8	0.1	2100.0	4272
COMPANYAGE	52.7	36.0	44.6	1	220	3314
REG_FAMA	42.0	--	49.4	0	1	4363
REG_HEAVY	32.8	--	46.9	0	1	4363
C4	39.6	35.6	19.5	1.5	98.9	3423
GOVSHARE	6.4	3.2	9.6	0	91.5	3407
RELQ	1.2	1.0	0.9	0.2	34.0	3978
ROA	3.6	2.6	11.8	-458.3	55.9	4329
ROE	0.2	0.1	3.2	-113.5	141.7	3953
CAPEX_ASSETS	0.05	0.04	0.05	0	0.5	3716
R_AND_D_SALES	-0.003	0	0.04	-1.4	0.0003	4344
DEBT	6556.2	1648.3	23802.7	0	448431	3788
LEVERAGE	0.5	0.5	0.3	0	6.2	3905

Notes. Amounts in $000s or 000s. LOBBYAMOUNT and CONTRIBUTEAMOUNT are inflation adjusted, using 1998 as the base year.

Table 2. Share of CEOs Obtaining or Being Nominated for Office

(1) Total # of CEOs in 2000 reviewed		438	
(2) % CEOs of same company in 2011		20%	
(3) % CEOs of another public company in 2011		7%	
(4) % died as CEOs		3%	
(5) # of CEOs in 2000 who retired before 2011		298	
(6) % of (5) appointed or nominated for political office		11%	
(7) % of CEOs appointed or nominated for **office**	Mean	95% Confidence Interval	
(a) If the firm lobbied in 1999, the % obtaining office was…	15%	12%	18%
(b) If the firm did not lobby in 1999, the % was…	3%	0%	6%

Table 3. Lobbying Participation and Shareholder Power (Logistic)

Explanatory variable	(1) Each variable on its own				(2) Both explanatory variables, plus other variables identified in note				
	Odds ratio	95% confidence interval		N	Odds ratio	95% confidence interval		N	% correctly classified
E-INDEX	1.15	1.04	1.28	3977	1.26	1.13	1.48	3407	78%
LNCSHR	1.58	1.43	1.73	3784	1.30	1.07	1.49		

The dependent variable is whether a firm engaged in lobbying in a given year. The E_INDEX measures shareholder rights; LNCSHR is the logged number of record shareholders of the firm, and is a proxy for shareholder dispersion. All models reflect robust standard errors, clustered at the firm level. Results reported in column (2) reflect the following additional variables (LOGASS, LOGEMPLOY, ROA, ROE, LEVERAGE, REG_HEAVY, and GOVSHARE25, as well as Fama 12-industry and yearly dummies). See Appendix A for descriptions.

Table 4. PAC Donation Participation and Shareholder Power (Logistic)

Explanatory variable	(1) Each variable on its own				(2) Both explanatory variables, plus other variables identified in note				
	Odds ratio	95% confidence interval		N	Odds ratio	95% confidence interval		N	% correctly classified
E-INDEX	1.04	0.95	1.14	3977	1.27	1.09	1.48	2189	80%
LNCSHR	1.59	1.43	1.77	3784	1.17	1.01	1.37		

The dependent variable is whether a firm sponsored a PAC that made a donation in a given year. The E_INDEX measures shareholder rights; LNCSHR is the logged number of record shareholders of the firm, and is a proxy for shareholder dispersion. All models reflect robust standard errors, clustered at the firm level. Results reported in column (2) reflect the following additional variables (LOGASS, LOGEMPLOY, ROA, ROE, LEVERAGE, REG_HEAVY, and GOVSHARE25, as well as Fama 12-industry and yearly dummies). See Appendix A for descriptions.

Table 5. Political Activity and Corporate Value

Panel A. Logged Industry-Adjusted Tobin's Q (OLS)

	(1) Each explanatory variable on its own and interacted with REG_HEAVY				(2) With other variables noted below			
Explanatory variables	Coef.	95% Confidence Interval		N	Coef.	95% Confidence Interval		N
LOBBY_YN	-0.18	-0.24	-0.11	3698	-0.07	-0.13	-0.01	3305
LOBBY_YN x REG_HEAVY	0.03	-0.02	0.09		0.11	0.03	0.19	
CONTRIBUTE_YN	-0.17	-0.23	-0.11	2483	-0.06	0.00	-0.11	2267
CONTRIBUTE_YN x REG_HEAVY	0.02	-0.04	0.07		0.08	0.01	0.16	

Ordinary least squares (OLS) models with logged median-industry-adjusted Tobin's Q as the dependent variable, as described in the text, with robust standard errors, clustered by firm. Results in column (1) reflect explanatory variables set to one for lobbying, PAC donations and their interactions with a dummy set to one if the firm is in a heavily regulated industry. Column (2) adds standard controls (LOGASS, LOG_CO_AGE_MONTHS, DEINC, ROE, ROA, CAPEX_ASSETS, R&D_SALES, LEVERAGE, a dummy for missing R&D data, LOGCSHR, yearly dummies, and Fama 12-industry dummies). See Appendix A for descriptions.

Panel B. Logged Industry-Adjusted Tobin's Q (Firm Fixed Effects)

	(1) Each explanatory variable on its own and interacted with REG_HEAVY, plus firm fixed effects				(2) With other variables noted above, plus firm fixed effects			
Explanatory variables	Coef.	95% Confidence Interval		N obs N firms	Coef.	95% Confidence Interval		N obs N firms
LOBBY_YN	-0.11	-0.17	-0.06	3698	-0.07	-0.13	-0.02	3305
LOBBY_YN x REG_HEAVY	0.02	-0.09	0.13	588	0.04	-0.10	0.18	556
CONTRIBUTE_YN	-0.01	-0.10	0.08	2483	0.02	-0.06	0.11	2267
CONTRIBUTE_YN x REG_HEAVY	-0.01	-0.16	0.14	587	0.02	-0.14	0.19	554

All models are as described for Panel A, with the addition of firm fixed effects in lieu of industry dummies.

Panel C. Logged Industry-Adjusted Tobin's Q (OLS), only firms in non-heavily regulated industries

	(1) Each interaction on its own				(2) Each interaction with variables noted above			
Explanatory variables	Coef.	95% Confidence Interval		N	Coef.	95% Confidence Interval		N
CAPEX_ASSETS	2.27	1.34	3.21	3675	1.58	0.78	2.39	3461
LOBBY_YN x CAPEX_ASSETS	-2.17	-3.09	-1.24		-0.89	-1.68	-0.11	
CAPEX_ASSETS	2.16	1.28	3.03	2469	1.33	0.50	2.166	2346
CONTRIBUTE_YN x CAPEX_ASSETS	-2.11	-2.99	-1.23		-0.63	0.00	0.07	

All models are as described for Panel A, but the sample is limited to firms outside of heavily regulated industries.

Table 6. Difference-in-Differences in Corporate Value Before and After *Citizens United*

	(1) Explanatory variable on its own				(2) With other variables noted below			
Explanatory variables	Coef.	95% Confidence Interval		N	Coef.	95% Confidence Interval		N
POSTCITIZENS x CPA_{2008}	-0.06	-0.13	0.02	3620	-0.08	-0.15	-0.01	3258
POSTCITIZENS	0.11	0.04	0.18		0.11	0.04	0.19	
CPA	-0.16	-0.23	-0.10		-0.05	-0.11	0.01	

Ordinary least squares (OLS) models with logged median-industry-adjusted Tobin's Q as the dependent variable, as described in the text, with robust standard errors, clustered by firm. The key variable of interest is POSTCITIZENS x CPA_{2008}, a dummy set to one for a firm engaged in lobbying or PAC donation in 2008, prior to *Citizens United,* as it was valued in the post-*Citizens United* period of 2010. Column (2) adds standard controls (LOGASS, LOG_CO_AGE_MONTHS, DEINC, ROE, ROA, CAPEX_ASSETS, R&D_SALES, LEVERAGE, a dummy for missing R&D data, LOGCSHR, yearly dummies, and Fama 12-industry dummies). See Appendix A for descriptions.

Figure 1. Industry and CPA

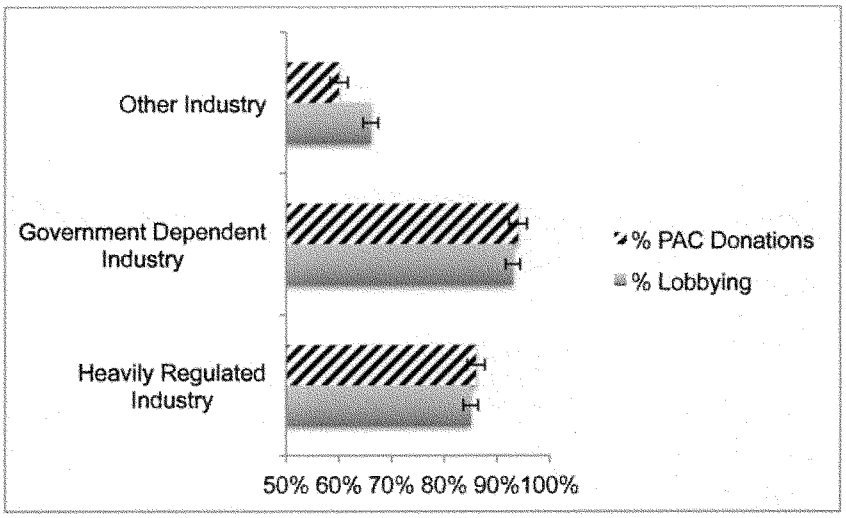


Figure 2. Lobbying Propensity, by Firm Size and Shareholder Dispersion

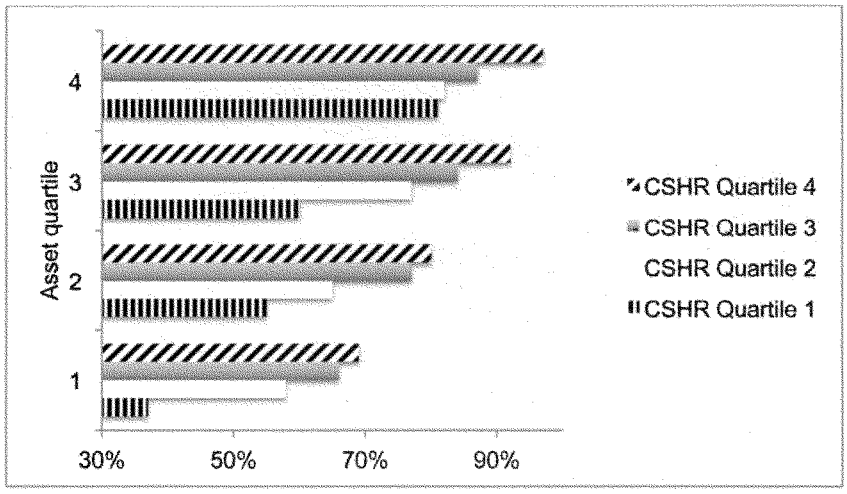


Figure 3a. CPA and EINDEX, Industries That Are Not Heavily Regulated

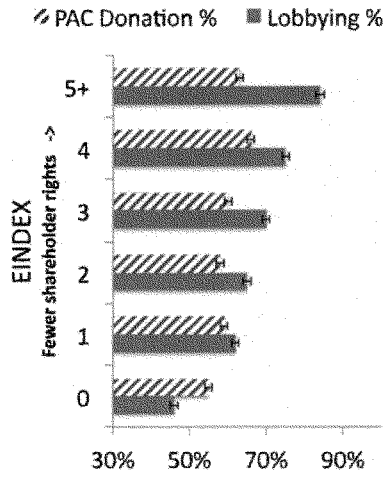


Figure 3b. CPA and EINDEX, Industries That Are Heavily Regulated

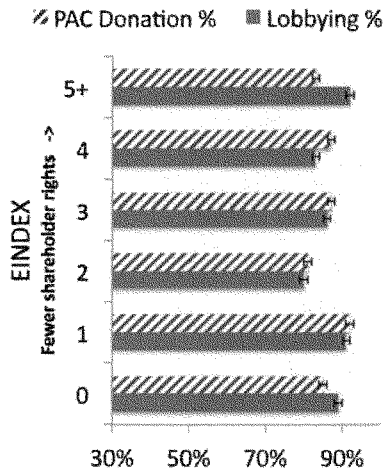


Figure 4a. CPA by Jet Use in Industries That Are Not Heavily Regulated

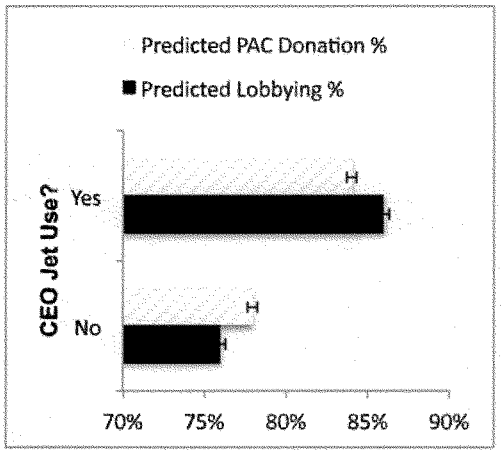


Figure 4b. CPA by Jet Use in Heavily Regulated Industries

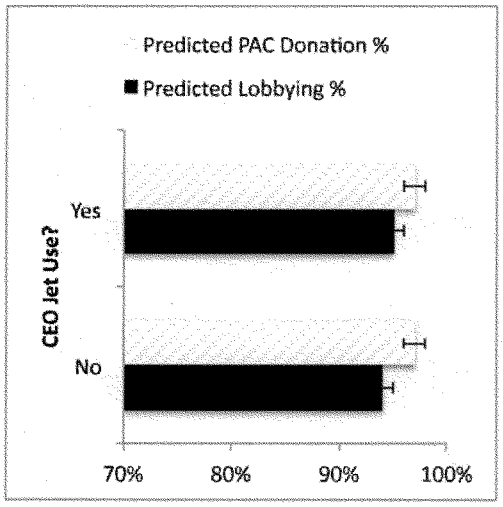


Figure 5. CPA and Corporate Value

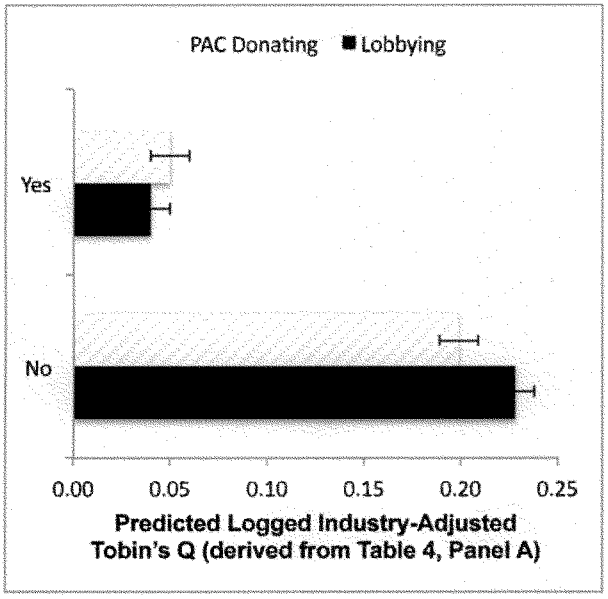
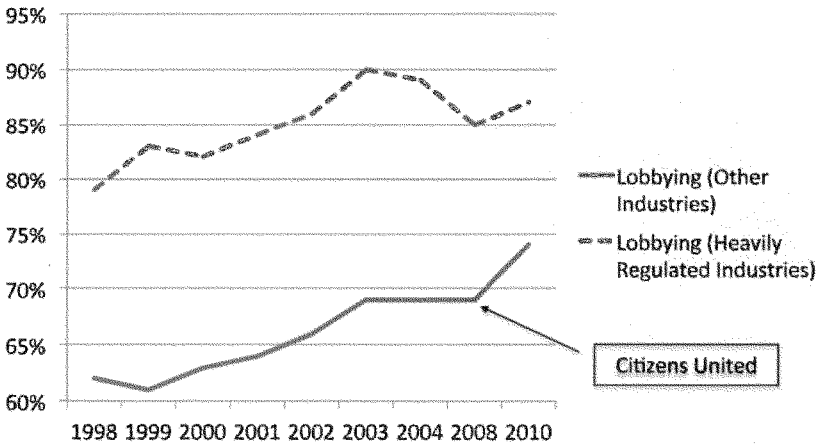


Figure 6. Change in Lobbying Activity Over Time



Appendix A. Control variables for regression models.

The variables included as controls for the regression models of CPA and Tobin's Q are:

- **LOGASS** (logged assets) and **LOGEMP** (logged number of employees) serve as proxies for firm size and/or for the size of the pool from which a company may solicit donations to a corporate PAC, from Compustat.

- **CAPEX_ASSETS**, the ratio of capital expenditures to assets, both from Compustat.

- **LOG_CO_AGE_MONTHS**, the log of the number of months since the company's founding, from the Corporate Library (available primarily for years after 2003), with missing years interpolated, as a proxy for firm reputation or credibility.

- Return on assets (***ROA***) and common equity (***ROE***) are used as controls in the models of LOGRELQ, all derived from Compustat.

- **DEINC,** a dummy set to one if the firm is incorporated in Delaware.

- **R_AND_D_SALES**, the ratio of research and development expenditures to sales (and a dummy set to one if R&D expenditures are missing from Compustat).

- **LEVERAGE**, the ratio of debt to assets, where debt is long-term debt (DD1 and DLTT in Compustat).

- **FAMA**, industry dummies using the Fama-French 1997 mapping of standard industrial classification codes to 48 categories (and another mapping into 12 categories).[40]

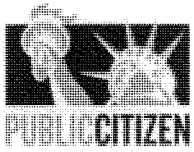
- **REG_FAMA**, a regulated-industry dummy for firms in regulated industries derived from Fama's website,[41] and **REG_HEAVY**, a subset of those industries in which regulation is particularly comprehensive (alcohol, tobacco, aircraft, drugs, utilities, telecom, transportation, banks, and insurance);

- **GOVSHARE**, the share of a firm's industry's revenues derived from government expenditures, as reported periodically by the Census Bureau, as a proxy for potential benefits from lobbying, and **GOVSHARE25**, a dummy set to 1 for firms in industries deriving more than 25% of revenues from government expenditures; and

[40] http://mba.tuck.dartmouth.edu/pages/faculty/ken.french/data_library.html.

[41] Regulated Fama 48-industries are 4 (alcohol), 5 (tobacco), 13 (drugs), 24 (aircraft), 26 (guns), 27 (gold), 30 (oil), 31 (utilities), 32 (telecom), 40 (transportation), 44 (banks), 45 (insurance) and 47 (finance). Id.

- **YEAR**, annual dummies, to control for time trends.



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March 28, 2012

The Hon. Charles Schumer, Chairman
The Hon. Lamar Alexander, Ranking Member
Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

Testimony Submitted on Behalf of Public Citizen

Before the Senate Committee on Rules and Administration

Hearing on the DISCLOSE Act of 2012 (S. 2219)

Public Citizen is pleased that the Senate Committee on Rules and Administration has decided to hold a hearing without hesitation or delay on the "Democracy Is Strengthened by Casting Light on Spending in Elections" (DISCLOSE) Act of 2012, which was introduced last week by Sen. Sheldon Whitehouse (D-R.I.). As of this writing, the legislation has already been endorsed by 38 cosponsors in the Senate and more than 160 cosponsors of companion legislation in the House (H.R. 4010).

Public Citizen respectfully submits testimony to the Committee on behalf of our more than 250,000 members and activists in strong support of this newest version of the DISCLOSE Act and applauds this effort to lift the veil of secrecy cloaking who is funding our elections.

The DISCLOSE Act is an important legislative response to the gravely unfortunate Supreme Court decision in *Citizens United v. Federal Election Commission.* The Court's decision to roll back a century of American political tradition banning corporate treasury money in elections poses severe dangers to our democracy. In the electoral arena, this decision is bringing a flood of new money into elections, crowding out the television airwaves near elections, ratcheting up the cost of campaigns and increasing the time and resources needed for candidate fundraising. In the legislative arena, the mere threat of corporate political spending gives corporate lobbyists a large new club to wield when negotiating with lawmakers.

The DISCLOSE Act is a desperately-needed step to repair some of the damage caused by *Citizens United.* It can provide voters with the means to decipher campaign messages by casting light on the true funding sources behind those messages. The legislative proposal also closes major loopholes in the current disclosure laws – loopholes that will become all the more problematic as corporations and wealthy individuals seek ways to influence elections and pressure lawmakers by funneling money into innocuous-sounding outside groups to handle their advertising campaigns secretly on their behalf.

This legislation is a transparency-only measure. It avoids all the regulatory controversies of earlier versions of the bill, such as restricting campaign expenditures by foreign subsidiaries of corporations, and provides only that the sources of money used to pay for elections are fully disclosed to the American public. The DISCLOSE Act of 2012 would require all entities that make campaign expenditures, including super PACs and third party front groups, to disclose the true sources of those funds. At the same time, the legislation carefully protects legitimate non-electioneering donations from disclosure by allowing groups to establish segregated campaign accounts and only disclose contributions into those accounts. The segregated campaign accounts permit such groups as the League of Conservation Voters, who conduct both electioneering campaigns and educational drives, to disclose only those donors who contribute to the electioneering activities.

The Influx of New Money

On January 21, 2010, the U.S. Supreme Court startled the American public when it ruled in *Citizens United v. Federal Election Commission,* contrary to long-standing precedent, that corporations have a constitutional right to spend unlimited amounts of money to elect or defeat candidates for public office.

The impact on our elections was felt almost immediately. In just the first year following the decision, campaign spending by outside groups in the 2010 election soared 427 percent over spending levels in the previous midterm election. Spending by outside groups jumped to $294.2 million in the 2010 election cycle from just $68.9 million in 2006, the last mid-term election cycle. The 2010 figures nearly matched the $301.7 million spent by outside groups in the 2008 presidential cycle. Of the $294.2 million spent in the 2010 cycle, $228.2 million (or 77.6 percent) was spent by groups that accepted contributions larger than $5,000 (the previous maximum a federal political action committee, or PAC, could accept in a single election cycle) or that did not reveal any information about the sources of their money. Nearly half of the money spent ($138.5 million, or 47.1 percent) came from only 10 groups.[1]

The rapid rise of new spending in the 2010 election presages what is likely to be blockbuster spending in the upcoming 2012 election, when the grand trophy of the White House is at stake. Outside groups had just sprung into action to tap into the new source of unlimited electioneering funds in 2010, not quite sure how to do it, or whether corporate CEOs would be willing to dip into the corporate till for campaign money. The learning curve is now over.

As we enter the 2012 election, estimates of the growth of campaign spending, especially by outside groups and super PACs, suggest that it will shatter all previous records. Though the actual amount of new campaign spending will not be known until after the 2012 election, estimates range as high as nearly $10 billion in state and federal elections, a 30 percent increase over the 2008 and 2010 election cycles.[2]

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[1] Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (January 2011) at 9.

[2] Borrell Associates, Political Advertising: The Flood of 2012 (March 2012).

Fading Disclosure

Perhaps even more alarming than the flood of new money into elections is the dramatic decline in transparency as to where all this money is coming from.

Before the Roberts Court reversed the precedents of two earlier landmark campaign finance decisions of previous Supreme Courts, the public was able to learn the identities of the sponsors of major campaign advertisements broadcast near federal elections. In the years following passage of the Bipartisan Campaign Reform Act (BCRA) of 2002, the public received nearly complete disclosure of funding sources behind electioneering communications and independent expenditures in the 2004 and 2006 elections. In the 2010 elections, with the sudden rise of corporate campaign money, donor disclosure fell to 34 percent for electioneering communications (ads that depict candidates very near an election but do not use the magic words of express advocacy, such as "vote for" or "vote against") and fell to 70 percent for express advocacy independent expenditures – marking a collapse of overall donor disclosure from nearly 100 percent in 2004 and 2006 to about 50 percent in 2010.[3]

This fading disclosure cannot be entirely blamed on the *Citizens United* decision. In fact, the Court voted 8-1 upholding the disclosure requirements in the same ruling. 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.[4]

The greatest damage to the disclosure regime lies in rulemaking by the Federal Election Commission (FEC). Following the 2007 *Wisconsin Right to Life v. FEC* decision, in which the Roberts Court ruled that corporations and unions may make electioneering communications so long as the ads could be interpreted as something other than an appeal to support or oppose candidates, the FEC modified its regulation implementing the disclosure requirement of BCRA.

The FEC reasoned that since corporations and labor unions could make electioneering communications, they should not be required to disclose the names of everyone who provides them with $1,000 or more for purposes unrelated to electioneering. The agency added a separate section to that effect, requiring a corporation or labor organization that makes electioneering communications to disclose "the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, *which was made for the purpose of furthering electioneering communications*." BCRA makes no such qualification; all donors must be disclosed under the plain language of the law.[5]

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[3] Public Citizen, Disclosure Eclipse (Nov. 18, 2010) at 4-5.
[4] Citizens United v. Federal Election Commission, 130 S.Ct. 876, 916 (Jan. 21, 2010).
[5] 11 C.F.R. § 104.20(c)(9) (emphasis added)

The new FEC rule, however, has been interpreted by a growing number of outside groups to mean that only those donors who specifically "earmark" funds for a campaign ad need be disclosed.

FEC staff has periodically requested full donor disclosure from outside groups financing independent ads, but the Commission itself has deadlocked on taking any action against those declining compliance. More and more of these groups are now refusing to disclose the major donors funding their campaign ads, claiming that none of their funders earmarked the money for electioneering activity. This refusal to disclose donors is also expanding among groups funding other independent expenditures, not just electioneering communications. Even some federally-registered super PACs have begun disclosing only their direct funders, such as a generic nonprofit group, without disclosing the actual donors behind those funds.

On August 18, 2010, the Republican bloc of FEC commissioners further emasculated the disclosure requirements when it blocked a case alleging that an organization called Freedom's Watch failed to comply with the disclosure rule.[6]

Freedom's Watch, a conservative nonprofit corporation, sponsored television ads in the 2008 elections that reportedly were funded by roughly $30 million from a single donor. A *New York Times* article quoted an unnamed Republican operative saying that the group's $30 million for ad spending "came almost entirely from casino mogul Sheldon G. Adelson," who has "insisted on parceling out his money project by project, as opposed to setting an overall budget, limiting the group's ability to plan and be nimble...."[7]

Substantial evidence showed that Adelson earmarked contributions for Freedom's Watch's electioneering communications budget. But in a written "statement of reasons," the three Republican commissioners announced a new, even higher bar for requiring disclosure: Not only must funds be earmarked for electioneering communications; they must be earmarked for a specific campaign ad.

Through deregulation and lack of enforcement, very little is left of what by all rights should be a very robust transparency law. Couple this lack of transparency with a flood of new money flowing into our elections from the *Citizens United* decision, and it becomes evident that financing campaigns in our country today is returning to the days of old when "Robber Barons" dominated government through secret corporate slush funds.

Conclusion: The DISCLOSE Act Reinstates Full Transparency, All the While Protecting Non-Electioneering Political Speech

It is a well-established norm of American politics that voters have a right to know who is paying how much for campaign ads. The Supreme Court has upheld the principle of disclosure in

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[6] Statement of Reasons for Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Freedom's Watch, Inc., MUR 6002 (Aug. 13, 2010), available at: http://eqs.sdrdc.com/eqsdocsMUR/10044274536.pdf]

[7] Michael Luo, "Great Expectations for a Conservative Group Seem All But Dashed," *The New York Times* (April 12, 2008).

election spending over and over again – including most recently in the *Citizen United* ruling – recognizing that who is paying for campaign advertising is valuable information that helps voters judge the merits of the barrage of ads that overwhelm the airwaves every election. The DISCLOSE Act of 2012 will provide voters with exactly that information.

At the same time, the DISCLOSE Act is not overly burdensome for groups that conduct both electioneering activity and activity unrelated to elections, such as genuine issue advocacy. The measure allows any group that wants to get involved in elections to set up a separate electioneering fund and only disclose the sources of money going into that electioneering fund. If a group decides to spend general treasury revenues, then it must disclose all its donors as required under BCRA.

To ensure that groups take some responsibility for the tone and content of their ads, the legislation also would require electioneering groups to list their top five funders. The head of such an organization must also appear in the ad itself and declare that he or she approves of the message.

One disclosure requirement missing in the Senate version of the bill is a provision to require corporations to inform shareholders of any significant corporate political expenditure. Since unlimited corporate political spending has suddenly been thrust upon the American political arena by the Court, there are no rules or procedures established in the United States to ensure that shareholders – those who actually own the wealth of corporations – are informed of decisions to spend their money on politics.

The DISCLOSE Act of 2012 is commonsense, straightforward legislation that would reinstate full transparency of electioneering spending and go a long way toward reining in some of the damage caused by the *Citizens United* decision. Public Citizen supports this measure and would like to see it pass the Senate with the addition of the shareholder disclosure provision contained in the House version.

Respectfully Submitted,

David Arkush, Director
Public Citizen's Congress Watch

Lisa Gilbert, Deputy Director
Public Citizen's Congress Watch

Craig Holman, Government affairs lobbyist
Public Citizen

Statement of Investors

Senate Committee on Rules and Administration

Hearing on the DISCLOSE Act of 2012

March 23, 2012

Dear Sens. Schumer and Alexander

Senate Committee on Rules and Administration:

We are writing to you as both shareholders in American corporations and as voters in support of the Disclose Act of 2012.

The Supreme Court decision in *Citizens United v. FEC* (January 2010) allows corporations to spend an unlimited amount of money on elections through independent expenditures and other communications. Previously, such expenditures could only be made through registered Political Action Committees (PACs) using separately raised funds.

While the Supreme Court has ruled that corporations are citizens for the purposes of free speech, what does that mean for the free speech rights of their shareholders? Shareholders are the ones who own the corporations, and they should accordingly have a say in how their money is spent on elections.

In fact, Supreme Court Justice Kennedy stated, in writing the majority opinion, "*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.*" He suggested that any abuse could be corrected by shareholders "*through the procedures of corporate democracy.*"

Eight justices supported full disclosure. Business leaders from the insurance, real estate, venture capital and asset management sectors have endorsed disclosure, including John Bogle, the founder and former chairman and chief executive of the Vanguard Group, the largest mutual fund firm in the country with over $1.5 trillion in assets.

Despite the fact that Citizens United upheld the disclosure requirements of the campaign financing law corporations are able to exploit provisions in the law governing nonprofit groups to make large political contributions without disclosure, making it easier than ever for cash to subvert our political system. Action to limit contributions at the corporate level is therefore urgent.

Political disclosure is necessary for the smooth functioning of markets, and fits comfortably within the securities laws and the SEC's framework. It is an important tool that helps shareholders,

management and directors deal with significant risks that can threaten companies and shareholder value.

The Disclose Act addresses this problem by requiring transparency so that shareholders (owners) of a corporation know how their company is spending money from its general treasury on political activities. This way, at the very least, if corporations are allowed to spend unlimited funds on elections, they are doing so with the knowledge of shareholders and can held accountable.

As voters and shareholders, we ask that you support this important tool of democracy.

Sincerely,

Ron Freund-Coordinator

6 Captain Drive, Suite 446

Emeryville, CA. 94608

Fr. Charles W. Dahm, O.P.
St. Pius V Parish

1919 S. Ashland
Chicago, IL 60608

Tamara Schiller, Chicago, IL and Charles Hoffman, Attorney at Law, Chicago, IL

1469 Farragut

Chicago, IL 60640

Norman Bannor, Chicago, IL

Jane Bannor, Statistician, Integriguard LLC

2701 West Fitch, Chicago IL 60645

Linda Williams, Senior editor, educational publishing (ret.), Deerfield, IL

Dr. Clifford E. Williams, Professor of Philosophy, Trinity College

1044 Linden

Deerfield, IL 60015

Margot Worfolk

1015 Landing Rd.

Naperville, Il 60540

Member of the Board of Directors, Chicago Religious Leadership Network on Latin America

Joe Houston

1015 Landing Rd.

Naperville, Il 60540

Laura Tye
Case Manager
The Hope Institute for Children and Families
4900 N Karlov Av
Chicago, IL 60630

James Tye
4900 N Karlov Av
Chicago, IL 60630

STETSON UNIVERSITY

March 29, 2012

Statement of Ciara Torres-Spelliscy[1]
Assistant Professor of Law
Stetson University College of Law
Senate Committee on Rules and Administration
Hearing on the DISCLOSE Act of 2012

Dear Chairman Schumer and Ranking Member Alexander,

Two years after the Supreme Court's landmark decision in *Citizens United v. FEC*, I encourage you to at long last take up the invitation by eight of nine Justices to bring transparency to American elections.

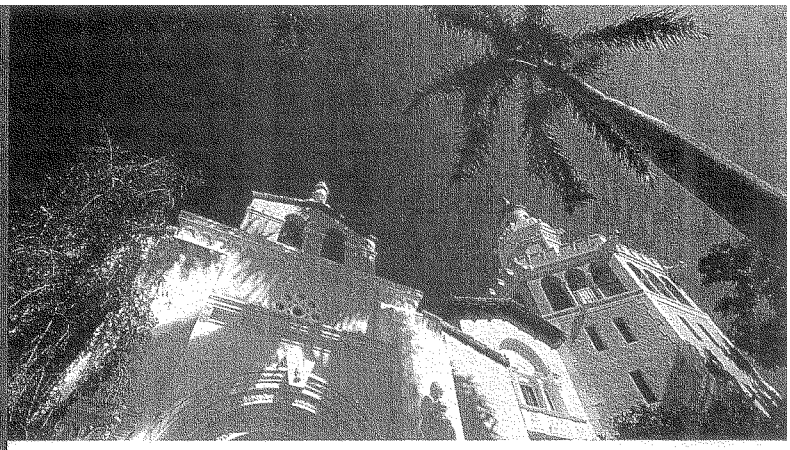
Attached is a law review article I wrote in the wake of *Citizens United* which highlights how the use of intermediaries mask the true identities of political spenders. It is entitled, "Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws."[2]

Reform in this area of the law is long overdue.

Sincerely,

Prof. Ciara Torres-Spelliscy

[1] Professor Torres-Spelliscy writes on her own behalf and not on the behalf of her University.
[2] If you are interested in how lower courts have embraced disclosure post-*Citizens United*, see "Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics after *Citizens United* and *Doe v. Reed*," 27(4) Georgia State University Law Review 1057 (Summer 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878727.



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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

By Ciara Torres-Spelliscy
Assistant Professor, Stetson University College of Law

Nexus: Chapman's Journal of Law & Policy, vol. 26, p. 59 (2011)

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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

Ciara Torres-Spelliscy*

Introduction

The 2010 midterm federal election may go down in history as the "Dark Election." Why? The source of a large percentage of outside political spending in the federal midterms was masked through the use of non-profit organizations.[1] The 2010 federal election was the most expensive federal election on record, but independent spending by outside

* The Author was Counsel at the Brennan Center for Justice at NYU School of Law and is an incoming Assistant Professor of Constitutional Law at Stetson University in the Fall of 2011. The author would like to thank Professor Frances Hill, Professor Jill Manny, Ezra W. Reese, Paul S. Ryan and Tara Malloy for reviewing an earlier draft of this piece, as well as Brennan Center lawyers Susan Liss, Monica Youn, Angela Migally, Mimi Marziani, Kelly Williams and legal intern Justin Krane for their helpful input.

1. *See* T.W. Farnam & Dan Eggen, *Interest-group Spending for Midterm Up Fivefold from 2006*; Many Sources Secret, WASH. POST, Oct. 4, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664_pf.html; Mike McIntire, *Hidden Under a Tax-Exempt Cloak, Private Dollars Flow*, N. Y. TIMES, Sept. 23, 2010, http://www.nytimes.com/2010/09/24/us/politics/24donate.html?pagewanted=1; Michael Crowley, *The New GOP Money Stampede*, TIME, Sept. 16, 2010, http://www.time.com/time/printout/0,8816,2019509,00.html#; Kristin Jensen & Jonathan D. Salant, *Republican Groups Use Hidden Money to Overcome Democrats' Cash*, BLOOMBERG BUSINESS WEEK, Sept. 21, 2010, http://www.businessweek.com/bwdaily/dnflash/content/sep2010/db20100921_184373.htm; Chisun Lee, *Higher Corporate Spending on Election Ads Could Be All but Invisible*, PROPUBLICA, Mar 10, 2010; Al Hunt, *More Cash Blots Out 'Sunlight' in U.S. Elections*, BLOOMBERG, Oct. 17, 2010, http://www.bloomberg.com/news/2010-10-17/more-cash-blots-out-sunlight-in-u-s-elections-albert-hunt.html.

groups in particular jumped markedly.[2] As Professor Michael M. Franz noted in a recent study, "[a]ll told, interest groups in 2010 increased their advertising totals over 2008 by 168 percent in House races and by 44 percent in Senate races."[3] By one measure, over one third of the outside spending was undisclosed,[4] and by another measure, 46% of outside spending was undisclosed.[5]

What types of disclosure are required of non-profits may have an enormous effect on how and when for-profit corporations spend money on politics after *Citizens United v. Federal Election Commission*, the Supreme Court case which permits unlimited political expenditures directly from corporate treasuries on political advertisements.[6] One way that for-profit corporations can throw their support behind, or undermine, a particular candidate after *Citizens United* is by donating money to a non-profit, which then, in turn, purchases a political ad. Under current tax law, for-profit political spending through non-profits such as social welfare organizations organized under Internal Revenue Code (IRC) Section 501(c)(4) or trade associations organized under IRC Section 501(c)(6) is undetectable by the public. Meanwhile, for-profit corporations typically disclose their spending through political 527s long after an election is over.

The President has highlighted the issue of campaign finance disclosure repeatedly in the past year after *Citizens United*. Not only did he take time during his first State of the Union to talk about the case,[7] he repeatedly raised the issue of disclosure, in particular in his Saturday addresses to the American people,[8] as

2. Press Release, *Election 2010 to Shatter Spending Records as Republicans Benefit from Late Cash Surge*, Center for Responsive Politics (Oct. 27, 2010), http://www.opensecrets.org/news/2010/10/election-2010-to-shatter-spending-r.html# (predicting spending would top $4 billion in the 2010 election); *see also* Center for Responsive Politics, *2010 Overview*, http://www.opensecrets.org/overview/index.php (showing over $3.6 billion raised during the 2010 election), last visited Feb. 2, 2011.

3. Michael M. Franz, *The* Citizens United *Election? Or Same as it Ever Was?*, THE FORUM Vol 8: Iss. 4, Article 7 at 6 (2010).

4. 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 36% of outside spending in the 2010 federal election was funded by secret sources).

5. 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.").

6. 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/ (arguing "[m]any corporations seem inclined to give to groups that are allowed by tax laws to keep their donations anonymous.").

7. President Barack Obama, State of the Union Address (Jan. 27, 2010) ("With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests –including foreign corporations – to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.").

8. Press Release, *Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the* Citizens United *Decision*, WHITE HOUSE (Sept. 18, 2010), http://www.whitehouse.gov/the-press-office/2010/09/

well as from the Rose Garden.[9] As President Obama summed up his argument, "the American people [ ] have the right to know when some group like 'Citizens for a Better Future' is actually funded entirely by 'Corporations for Weaker Oversight.'"[10]

If the past is prologue, we should anticipate a marked increase in the use of non-profits to mask for-profit money in politics. History shows that for-profit corporations spend through non-profits to enjoy their anonymity while spending without accountability from shareholders or customers.[11] And *Citizens United* may only expand this corporate habit of spending through intermediaries. If for-profit corporations are purposefully using non-profits to hide the true source of their funds, then it is possible that the degree of disclosure required of non-profits in the future may have an impact on whether for-profits give money to ideological and politically active non-profits.[12]

Citizens United changed many aspects of American campaign finance law. The Supreme Court's decision ended decades-old restrictions on the use of union and corporate treasury funds to pay for independent expenditures and electioneering communications.[13] But the one area where the *Citizens United* Court increased the ability of Congress to regulate was the disclosure of the sources of money in politics.[14] Indeed, the Supreme Court found that the Bipartisan Campaign Reform Act of 2002's (BCRA's) disclaimer and disclosure provisions could be constitutionally applied to the plaintiff in *Citizens United*, a 501(c)(4) organization, as well as to its ads and its film entitled "Hillary: The Movie."[15]

As *Citizens United* reaffirms, in order for voters to make informed choices at the

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18/weekly-address-president-obama-castigates-gop-leadership-blocking-fixes-; Press Release, *Weekly Address: President Obama Challenges Politicians Benefiting from* Citizens United *Ruling to Defend Corporate Influence in Our Elections*, WHITE HOUSE (Aug. 21, 2010), http://www.whitehouse.gov/the-press-office/2010/08/21/weekly-address-president-obama-challenges-politicians-benefiting-citizen.

9. Jesse Lee, *President Obama on* Citizens United*: Imagine the Power this Will Give Special Interests over Politicians*, WHITE HOUSE BLOG, July 26, 2010, http://www.whitehouse.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit.

10. President Barack Obama, *Weekly Address to the Nation* (May 1, 2010), http://www.whitehouse.gov/the-pressoffice/weekly-address-president-obama-calls-congress-enact-reforms-stop-a-potential-corpor.

11. *See* 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.

12. *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 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.").

13. *See* Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876 (2010).

14. *Id.*

15. Citizens United went on to avoid federal disclosure requirements by claiming that it is a press entity. In an advisory opinion, the FEC agreed, thereby granting Citizens United a media exemption from disclosure. *See* Federal Election Comm., A.O. 2010-08, CITIZENS UNITED (2010) (The remainder of this article assumes that this media exemption is not available for most 501(c)(4)s or 501(c)(6)s).

ballot box, they must know who is paying for each side of a political fight. Campaign finance disclosure and disclaimer laws should be adopted at the federal level to achieve this end, regardless of the tax status of the spender. Yet the question remains, how expansive is this governmental right to mandate disclosure? And in particular, what types of disclosure can non-profit social welfare organizations or trade associations be subject to in the future once they purchase political advertisements? These are the questions that I will endeavor to answer.

While the Treasury Department's Internal Revenue Service (IRS) grants 501(c)(4)s and 501(c)(6)s a large degree of anonymity for tax reporting purposes, the Federal Election Commission (FEC) already requires certain reporting from any entity that funds an independent expenditure or an electioneering communication in a federal election. Because of gaps in the law, non-profit structures can be used as conduits for unregulated campaign spending. To fill these holes in the law, federal regulators should go further than they have in the past to require more detailed and meaningful disclosure of the original sources of the money in politics.

As the Supreme Court has noted, "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[16] This article explores the disclosure that is and that can be required of 501(c)(4)s and 501(c)(6)s when they engage in political advertising. To fully explore this topic, this article, by necessity, also examines the tax treatment of 501(c)(3)s and 527s.[17] Although the IRS's treatment of these four types of tax-exempt organizations will be explained, my focus is on the disclosure that federal elections administrators can require of 501(c)(4)s and 501(c)(6)s once they fund political advertisements for or against federal candidates.[18] To capture the way that money is often moved around a series of entities, disclosure at the federal level needs to be bolstered to move beyond FECA and BCRA.

Of course, not every voter will pour through campaign disclosure filings to find out who is funding each and every race on the November ballot. Instead, voters, like other busy adults, rely on mental shortcuts, to place the candidates into a sensible framework. Or put another way, "[e]mpirical psychological research demonstrates that voters rely upon heuristics, or cognitive shortcuts, in

16. Louis Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933), *quoted in* Buckley v. Valeo, 424 U.S. 1, 67 (1976).

17. While this article will discuss 501(c)(3)s, 501(c)(4)s, and 501(c)(6)s, these are just three of twenty-eight types of non-profits listed in Section 501 of the IRC. *See generally* Ellen Aprill, *Background on Nonprofit, Tax-Exempt Section 501(c)(4) Organizations*, Election Law Blog (undated), http://electionlawblog.org/archives/aprill.pdf.

18. For a detailed discussion of the tax implications of *Citizens United*, *see* Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After* Citizens United, Loyola Law School Los Angeles Legal Studies Paper No. 2010-57 (Dec. 17, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1727565.

determining vote choice."[19] One of these shortcuts is seeing who is supporting or opposing a given candidate. If a candidate is getting praise from an industry that the voter distrusts, the voter may distrust the candidate too. But when it is unclear who is praising the candidate, the voter is deprived of a useful democratic heuristic.[20]

First, the "Dark Election of 2010" was not inevitable. Instead, it is the result of key policy choices. As this article will demonstrate, the case law and federal elections statutes both support disclosure of who is spending money in federal elections. Rather, the Dark Election was caused by a regulatory gap between the FEC and the IRS. Yet, at the regulatory level, the FEC has long failed to require disclosure of underlying donors to the entities that purchase federal election ads, and while the IRS gathers donor information from 501(c)(4)s and 501(c)(6)s, it does not make this donor information publicly available. Then this article will discuss the past and the present abuses of this disclosure gap. Finally, I argue that the FEC should require detailed disclosure by all political spenders, tax status notwithstanding.

This is an area where definitions of very similar words have different meanings in the tax and the election contexts. Here, the focus is primarily political campaign activity in the form of purchasing an advertisement that supports or opposes a candidate by certain tax-exempt entities. This article will be limited to the purchasing of what are defined by federal election law as independent expenditures and electioneering communications. Independent expenditures are advertisements which support or oppose a candidate for office by using *Buckley v. Valeo*'s "magic words" of express advocacy.[21] Meanwhile, electioneering communications are defined by BCRA as advertisements which mention a federal candidate, are broadcast 30 days before a federal primary or 60 days before a federal general election, to at least 50,000 persons, costing at least $10,000 and targeted at that federal candidate's electorate.[22]

At times to be complete, I will reference the ability of certain tax-exempt entities to lobby. However, lobbying is not a primary focus of this article and should not be considered synonymous with political campaign activity. Furthermore, the 501(c)(3) non-profits that are referenced throughout are public charities, not private foundations.[23] And finally, as used herein, the term "political campaign ac-

19. Molly J. Walker Wilson, *Behavioral Decision Theory and Implications of the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 681 (Jan. 2010).

20. Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 265 (2010) ("Heuristic cues that are not misleading, however, are at least an improvement for the relatively uninformed.").

21. *Buckley*, 424 U.S. at 44, n.52.

22. 2 U.S.C. § 434(f)(3)(A)(i) (BCRA § 201).

23. B. HOLLY SCHADLER, THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(c)(3)S, 501(c)(4)S AND POLITICAL ORGANIZATIONS, 1 (2006) ("In 1969, Congress divided 501(c)(3) organizations into two classes: 'private foundations' and 'public charities.' Private foundations are subject to several restrictions on their advocacy activities that do not apply to public charities. . .").

tivity" does not include non-partisan activities like voter registration, get out the vote efforts, voter education guides or hosting candidate debates.[24] The term is limited to activities such as supporting or opposing candidates or what a layperson might refer to as "partisan politicking."

Part I. Emerging Agreement on the Need for Transparency in Elections

In a rare instance of convergence, the controlling majorities in all three branches of government in 2010, agreed that transparency is a necessary prerequisite for a strong democracy.[25] As part of the Congressional responses to *Citizens United*, committee hearings were held in both the House and Senate. The Committee for House Administration, which has primary jurisdiction over federal elections, concluded after these hearings that transparency in elections is key to safeguarding the health of our democracy. As the Committee wrote, "[t]o prosper, our democracy requires transparency and accountability in our political campaigns. [K]nowing the source of political spending allows voters to better assess the truthfulness and accuracy of the claims of the spenders and the candidates. It invites a healthy skepticism and allows voters to investigate the motives of the sponsor."[26]

This belief that transparency is an integral part to a functioning democracy is also shared by President Obama. As he warned, disclosure loopholes can be exploited at the voter's expense:

> [I]n my State of the Union Address, I warned of the danger posed by a Supreme Court ruling called *Citizens United*.... It gave the special interests the power to spend without limit – and without public disclosure – to run ads in order to influence elections. Now, as an election approaches, it's not just a theory. We can see for ourselves how destructive to our democracy this can become. We see it in the flood of deceptive attack ads sponsored by special interests using front groups with misleading names. We don't know who's behind these ads or who's paying for them. Even foreign-controlled corporations seeking to influence our democracy are able to spend freely in order to swing an election toward a candidate they prefer.[27]

And as will be detailed further below, the Supreme Court has repeatedly endorsed the democratic-reinforcing power

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24. *Id.* at 11-12 (The IRS does not consider the following to be political activities: nonpartisan voter registration, candidate questionnaires, hosting debates, or get-out the vote programs).

25. Of course there is not total unanimity on this topic. Every Republican Senator in the 111th Congress voted against stronger disclosure of campaign spending. *See* Ciara Torres-Spelliscy, *Why Can 41 Senators Crush Popular Will to Temper Money in Politics?*, THE HILL, July 28, 2010, http://thehill.com/blogs/congress-blog/politics/111381-why-can-41-senators-crush-popular-will-to-temper-money-in-politics.

26. *See* COMM. ON HOUSE ADMIN., DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS ACT' OR THE "DISCLOSE ACT," H.R. 5157, H.R. REP. No. 111-492 (May 25, 2010), http://www.rules.house.gov/111/CommJurRpt/111_hr5175_rpt.pdf.

27. *See* Press Release, *Weekly Address: President Obama Castigates GOP Leadership for Blocking Fixes for the* Citizens United *Decision*, WHITE HOUSE (Sept. 18, 2010), http://www.whitehouse.gov/the-press-office/2010/09/18/weekly-address-president-obama-castigates-gop-leadership-blocking-fixes-.

of transparency around elections in case after case for the past thirty-five years.[28]

This belief in the power of transparency within the democratic framework is shared not only by the government, but also by legal scholars. Professor Cass Sunstein has noted that disclosure laws have proliferated in the past few decades across all sorts of legal topics including campaign finance:

> [R]egulation through disclosure, has become one of the most striking developments in the last generation of American law. . . .[C]onsider . . .the Freedom of Information Act ("FOIA"), and the Federal Election Campaign Act ("FECA"). Here the goal is to allow more in the way of public monitoring of governmental decisions, with particular issues (. . . [like] unlawful behavior during campaigns [and] official corruption) receiving special attention.[29]

Or in other words, disclosure of how politics is funded boosts the government's anti-corruption interest in campaign finance. And as Professor Burt Neuborne has written, campaign finance disclosure helps voters place candidates on a political spectrum: "compelled public disclosure of campaign contributions, campaign expenditures, and individual expenditures on behalf of a candidate was sustained in *Buckley*, in part, because the Court believed that knowledge of a candidate's financial supporters was of great value to voters in assessing the candidate's political positions."[30] Or as Professor Franz put it succinctly, "greater disclosure seems a no-brainer. Even the strongest of reform opponents, like Senator Mitch McConnell, have argued for many years that disclosure regulations are not only fair but normatively good."[31] Thus, there is a growing consensus both inside and outside of government that increasing voter knowledge justifies robust disclosure in the campaign finance context.

Part II. Case Law: the Supreme Court from *Buckley* through *Citizens United* and *Doe v. Reed* Finds Disclosure Constitutional

While the Roberts Supreme Court is generally hostile to campaign finance laws such as contribution and expenditure limits, like many previous Supreme Courts, it has endorsed the need for robust disclosure of campaign funding.[32] The case law is clearly on the side of re-

28. Or as the Sixth Circuit stated in a different context, "[d]emocracies die behind closed doors." Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (explaining that the First Amendment prohibits the government from closing immigration hearings to the public and press).

29. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 613-14 (Jan. 1999).

30. Burt Neuborne, *One Dollar-One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L. J. 1, 9 (Fall 1997).

31. Franz, *supra* note 3, at 19 (citing http://www.mcclatchydc.com/2010/08/02/98492/commentary-mcconnells-about-face.html).

32. *Democracy is Strengthened by Casting Light on Spending in Elections: Hearing on H.R. 5175 Before the H. Comm. on House Admin.*, 111th Cong. 2-3 (2010) (Statement Donald Simon, General Counsel, Democracy 21), *available at* http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BE0088B11-5E6C-4C59-A277-FD8F8F0C557D%7D.PDF ("the Supreme Court has consistently endorsed the principle that the public has the right to know about expenditures being

formers who seek transparency; not the obfuscators.

In 1976, in *Buckley v. Valeo* the Supreme Court recognized that disclosure of campaign spending is "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[33] Since *Buckley*, the Court has consistently recognized that disclosure of political spending: (1) "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" (2) "provides 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;" and (3) "[is] an essential means of gathering the data necessary to detect violations of the contribution limitations."[34]

In *Buckley*, the Supreme Court upheld FECA's disclosure requirements for independent expenditures, but limited this disclosure to "express advocacy" – an advertisement for or against a candidate that used specific "magic words," such as "vote for" or "vote against." This magic words test made it impossible to distinguish "sham issue ads" (ads that avoided these magic words, but were nonetheless intended to influence an election) from genuine issue ads (ads that express an opinion on a public issue). Consequently, from 1976-2002, there were no limits on who could buy the sham issue ads or on how they were financed, and no disclosure was required. Hundreds of millions of dollars of corporate and union treasury funds – money that could not legally be used directly to influence elections pre-*Citizens United* – poured into federal campaign ads through the "sham issue ad" loophole.[35]

In the decades following *Buckley*, Congress observed that independent spenders found ways to mask express advocacy ads as sham issue ads to escape disclosure. To plug this loophole, Congress enacted BCRA. It banned the use of corporate and union general treasury funds for "electioneering communications"– broadcast ads aired just prior to a primary or general election that refer to a candidate and target the candidate's constituents – but allowed such communications to be paid for through separate segregated funds (SSFs), which are often also called corporate or union political action committees (PACs).[36] SSFs are subject to contribution limits, disclosure of contributors, and solicitation restrictions. BCRA also mandated disclosure and dis-

made to influence election campaigns, and about the sources that are providing the funds used for such expenditures.").

33. *Buckley*, 424 U.S. at 68 (footnotes omitted).

34. *Id.* at 67.

35. CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 10-11 (Brennan Center 2001), http://brennan.3cdn.net/efd37f417f16ee6341_4dm6iid9c.pdf; *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 197 (2003) (finding political advertising sponsors often hid behind misleading names, such as "Citizens for Better Medicare" (the pharmaceutical industry) or "Americans Working for Real Change" (business groups opposed to organized labor)).

36. 2 U.S.C. §§ 441b(b)(2), 441b(c) (BCRA § 203).

claimer requirements for electioneering communications.

Reasoning that "they do not prevent anyone from speaking," the Supreme Court in *McConnell v. FEC* expressly upheld BCRA's electioneering communications reporting provisions by a vote of eight to one.[37] (For more details about BCRA's disclosure requirements, *see* Part III of this article.) Like the Court in *Buckley*, the *McConnell* Court concluded that government interests were sufficiently strong to support disclosure of who funded broadcast electioneering communications. Specifically, interests in "providing the electorate with information, deterring actual corruption, avoiding the appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions" justified any incidental burden imposed by BCRA's disclosure requirements.[38]

While *Citizens United* invalidated the corporate SSF/PAC requirement, it did nothing to disturb the disclosure required for federal campaign ads. On the contrary, as in *McConnell*, eight Supreme Court Justices in *Citizens United* voted to uphold disclosure of who funds political advertisements and where those funders get their money.[39] Moreover, *Citizens United* clarified a legal issue that had previously split the lower courts by rejecting the contention that disclosure can only be required of communications that are the functional equivalent of express advocacy.[40]

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37. 540 U.S. at 201 (*quoting* McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)).

38. *Id.* at 196.

39. *Id.* at 194-95, 199 (upholding 47 U.S.C. § 315(e)(1)(A)). In both *Citizens United* and *McConnell*, Justice Thomas was the lone dissenter.

40. The 2007 Supreme Court case *Wisconsin Right to Life* (*WRTL II*) did great mischief to state disclosure laws in the lower courts in a case that clearly did not apply to disclosure. Courts reached varying conclusions in *WRTL II*'s wake. *See, e.g.*, California Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1177 (9th Cir. 2007) (*WRTL II* did not reach disclosure); Citizens United v. Fed. Election Comm'n, 530 F.Supp.2d 274, 281 (D.D.C. 2008) (same), *rev'd in part* 130 S.Ct. 876 (2010); and Koerber v. Fed. Election Comm'n, 583 F.Supp.2d 740, 746 (E.D.N.C. 2008) ("The *WRTL II* decision makes no mention of the disclosure requirements upheld in *McConnell*"), *but see* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 304 (4th Cir. 2008) (finding disclosure by political committees is both "costly" and "burdensome."); Ctr. for Individual Freedom, Inc. v. Ireland, 613 F.Supp.2d 777 (S.D.W.Va. 2009) (granting the plaintiff's request for a preliminary injunction of West Virginia's definition of electioneering communications); Broward Coalition of Condominiums, Homeowners Associations & Community Organizations, Inc. v. Browning, No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009) (permanently enjoining the electioneering portions of the Florida law); Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Herbert, 581 F.Supp.2d 1132, 1150 (D. Utah 2008) (holding "advertisements [at issue] are not unambiguously campaign related and thus cannot be constitutionally regulated."). This trend has reversed itself again after *Citizens United*. Now lower courts are overwhelming upholding disclosure laws. Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1012 (9th Cir. 2010) (upholding Washington's political committee financial disclosure requirements); SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 697 (D.C. Cir. 2010) (upholding ongoing disclosure requirements for organization making federal independent expenditures); National Organization for Marriage v. Roberts, 2010 WL 4678610, *5 (N.D. Fla. Nov. 8, 2010) (finding that Florida disclosure requirements connected to "electioneering communications organizations" "would not prohibit [plaintiff] from engaging in its proposed speech"); Yamada v. Kuramoto, 2010 WL 4603936, *1 (D. Haw. Oct. 29, 2010) (finding that "*Citizens United* also endorsed disclosure"); Iowa Right to Life (IRTL) v. Smithson, 2010 WL 4277715, *3 (S.D. Iowa Oct. 20, 2010) (finding "under *Citizens United*, '[t]he Government may regulate

Citizens United expressly affirmed the importance of disclosure as a means of "'provid[ing] the electorate with information' about the sources of election-related spending."[41] As the Court explained, "[t]here was evidence in the [*McConnell*] 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."[42] The Court also concluded that FEC disclaimer requirements could be constitutionally applied to Citizens United's ads.

The disclaimers required by § 311 "provid[e] the electorate with information," *McConnell*, *supra*, at 196, and "insure that the voters are fully informed" about the person or group who is speaking, *Buckley*, *supra*, at 76; *see also Bellotti*, 435 U. S., at 792, n. 32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.[43]

Finally, *Citizens United* rejected the so-called "functional equivalence" test articulated in *Wisconsin Right to Life II* in the disclosure context. The "functional equivalence" test stated that an ad could only be subject to corporate money source restrictions by the FEC if it were functionally equivalent to express advocacy.[44] As Justice Kennedy noted,

> Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U. S. C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinc-

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corporate political speech through disclaimer and disclosure requirements. . .'"); Wisconsin Club for Growth v. Myse, 2010 WL 4024932 (W.D. Wis. Oct. 13, 2010) ("plaintiffs' reliance on *FEC v. WRTL* ignores the Supreme Court's later treatment of disclosure and disclaimer regulations in *Citizens United*"); Minnesota Citizens Concerned for Life, Inc. v. Swanson, 2010 WL 3768041, *9 (D. Minn. Sept. 20, 2010) ("The law to which Plaintiffs object is, in fact, a disclosure law-a method of requiring corporations desiring to make independent expenditures to disclose their activities. Such laws are permissible under *Citizens United*.") affd. No. 10-3126 (8th Cir. May 16, 2011); Center for Individual Freedom v. Madigan, 2010 WL 3404973, *4 (N.D. Ill. Aug. 26, 2010) ("in *Citizens United*, the Supreme Court expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent."); Nat'l Org. for Marriage v. McKee, No. 09-538, 2010 WL 3270092, at 10 (D. Me. Aug. 19, 2010) (upholding Maine's political committee financial disclosure requirements and finding "NOM's desire to limit campaign finance disclosures to 'major purpose' groups would yield perverse results, totally at odds with the interest in 'transparency' recognized in *Citizens United*.").

41. *Citizens United*, 130 S.Ct.at 914 (quoting Buckley, 424 U.S. at 66).

42. *Id.* at 885 (quoting *McConnell*) (internal citations and quotations omitted).

43. *Id.* at 915.

44. Trevor Potter, *Trevor Potter Testifies on DISCLOSE Act*, CAMPAIGN LEGAL CENTER BLOG (May 11, 2010), http://www.clcblog.org/blog_item-327.html ("As to the argument that disclosure requirements should be limited to "express advocacy," Justice Kennedy's [*Citizens United*] Opinion flatly declared: 'We reject this contention.' He noted that the Supreme Court had, in a variety of contexts, upheld disclosure requirements that covered constitutionally protected acts, such as lobbying.").

> tion into BCRA's disclosure requirements. *We reject this contention.*[45]

In short, *Citizens United* breathed new life into the longstanding constitutionality of disclosure of campaign spending, even as applied to a 501(c)(4) nonprofit organization.[46]

Furthermore, in June of 2010, the Supreme Court also reaffirmed its endorsement of the values of disclosure in *Doe v. Reed*. In *Reed*, the question was the constitutionality of requiring disclosure of certain information about petition signers. The plaintiffs in the case argued that the Washington State statute requiring such disclosure was facially invalid as well as unconstitutional as applied to the plaintiffs, signers of a petition to get an anti-gay question on the ballot. The Supreme Court reviewed the facial challenge. Chief Justice Roberts wrote for the majority that disclosure helped ensure the integrity of the ballot:

> Public disclosure [] helps ensure . . . the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process [We] conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.[47]

Justice Scalia wrote a particularly forceful concurrence in *Reed* arguing that the mechanisms of democracy require the willingness to be subject to certain minimal disclosures. As Justice Scalia implored,

> 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. For my part, I do not look forward to a society . . . [where] even exercises [of] the direct democracy of initiative and referendum [are] hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[48]

However, several Justices in *Reed* did state that if the plaintiffs should succeed in showing that disclosure of their personal information related to a particular petition about gay marriage would result in harassment or intimidation, then they may be excused from disclosure.[49] This "as-applied" part of the case is still being litigated. Nonetheless, *Reed*, like *Citizens United*, stands firmly for the proposition that disclosure during the political process is a benefit to the voter.

The Supreme Court's last chance to opine on the regulation of a 501(c)(6)'s (trade association's) political activities was in 1990, in *Austin v. Michigan Chamber of Commerce*. In that case, the issue was the corporate independent expenditure ban and not disclosure. This case has been overruled by *Citizens*

45. *Citizens United*, 130 S.Ct. at 915 (emphasis added) (citations omitted).

46. *Citizens United* was cited in *SpeechNow.org* which held that federal PAC contribution limits could not apply to individuals giving to an independent expenditure committee organized under Section 527 of the Internal Revenue Code, but that such contributions must be disclosed and that the group must register as federal PAC. SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 696 (D.C. Cir. 2010).

47. Doe v. Reed, 130 S.Ct. 2811, 2820 (2010).

48. *Id.* at 2837 (Scalia, J., concurring).

49. *Id.* at 2823 (Alito, J., concurring).

United. However, it is worth noting that in his dissent in *Austin*, Justice Kennedy was supportive of disclosure as a more tailored regulation. He wrote, "[t]he more narrow alternative of recordkeeping and funding disclosure is available."[50]

Neither 501(c)(4)s nor 501(c)(6)s are entitled to blanket anonymity. A recent case from 2009 in the DC Circuit makes this crystal clear. The case concerned the constitutionality of a 2007 federal lobbying law[51] which was challenged both facially and as applied to the National Association of Manufacturers (NAM).[52] Under that law, members of NAM who actively participated in planning, supervision or control of Congressional lobbying activities would be disclosed.[53] NAM, which generally keeps its membership confidential, claimed that disclosure of the names of the corporations who actively participated in lobbying Congress would have a chilling effect.[54] The DC Circuit, however, rejected the idea that Supreme Court cases concerning limited exceptions from disclosure rules provided reason to exempt NAM from disclosure.[55] The Court also stated that the lobbying law was narrowly tailored to better inform Congress about who was behind lobbying campaigns.[56]

In conclusion, case law from *Buckley* to today, clearly stands for the legality and constitutionality of disclosure and disclaimer requirements for political ads, ballot petitions and direct lobbying. And these holdings do not hinge on the tax status of the spender.

Part III. Statutory Law Also Requires Disclosure

The case law could not be more clear in its endorsement of disclosure of political spending around elections. So was the Dark Election brought to us by poorly drafted statutory laws? As it turns out, the federal elections laws themselves also require robust disclosure not only of the entity making federal political ads (whether independent expenditures or

50. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 707 (1990) (Kennedy, J. dissenting).

51. The federal lobbying law challenged was the Honest Leadership and Open Government Act (HLOGA), which applies to all lobbying coalitions and associations and does not hinge on 501(c)(6) status. National Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 7-8 (D.C. Cir. 2009).

52. *Id.* at 8.

53. *Id.* at 12.

54. *Id.* at 9.

55. *Id.* at 20-22 ("This, then, is a case like *Buckley*, not *NAACP*. As in *Buckley*, the plaintiff has tendered no record evidence of the sort proffered in *NAACP v. Alabama*.") (internal citation omitted). *NAACP* (and its progeny) holds that if a group will be subject to harassment, then it can be excused from disclosure that would otherwise apply. *See also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98-99 (1982) (protecting individual contributors to widely ostracized minority political parties from harassment by invalidating certain disclosure requirements).

56. *Id.* at 20. ("[T]here is more than a substantial relation between the governmental interest in greater transparency and the information that amended § 1603(b)(3) requires to be disclosed; in fact, the section's disclosure requirements are narrowly tailored and effectively advance that interest. Moreover. . . the governmental interest in providing information about who is being hired, who is putting up the money, and how much they are spending to influence federal decisionmakers is not just some legitimate governmental interest. It is a vital national interest.") (internal citations omitted).

electioneering communications), but also the underlying money sources behind the expenditures. For example, *Citizens United* and *McConnell* affirmed the constitutionality of the campaign finance disclosure required by BCRA § 201. Here are the relevant portions of the federal elections law:

> [BCRA] SEC. 201. DISCLOSURE OF ELECTIONEERING COMMUNICATIONS.
> (a) "(f) DISCLOSURE OF ELECTIONEERING COMMUNICATIONS.—
> "(1) STATEMENT REQUIRED.—Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).
> "(2) CONTENTS OF STATEMENT.—Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:
> "(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.
> "(B) The principal place of business of the person making the disbursement, if not an individual.
> "(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.
> "(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.
> . . .
> "(F) . . .the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.[57]

In short, a plain reading of the meaning of the statute indicates that those spending $10,000 or more on electioneering communications must disclose that fact to the FEC before the election and must name every donor who provided $1,000 or more to fund the ad.[58] FECA's older treatment of independent expenditures is also clearly intended to capture underlying donors and not just the reporting entity.[59]

Part IV. FEC's Lax Disclosure Requirements

So if the Supreme Court's case law is on the side of disclosure and the federal

57. Bipartisan Campaign Reform Act of 2002, § 202 (2002), *available at* http://news.findlaw.com/nytimes/docs/fec/bcmpnrfrmact2002.pdf.

58. *See* 2 U.S.C. § 434(f)(2)(E)-(F) (2007) (requiring any "person" who makes electioneering communications that aggregate more than $10,000 during the year to report, among other things, the identity of donors who have contributed at least $1,000 during the period between the first day of the preceding calendar year and the date of the communication; however, if the disbursement was paid out from a separate bank account that contains only contributions by U.S. citizens or green cardholders made directly to the account for electioneering communications, then only the donors who have contributed at least $1,000 to that account are disclosed).

59. *See* 2 U.S.C. § 434(c) (requiring any "person" who makes independent expenditures that aggregate more than $250 during the year to report, among other things, the identity of donors who have contributed at least $200 for the purpose of furthering the independent expenditure, a certification that the expenditure was truly independent, and an indication of which candidate is supported or opposed by the expenditure.).

election statutes are also clear on their face that disclosure of donors is required by anyone who pays for independent expenditures and electioneering communications in federal elections, then how could we have a federal election like the 2010 midterm election where the sources of political ads are hidden from the public view? The system falls apart where the rubber meets the road, in the regulations. To be more specific, there can be federal elections with veiled political actors because the FEC's poor regulatory choices enable obfuscation. In addition, as will be discussed in more detail below, the IRS does not require public disclosures of underlying funders to 501(c)(4)s or 501(c)(6)s. Thus any political spending through such groups can be missed by both the FEC's and the IRS's regulations.

A. Federal PAC Disclosure Requirements[60]

The remainder of this article assumes that after *Citizens United*, corporations and non-profit organizations will spend money on political ads directly from their general treasury funds. However, 501(c)(4)s and 501(c)(6) do retain the right to spend through a PAC. Spending through federal PACs is fully transparent.

Under federal law, a PAC or party committee must itemize its payments for independent expenditures once the calendar-year total paid to a vendor or other person exceeds $200 with respect to a particular election.[61] Once a committee's aggregate independent expenditures reach or exceed $10,000 with respect to a given election at any time up to and including the 20th day before an election, the PAC must file a 48-hour independent expenditure report after the independent expenditure communication is publicly distributed. Once a political committee's aggregate independent expenditures reach or exceed $1,000 with respect to a given election, and are made fewer than 20 days, but more than 24 hours, before an election, the independent expenditure must be reported to, and received by, the FEC within 24 hours of the time the communication is publicly distributed. These reports must include all independent expenditures with respect to that election that have not been previously disclosed.[62] All reports of independent expenditures must contain the following information: the name and mailing address of the person to whom the expenditure was made,[63] the amount, date and purpose of the expenditure and a statement that indicates whether such expenditure was in support of, or in opposition to, a candidate, to-

60. Fed. Election Comm'n, *Federal PAC Disclosure Requirements* (2010), http://www.fec.gov/pages/brochures/indexp.shtml#Reporting_IE.

61. 11 C.F.R. §104.3(b)(3)(vii)(A); §104.4(a)-(c).

62. 11 C.F.R. 104.4(b)(2), (e)(2)(ii) and (f); 109.10(c); 109.10(d).

63. Such identification is only made for persons who have received disbursements for independent expenditures from the political committee aggregating over $200 during the calendar year with respect to a given election. 11 C.F.R. § 104.3(b)(3)(vii)(A) (2009).

gether with the candidate's name and office sought.[64]

In other words, federal PACs must account for every dollar in and every dollar out, and this information is reported to the FEC where the public can find it in the FEC's online database.[65] But because of *Citizens United*, political spending by corporations is no longer required to go through PACs. Instead, corporations can either spend funds on politics directly from their treasury in their own names or they can use less transparent non-profits as a vehicle to spend money in politics.

B. Federal Electioneering Communication Disclosure

FEC regulations require disclosure by any entity that purchases an electioneering communication in a federal election. However, the FEC has taken a narrow approach to interpreting BCRA's clear language requiring disclosure of underlying funders. Instead of requiring advertisers to name each $1,000 donor as the statute directs, the FEC has only required the name of donors who specifically earmarked their $1,000 donations. Since many donors give unrestricted funds, there are often no "earmarked" donors to report.

FEC electioneering communication disclosures are required of all entities, including 501(c)(4)s and 501(c)(6)s. But to fully understand the current state of regulatory affairs, a little history is necessary to gain perspective. Before *Citizens United*, the FEC applied BCRA § 201 disclosure requirements to certain 501(c)(4)s that were allowed to make electioneering communications under the "*MCFL* exemption."[66] *MCFL* 501(c)(4) corporations – called "Qualified Nonprofit Corporations" (QNCs) by the FEC – could already use general treasury funds to pay for campaign ads in federal elections pre-*Citizens United*. But to enjoy the MCFL exemption, the non-profit could not take in money from for-profit corporations, which were themselves banned at the time from spending in federal elections.

MCFL 501(c)(4)s that funded electioneering communications have always been subject to the same reporting requirements as any other funder.[67] In other words, these 501(c)(4)s had to disclose on FEC Form 9[68] not only that they had funded an electioneering communication costing $10,000 or more, but also the

64. 11 C.F.R. § 104.3(b)(3)(vii) (2009); 11 C.F.R. § 109.10(e).

65. Fed. Election Comm'n, *FEC Electronic Filing Report Retrieval* (2010), http://www.fec.gov/finance/disclosure/efile_search.shtml.

66. The name of this exemption comes from the 1986 Supreme Court case, *Massachusetts Citizens for Life, Inc.* (*MCFL*) which held the prohibition on corporate and union treasury spending on independent expenditures found in 2 U.S.C. § 441b could not apply to ideological non-profits that do not take corporate or union money. Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263 (1986).

67. Fed. Election Comm'n, *Electioneering Communications Brochure* (Jan. 2010), http://www.fec.gov/pages/brochures/electioneering.shtml#Application.

68. FEC Form 9 requires disclosure of donations made for the purpose of electioneering. 11 C.F.R. § 114.14(d)(2) (2010); 11 C.F.R. § 104.20(c)(7) (2010). The corresponding statute, 2 U.S.C. § 434(f)(2), was unsuccessfully challenged as unconstitutional. *Citizens United*, 130 S. Ct. at 914; Koerber v. Fed. Election Comm'n, 583 F. Supp. 2d 740, 746 (E.D.N.C. 2008). *Koerber* rejected a preliminary injunction because the

names of any donor who provided $1,000 or more for the communication.[69] As alluded to above, there is a reporting loophole.[70] According to the instructions for 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)."[71] Therefore, if a 501(c)(4) does not have any earmarked contributions which were given specifically for the electioneering contribution, then the organization does not have to report the source of its funds to the FEC even if that 501(c)(4) ends up funding millions of dollars of political ads.[72]

After *Citizens United* and *WRTL II*,[73] a 501(c)(4) need not be a QNC in order to fund an electioneering communication; now, all 501(c)(4)s, whether funded by for-profit corporations or individuals, can purchase electioneering communications in federal elections. Moreover, FECA's definition of "person" includes corporations.[74] Therefore after *Citizens United*, all non-*MCFL* entities (such as 501(c)(4)s and (c)(6)s) are subject to the same disclosure requirements that have been applied to *MCFLs* for years and can take advantage of the same reporting loopholes that *MCFLs* have used to evade full disclosure of underlying donors.

C. Federal Independent Expenditure Disclosure Requirements

Citizens United also left intact FECA's disclosure requirements for independent expenditures which were affirmed by *Buckley*. An independent expenditure is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in coopera-

court found that the plaintiffs would not ultimately succeed on a constitutional challenge to the disclosure requirements. *Koerber*, 583 F. Supp at 746 (citing *McConnell*, 540 U.S. at 198).

69. Fed. Election Comm'n, *FEC Form 9 24 Hour Notice of Disbursements / Obligations for Electioneering Communications* (Dec. 2007), http://www.fec.gov/pdf/forms/fecfrm9.pdf.

70. *See* Notice 2007–26, *Electioneering Communications, Federal Election Commission Final Rule and Transmittal of Rule to Congress*, 72 Fed. Reg. 72911 (Dec. 26, 2007), http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf ("Donations made for the purpose of furthering an EC [electioneering communication] include funds received in response to solicitations specifically requesting funds to pay for ECs as well as funds specifically designated for ECs by the donor."); however, the solicitation prong was invalidated by the DC Circuit in 2009. Emily's List v. Fed. Election Comm'n, 581 F.3d 1, 18 (D.C. Cir. 2009).

71. 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.

72. A new FEC rulemaking is in order to broaden disclosure not only for money that was earmarked, but also money that was used to pay for electioneering communications.

73. *WRTL II* allowed non-QNCs to fund electioneering communications as long as the ads were not the functional equivalent of express advocacy. *See WRTL II*, 551 U.S. 449, 481 (2007). *Citizens United* allows all corporations, whether for-profit or not-for-profit, to fund all electioneering communications. *See Citizens United*, 130 S.Ct. at 917.

74. 2 U.S.C.A. § 431(11) (2002) (a "person" includes "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government. . .").

tion, 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 or its agents."[75] As *Citizens United* explains, "[i]n *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures."[76]

The FEC requires disclosure of any person or entity funding independent expenditures of $250 or more as well as contributors who provided $200 or more for the advertisement.[77] As the FEC mandates, "[i]n the case of a person other than a political committee, [disclosure must include] the identification of each person who made a contribution in excess of $200 to the person filing such report for the purpose of furthering the reported independent expenditure."[78]

Funders, including *MCFL*s, making independent expenditures have consistently been required to adhere to these disclosure provisions by filing a FEC Form 5.[79] Like the flaws in FEC Form 9, there is a significant reporting loophole on FEC Form 5. The instructions for the form note that "[the reporting entity must] [p]rovide the requested information for each contribution over $200 that was made *for the purpose of furthering the independent expenditures*."[80] In other words, only donations over $200 that were designated or earmarked for the independent expenditures are reported to the FEC. Thus, going forward, the FEC may apply the same disclosure requirements for all independent expenditures, but they are also hampered by the Form 5 loopholes which thwart meaningful disclosure of underlying donors.[81] The current FEC rules facilitate Alice in Wonderland Cheshire Cat reports, where $1 million could be spent on a federal political ad and yet no one is listed as an underlying donor.

One way to strengthen the federal disclosure on both FEC Form 5 and FEC Form 9 is to require disclosure of all corporate funders of the reporting spender regardless of whether the corporate funds were earmarked or not. Such blanket disclosure may sweep in donors who have not given to support the ad in question.

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75. Fed. Election Comm'n, *Coordinated Communications and Independent Expenditures Brochure* 7 (2009), http://www.fec.gov/pages/brochures/ie_brochure.pdf; 11 C.F.R. §100.16(a) (2010).

76. *Citizens United*, 130 S.Ct. at 914.

77. Fed. Election Comm'n, *Coordinated Communications Brochure, supra* note 75, at 8 ("Any other person (individual, partnership, qualified non-profit corporation or group of individuals) must file a report with the FEC on FEC Form 5 at the end of the first reporting period in which independent expenditures with respect to a given election aggregate more than $250 in a calendar year. . .").

78. *Id.* at 10 (citing 11 CFR 104.3(b)(3)(vii) and 109.10(e)).

79. Fed. Election Comm'n, *FEC Form 5 Report of 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.

80. Fed. Election Comm'n , *Instructions for FEC Form 05 and Related Schedules*, 3 (Sept. 2005) (emphasis added).

81. A new FEC rulemaking is in order to broaden disclosure not only for money that was earmarked, but also money that was used to pay for independent expenditures.

The Congressional Research Service has argued:

> [D]onors who make non-earmarked contributions are supporting the entirety of the organization's activities, and it might be questioned whether the government can require the public disclosure of their identities simply because the organization happens to engage in limited amounts of campaign activity. Such an argument might be extended to the disclaimer requirements as well. On the other hand, it is arguably unclear whether this argument has constitutional merit [because] [t]he Court has generally looked favorably on disclosure and disclaimer requirements. . .[82]

So while it is an open question of law how a court would rule on such a requirement to reveal non-earmarked corporate donations, as detailed above in the case law section, the Court has been consistently supportive of robust disclosure in the campaign finance and election contexts from *Buckley v. Valeo* to *Doe v. Reed*.

D. FEC Disclaimer Requirements

In addition to the disclosure requirements that the FEC applies to the funders of electioneering communications and independent expenditures, the FEC also requires specific disclaimers on political broadcast advertisements. These disclaimer requirements are sometimes known as "stand by your ad" requirements. These disclaimer requirements for electioneering communications were just upheld by the Supreme Court eight to one in *Citizens United* as being fully constitutional.

Federal independent expenditures must include the following types of disclaimers:

> For messages that are not authorized, and are not financed by a candidate or a candidate committee, the disclaimer statement must:
> - State that the communication is not authorized by any candidate or the candidate's committee; and
> - Identify the name and street address, telephone number or World Wide Web address of the person who financed the communication.[83]

For electioneering communications, the required disclaimers are quite similar:

> *Radio*
> The disclaimer notice must include the name of the political committee or person responsible for the communication and any connected organization. Example, "ABC is responsible for the content of this advertising." 11 CFR 110.11(c)(4).
> *Television*
> The disclaimer . . .must be conveyed by a "full-screen view of a representative of the political committee or other person making the statement," or a "voice-over" by the representative.[84]
> The disclaimer statement must also appear in writing at the end of the communication in a "clearly readable manner" with a "reasonable degree of color contrast" be-

82. 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 (2010), http://www.fas.org/sgp/crs/misc/R41096.pdf.

83. Fed. Election Comm'n, *Coordinated Communications Brochure, supra* note 75, at 10; 11 C.F.R. §109.11, 110.11(a)(2) and (b)(3) (2010).

84. Fed. Election Comm'n, *Special Notices on Political Ads and Solicitations* (Oct. 2006), http://www.fec.gov/pages/brochures/notices.shtml#disclaimers; 11 C.F.R. §110.11(c)(4)(ii)(2010) (2 U.S.C. § 441d(d)(2)).

tween the background and the printed statement "for a period of at least four seconds."[85]

These federal stand-by-your-ad disclaimer requirements assist the voter in discerning who is funding a given political advertisement.

After *Citizens United*, bills were introduced in the 111th Congress to increase the disclaimer requirements for political ads that are funded by corporations and labor unions. One such bill, H.R. 4527, would have required the corporate or union logo to appear in the ad along with a picture of the CEO or labor leader.[86] Also, the DISCLOSE Act (H.R. 5175) introduced by Senator Schumer and Congressman Van Hollen included a new requirement that the top five funders also be listed in campaign ads so that for-profit corporations could not hide behind the name of another person or entity when funding political advertisements.[87] Thus far, these federal bills have not become law. However, Connecticut, a national leader in this area, changed its law to provide for top five funder disclaimers.[88] A sample of the Connecticut law can be found at Appendix A.

Part V. Does Tax Status of a Political Funder Matter for an Election Regulator?

From the democratic perspective, the determinative question when it comes to the disclosure of campaign finance should be: what types of disclosure will facilitate an educated and informed electorate? In accordance with the Supreme Court precedent described above, the correct answer for Congress is to require disclosure of the funders of partisan political advertisements no matter what the tax status of the spender.

The FEC has regulated the disclosure of all "persons", including non-profit corporations making independent expenditures for decades, nonetheless there is confusion generated by the fact that the FEC and IRS have overlapping yet non-identical jurisdiction over the same entities. Moreover, the IRS and the FEC are not in perfect harmony. Whether contributors are disclosed by the IRS to the public and whether expenditures will be taxed depends on which type of tax exempt status is adopted (for example, 501(c)s face different tax consequences than 527s).[89] Meanwhile, the FEC's dis-

85. *Id.*; 11 C.F.R. § 110.11(c)(4).

86. H.R. 4527 (111th Cong. 2d Sess. 2010).

87. H.R. 5175 (111th Cong.) (requiring the top five contributors to an organization that purchases political advertising will be listed on the screen of the advertisement.); *see also* Justin Levitt, *Confronting the Impact of* Citizens United, Loyola Law School Los Angeles Legal Studies Paper No. 2010-39, 10 (2010), http://ssrn.com/abstract=1676108 ("Consider a few simple elements designed to appear, in standardized form, within a communication itself: a sort of 'Nutrition Facts' label for democracy. Such a label would signal the importance of the information it contains, as well as providing the information itself. This, in turn, would improve the chance that voters pay attention, increasing the cognitive processing.").

88. Connecticut Public Act No. 10-187, "An Act Concerning Independent Expenditures" (2010).

89. *See* Ezra W. Reese, *The Other Agency: The Impact of Recent Federal Law Enforcement on Nonprofit Political Activity*, 58 TAX ANALYSTS 131 (2007), *available at* http://www.moresoftmoneyhardlaw.com/clientfiles/Reese%20EOTR%20Article.pdf ("Section 501(c)(4) social welfare organizations may engage in some political

closure regulations are triggered by the type of speech (*e.g.*, independent expenditures and electioneering communications) and not by the type of speaker (501(c)(4)s or 501(c)(6)s).

The IRS has a revenue-generating interest in regulating tax-exempt entities to ensure they are not abusing their tax-exempt status (or in the case of 501(c)(3)s their ability to receive tax deductible contributions). Unlike the FEC, the IRS is not interested in the integrity of elections. Each tax status is subject to particular regulations about how much (if any) political activity that entity can do without either jeopardizing its tax status or triggering an excise tax liability. From the point of view of the IRS, tax-exempt organizations fall on a spectrum with respect to political engagement. On one end of the spectrum, 501(c)(3)s are barred from political campaign activities. Meanwhile 501(c)(4)s and (6)s may engage in political campaign activities so long it is not the organization's primary purpose. Once a tax-exempt organization has political campaign activity as its primary purpose, it is a 527. One source of the different treatment among the federal agencies is the IRS uses a facts and circumstances test for non-profit political intervention while the FEC regulates sources of independent expenditures that contain express advocacy and electioneering communications as defined under federal law regardless of tax status. Although the differences in tax treatment have no bearing on the scope of disclosure an election regulator can require, much ink has been spilled over what disclosure requirements have been and can be applied to various types of tax-exempt entities. Below is a short overview of those facts.

Part VI. The IRS's Perspective on Political Activity by Tax Exempt Organizations

A. Four Types of Tax Exempt Organizations (501(c)(3)s, 501(c)(4)s, 501(c)(6)s and 527s)

1. 501(c)(3)s (Public Charities)

According to the IRS, a charitable 501(c)(3) organization may not engage in political campaign activity but may conduct limited lobbying.[90] As the IRS explains, 501(c)(3)s "may not attempt to influence legislation as a substantial part of its activities[,] . . . may not participate in any campaign activity for or against political candidates[,] [and they] are eligible to receive tax-deductible contributions. 501(c)(3) organizations are restricted in how much political and legislative (lobbying) activities they may conduct."[91] Thus, 501(c)(3)s stand on one

activity, but their primary purpose cannot include 'direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.' Labor unions and business leagues are subject to similar limitations. The interpretation and enforcement of this phrase is also dependent on 'all the facts and circumstances.'") (citing Rev. Rul. 2004-6, 2004-1 C.B. 328.).

90. 26 U.S.C. § 501(c)(3).

91. IRS, *Exemption Requirements - Section 501(c)(3) Organizations* (Dec. 7, 2009), http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html.

end of the partisan political campaign activity spectrum where such activity is barred by the IRS.

2. 501(c)(4)s (Social Welfare Organizations)

A 501(c)(4) is a social welfare organization that may engage in a certain amount of political campaign activity so long as it is not its primary activity.[92] According to the IRS:

> [A 501(c)(4)] must not be organized for profit and must be operated exclusively to promote social welfare. . . .To be operated exclusively to promote social welfare, an organization must operate primarily to further the common good and general welfare of the people of the community. . . .Seeking legislation germane to the organization's programs is a permissible means of attaining social welfare purposes. Thus, a section 501(c)(4) social welfare organization may further its exempt purposes through lobbying as its primary activity without jeopardizing its exempt status. . . . The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity. However, any expenditure it makes for political activities may be subject to tax under section 527(f).[93]

Social welfare organizations organized under IRC Section 501(c)(4) are in the middle of the political campaign activity spectrum. They can do some political activity, but if it becomes the organization's primary activity, then the organization will become a 527 and be subject to the rules and taxes that apply to a 527.

3. 501(c)(6)s (Trade Associations)

501(c)(6)s, including trade associations, can also participate in a certain amount of political campaign activity so long as it is not its primary activity.[94] According to the IRS:

> Section 501(c)(6) of the Internal Revenue Code provides for the exemption of business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues, which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. . . . Trade associations and professional associations are business leagues. To be exempt, a business league's activities must be devoted to improving business conditions of one or more lines of business as distinguished from performing particular services for individual persons. No part of a business league's net earnings may inure to the benefit of any private shareholder or individual and it may not be organized for profit to engage in an activity ordinarily carried on for profit . . .Chambers of commerce and boards of trade are organizations of the same general type as business leagues. They direct their efforts at promoting the common economic interests of all commercial enterprises in a trade or com-

92. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i).

93. IRS, *Social Welfare Organizations* (Sept. 15, 2009), http://www.irs.gov/charities/nonprofits/article/0,,id=96178,00.html; the IRS regulations provide that "the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." *See* Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) and (ii).

94. Treas. Reg. § 1.501(c)(6)-1 (1995).

> munity.[95] Participating directly or indirectly, or intervening, in political campaigns on behalf of or in opposition to any candidate for public office does not further exempt purposes under Internal Revenue Code section 501(c)(6). However, a section 501(c)(6) business league may engage in some political activities, so long as that is not its primary activity. However, any expenditures it makes for political activities may be subject to tax under section 527(f).[96]

501(c)(6)s stand in the same place as 501(c)(4)s on the political campaign activity spectrum for the IRS. Trade associations and business leagues can do some political campaign activity, but it cannot become their primary activity.

4. 527s (Political Organizations)

Finally, 527s are organizations whose primary purpose is political.[97] According to guidance from the IRS: "Political organizations are organized and operated primarily to accept contributions and make expenditures for the purpose of influencing the 'selection, nomination, election, or appointment of any individual to Federal, State, or local public office or office in a political organization, or the election of Presidential electors.'" Political organizations include . . .PACs[ ].[98] 527s stand at the opposite extreme of political campaign activity spectrum from the 501(c)(3)s. A 527 can do as much political activity as it desires, but as will be detailed more below remains subject to public disclosure of its contributors by the IRS.[99] Many 527s qualify as political action committees (PACs) under federal or state law.

B. IRS Disclosure of Political Activity by Tax Exempt Organizations

The IRS requires different types of disclosures from each of the four types of tax exempt organizations mentioned above.

1. 501(c)(3)s IRS Disclosure

Public charities organized under Section 501(c)(3) of the IRC must disclose their lobbying activities. 501(c)(3)s must file Form 990 annually, which after the redesign in 2007, requires a total lobbying expenditures on new Schedule C.[100]

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95. IRS, *Business Leagues* (Aug. 31, 2009), http://www.irs.gov/charities/nonprofits/article/0,,id=96107,00.html.

96. IRS, Political Campaign Activities - Business Leagues (Nov. 6, 2009), http://www.irs.gov/charities/nonprofits/article/0,,id=163922,00.html.

97. 26 U.S.C. § 527; Treas. Reg. § 1.527-6(f).

98. IRS, *Definition of Political Organization* (October 31, 2007), http://www.irs.gov/newsroom/article/0,,id=103480,00.html.

99. DeNicola et al., *supra* note 12, at 12 ("Heightened political activity on the part of some independent 527s has led to an increase in regulation. This greater regulation has thus made 501(c)(4) and 501(c)(6) organizations more attractive vehicles for some donors.").

100. IRS, *Instructions for Form 990 Return of Organization Exempt From Income Tax* (2009), http://www.irs.gov/pub/irs-pdf/i990.pdf; IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities For Organizations Exempt From Income Tax Under section 501(c) and section 527*, http://www.irs.gov/pub/irs-tege/f990rschc.pdf; IRS, *Instructions for Schedule C (Form 990 or 990-EZ) Political Campaign and Lobbying Activities*, http://www.irs.gov/pub/irs-pdf/i990sc.pdf.

Because 501(c)(3)s are barred from partisan political activity, they do not report political activity on Form 990.[101] They have to disclose their contributors who gave over $5,000 on Form 990 to IRS, but this information is not publicly disclosed.[102]

2. 501(c)(4)s (Social Welfare Organizations) IRS Disclosure

501(c)(4) social welfare organizations must disclose their lobbying and political campaign activities on Form 990 including a narrative description of such activity on Part IV of the form.[103] They must also detail in particular, under Part I-C of the Form 990, the names, addresses and employer identification numbers of all 527 political organizations to which payments were made and whether any funds were delivered to a Separate Segregated Fund (SSF) or Political Action Committee (PAC).[104] They have to disclose their contributors who gave over $5,000 on Form 990 to IRS, but this information is not publicly disclosed.

3. 501(c)(6)s (Trade Associations) IRS Disclosure

501(c)(6) trade associations and business leagues must disclose their lobbying and political campaign activities on Form 990 including a narrative description of such activity on Part IV of the form.[105] They must also detail in particular, under Part I-C of the Form 990, the names, addresses and employer identification numbers of all 527 political organizations to which payments were made and whether any funds were delivered to a SSF or PAC.[106] They have to disclose their contributors who gave over $5,000 on Form 990 to IRS, but this information is not publicly disclosed.

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101. IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities for Organizations Exempt from Income Tax Under Section 501(c) and Section 527*, http://www.irs.gov/pub/irs-tege/f990rschc.pdf (instructing 501(c)(3)s to not to fill in Part I-C regarding political expenditures).

102. Whitaker, et al., *supra* note 82, 6 n.41 ("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).").

103. There are no specifics about what must be included in the narrative description according to the Form 990's instructions. See IRS, *Instructions for Schedule C (Form 990 or 990-EZ) Political Campaign and Lobbying Activities*, http://www.irs.gov/pub/irs-pdf/i990sc.pdf.

104. IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities For Organizations Exempt From Income Tax Under section 501(c) and section 527*, http://www.irs.gov/pub/irs-tege/f990rschc.pdf (See instructions under Part I-C, line 5.)

105. There are no specifics about what must be included in the narrative description according to the Form 990's instructions. *See* IRS, *Instructions for Schedule C (Form 990 or 990-EZ) Political Campaign and Lobbying Activities*, http://www.irs.gov/pub/irs-pdf/i990sc.pdf.

106. IRS, *Form 990 Schedule C, Political Campaign and Lobbying Activities For Organizations Exempt From Income Tax Under section 501(c) and section 527*, http://www.irs.gov/pub/irs-tege/f990rschc.pdf (*See* instructions under Part I-C, line 5.).

4. 527s (Political Organizations) IRS Disclosure

After a change in the law in 2000, 527s are required to make very detailed public disclosure of their contributions and political expenditures on Form 8872.[107] As one treatise explains, "A political organization which accepts a contribution, or makes an expenditure, for an exempt function [] during any calendar year must submit reports to IRS, on Form 8872, providing information on the organization's contributions, contributors, expenditures and expenditure recipients. . . ."[108] Forms 8872 from 527s are searchable on the IRS's webpage.[109] While the IRS's disclosure of contributions to and expenditures from 527s is extensive, the reports often are not disclosed in time to inform a voter: "[u]nfortunately, voters are not privy to most of the financial transactions of 527s involved in [elections], as the IRS's database is neither easily searchable, nor timely (the pre-election Form 8872 is not disclosed until the January after the election)."[110] Thus, even though the IRS has robust contributor disclosure to the public for 527s, it does not serve the role of educating voters because it is not available before most federal elections.

5. 501(c)(3)s with 501(c)(4) and 527 Arms

As noted above, 501(c)(3)s cannot engage in political campaign activity. Instead, if they want to engage in political campaign activity they need to establish an affiliated 501(c)(4) to conduct the political spending.[111] This requirement of public charities' establishing an affiliated 501(c)(4) to engage in partisan politicking was upheld by the Supreme Court in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983).[112]

In some cases, 501(c)(3)s have established an affiliated 501(c)(4), which in turn creates a 527 to allow them to engage in a greater amount of political activity.[113] "Often 501(c)(4) organizations are affiliated with 501(c)(3) corporations, an arrangement that allows the charita-

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107. IRS, *Instructions for Form 8872 Political Organization Report of Contributions and Expenditures* (Jan. 2007), http://www.irs.gov/pub/irs-pdf/i8872.pdf; Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After* Citizens United, *supra* note 18, at 66 (complaining "[w]ithin three months of their introduction, amendments to section 527 adding notification and disclosure requirements became law, without formal legislative history.").

108. *Political Organizations*, 34 Am. Jur. 2d Federal Taxation ¶ 20658 (Jan. 2010) (internal citations omitted).

109. IRS, Political Organization Filing and Disclosure (2010), http://www.irs.gov/charities/political/article/0,,id=109644,00.html (follow the link entitled Search Political Organization Disclosures).

110. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 319-20 (2005).

111. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1981).

112. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After* Citizens United, *supra* note 18, at 97 (noting "[c]lose examination of *Citizens United* reassures that it did not undermine the holding or reasoning of [*Reagan v. Taxation with Representation*].").

113. Schadler, *supra* note 23, at 28 ("In *Reagan v. Taxation with Representation*, the Supreme Court ruled that a 501(c)(3) organization may establish a separate 501(c)(4) to expand its capacity to lobby. . .").

ble organizations an outlet for their political activities, and the 501(c)(4) can create a . . .527. . . .[I]ngenious tax lawyers [can] construct complicated arrangements . . .to accomplish political objectives while erecting a virtually impenetrable curtain over the identity of those funding the organizations."[114] These 3-part structures are manageable only by the most sophisticated of nonprofits, however, the 501(c)(3)'s tax deductible money cannot be used by the affiliated 501(c)(4) or 527 for political campaign activity.[115] The three types of affiliated entities can share space and common solicitations.[116]

C. IRS Taxation and Political Activity by Tax Exempt Organizations

1. Tax Implications for 501(c)(3)s Political Activity

501(c)(3)s can lose their tax exempt status if they engage in political campaign activities or could be subject to penalties.[117] As this article explains: "Violation of this prohibition can result in a penalty against the organization and against the organization managers who agree to the political activity; the IRS also has the authority, in the case of 'flagrant' political campaign activity, to seek an injunction in federal court to prevent future political expenditures. Violation can also result in the revocation of exemption."[118] The threat of loss of status is not a theoretical one. Churches that have engaged in political spending have had their tax-exempt status revoked.[119] Thus far, the Supreme Court has supported the strict limits on 501(c)(3)s' political engagement.[120] Whether this restriction on political engagement by 501(c)(3)s will survive the reasoning of *Citizens United* is an open question.

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114. Garrett & Smith, *supra* note 110, at 310 (internal citations omitted).

115. Schadler, *supra* note 23, at 7 (For example, "a 501(c)(3) may not do anything indirectly through participating in a coalition that it may not do individually."); *id.* at 28 ("the 501(c)(3) must be able to demonstrate that it is not subsidizing, directly or indirectly, the political work of its affiliated 501(c)(4) or the 501(c)(4)'s affiliated political organization.").

116. *Id.* at 30 ("A 501(c)(3) and 501(c)(4) may share employees, equipment and office space.").

117. Donald B. Tobin, *Political Advocacy and Taxable Entities: Are they the Next 'Loophole?'*, 6 FIRST AMENDMENT L. REV., 41, 51 (Fall 2007) ("In order to ensure that tax-exempt status is not used as a means of subsidizing political campaign activity, the tax code prohibits 501(c)(3) organizations from participating or intervening in 'any political campaign on behalf of (or in opposition to) any candidate for public office.' There is no de minimus exception to this rule, and even a small amount of campaign activity is prohibited.").

118. Reese, *supra* note 89, at 131 (internal citations omitted).

119. *See* Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000) (upholding revocation of church's tax exempt status for its purchase of two full page political ads in a news paper.).

120. Reagan v. Taxation with Representation of Washington, 461 U.S. 540, 548 (1983) (holding "Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment activities."); *see also* Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(C)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1315 (Apr. 2007) ("In order to deal with the increase in alleged violations of the political campaign ban during the 2004 elections, the IRS instituted a compliance initiative. As part of the compliance initiative, the IRS examined 110 501(c)(3) organizations that were alleged

2. Tax Implications for 501(c)(4)s Political Activity

In contrast to 501(c)(3)s, which are barred from political interventions, 501(c)(4)s can engage in a measure of political activities.[121] However, a 501(c)(4) that uses a substantial part of its resources on political campaign activities may lose its tax-exempt status.[122] A "501(c)(4)['s]. . .primary purpose cannot include 'direct or indirect participation or intervention in political campaigns[']. . .If engaging in political intervention were to constitute a primary activity of a section 501(c)(4) organization, the IRS could revoke its tax-exempt status (either prospectively or retroactively), which could result in significant monetary consequences."[123]

According to the Alliance for Justice (which counsels non-profits on complying with IRS regulations), "[n]o clear test exists for determining when political activity becomes an organization's primary purpose. If political activity expenditures exceed 50 percent of total program expenditures, the primary purpose most likely is *not* social welfare."[124] However, 501(c)(4)s' political activity may trigger tax consequences. As one article explains, "political intervention expenditures are subject to a tax at the highest corporate rate (currently 35 percent) on the lesser of (i) the net investment income of the organization for the taxable year in which those expenditures are made, or (ii) the aggregate amount of expenditures made by the organization for political intervention during the taxable year."[125] Furthermore, individual (not corporate) donors to 501(c)(4)s who give large donations may trigger gift taxes.[126]

Non-profits organized as 501(c)(4)s that engage in too much political activity will likely be deemed 527s by the IRS. As another article states, "an organization that fails to be a 501(c)(4) because it primarily engages in political activity will be treated as a 527, and that 527 is not an elective provision. . . .The organization that guesses wrong stands not only to

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to have violated the campaign ban. Of the 82 cases closed by the IRS at the time the report was issued, 59 (72%) were found to be in violation of the campaign prohibition.").

121. Revenue Ruling 81-95 states affirmatively, "an organization may carry on lawful political activities and remain exempt under § 501(c)(4) as long as it is primarily engaged in activities that promote social welfare."

122. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i), (ii) (1959).

123. Reese, *supra* note 89, at 131 (internal citations omitted).

124. Schadler, *supra* note 23, at 11.

125. Reese, *supra* note 89, at 132 (internal citations omitted).

126. William P. Barrett, "Hey, Secret Big Political Donor, Don't Forget The 35% Gift Tax," FORBES, Oct. 14 2010, http://blogs.forbes.com/williampbarrett/2010/10/14/hey-secret-big-political-donor-dont-forget-the-35-gift-tax/; I.R.C. § 2501 gift tax is imposed on the gratuitous transfer of cash and property by individuals; it does not apply to transfers made by corporations. *See* Alliance for Justice, "Contributions to Nonprofits and the Gift Tax", (Jun. 2009), http://www.afj.org/assets/resources/nap/gift-tax-fact-sheet.pdf, *but see* Ellen P. Aprill, "Section 501(c)(4) Organizations, the Gift Tax, and Election Law Disclosure," Loyola Law School Los Angeles Legal Studies Paper No. 2010-50 (Nov. 2010) (addressing the ambiguity of whether the gift tax applies to donations to 501(c)(4)s); Ben Smith IRS Gift Tax Move Could Hit New Anonymous Groups, POLITICO, May 11, 2011 (noting that the IRS has begun to enforce the gift tax on 501(c)(4) donors).

lose its 501(c)(4) status but also to face severe penalties for failure to comply with the registration and disclosure requirements of § 527."[127] Therefore, any 501(c)(4) that inadvertently turns into a 527 by engaging in political campaign activity as its primary activity is subject to the more rigorous public IRS disclosure applicable to a 527.

Taxpayers do not have a private right of action to sue 501(c)s that may be abusing their status, but taxpayers who suspect that a non-profit may be abusing its exempt status can raise their concerns with the IRS. As Professor Aprill explains, "[t]axpayers do not have the option of supplementing IRS enforcement efforts by suing organizations to challenge their exempt status. They lack standing to do so. *See In re United States Catholic Conference*, 885 F.2d 1020 (1989), *cert. denied* 495 U.S. 918 (1990). Taxpayers can, however, file a complaint with the IRS if they believe that the activities or operations of a tax-exempt organization are inconsistent with its tax-exempt status."[128] Such taxpayer complaints have already been filed against a 501(c)(4) operating in the 2010 election.[129]

3. Tax Implications for 501(c)(6)s Political Activity

Federal law pre-*Citizens United* required 501(c)(6) trade associations to pay for express advocacy through a PAC. As a PLI practice guide from 2007 indicates, "Generally, political involvement of trade associations is limited to the solicitation of voluntary contributions to a separate segregated fund or PAC that is established and administered by a trade association. As a consequence, transfers of [trade association] dues receipts to a PAC are severely restricted."[130] This funding restriction on independent expenditures by trade associations is likely unconstitutional after *Citizens United*. 501(c)(6)s cannot, however, have political campaign activities as their primary activity. Once they do, they risk losing their tax status and just like a political 501(c)(4), a political 501(c)(6) may be deemed to a 527.[131]

4. Tax Implications for 527s Political Activity

Under the tax code, 527s must either disclose their contributors and expenditures or be subject to a 35% tax.[132]

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127. Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 107-08 (2004) (internal citations omitted) (referencing IRS Field Service Advice 2000-37-040).

128. Aprill, "Background on Nonprofit, Tax-Exempt Section 501(c)(4) Organizations," *supra* note 17, at 4.

129. Dan Eggen, *Campaign Watchdogs Accuse Top Conservative Group of Violating Tax Laws*, WASH. POST, Oct. 5, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/05/AR2010100501790.html (noting Campaign Legal Center and Democracy 21 have filed a complaint with the IRS against American Crossroads and Crossroads GPS).

130. Kenneth A. Gross, Ki P. Hong & Lawrence M. Noble, *Political Activity by Trade Associations*, 1624 PLI Corporate Law and Practice Course Handbook Series 325, 333 (Oct. 2007) (internal citations omitted).

131. Rev. Rul. 67-368; 1967-2 C.B. 194 (ruling that an organization whose primary activity was rating candidates using non-partisan criteria did not qualify for § 501(c)(4) status); Gen. Couns. Mem. 34233 (Dec. 30, 1969) (applying similar reasoning to § 501(c)(6) organizations).

132. 26 U.S.C. § 527(i)(1); 26 U.S.C.§ 527(j)(3); § 527(j)(1).

> Under section 527(i), an organization must give formal notice to the Secretary of the Treasury in order to receive tax-exempt treatment for campaign-related income. 26 U.S.C. § 527(i)(1). Under section 527(j), such an organization must disclose the name, address and occupation of each contributor who gives more than $200 in the aggregate, as well as the name and address of each recipient of more than $500 in aggregate expenditures. 26 U.S.C. § 527(j)(3). If an organization that gives notice under section 527(i) fails to make the required disclosures, it must pay the highest corporate tax rate on "the amount to which the failure relates." 26 U.S.C. § 527(j)(1).[133]

A few groups have chosen to pay the tax rather than disclose.[134] Those 527s who do disclose do so using Form 8872.[135] 527s are not subject to the gift tax.[136]

The IRS treatment of tax exempt organizations as a whole creates a structure where public charities, which are entitled raise funds through tax-deductible contributions, may not engage in any political campaign activities. Trade associations can engage in some politics provided it is not their primary purpose, but there is strong tax incentive to avoid this activity (since this activity may be taxed and the portion of dues attributable to this activity is not deductible as a business expense by members).[137] Instead, they, like 501(c)(4) social welfare organizations, are incentivized to create SSFs or PACs for their political spending which are completely transparent.[138]

Part VII. Evidence of the Non-Profit Disclosure Loophole Problem

Even before *Citizens United*, political spending by tax exempt entities was sizable in the 2008 and 2004 federal election cycles. According to the Campaign Finance Institute, 501(c)s and 527s spent more than $400 million in the 2008 federal elections, slightly down from $426 million in 2004.[139] Of those, $60 million was from 501(c)s in 2004 and $196 million was from 501(c)s in 2008. While the totals are not in yet for the 2010 midterm, press reports on spending in

133. Mobile Republican Assembly v. U.S., 353 F.3d 1357, 1360 (11th Cir. 2003) (upholding disclosure to IRS under IRC Sec. 527).

134. Garrett & Smith, *supra* note 110, at 319 ("The Center for Responsive Politics has determined that a few dozen 527s have used this provision to avoid disclosure. . .").

135. IRS, *Instructions for Form 8872* (Jan. 2007), http://www.irs.gov/pub/irs-pdf/i8872.pdf.

136. IRC § 2501(a)(5) exempts contributions to 527s from the gift tax.

137. *See* IRC § 162(e) (disallowing deductions for political spending as an exception to the IRC 162(a) which allows deductions for certain ordinary and necessary business expenses). IRC § 162(e) applies to 501(c)(6) dues. *See also* American Soc'y of Ass'n Executives v. U.S., 195 F.3d 47 (D.C. Cir. 1999), *cert. denied* 529 U.S. 1108 (2000).

138. Aprill, *Section 501(c)(4) Organizations, the Gift Tax, and Election Law Disclosure*, *supra* note 126, at 50 ("to the extent an organization exempt under section 501(c) does engage in politicking using monies from its general funds, the organization is subject to tax under section 527(f) on the lesser of their net investment income or the amount spent on politicking. They can avoid this section 527(f) tax, however, if they maintain a separate segregated fund for all funds to be used for politicking."); 26 U.S.C. § 572(f); Treas. Reg. § 1.527-6(f).

139. Press Release, Campaign Finance Institute, *Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election* (Feb 25, 2009), http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=221.

midterm already indicate that these records are likely to be shattered.[140]

Recent history warns that when regulators fail to craft tightly-worded disclosure requirements that capture all political funders, some 501(c)(4)s and 501(c)(6)s exploit these loopholes to fund political speech anonymously. This occurred with federal sham issue ads before BCRA;[141] it has also occurred in state after state where loose disclosure rules have failed to capture political funding by non-PACs such as 501(c)(4)s and 501(c)(6)s. By contrast, *see* Appendix A for sample language from Connecticut which requires detailed reporting from entities funding independent expenditures.

A. Daisy Chains and Russian Dolls

Modern, post-Watergate campaign finance law was premised on political spending through transparent political action committees since federal political spending through corporations was largely illegal in the 1970s under the Taft Hartley, the Tillman Act and FECA.[142] Not surprisingly, modern campaign finance disclosure rules have not kept up with the shell game of moving money around before it is spent on a political ad to avoid public accountability.

The practice of giving through many entities to hide the true funder of a political spending is a long standing campaign finance problem which has been made worse by *Citizens United*. Before *Citizens United*, both corporations and trade association had to give through transparent PACs in federal elections or go through the ruse of sham issue ads. Now they can fund express advocacy without the discipline or disclosure of a PAC.[143]

Professors Elizabeth Garrett and Daniel A. Smith detail this problem of veiled political actors, noting that "[c]omplicated arrangements consisting of nonprofit corporations, unregulated entities, and unincorporated groups can lead to structures resembling Russian matryoshka dolls, where each layer is removed only to find another layer obscuring the real source of money."[144] One way to address this "daisy chain" or "Russian doll" problem where the reporting organization is not the original funder is to adopt a disclaimer that requires not only the name of the reporting organization but also the names of the top funders within the ad itself. This approach has been advocated by Congressional leaders

140. Jim Kuhnhenn, *GOP Groups Plan $50 Million Advertising Drive*, MSNBC, Oct. 13, 2010 (reporting 501(c)(4)s American Crossroads and Crossroads Grassroots Policy Strategies have raised $56 million and the 501(c)(6) Chamber of Commerce has spent $20 million).

141. HOLMAN & MCLOUGHLIN, *supra* note 35, at 10-11.

142. *See* United States v. U.S. Brewers Ass'n, 239 F. 163 (W.D. Pa. 1916) (upholding the Tillman Act and finding "[t]hese artificial creatures [*e.g.*, corporations] are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed."); Pub. L. No. 80-101, 61 Stat. 159 (1947); 2 U.S.C. § 441b.

143. *See* Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, 7 (Brennan Center 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550990.

144. Garrett & Smith, *supra* note 110, at 296.

Senator Schumer and Congressman Van Hollen as a desirable change in federal law in the wake *Citizens United*.[145] When it comes to disclaimers, the states beat the federal government to the punch. For example, in the wake of *Citizens United*, Connecticut adopted this "top-funders" disclaimer approach to capture those funders that try to hide behind a benign sounding organization.[146]

Another problem is the use of misleading names which may make a voter think that the funder is someone else entirely. Courts— including the Supreme Court— generally agree that voters need to know who is funding matters on the ballot. Professors Garrett and Smith explain the courts' hostility to stealth political spending through misleading fronts: "In *McConnell*, the [Supreme] Court was particularly concerned that interest groups had run advertisements to influence candidate elections and yet had hidden their sponsorship behind 'dubious and misleading names.'"[147] As noted earlier, the Supreme Court's hostility to secretive political spending has been echoed again in more recent cases such as *Citizens United* and *Doe v. Reed*.

The abuse of front groups could be curbed if simple disclaimer rules required disclosure of big funders. As the Brennan Center noted in Congressional testimony, front groups can be incredibly misleading to the voting public: "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. When the disclosure reports for these groups were filed, it was revealed that 'Littleton Neighbors' was exclusively funded by Wal-Mart, and not a grass roots organization."[148] But without disclaimers which include the names of top-funders, the public is easily misled by ads produced by a benign sounding name. And this problem of hidden donors may be masking donations from for-profit companies in general and publicly traded corporations in particular. Remember pre-*Citizens United* and pre-*Wisconsin Right to Life II*, in order for a 501(c)(4) to take advantage of the *MCFL* exemption, they had to assert to the FEC that they

145. H.R. 5175, *supra* note 87; *see also* President Barack Obama, "Weekly Address: No Corporate Takeover of Our Democracy" (Aug. 21, 2010), http://www.whitehouse.gov/blog/2010/08/21/weekly-address-no-corporate-takeover-our-democracy (supporting passage of bill requiring more disclosure of political funders).

146. *See* An Act Concerning Independent Expenditures, Conn. Public Act No. 10-187, § 10 (2010) ("In the case of an entity making or incurring such an independent expenditure [in Connecticut], which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such communication shall also bear upon its face the words 'Top Five Contributors' followed by a list of the five persons or entities making the largest contributions to such organization during the twelve-month period before the date of such communication.").

147. Garrett & Smith, *supra* note 110, at 300 (internal citations omitted).

148. "Testimony of the Brennan Center at NYU School of Law before the Committee on House Administration, U.S. House of Representatives" 9 (May 11, 2010), available at http://www.brennancenter.org/page/-/Democracy/CFR/BCtestimonyDISCLOSEact.pdf?nocdn=1; Def.'s Response Br. to Pls.' Mot. for Summary Judgment, Sampson v. Coffman, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

were not acting as a conduit for for-profit corporations.[149] That *MCFL* requirement is gone for issue ads under *WRTL II* and gone for all express advocacy ads under *Citizens United*.

B. Evidence of the Social Welfare Organization Obfuscation Problem

As alluded to earlier, Section 527 of the IRC was amended in 2000 to require more disclosure of contributions and expenditures from 527s, but this robust public disclosure was not extended to 501(c)s by Congress. As Professor Donald B. Tobin explains, "Congress chose not to require other 501(c) organizations . . . to disclose their contributors. . . .It appears that there was not support in Congress for extending the disclosure provisions to other 501(c) organizations, so the disclosure provisions only apply to section 527 political organizations."[150] *Citizens United* makes clear that strong public disclosure can be applied to tax-exempt entities organized under Section 501(c). But the law needs to be adjusted to capture the underlying funding streams as well.

501(c)(4)s can be used to hide other political spenders. In 2008, the NRA and the Defenders of Wildlife, both 501(c)(4)s, spent $17 million and $3 million respectively on independent expenditures advocating for the election or defeat of federal candidates.[151] Also as the Brennan Center noted in Congressional testimony,

> Similarly, the Committee for Truth in Politics, a 501(c)(4) ironically dedicated to "honesty in government," aired deceptive television advertisements attacking financial reform and Senators Max Baucus and Jon Tester just this year. The Committee for Truth in Politics has refused to make the minimal disclosures required by current law. But even if it had complied with existing law, it still would not have to identify the source of its funds.[152]

501(c)(4)s played a significant role in the 2010 general election as well.[153]

C. Evidence of the Secretive Trade Association Problem

Trade associations, especially post-*Citizens United*, hold the potential for a total end-run around disclosure of corporate campaign financing at the federal level. As one law review article put it, "The most problematic part of trade organizations participating in elections is that their contributors, actions, and spending are secretive. [Loopholes] allow[] contributors to hide their influence on elections. . . This covert nature of trade organizations makes it hard for voters to determine who is behind an ad, while si-

149. *MCFL*, 479 U.S.at 249.

150. Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, n. 71 (Winter 2003) (internal citations omitted).

151. Center for Responsive Politics, *Independent Expenditures: 2008 Committees* (undated), http://www.opensecrets.org/indexp/summ.php?cycle=2008&type=M.

152. Brennan Center Testimony, *supra* note 148.

153. Barrett, *supra* note 126 (referencing 501(c)(4) Crossroads Grassroots Policy Strategies); *see also* Congress Watch, *supra* note 5.

multaneously increasing the fundraising power of the trade organization."[154]

Trade associations organized under section 501(c)(6) of Internal Revenue Code are currently not required to divulge the identity of those funding their political activities; similarly, most corporations do not reveal how much they have given to trade associations.[155] The use of trade associations and other non-profits may be particularly problematic when we consider that much of that money is traceable to shareholder investments.[156] As Professor John Coates noted in Congressional testimony, publicly traded corporations' use of trade association raises corporate governance issues:

> Here, the role of nominally general purpose donations to advocacy groups is even more troubling, since for-profit corporations have sought to avoid being linked to direct election activity by turning over large sums with no formal strings attached to these groups. As a result, these groups have been free to diverge even farther from shareholder goals than corporate managers have been able to do directly. In effect, the role of general purpose donations to such advocacy groups has been to double down on the agency problems troubling America's corporate governance system: first, managers diverge from shareholders' interests, and then the chieftains of the advocacy groups diverge even further, all without any information being provided to shareholders, on whose behalf all of this activity is supposedly undertaken.[157]

As the nonpartisan Center for Political Accountability has documented, the damage to shareholder value by secretive political spending through trade associations presents a real danger: "[It] allows companies to give political money and then claim they didn't know that it ended up supporting organizations and candidates with which they may not want to be publicly associated. It also prevents investors and directors from . . .being able to evaluate the risks . . .for shareholder value."[158] Consequently, the lack of transparency that is applied to non-profits can compound the already daunting corporate governance problems which are presented by *Citizens United*.[159] Furthermore the lack of transparency raises the specter that foreign-owned corporations may secretly funnel their dollars, or yen

154. Shayla Kasel, *Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions*, 33 J. CORP. L. 297, 314-15 (Fall 2007) (internal citations omitted).

155. Freed & Carroll, *supra* note 11, at 1.

156. *See also* Jeffrey Birnbaum, *The End of Legal Bribery*, WASHINGTON MONTHLY, June 2006 (noting risks of criminal prosecution for certain corporate political bribery) ("Ken Gross, head of the political law practice at Skadden, Arps, Slate, Meagher & Flom, has been swamped this year with requests for information and analysis from big corporations and trade associations eager to know how to stay out of trouble in post-Abramoff Washington. Gross is warning his big business clients to be extra careful about how they handle their millions of dollars in contributions to candidates for federal office. Tying those gifts even subtly to a request to take a specific action, he warns, could put both the giver and the receiver into legal jeopardy.").

157. John Coates, "Statement before the U.S. House of Representatives' Committee on House Administration," 5 (May 11, 2010), http://cha.house.gov/UserFiles/306_testimony.pdf.

158. Freed & Carroll, *supra* note 11, at 7.

159. For a more in depth discussion of the corporate governance issues raised by *Citizens United*, *see* Torres-Spelliscy, *Corporate Campaign Spending*, *supra* note 143.

or francs into the American political system.[160]

One article notes that the most famous 501(c)(6), the U.S. Chamber of Commerce,[161] has been allowed to keep its contributing corporations secret: "[T]he public will never know who is funding the Chamber's attack ads . . . because the Chamber is a registered 501(c)(6) trade organization, and therefore is not required to itemize its political activities."[162] Even as the Chamber conceals the identity of its donor corporations, the Chamber itself has also hidden behind other organizations to conceal its role in politics. A recent example of the Chamber getting caught hiding behind a benign-sounding name was revealed in the case, *Voters Education Committee v. Washington State Public Disclosure Commission*.[163] The Chamber had given $1.5 million dollars to a group called the "Voters Education Committee" (VEC), which in turn spent the money on political television advertisements without registering as a political committee or disclosing information about its contributions and expenditures.[164] Concluding that VEC should have been registered as a PAC under Washington law, the Washington Supreme Court explained that "these disclosure requirements do not restrict political speech – they merely ensure that the public receives accurate information about who is doing the speaking."[165]

Other examples of the trade association problem have also come to light. For instance, in a 2000 Michigan senate race, Microsoft used the U.S. Chamber of Commerce to fund $250,000 in attack ads against a candidate. Microsoft's involvement in the election would have remained secret but for the efforts of the press.[166] More recently, Americans for Job Security, a 501(c)(6), has reportedly spent over $1 million on advertisements attacking a candidate in the 2010 Arkansas Democratic Congressional primary.[167]

160. Kim Geiger, *Liberal Groups Say Foreign Funds Aid Republicans*, L.A. TIMES, Oct. 7, 2010 (noting accusations that the U.S. Chamber of Commerce of using foreign money to help fund GOP candidates in the 2010 election).

161. One of the reasons why policy maker should be mindful of how much political money is flowing through a group like the U.S. Chamber of Commerce is that the Chamber's spending may dwarf that of political parties and yet can be cloaked under current reporting requirements. *See* Marc Ambinder, *The Corporations Already Outspend the Parties*, THE ATLANTIC, Feb. 1, 2010, http://www.theatlantic.com/politics/archive/2010/02/the-corporations-already-outspend-the-parties/35113/.

162. Kasel, *supra* note 154, at 298.

163. 161 Wash.2d 470 (2007).

164. *Id.* at 474.

165. *Id.* at 497.

166. John R. Wilke, *Microsoft Is Source of 'Soft Money' Funds Behind Ads in Michigan's Senate Race*, WALL ST. JOURNAL, Oct. 16, 2000.

167. Greg Sargent, *Shadowy Outside Group Spending $1.5 million to Influence Arkansas Dem Primary*, WASH. POST BLOG, May 6, 2010, http://voices.washingtonpost.com/plum-line/2010/05/shadowy_outside_group_spending.html; Robb Mandelbaum, *With a Provocative Ad, Another Business Group Backs Lincoln in Arkansas*, N. Y. TIMES BLOG, May 7, 2010, http://boss.blogs.nytimes.com/2010/05/07/with-a-provocative-ad-another-business-group-backs-lincoln-inarkansas/?src=busln.

D. Evidence of Secretive Spending from the 2010 Midterm General Elections

In the lead up to the 2010 Congressional general election, articles in the press were replete with stories of how much of the independent spending in the federal election was not disclosed to the public.[168] Much of this undisclosed spending was done through 501(c)(4)s and 501(c)(6)s. And an initial study by government watchdog, Public Citizen, found an increase in undisclosed donors in the 2010 midterm election compared with previous elections.[169] These findings of hidden political spending were also noted by the nonpartisan group, the Center for Political Integrity, as well.[170]

This led Senator Max Baucus of Montana, Chairman of the Senate Finance Committee, to request an investigation by the Internal Revenue Service into whether certain tax exempt non-profits are misusing their tax status. As Senator Baucus wrote, "Is the tax code being used to eliminate transparency in the funding of our elections – elections that are the constitutional bedrock of our democracy? They also raise concerns about whether the tax benefits of nonprofits are being used to advance private interests."[171] But the Dark Election in 2010 was not inevitable. It could have been prevented by changing federal law.[172] American law makers need to come together to amend our laws before 2012's presidential election.

Part VIII. Policy Solutions: Make all 501(c)s Funding Political Ads Report to the FEC

The sensible thing for Congress to do is craft campaign finance rules that require disclosure of campaign activity no matter what tax status is adopted by the spender. No matter what the tax consequence, there is a compelling governmental interest in providing real transparency for the sources of money in politics. If 501(c)s are going to refuse to spend through separate and transparent PACs, then they may open themselves to a more probing inquiry of where the money came from. Right now we do not know whether multi-million dollar 501(c)s who are buying political ads in the 2010 election are funded by a single

168. *See* for example, Farnam & Eggen, *supra* note 2; McIntire, *supra* note 1; Crowley, *supra* note 1; Jensen & Salant, *supra* note 1.

169. Taylor Lincoln & Craig Holman, *Fading Disclosure Increasing Number of Electioneering Groups Keep Donors' Identities Secret* (Public Citizen Sept. 15, 2010), http://www.citizen.org/documents/Disclosure-report-final.pdf (reporting only one third of the independent spending in the 2010 election named underlying donors).

170. Stone, *supra* note 6.

171. Letter from Sen. Max Baucus to Internal Revenue Service (Sept. 28, 2010), available at http://www.politico.com/static/PPM176_100929_irs.html.

172. Interestingly, corporate managers at for-profit corporations may be less hostile to certain non-profit disclosure than predicted. *See* Zogby International, *Committee for Economic Development: October Business Leader Study* (Oct. 2010), http://files.e2ma.net/1351457/assets/docs/zogbypoll2010.pdf (finding in a poll of 301 business opinion leaders 88% supported the following statement "politically active organizations to which a company contributes should disclose to the company their direct and indirect political expenditures.").

billionaire, a clutch of publicly traded companies or thousands of small donors.

As the *Harvard Law Review* argued a decade ago in 2001, disclosure should be the norm in politics no matter what the tax structure of the spenders:

> Contribution and expenditure disclosure requirements should be imposed on all political organizations for two reasons. First, disclosure requirements reduce the appearance of corruption by informing voters of the possibility that candidates have made deals with generous supporters. The disclosure reports expose contributors to whom candidates are beholden for campaign funding and thereby make quid pro quo arrangements less likely. A second and related rationale is that disclosure aids voters in predicting candidates' behavior when in office. Information regarding which individuals and organizations support a particular candidate, and from whom the candidate has accepted support, provides valuable data points concerning the candidate's issue positions, including positions that the candidate may not have made public.[173]

So in sum, we need either new FEC regulations or revisions to FECA. I suggest that the FEC require the same types of disclosure for independent expenditures from all entities that they have required from *MCFL* 501(c)(4)s for decades. But that even these requirements can be strengthened by requiring disclosure of underlying donors, even if they do not earmark their funds for specific independent expenditures and electioneering communications, and by adding top five donor disclaimers to the face of political ads.

Conclusion

Following the plain language of FECA and BCRA, the FEC has long required minimal disclosure of any entity that funds political ads in federal elections. *Citizens United* makes clear that this disclosure, as well as BCRA's disclaimers, applies to any entity spending $10,000 on a federal electioneering communication, including 501(c)(4)s. Despite the internal complexity of U.S. tax laws and the varied tax treatment of different non-profits, Congress should use *Citizens United* as clear permission to apply strong disclosure requirements to any player on the political stage that spends a high amount of money to reveal its underlying donors. The tax consequence of political spending is a matter for the Treasury Department to resolve. But for Congress, the integrity of their elections and empowering voters through the availability of basic information are of primary importance. The voter's right to make an informed vote must take precedence over a non-profit's claims to secrecy in political spending.[174]

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173. *Recent Legislation, Campaign Finance Reform-Issue Advocacy Organizations-Congress Mandates Contribution and Expenditure Requirements for Section 527 Organizations*, 114 HARV. L. REV. 2209, 2213-15 (2001) (arguing that disclosure provisions should apply to all 501(c) organizations) (internal citations omitted).

174. For a discussion of how states should deal with parallel issues of disclosure in states elections, *see* Ciara Torres-Spelliscy, *Transparent Elections After* Citizens United (Brennan Center 2011).

Appendix A

Selections from Connecticut Public Act No. 10-187

"An Act Concerning Independent Expenditures" (2010).

Section 6

(e) (1) Any individual, entity or committee acting alone may make unlimited independent expenditures. Except as provided in subdivision (2) of this subsection, any such individual, entity or committee that makes or obligates to make an independent expenditure or expenditures in excess of one thousand dollars, in the aggregate, shall file statements according to the same schedule and in the same manner as is required of a campaign treasurer of a candidate committee under section 9-608.

(2) Any individual, entity or committee that makes or obligates to make an independent expenditure or expenditures to promote the success or defeat of a candidate for the office of Governor, Lieutenant Governor, Secretary of the State, State Treasurer, State Comptroller, Attorney General, state senator or state representative, which exceeds one thousand dollars, in the aggregate, during a primary campaign or a general election campaign, as defined in section 9-700, on or after January 1, 2008, shall file a report of such independent expenditure to the State Elections Enforcement Commission. The report shall be in the same form as statements filed under section 9-608, except that such report shall be filed electronically. If the individual, entity or committee makes or obligates to make such independent expenditure or expenditures more than ninety days before the day of a primary or election, the individual, entity or committee shall file such report not later than forty-eight hours after such payment or obligation. If the individual, entity or committee makes or obligates to make such independent expenditure or expenditures ninety days or less before the day of a primary or election, the person shall file such report not later than twenty-four hours after such payment or obligation. The report shall be filed under penalty of false statement.

(3) The independent expenditure report shall (A) identify the candidate for whom the independent expenditure or expenditures is intended to promote the success or defeat, (B) affirm under penalty of false statement that the expenditure is an independent expenditure, and (C) provide any information that the State Elections Enforcement Commission requires to facilitate compliance with the provisions of this chapter or chapter 157.

(4) Any person may file a complaint with the commission upon the belief that (A) any such independent expenditure report or statement is false, or (B) any individual, entity or committee that is required to file an independent expenditure report under this subsection has failed to do so. The commission shall make a prompt determination on such a complaint.

(5) (A) If an individual, entity or committee fails to file a report required under subdivision (2) of this subsection for an independent expenditure or expenditures made or obligated to be made more than ninety days before the day of a primary or

election, the person shall be subject to a civil penalty, imposed by the State Elections Enforcement Commission, of not more than five thousand dollars. If an individual, entity or committee fails to file a report required under subdivision (2) of this subsection for an independent expenditure or expenditures made or obligated to be made ninety days or less before the day of a primary or election, such individual, entity or committee shall be subject to a civil penalty, imposed by the State Elections Enforcement Commission, of not more than ten thousand dollars. (B) If any such failure is knowing and wilful, the person responsible for the failure shall also be fined not more than five thousand dollars or imprisoned not more than five years, or both.

Section 10

(h) (1) No entity shall make or incur an independent expenditure for any written, typed or other printed communication, or any web-based, written communication, that promotes the success or defeat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless such communication bears upon its face the words "Paid for by" and the name of the entity, the name of its chief executive officer or equivalent, and its principal business address and the words "This message was made independent of any candidate or political party.". In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such communication shall also bear upon its face the words "Top Five Contributors" followed by a list of the five persons or entities making the largest contributions to such organization during the twelve-month period before the date of such communication.

(2) In addition to the requirements of subdivision (1) of this subsection, no entity shall make or incur an independent expenditure for television advertising or Internet video advertising, that promotes the success or de-feat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless at the end of such advertising there appears simultaneously, for a period of not less than four seconds, (A) a clearly identifiable video, photographic or similar image of the entity's chief executive officer or equivalent, and (B) a personal audio message, in the following form: "I am 'w. (name of entity's chief executive officer or equivalent), 'w. (title) of 'w. (entity). This message was made independent of any candidate or political party, and I approved its content.". In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt po-

litical organization organized under Section 527 of said code, such advertising shall also include a written message in the following form: "The top five contributors to the organization responsible for this advertisement are" followed by a list of the five per-sons or entities making the largest contributions during the twelve-month period before the date of such advertisement.

(3) In addition to the requirements of subdivision (1) of this subsection, no entity shall make or incur an independent expenditure for radio advertising or Internet audio advertising, that promotes the election or defeat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless the advertising ends with a personal audio statement by the entity's chief executive officer or equivalent (A) identifying the entity paying for the expenditure, and (B) indicating that the message was made independent of any candidate or political party, using the following form: "I am 'w. (name of entity's chief executive officer or equivalent), 'w. (title), of 'w. (entity). This message was made independent of any candidate or political party, and I approved its content.". In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such advertising shall also include (i) an audio message in the following form: "The top five contributors to the organization responsible for this advertisement are" followed by a list of the five persons or entities making the largest contributions during the twelve-month period before the date of such advertisement, or (ii) in the case of such an advertisement that is thirty seconds in duration or shorter, an audio message providing a web site address that lists such five persons or entities. In such case, the organization shall establish and maintain such a web site with such listing for the entire period during which such organization makes such advertisement.

(4) In addition to the requirements of subdivision (1) of this subsection, no entity shall make or incur an independent expenditure for automated telephone calls that promote the election or defeat of any candidate for nomination or election or promotes or opposes any political party or solicits funds to benefit any political party or committee, unless the narrative of the telephone call identifies the entity making the expenditure and its chief executive officer or equivalent. In the case of an entity making or incurring such an independent expenditure, which entity is a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as amended from time to time, or an incorporated tax-exempt political organization organized under Section 527 of said code, such narrative shall also include an audio message in the following form: "The top five contributors to

the organization responsible for this telephone call are" followed by a list of the five persons or entities making the largest contributions during the twelve-month period before the date of such telephone call.

March 28, 2012

The Hon. Charles Schumer
Chair, Senate Rules Committee
Russell 305
Washington, DC 20510

Dear Chairman Schumer:

The Campaign Legal Center strongly supports S. 2219, the DISCLOSE Act of 2012, and urges the Committee to report it out expeditiously without any weakening changes. S. 2219 is appropriately targeted, narrowly tailored, clearly constitutional and desperately needed.

In the 2010 elections, corporations, unions and other outside groups spent some $300 million or more to influence the midterm elections. Those expenditures included more than $135 million in secret contributions by donors whose identities were hidden from the American people. Campaign finance expert Professor Anthony Corrado, of Colby College, estimates that 90% of the sources of funding of the ten largest independent players in the 2010 midterm election was undisclosed.

In the 2012 elections, there is now even greater secret, undisclosed spending with both the Presidency and control of Congress in play. Left unchecked, secret money spent in political campaigns will result in sharply increased power for those givers, and greater sway in the halls of Congress, skewing the political process even further.

It is well established that laws requiring disclosure of the sources of election-related expenditures are constitutional. In a series of cases, the Supreme Court has repeatedly upheld robust disclosure requirements when it comes to campaign-related spending, and has explicitly and repeatedly recognized the value of ensuring that voters have the information they need to assess a speaker and that speaker's message. Even as the Court overthrew decades of practice and jurisprudence in the *Citizens United v. Federal Election Commission* decision, it overwhelmingly endorsed disclosure of funds spent on election activity as the antidote to corruption.

In that case, the Supreme Court had only a narrow 5-4 majority to strike down the restrictions on independent political expenditures by corporations, but it had an 8-1 majority, spanning the philosophical wings of the Court, in favor of disclosure over the Internet and by other means to the public and shareholders of the details of corporate funding of such political expenditures.

With the Supreme Court having struck down corporate speech restrictions, it is now up to Congress to supply the full disclosure the Court hailed. The Campaign Legal Center is urging

Congress to muster the same broad philosophical support for such disclosure, since both political parties have long favored at least that much regulation.

S. 2219, a modified version of the legislation that was introduced last year, approaches this task by ensuring that the disclosure required is specifically targeted at campaign-related activities. It does not require groups to disclose their membership lists, but does address the "Russian nesting doll" problem that current laws are not reaching – either due to lax enforcement or to partisan disagreement about what transactions are covered by current statutes. S. 2219 appropriately addresses this and other problems that have arisen in the current disclosure regime in a targeted way.

The Gap in Current Law

The Supreme Court's decision in *Citizens United* and the subsequent decision by the U.S. Court of Appeals for the District of Columbia in *SpeechNow.org v. FEC* highlighted gaps in current disclosure laws. These gaps have been exacerbated by the actions of the Federal Election Commission (FEC).

Under current federal law, political action committees (PACs) are entities with the major purpose of influencing elections that raise or spend more than $1,000 in connection with a federal election. The same disclosure laws that cover other PACs -- disclosure to the FEC of donors who contribute more than $200 – currently cover the independent expenditure-only political action committees, now known as Super PACs. PACs are also required to disclose disbursements exceeding $200 to any individual or vendor.

This disclosure regime for PACs has worked fairly well over the past thirty years, providing the public the opportunity to obtain accurate information about the funding and spending of PACs in federal elections.

Now, however, the disclosure requirements for campaign-related contributions are being evaded because the current laws and regulations did not anticipate these new rulings. As a result, Super PACs are receiving contributions from corporate entities whose funders remain anonymous, thereby undermining the purpose and effectiveness of the disclosure. For example, a disclosure report for a Super PAC may indicate it received funding from the corporation "Americans Who Love America, Inc.," but not reveal the funding behind that organization.

Also, entities are being established that are undertaking significant election-related activities, but that do not qualify as Super PACs under current law and practices. These "shadow PACs" are usually organized as 501(c)(4) "social welfare" organizations that claim their primary purpose is lobbying or 501(c)(6) trade associations. Contributions to these tax-exempt organizations do not have to be disclosed under current tax law. However, there are a number of these "shadow PACs" that are undertaking significant election-related activities and playing a large part in the 2012 campaigns. In essence, this new scheme is allowing corporations and individuals to evade disclosure of their electoral spending by laundering money through third-party organizations not covered by current disclosure laws.

Moreover, the FEC has played a critical and damaging role in undermining a disclosure regime that accurately reflects the activities that are being undertaken to influence the outcome of federal elections. The FEC weakened a disclosure requirement of the Bipartisan Campaign Reform Act of 2002 (BCRA) by requiring groups spending money on "electioneering communication" to disclose only those donors that specifically designate their contributions to the organization for the funding of such ads. The FEC rules thus create a roadmap for evasion of the law.

The DISCLOSE Act of 2012 would require any "covered organization" – a corporation, labor union, 501(c) organization (other than a (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 is spent. The FEC must post the report on its website within 24 hours after receiving it.

Under S. 2219, if a covered organization does not wish to fall under the disclosure requirements, it may set up a segregated bank account dedicated to campaign-related disbursements that only contains funds donated directly to the account and then disclose only those donors. If, however, the campaign-related disbursement is paid for out of its general treasury fund, it has to disclose the source of all donations of $10,000 or more. A donor can request for his donation to not be used for campaign-related disbursements and thus, not be included in the segregated fund. The bill does not cover certain internal transfers between affiliated organizations, unless made for the purpose of funding a campaign-related disbursement.

S. 2219 also includes improved "Stand By Your Ad" requirements for Super PACs and other outside spending groups and ensures a more timely disclosure schedule for outside spending groups.

Completing the Process Begun by the Court

In Justice Kennedy's majority opinion in *Citizens United v. Federal Election Commission*, he made two things very clear: First, it is generally constitutional to require disclosure of the sources of funding for spending in federal elections, whether or not that spending "expressly advocates" the election or defeat of a federal candidate. Second, he and seven other Justices were clear that they thought such disclosure was entirely appropriate and useful in a democracy.

Justice Kennedy stated that disclosure of the sources of funding of political advertising "provide[s] the electorate with information" and "insure[s] that the voters are fully informed about the person or group who is speaking. He also cited the holding in *First National Bank of Boston v. Bellotti* that, "Identification of the source of the advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."

Justice Kennedy also rejected the argument that disclosure requirements should be limited to "express advocacy." Justice Kennedy's Opinion flatly declared: "We reject this contention." He noted that the Supreme Court had, in a variety of contexts, upheld disclosure requirements that covered constitutionally protected acts, such as lobbying. "For these reasons," Justice Kennedy

stated, "we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."

As to the value of disclosure of political spending, Justice Kennedy was equally clear. He 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 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.

Justice Kennedy concluded:

> 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.

Thus, Justice Kennedy binds together the two elements of his opinion—independent corporate speech in elections is a First Amendment right, and the funding sources of such speech must be fully disclosed in order to make this constitutional right function in our political system. This section of Justice Kennedy's Opinion was the only one joined by the four *Citizens United* dissenters, meaning that the fundamental importance of disclosure was recognized by eight of the nine Justices. Full disclosure is one of the few concepts in this contentious area of law to receive such a broad endorsement from the Supreme Court.

This background is important to your consideration of S. 2219, the DISCLOSE Act 2012, not only because it makes it clear that the disclosure provisions of the bill are constitutional, but also because they complete the process begun by the Court.

Unrestricted corporate speech in elections without disclosure of the sources of such speech is indeed contrary to the Court's theory in *Citizens United*, which paired corporate First Amendment speech rights with the virtues of disclosure of the sources of such speech—disclosure to shareholders and to the general public. (The *Citizens United* case referred only to corporate speech and disclosure, because only a corporation was challenging the restrictions in the law. However, the DISCLOSE Act recognizes that First Amendment rights found in *Citizens United* are considered by the FEC to apply to unions as well, and therefore includes unions in the Act's provisions.)

It is notable that just months after the Citizens United decision, Justice Antonin Scalia once again took the opportunity to stress the importance of disclosure in the political arena. In the case *Doe v. Reed*, concerning the disclosure of petitions signers for a ballot measure, Justice Scalia rejected arguments about potential threats of harassment of signers by opponents of the petition. In that case, he wrote:

> 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, campaign 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.

Summary

For more than three decades following the Watergate scandal, both Republicans and Democrats agreed that disclosure of money spent in politics was essential to protecting the integrity of U.S. elections and government decision-making. That disclosure consensus has now broken down in spite of strong statements and clear holdings by the U.S. Supreme Court. The partisan schism over disclosure is most revealed at the FEC where regulations have eviscerated existing contribution disclosure requirements, leaving gaping loopholes in federal disclosure laws.

It is unfortunate that there are those who attempt to cast this debate as a partisan one between Republicans and Democrats. It should not be. Many Republicans have long argued for the exact conclusion that Justice Kennedy arrived at: less restriction on political speech in return for "full disclosure."

S. 2219 fulfills an important need by requiring disclosure of individuals and entities spending money in U.S. elections. A strong majority of the U.S. Supreme Court has stated that such disclosure is not only constitutional, but is the expected and indeed necessary counter-balance to the new corporate right to expend unlimited funds in U.S. elections.

The Campaign Legal Center urges Congress to require such complete disclosure as quickly as possible. As Justice Kennedy's majority opinion said on this point:

> 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.

Sincerely,

Trevor Potter
President, Campaign Legal Center

THE "SENATE CAMPAIGN DISCLOSURE PARITY ACT"

WEDNESDAY, APRIL 25, 2012

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

The Committee met, pursuant to notice, at 9:39 a.m., in Room 301, Russell Senate Office Building, Hon. Charles E. Schumer, chairman of the Committee, presiding.

Present: Senators Schumer, Udall, and Alexander.

Also Present: Senator Tester.

Staff Present: Jean Bordewich, Staff Director; Josh Brekenfeld, Deputy Staff Director; Adam Ambrogi, Chief Counsel; Veronica Gillespie, Elections Counsel; Kelly Fado, Operations Oversight; Julia Richardson, Counsel; Nicole Tatz, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan, Professional Staff; Jeff Johnson, Staff Assistant; Mary Suit Jones, Republican Staff Director; Shaun Parkin, Republican Deputy Staff Director; Paul Vinovich, Republican Chief Counsel; Michael Merrell, Republican Elections Counsel; Lindsey Ward, Republican Professional Staff; Trish Kent Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman SCHUMER. The Rules Committee shall come to order, and good morning, everybody. I would like to thank my friend, Ranking Member Alexander, for joining me at this hearing to discuss the Senate Campaign Disclosure Parity Act, S. 219, introduced by Senator Tester last year.

The legislation we are going to discuss today is, in my opinion, a no brainer. It is non-controversial, will save taxpayers about half a million dollars a year, and has wide bipartisan support. It has 24 co-sponsors from both parties, including our Committee colleague, Senator Cochran, and six other Republicans.

Senator Tester is here today, and without objection, I would like to welcome him on the dais for the hearing. I strongly applaud my colleague from Montana for pushing this bill because it will cut government spending, strengthen campaign disclosure and make senators comply with the same filing requirements as every other federal candidate.

The current paper-based filing procedure for Senate candidates is a relic from an earlier time. Senate candidates are required to submit their campaign reports on paper to the Secretary of the Senate, who then has to scan that information and e-mail it to the Federal Election Commission, which prints it out and mails it to a private contractor. Finally, on receiving thousands of pages in the mail, a private contractor manually types the information into a searchable format and e-mails it back to the FEC, which posts it on their online database.

Needless to say, the process is cumbersome, wasteful and time consuming. I strongly believe that timely disclosure of campaign finance reports is crucial to safeguard the integrity of our elections. This bill helps do that. When the legislation passes, Senate candidates will finally join candidates from the House and for the president, being required to file their campaign reports electronically and directly with the FEC rather than indirectly and on paper with the Secretary of the Senate.

Not only is e-filing more reliable and makes campaign data available sooner, it also creates significant savings at a time when both parties are searching for ways to reduce our national debt. We will save about $100,000 a year, and probably even greater savings, although not in the CBO way. We will free up staffers to perform other functions.

The FEC estimates it would save them approximately $430,000 a year from eliminating the need for outside contractors who convert the scanned files into the FEC's electronic database. It would free up two full-time agency positions and would help them with their supply situation.

The FEC has included this policy change in its legislative recommendations for Congress for years. Now currently a handful of senators from both parties already voluntarily e-file their campaign reports with the FEC, so we know it works. And as a sign of my own commitment to this legislation, I have recently begun e-filing my reports. Is there any good reason to oppose the legislation? I cannot think of one. But in the past when the bill was brought up, it was sunk by controversial, completely unrelated amendments, or simply blocked. Senator Alexander and I have worked to try and avoid that on bills like this, and by fortunate coincidence, we are the two ranking members of the Rules Committee, so I hope we can get this bill done quickly.

Senator Tester's legislation is common sense, bipartisan, and I hope we can all agree on it and do it. Before we turn to Senator Tester to make a statement and the panel of experts, I would like to call on my friend and colleague Senator Alexander. We are so close. This is the third time we are meeting this morning already.

Senator ALEXANDER. And I am sure not the last.

Chairman SCHUMER. And not the last.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thanks, Mr. Chairman. Thank you for having the hearing. Senator Tester, welcome, and welcome to the witnesses. I will ask consent that my entire statement be put in the record——

Chairman SCHUMER. Without objection.

Senator ALEXANDER [continuing]. And make just these comments. I support this legislation. I hope we can bring it out, report it quickly, bring it to the floor. I have previously co-sponsored legislation like this. This bill is better. It has less extraneous matter on it, and I think therefore, it will be better received by the Senate.

It is possible that as it makes its way through the Senate, there will be other common sense bipartisan suggestions for how to improve our electoral process, and at that point I hope we can consider those. But I compliment the chairman, Senator Tester, for

their work on this. I look forward to joining them and trying to turn it into a law.

Senator SCHUMER. Senator Tester, we welcome you to the Committee, and thank you for your leadership here. Your entire statement will be read in the record, but feel free to proceed as you wish.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. Thank you, Chairman Schumer, and Ranking Member Alexander. It is a pleasure to be here today with two of my favorite senators. Thank you very much for holding this hearing I think on an important issue.

I will apologize first. I have a very important Veterans hearing that I have to go to, so when I get done with my statement, I am going to have to scoot. But as far as S. 219 goes, I think Congress has an obligation to be as transparent and as open as possible. And at a time when we are looking to save some money, we all share the responsibility for identifying places to save taxpayer dollars.

This is a rare opportunity that we have in both cutting spending and improving transparency here in Washington, and that's exactly what S. 219, the Senate Campaign Disclosure Parity Act, will do. My bill requires Senate campaign committees to file their campaign finance reports directly and electronically with the Federal Elections Commission, rather than first filing on paper with the Secretary of the Senate.

This bill would bring Senate campaign reporting and transparency into the 21st Century by requiring Senate candidates to do what presidential and House candidates have been doing since 2001. In the Senate, we have long exempted ourselves from mandatory electronic filing of campaign reports, holding fast to an outdated system of filing our reports with the Secretary of the Senate.

The Secretary of the Senate then prints out reports and delivers reports to the FEC. The FEC then reenters the reports into their computer databases. The system is redundant and it is wasteful. The FEC estimates it would save over $430,000 a year if they received the reports directly in electronic form from the candidates.

I also have serious concerns about the time delays that are a direct result of the current system of disclosure. Citizens are unable to view Senate candidate campaign finance information until weeks or even months after the data is initially filed. For example, campaign finance data filed in the fourth quarter prior to a general election is typically not accessible to the public until the following February, long after the election has taken place.

In Montana, accountability and transparency are expected from our elected officials and candidates for public office. We expect to know what our elected officials are up to and who they are raising money from. That is why I have led the charge here to bring more sunlight to Senate campaigns, because I feel so strongly about adding more accountability to Senate campaigns. I already filed my campaign finance disclosure electronically with the FEC, and as the chairman pointed out, so do many other—so do many of the cosponsors of this bill.

If I am going to put this in one sentence, I would say this. We look for common sense measures in the Senate to be done. I think

the public expects us to do things that make sense. This makes sense. Thank you for allowing me to be a part of your Committee Chairman Schumer. Thank you for your leadership, Senator Tester. Would you like to make a brief statement, Senator Udall?

Senator UDALL. No, but I was fortunate to be here and to hear Senator Tester's statement, and he has moved me, and I am going to join as a co-sponsor on his legislation because of his excellent statement here, even before hearing these distinguished witnesses.

So Senator Tester, you have one more. I believe you have 24. I guess I am number 25 here, to try to move it along.

Chairman SCHUMER. But a very important 25. I think this seals the deal. Thank you. And we know you have to leave, Senator Tester, but thank you for being here.

Senator TESTER. Thank you.

Chairman SCHUMER. Okay, let me introduce our two witnesses. Ms. Nancy Erickson, who we all know, and I think I can speak for all of us, know and love, has served as Secretary of the Senate since 2007. She is only the sixth woman to hold the position. She worked for 16 years in the office of former Senator Tom Daschle in various legislative scheduling constituent outreach services. As Secretary of the Senate, she oversees the filing of Senate candidates' campaign finance reports.

Paul Ryan is the senior counsel at the Campaign Legal Center, where he has worked since 2004. He is the former political reform director at the Center for Government Studies and an expert on campaign finance and election law, and he has litigated many key cases, published numerous articles, and testified before Congress on these issues.

Both witnesses' statements will be read into the record in their entirety, and Ms. Erickson, you may proceed.

STATEMENT OF THE HONORABLE NANCY ERICKSON, SECRETARY OF THE SENATE

Ms. ERICKSON. Good morning. I appreciate this invitation to discuss the impact that the implementation of S. 219, the Senate Campaign Disclosure Parity Act, would have on the Office of Public Records, one of 26 departments under the Office of the Secretary.

Current law requires the secretary to receive Senate campaign reports as a custodian for the Federal Election Commission (FEC). The Secretary is required to forward Senate campaign reports to the FEC within two working days upon receipt.

Since the enactment of the Federal Election Campaign Act of 1972 FECA, the Secretary's Office of Public Records has been a filing location for Senate FECA documents which have been submitted by Senate candidates in paper form. In response to the Committee's inquiry, I can confirm for you that House candidates file their reports directly with the FEC.

From our observations, many Senate campaign filers already use the FEC's electronic system to prepare their reports, only to then print the pages for delivery to the Office of Public Records. In addition to filing with the Office of Public Records, Senate candidates also have the option of voluntarily filing electronically with the FEC, which makes those electronic reports available as unofficial Senate electronic filings.

A few filers take this additional step of voluntarily submitting their campaign reports electronically.

My office takes seriously its responsibility to implement Senate policy in an effective and cost efficient manner. To date, Public Records has developed a processing system that involves accepting and date stamping reports, copying the date stamp on the report's mailing envelope as requested by the FEC, scanning and indexing those reports, then making them available to the public as soon as possible, usually the following day through an internal database that can be viewed on public terminals in 232 Hart Senate Office Building.

Despite the fact that the statute allows the Office of Public Records two days to transmit reports to the FEC, reports are typically transmitted to the FEC the same day they are received. Our office also stores and archives the reports.

Over the years the Office of Public Records has streamlined this process utilizing a high volume scanner and transmitting reports to the FEC over an internet connection instead of relying on a T–1 telecom line, saving our office $5,000 a year. Despite using the most modern tools available, the processing of paper documents remains labor intensive.

As you know, the size of FEC reports varies during the election and non-election years. In 2010, Public Records processed 6,410 total reports consisting of 522,210 pages. One report alone exceeded 9,000 pages. In 2011, a non-election year, the numbers decreased to 3,486 filings and 223,734 pages. Since the first of this year, Public Records has processed 1,955 reports and 157,032 pages.

S. 219 requires all Senate candidates to file election campaign reports directly with the FEC. I understand that this would have the effect that candidates with more than $50,000 in contributions or expenditures would be required to file electronically with the FEC. As an officer of the Senate, the Secretary defers policy decisions to the Senate, and my office stands ready to implement this proposed change without delay should the Senate approve the measure.

S. 219-related cost savings for the Office of Public Records would include staff hours of 1.5 Public Record staffers to process FEC reports. Such savings in labor hours would be beneficial to our operations, especially since we have been given new implementation responsibility under the STOCK Act, and our budget, like other legislative branch agencies, has been significantly cut.

As you know, the STOCK Act will expand paper financial disclosure filings in the short term to include periodic transaction reports which will initially require scanning and indexing paper reports in a system similar to the current one used for FEC reports.

The Sergeant at Arms, which provides technical support for the Office of Public Records' highly customized FEC and Lobbying Disclosure Act filing systems and databases, must periodically upgrade the FEC processing application for maintenance purposes. The last major upgrade of the system took four months of staff time from Sergeant at Arms technical staff. Elimination of the current FEC processing system and database would result in Sergeant at Arms manpower savings and would allow that organization to redirect resources and manpower to our joint effort to build an electronic financial disclosure system.

Again, I appreciate the opportunity to share information on the important work of our Office of Public Records. Our office has appreciated the support of the Committee over the years on a variety of issues. And in particular, I want to express my appreciation for your support as we implemented new electronic lobbying filing requirements under the Honest Leadership Open Government Act.

We stand ready to implement S. 219 if enacted. Thank you.

[The prepared statement of Ms. Erickson is included in the record]

Chairman SCHUMER. Thank you, Madam Secretary. And now we will hear from Mr. Ryan.

STATEMENT OF PAUL RYAN, THE CAMPAIGN LEGAL CENTER

Mr. RYAN. Good morning, Mr. Chair, distinguished Committee members. Thank you for this opportunity to provide my views this morning on S. 219, the Senate Campaign Disclosure Parity Act. I have submitted more detailed written testimony for the record.

The improvement in Senate-related campaign finance disclosure that would result from the passage of S. 219 is long overdue and the Campaign Legal Center strongly supports this bill.

All or nearly all federal candidates and political committees compile their campaign finance data using computers and sophisticated software. Computerization of this data collection process has been the norm for more than a decade. Nearly all candidates for the House of Representatives and the Office of President, and nearly all federal political committees, also file their campaign finance disclosure reports electronically directly with the FEC.

This data is then made available to the public quickly in a searchable format via the FEC's website typically within 24 hours. Senate candidates, however, willfully remain stuck in the Dark Ages, filing their disclosure reports on paper and denying the public timely access to the information that the Supreme Court has repeatedly recognized as being vital to democracy.

In Citizens United v. FEC, for example, eight of the Supreme Court's nine justices upheld a challenge disclosure law and stressed the importance of timely disclosure, noting that "modern technology makes disclosure rapid and informative." The Court continued, "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. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

Though modern technology and internet undoubtedly make rapid and prompt disclosure possible, the Senate has, for more than a decade, refused to utilize such technology. Under current law, senators compile their campaign finance data electronically, but then nonsensically hit the print button and file their disclosure reports with the Secretary of the Senate in paper format.

The reports are then scanned into an electronic format and delivered to the FEC, which then prints the reports once again and reportedly spends more than $400,000 per year paying people to convert this data back into a searchable digital format that's eventu-

ally uploaded to the FEC's website and finally made accessible to the public.

This process can take weeks and may deny voters the important campaign finance data critical to their decision making on election day until after election day. What reason can the Senate possibly have for clinging to the archaic paper-based disclosure system? Unless the Senate's goal is to deny voters important information and waste millions of taxpayer dollars in the process in this time of fiscal crisis, the Campaign Legal Center can fathom no excuse for the Senate's continued refusal to mandate electronic filing of campaign finance disclosure reports.

S. 219 presents a simple tax dollar saving fix to the Senate's broken disclosure system. Under S. 219, Senate candidates and committees would file campaign finance disclosure reports electronically with the FEC by the same rules applicable to all other federal political committees and candidates. Enactment of S. 219 would save candidates and committees the printing costs of this present paper-based system and would save taxpayers the needless expense of turning those paper reports back into digital searchable format.

More importantly, enactment of S. 219 would bring Senate-related campaign finance disclosure in step with the rapid, prompt and effective disclosure promised to voters by the Supreme Court in Citizens United, "enabling the electorate to make informed decisions and give proper weight to different speakers and messages."

We call on the Senate to schedule an up or down vote on S. 219 immediately and to pass this long overdue legislation. Thank you again for this opportunity to testify before you today.

[The prepared statement of Mr. Ryan is included in the record]

Chairman SCHUMER. Well, thank you. And I want to thank both of you. As a testament to the completeness of your testimony and the need for this bill, and I think its lack of controversy, I do not have any questions. Senator Alexander?

Senator ALEXANDER. I thank both witnesses for their testimony, and neither do I have questions.

Chairman SCHUMER. Senator Udall?

Senator UDALL. I am on the same wave length as both of you and very much appreciate the witnesses being here. And I appreciate our Secretary of the Senate, who does a very, very good job for us.

Chairman SCHUMER. I agree with those kudos. Okay, so I believe this legislation is something we can get behind. I am going to work with my friend, Senator Alexander, to move it quickly out of committee and through the Senate. Obviously, if there are similar provisions that have the same kind of bipartisan support, I would have no objection to hearing—doing them all together, and my guess, without having talked to him, neither would Senator Reid.

So, without objection, the hearing record will remain open for 10 business days for additional statements and documents submitted for the record. We also request that our witnesses respond in writing to additional written questions from Committee members.

I want to thank my colleagues, Senator Udall, Senator Alexander, as well as Senator Tester, for being here. The hearing is now adjourned.

[Whereupon, at 10:00 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Testimony of Nancy Erickson, Secretary of the Senate
Before the Senate Committee on Rules & Administration
April 25, 2012

Good Morning. I appreciate the invitation to discuss the impact that the implementation of S. 219, the Senate Campaign Disclosure Parity Act, would have on the Office of Public Records, one of twenty-six departments under the Secretary of the Senate.

Current law requires the Secretary of the Senate to receive Senate campaign reports as custodian for the Federal Election Commission (FEC). The Secretary is required to forward Senate campaign reports to the FEC within two working days after receipt.

Since the enactment of the Federal Election Campaign Act of 1972 (FECA), the Secretary's Office of Public Records has been the filing location for Senate FECA documents, which have been submitted by Senate candidates in paper form. In response to the Committee's inquiry, I can confirm for you that House candidates file their reports directly with the FEC. From our observations, many Senate campaign filers already use the FEC's electronic system to prepare their reports, only to then print the pages for delivery to the Office of Public Records. In addition to filing with the Office of Public Records, Senate candidates also have the *option* of voluntarily filing electronically with the FEC, which makes those electronic reports available as "Unofficial Senate Electronic Filings." A few filers take this additional step of voluntarily submitting their campaign reports electronically.

My office takes seriously its responsibility to implement Senate policy in an effective and cost-efficient manner. To date, Public Records has developed a processing system that involves accepting and date-stamping reports; copying the date stamp on the report's mailing envelope as requested by the FEC; scanning and indexing those reports; then making them available to the public as soon as possible, usually the following day, through an internal database that can be viewed on public terminals in 232 Hart Senate Office Building. Despite the fact that the statute allows the Office of Public Records two days to transmit reports to the FEC, reports are typically transmitted to the FEC the same day they are received. Our office also stores and archives the reports.

Over the years, the Office of Public Records has streamlined this process, utilizing a high-volume scanner and transmitting reports to the FEC over an Internet connection, instead of relying on a T-1 telecom line, saving our office $5,000 a year. Despite using the most modern tools available, the processing of paper documents remains labor intensive. As you know, the size of FEC reports varies during election and non-election years:

> In 2010, Public Records processed 6,410 total reports consisting of 522,210 pages. One report alone exceeded 9,000 pages.

In 2011, a non-election year, the numbers decreased to 3,486 filings and 223,734 pages.

Since the first of this year, OPR has processed 1,955 reports and 157,032 pages.

S. 219 requires all Senate candidates to file election campaign reports directly with the FEC. I understand that this would have the effect that candidates with more than $50,000 in contributions or expenditures would be required to file electronically with the FEC. As an officer of the Senate, the Secretary defers policy decisions to the Senate, and my office stands ready to implement this proposed change without delay should the Senate approve the measure.

S. 219-related cost savings for the Office of Public Records would include staff hours of 1.5 Public Records' staffers, who process FEC reports. Such savings in labor hours would be beneficial to our operations, especially since we have been given new implementation responsibility under the STOCK Act, and our budget, like other legislative agencies, has been significantly cut. As you know, the STOCK Act will expand paper financial disclosure filings in the short term to include periodic Transaction Reports, which will initially require scanning and indexing paper reports in a system similar to the current one used for FEC reports.

The Sergeant at Arms, which provides technical support for the Office of Public Record's highly customized FEC and Lobbying Disclosure Act filing systems and databases, must periodically upgrade the FEC processing application for maintenance purposes. The last major upgrade of the system took four months of staff time from SAA technical staff. Elimination of the current FEC processing system and database would result in SAA manpower savings and would allow that organization to redirect resources and manpower to our joint effort to build an electronic financial disclosure filing system.

Again, I appreciate the opportunity to share information on the important work of the Office of Public Records. Our office has appreciated the support and guidance of this committee over the years on a variety of issues, and in particular, I want to express my appreciation for your support as we implemented new electronic lobbying filing requirements under the Honest Leadership Open Government Act. We stand ready to implement S. 219 if enacted.

Nancy Erickson

Nancy Erickson was elected Secretary of the Senate when the Senate convened on January 4, 2007. She is the thirty-second person, and the sixth woman, to serve as Secretary of the Senate.

Erickson began her career in Washington, D.C. in 1987 with the General Accounting Office's audit sites at the Federal Communications Commission (FCC) and the Environmental Protection Agency (EPA). Following her selection as a Presidential Management Intern (PMI) in 1988, Nancy gained insight into management activities at the Department of Health and Human Service's Health Care Financing Administration, which oversaw Medicare and Medicaid operations. Nancy concluded her rotations in the PMI program as a fellow in the Office of Senator Tom Daschle, where she ultimately accepted a legislative staff position.

A sixteen year veteran of Senator Daschle's staff, Nancy held a variety of positions in the legislative, scheduling, and constituent outreach functions of the office. She was named Deputy Chief of Staff following Senator Daschle's election as Democratic Leader. Most recently, Nancy has served as the Democratic Representative in the Senate Sergeant at Arms (SAA) office, a position appointed by Senator Harry Reid.

Erickson, a native of South Dakota, received bachelor of arts degrees in Government and History from Augustana College in Sioux Falls, South Dakota, in 1984. She also earned a M.A. in public policy from the American University in Washington, D.C. in 1987.

215 E Street, NE · Washington, DC 20002
tel (202) 736-2200 · fax (202) 736-2222
www.campaignlegalcenter.org

Executive Summary of Testimony of Paul S. Ryan
Before the Senate Committee on Rules and Administration
Re: The Senate Campaign Disclosure Parity Act (S.219)
April 25, 2012

Distinguished committee members, thank you for this opportunity to provide my views on S. 219, the *Senate Campaign Disclosure Parity Act*. The improvement in Senate-related campaign finance disclosure that would result from passage of S. 219 is long overdue. The CLC strongly supports the *Senate Campaign Disclosure Parity Act*.

All or nearly all federal candidates and political committees compile their campaign finance data using computers and sophisticated software—including software provided free of charge by the FEC. Computerization of this data collection process has been the norm for more than a decade. Nearly all candidates for the U.S. House of Representatives and the office of President, and nearly all federal political committees, also file their campaign finance disclosure reports electronically with the FEC. This data is then made available to the public via the FEC's website, typically within 24 hours. *See* 2 U.S.C. § 434(a)(11).

In *Citizens United v. FEC*, eight of the Supreme Court's nine justices upheld a challenged disclosure law and stressed the importance of timely disclosure, noting that "modern technology makes disclosures rapid and informative." *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010). Though modern technology and the Internet undoubtedly make "rapid" disclosure possible, the Senate has for more than a decade refused to utilize such technology, exempting itself from mandatory electronic filing requirements applicable since 2001 to candidates for the offices of the House and President. In doing so, the Senate has kept voters in the dark regarding campaign financing and wasted millions of taxpayer dollars along the way.

Under current law, candidates for the office of Senator compile their campaign finance data electronically, but then nonsensically hit "print" and file their disclosure reports with the Secretary of the Senate in paper format. The reports are then delivered to the FEC, which reportedly spends more than $250,000 per year paying people to retype the data back into a searchable digital format that is eventually uploaded to the FEC's website and made assessable to the public. This process can take weeks and may deny voters access to important campaign finance data until after Election Day.

S. 219 presents a simple, tax-dollar-saving fix to the Senate's broken disclosure system and would bring Senate-related campaign finance disclosure in step with the "rapid," "prompt" and "effective" disclosure promised to voters by the Supreme Court in *Citizens United*—"enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages." We call on the Senate to schedule an up-or-down vote on S. 219 immediately and pass this overdue legislation. Thank you for the opportunity to testify before you today.

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Testimony of Paul S. Ryan

Senior Counsel, Campaign Legal Center

Before the Senate Committee on Rules and Administration

Re: The Senate Campaign Disclosure Parity Act (S.219)

April 25, 2012

Distinguished committee members, thank you for this opportunity to provide my views on S. 219, the *Senate Campaign Disclosure Parity Act*.

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization founded in 2002 that works in the areas of campaign finance, elections and government ethics. The CLC offers nonpartisan analyses of issues and represents the public interest in administrative, legislative and legal proceedings. The CLC also participates in generating and shaping our nation's policy debate about money in politics, disclosure, political advertising, and enforcement issues before the Congress, the Federal Election Commission (FEC), the Federal Communications Commission (FCC) and the Internal Revenue Service (IRS). The CLC's President is Trevor Potter, former Chair of the FEC, and our Executive Director is Gerry Hebert, former acting head of the Voting Section of the Civil Rights Division at the Department of Justice. I serve as Senior Counsel at the Campaign Legal Center and have more than a decade of experience practicing election law.

The improvement in Senate-related campaign finance disclosure that would result from passage of S. 219 is long overdue. The CLC strongly supports the *Senate Campaign Disclosure Parity Act*.

All or nearly all federal candidates and political committees compile their campaign finance data using computers and sophisticated software—including software provided free of charge by the FEC. Computerization of this data collection process has been the norm for more than a decade. Nearly all candidates for the U.S. House of Representatives and the office of President, and nearly all federal political committees, also file their campaign finance disclosure reports electronically with the FEC. This data is then made available to the public via the FEC's website, typically within 24 hours. *See* 2 U.S.C. § 434(a)(11).

Senate candidates and their committees, however, willfully remain stuck in the Dark Ages—filing their disclosure reports on paper and denying the public timely access to information the Supreme Court has repeatedly recognized as vitally important to effective democracy.

In *Citizens United v. FEC*, for example, eight of the Supreme Court's nine justices upheld a challenged disclosure law and stressed the importance of timely disclosure, noting that "modern technology makes disclosures rapid and informative." *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010). The Court continued:

> 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. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. (internal citations omitted).

Though modern technology and the Internet undoubtedly make "rapid" and "prompt" disclosure possible, the Senate has for more than a decade refused to utilize such technology, exempting itself from mandatory electronic filing requirements applicable since 2001 to candidates for the offices of the House and President. In doing so, the Senate has kept voters in the dark regarding campaign financing and wasted millions of taxpayer dollars along the way.

Under current law, candidates for the office of Senator, their principal campaign committees, and the Republican and Democratic Senatorial Campaign Committees compile their campaign finance data electronically, but then nonsensically hit "print" and file their disclosure reports with the Secretary of the Senate in paper format. *See* 2 U.S.C. § 432(g). The reports are then delivered to the FEC, which reportedly spends more than $250,000 per year paying people to retype the data back into a searchable digital format that is eventually uploaded to the FEC's website and made assessable to the public. This process can take weeks and may deny voters access to important campaign finance data until after Election Day.

What reason can the Senate possibly have for clinging to its archaic paper-based disclosure system? Unless the Senate's goal is to deny voters important information and waste millions of taxpayer dollars in this time of fiscal crisis, the Campaign Legal Center can fathom no excuse for Senate's continued refusal to mandate electronic filing of campaign finance disclosure reports.

S. 219 presents a simple, tax-dollar-saving fix to the Senate's broken disclosure system. S. 219 would amend section 432(g) of the Federal Election Campaign Act to repeal the electronic filing exemption for candidates for the office of Senator, their principal campaign committees, and the Republican and Democratic Senatorial Campaign Committees. Under the *Senate Campaign Disclosure Parity Act*, these candidates and committees would file campaign finance disclosure reports electronically with the FEC, by the same rules applicable to other federal candidates and committees.[1]

Enactment of S. 219 would save candidates and committees the printing costs of the present paper-based system and would save tax payers the needless expense of turning those paper reports back into digital, searchable data.

More importantly, enactment of S. 219 would bring Senate-related campaign finance disclosure in step with the "rapid," "prompt" and "effective" disclosure promised to voters by the Supreme Court in *Citizens United*—"enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages."

Past efforts to provide for electronic disclosure have been repeatedly derailed in this body by threats to offer poison pill amendments—such as banning outside groups from filing ethics

[1] FEC rules provide that any committee required to file reports with the Commission (*i.e.*, committees other than Senate candidate committees and the Republican and Democratic Senatorial Campaign Committees, which file reports with the Secretary of the Senate) must file reports in an electronic format if the committee receives or spends, or has reason to expect to receive or spend, in excess of $50,000 in a calendar year. *See* 11 C.F.R. § 104.18(a). This $50,000 threshold would likewise apply to committees brought into the mandatory electronic filing system by S. 219.

complaints against Senators. What on earth is the Senate waiting for? We call on the Senate to schedule an up-or-down vote on S. 219 immediately and pass this overdue legislation.

Thank you for the opportunity to testify before you today.

215 E Street, NE · Washington, DC 20002
tel (202) 736-2200 · fax (202) 736-2222
www.campaignlegalcenter.org

Paul S. Ryan
Senior Counsel
pryan@campaignlegalcenter.org

Paul S. Ryan, Senior Counsel, Campaign Legal Center
April 2012

Paul S. Ryan joined the Campaign Legal Center in October 2004. He has specialized in campaign finance, ethics, and election law for more than a decade and is former Political Reform Project Director at the Center for Governmental Studies (1999-2004) in Los Angeles. Mr. Ryan litigates campaign finance issues before federal and state courts throughout the United States and has published extensively on the subject of election law in journals including the *Stanford Law and Policy Review* and the *Harvard Journal on Legislation.*

Mr. Ryan has testified as an expert on election law before Congress, regularly represents the Campaign Legal Center before the Federal Election Commission and has testified before state and municipal legislative bodies and ethics agencies around the nation. He has appeared as a campaign finance law expert on news programs of CNN, NBC, C-SPAN, NPR and other media outlets, and is quoted regularly by *The New York Times*, *Los Angeles Times*, *The Washington Post*, *Roll Call* and other news publications.

Mr. Ryan is a graduate of the University of California, Los Angeles School of Law's Program in Public Interest Law and Policy (2001) and the University of Montana (1998), and is admitted to practice law in the District of Columbia, the State of California, the Supreme Court of the United States, the U.S. Fourth Circuit Court of Appeals and the U.S. Ninth Circuit Court of Appeals.

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