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THE FAIR ELECTIONS NOW ACT: A COMPREHENSIVE RESPONSE TO CITIZENS UNITED

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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THE FAIR ELECTIONS NOW ACT: A COMPREHENSIVE RESPONSE TO CITIZENS UNITED

TUESDAY, APRIL 12, 2011

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND HUMAN RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Subcommittee met, pursuant to notice, at 10:06 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Subcommittee, presiding.

Present: Senators Durbin, Whitehouse, Franken, and Blumenthal.

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

Chairman DURBIN. This hearing of the Subcommittee on the Constitution, Civil Rights, and Human Rights will come to order, and we will examine today the impact of the Supreme Court's 2010 decision in *Citizens United* v. *FEC*, a landmark ruling that by all indications has dramatically changed the nature of financing in Congressional campaigns.

We will also discuss the *Fair Elections Now Act*, a comprehensive proposal which I have introduced to fundamentally reform the way that these Congressional campaigns are financed.

Senator Graham, unfortunately, is unable to be with us today. He had to be back home in his State, but I want to thank him in advance for his tremendous bipartisan cooperation on these hearings.

I am going to make a few remarks, and then if a Ranking Member is here from the Republican side, I will certainly give them an opportunity to speak to this issue before the hearing commences.

On November 19, 1863, Abraham Lincoln stood before 10,000 Americans to formally dedicate the Soldiers National Cemetery. He was not the main speaker on that day. That honor belonged to Edward Everett, the former Secretary of State, who spoke for more than two hours. When President Lincoln was given a chance to speak, he spoke for about two minutes. He delivered the Gettysburg Address, which has become one of the most famous speeches in American history.

He paid respect to the soldiers who died at Gettysburg. He challenged their survivors to uphold the principle for which they had

died: a "government of the people, by the people, and for the people."

My guess is that President Lincoln would be certainly surprised, if not disappointed, to look at the expanded role of special interests in Congress today.

Senators and Congressmen are forced to spend so much time chasing campaign donations that Congress has become more responsive to lobbyists and corporate donors than it is to everyday Americans. It is personally troubling to me, if not embarrassing, how much time we spend behind closed doors talking about raising money for campaigns.

Some argue that our government of, by, and for the people has morphed into one that is bought and paid for by special interests.

Our fellow Americans see the corrosive impact that special interest money has on our political system, and they do not like it one bit. Recent surveys confirm that Americans are losing faith in Congress: Eight out of 10 Americans surveyed in February believe that Members of Congress are "controlled" by the people who fund their campaigns; seven out of 10 Americans believe that "most Members of Congress [are] willing to sell their vote for either cash or a campaign contribution."

Let me be clear: The overwhelming majority of people serving in American politics in both political parties are good, honest, hard-working people who are guided by the best of intentions.

The problem is that even the best of us are caught in a terrible, corrupting system. This system creates the perception among average Americans that politicians are beholden to big money interests.

The situation has been made worse by the Supreme Court's decision in *Citizens United*. In that decision, which ignored decades of Court precedent, a divided Supreme Court held that corporations and unions can spend as much money as they want to influence Congressional elections.

That is exactly what happened after the Citizens United decision in the election of 2010.

Last year, a record $4 billion was spent on federal elections by outside organizations, political parties, and Congressional campaigns.

Outside groups spent 500 percent more on Congressional campaigns than they did just four years earlier.

The amount of money these lobbyists and corporations are willing to spend is going to continue to increase dramatically, and more and more of it will be done in secret. We will not know the sources of the money that is being spent in these campaigns.

Big money donors, corporations, and lobbyists are spending tens of millions of dollars to elect candidates. It is not just simply because of their love for our system of government. So no one should be surprised, as you go out here in the corridors of this building, to see who is walking the halls, hoping to cash in on their investments.

This flood of campaign spending from big corporations and special interest lobbyists is drowning out the voice of everyday Americans and crippling Congress' ability to solve problems.

The Supreme Court may strike another blow in favor of special interests this term when it takes up the Arizona campaign finance

law, enacted by the people of Arizona. Clearly, it is time for Congress to step in.

Transparency is critical. We need to know which special interests are donating to candidates and how much they are giving. But our system is in desperate need of even more comprehensive reform. That is why I introduced the *Fair Elections Now Act*, with 12 of my Senate colleagues. Our bill will allow candidates to get out of the fundraising business and focus on being Senators and Congressmen.

The voluntary system created by the *Fair Elections Now Ac*t will allow candidates to run competitive campaigns without raising a dime, not a penny, from special interest lobbyists or corporations.

Qualified candidates will receive grants, matching funds, and television vouchers to help them run their campaigns.

In return, the candidates voluntarily agree to only accept campaign donations of $100 or less from citizens in their own State.

Fair Elections candidates will be able to stand up and publicly say, "I did not take a dime from special interest groups. I am beholden to no one but you as a voter, and I will represent your interests if I am elected."

Now, they will be able to say that. Those who do not engage in the system will not. Those who do not engage in the system probably will have more money to spend. But I am betting on the American people when it comes down to this. If you have people who stand up and honestly say, "I am here because of small donations and I did not get the money from special interest groups. My opponent went the other way and spent a lot more money. You are going to see that person on TV and hear him on radio a lot more. Take your pick." I think that is a fair match.

Not one penny of taxpayer money will be used to fund this system. We would pay for it by asking the businesses and corporations who earn more than $10 million a year in federal contracts to pay a fee of one-half of one percent, up to $500,000 per year.

Incidentally, these same corporations are now usually the owners of big political action committees which spend dramatically more money than that on campaigns. So this is not a new hardship or burden to these major corporations and businesses.

This *Fair Elections Now Act* will amplify the voice of everyday Americans and, I hope, will break some of the gridlock in Washington.

You might wonder why it is so hard to cut a defense program from the Pentagon or why Congress cannot get rid of tax benefits for certain corporations and special interests. The answer, I am afraid, is very clear.

For every program, tax break, or government contract, there is usually a lobbyist on deck ready to pounce when their client's pet project is threatened. There is nothing wrong with that. That is part of our constitutional process, petitioning Congress.

Members of Congress thinking about cutting the program, though, often have to look into the eyes of the same lobbyist who is writing a check that evening or the previous day to their campaigns. It is a vicious cycle in a corrupting system. It needs to end.

Lobbyists and special interest donors will not have that kind of influence over candidates who participate in the *Fair Elections* sys-

tem. Restoring a government of, by, and for the people requires reforming the way we finance Congressional campaigns. The *Fair Elections Now Act* is the vehicle, I hope, that will start that conversation.

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

I am going to start with the panel here, and as I said, if a minority Member of the Committee appears, I will give them an opportunity for an opening statement.

We welcome this panel of three. Each witness will have five minutes for an opening statement, and as is the custom of this Committee, I begin by swearing the witnesses in, so if you would all please stand and raise your right hands.

Do you swear or affirm the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SIMPSON. I do.

Ms. YOUN. I do.

Ms. MITCHELL. I do.

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

Now, the first witness is no stranger to these halls. His name is Alan Simpson. Alan Simpson, the former Republican Senator from Wyoming, is co-chair of Americans for Campaign Reform, a nonpartisan organization he co-chairs with Senators Bradley, Bob Kerrey, and Warren Rudman. He was also—and I know very well—the co-chair of President Obama's Commission on Fiscal Responsibility and Reform.

Al Simpson was a member of the Wyoming State Legislature for 13 years, served in the Senate for three terms, and for 10 of those years he had the same job I have—Assistant Majority Leader. After leaving the Senate, Senator Simpson was a visiting lecturer and director of the Institute of Politics at Harvard University's John F. Kennedy School of Government.

I did not know that Harvard was a recognized institution in Wyoming, but now that you have bridged that, I——

Mr. SIMPSON. It is a beautiful thing.

Chairman DURBIN. It is a beautiful thing.

In 2000, he returned to his alma mater, real alma mater, University of Wyoming, to teach. He is a partner in the Wyoming law firm of Burg Simpson and a consultant in the Washington, DC, firm Tongour-Simpson Group.

Senator Simpson, I thank you for joining us today. It is an honor, and the floor is yours.

STATEMENT OF HON. ALAN SIMPSON, FORMER U.S. SENATOR FROM THE STATE OF WYOMING, CODY, WYOMING

Mr. SIMPSON. Well, Mr. Chairman, and Lindsey, wherever he is, let me just say a word. I thank you for this opportunity to testify. The last part about Tongour-Simpson is one arrest, I am not involved with them at all. I never have been a lobbyist. That would have prevented me from going on the floor and seeing my chums from both sides of the aisle.

I want to say a word about this Chairman. We served together on the National Commission on Fiscal Responsibility and Reform. This is a splendid person who took heat and voted for the final report, and I remember his last remarks. When he finished voting, he said his son called and said, "Thanks, Dad." And that is what this is about, what we do over there. We are doing it for 15 reasons. Erskine and I, he has got nine grandchildren and I have six. Well, enough of that.

But my father was in World War I. He was a veteran. He had a phrase that fits Senator Durbin: "He has got more guts than a government mule." I will leave it at that for you to discern how deeply that goes.

And then to see Cleta over here, whom I have not seen for years, and to meet with Monica, what a pleasure.

Well, I see the button, and I know that you are very difficult when it goes over five minutes. You have covered who is on this group Americans for Campaign Reform, John Rauh and Dan Weeks—amazing people—but we have to do something here. This is really an extension of what you and I did on the Commission. The reason the gridlock is there, is when we discovered $1,100,000,000,000 in tax expenditures, which is just spending by another name, or earmarks, it is because of the power of the lobbyists and the power of the vested interests.

So, anyway, growing older has a way of focusing on things you leave behind, and when I take stock of the country that my children and grandchildren will have, I shudder because the causes of concern are many. I will not pretend to offer them all.

There is an old guy in Wyoming—he died—very wealthy, and they said, "How much did he leave?" And an old cowboy said, "All of it." Which is about what it is. And we are going to leave nothing for these young people, and part of it is because of this twisted system.

Well, we will never get things right, and I did serve, as you did, as assistant Majority and Minority Leader under Bob Dole. I cannot tell you the times that we would be in the midst of debate at night, and Bob would say, "We are going to have a vote at about 10 o'clock." And they would say, "I have to be in Detroit at 10 o'clock," or "I have to be in L.A. at 10 o'clock because I have a fundraiser."

So Bob and I would finally say, "Well, it might be a great idea to recall that you came here to legislate and could you that? Wouldn't that be wonderful? You could come here and do what you get paid to do?" And that is called legislate, not go to the cubicle and raise money with a Rolodex and spend half your day in there for your next campaign.

Absolutely absurd, and you have seen it, and I have seen it. The system does not work. You do not have time to visit with colleagues. You do not have time to speak with each other. You do not have time to commingle in social events. You are stuck—stuck in a trough of raising bucks.

And then, of course, the Supreme Court decision is a hammer. I do not get it. I do not understand how you can have "corporate personhood." That is really from Oz. But so it is, and it will clog the system in ways that you and I will never know—and already

is. So few people give of the private sector because the others crowd it out.

Well, I see I have one minute, this yellow light. I have this beautiful testimony. I scribbled all over it on your behalf. I came here on my own expense. What in the world am I doing here?

No, I did not mean that. I can leave that out. This is going to go into the record, anyway.

Ah, yes, why is it that the same Congress that authorizes the VA to negotiate discounts on pharmaceuticals has made it illegal for the government to negotiate such discounts for millions more of our elderly and disabled?

Why is it that Congress continues to approve the multi-billion-dollar contracts when the Pentagon does not even want the equipment? Why do public employee pensions often exceed the private sector equivalents?

Why is it that all of these issues and more, which together account for hundreds of billions in tax expenditures, have not factored more strongly into our current budget debate? It is absolutely—we all know what is happening, all of us. All of us were here.

So I think this is a very good bill, and I think the financing of it is a very good measure. I think that is good. If you figure out what they have spent with PACs, what they would be putting in to fund this effort would be certainly nothing excessive.

But in our final report, which you signed on to, Erskine and I observed, as you did, "In the weeks and months to come, countless advocacy groups and special interests will try mightily and savagely and heavily to exempt themselves from shared sacrifice and common purpose. The national interest, not special interests, must prevail."

So, in the future of our country, I think if it is going to continue as great Nation, you have got to get a handle on this, which is directly responsible for the gridlock we see every day in the news.

I thank you very much, and go forth and multiply.

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

Chairman DURBIN. I will have some questions.

Cleta Mitchell is a partner at Foley & Lardner and a member of the American Bar Association's Standing Committee on Election Law. We are honored that she has joined us today.

Ms. Mitchell serves on the Board of Directors of the National Rifle Association. She is the Chairman of the American Conservative Union Foundation and President of Republican National Lawyers Association. She has served as legal counsel to the National Republican Senatorial Committee and the National Republican Congressional Committee.

Ms. Mitchell is a former member of the Oklahoma House of Representatives. She served as director and general counsel of the Term Limits Legal Institute. She has litigated cases in State and federal courts nationwide, served as co-counsel in U.S. Supreme Court cases on Congressional term limits and the 2002 federal campaign finance law. She received her Bachelor's degree and Juris Doctorate degrees from the University of Oklahoma.

Ms. Mitchell, please proceed with your testimony.

STATEMENT OF CLETA MITCHELL, PARTNER, FOLEY & LARDNER, WASHINGTON, D.C., AND PRESIDENT, REPUBLICAN NATIONAL LAWYERS ASSOCIATION

Ms. MITCHELL. Thank you, Mr. Chairman. It is an honor for me to be with you this morning. My written testimony, of course, will be made part of the record. I want to just touch on a few highlights.

First, this hearing is entitled "*Fair Elections Now Act*: A Reasoned Response to *Citizens United*." I want to talk about *Citizens United* because I think there has been much that has been said about it which is not based on fact.

Citizens United was actually a return to the jurisprudence of the Supreme Court prior to two aberrant decisions, and in the *Citizens United* decision, the Supreme Court cited 22 cases going back 60 years of Supreme Court precedent which establishes that corporations have First Amendment rights.

There is a very real body of law going back more than a century which established that corporations under American law have personhood or citizenship rights. So to say that *Citizens United* is somehow a departure is not correct.

What *Citizens United* did was restore the precedent that existed prior to 1990 when the Supreme Court in the decision *Austin* v. *Michigan Chamber of Commerce* departed from its historic ruling that corporations—that entities, whether it is corporations or political parties or individuals, have a right to make independent expenditures.

Citizens United is not about contributions. In fact, the Supreme Court specifically said in that decision that all of the body of law related to contributions to federal candidates were undisturbed. What *Citizens United* said and what it stands for is the proposition that corporations do have First Amendment rights, as had been the Court's decision since the early 1950s, and that the government and Congress have no constitutional authority to deny speech rights to any source simply because of the form of that source or the speaker. That is what the Court said, is that Congress was essentially putting itself in a position of granting speech licenses and that that does not meet the First Amendment test.

I want to turn specifically to the bill before the Subcommittee, Senate bill 749, and I want to call to everyone's attention that this Friday there will be a national referendum on this legislation. Millions of Americans will go to the polls and will cast their ballots on whether or not they believe in public funding for federal candidates. When they file their tax returns this Friday at their local post offices, they will vote overwhelmingly that their answer is no.

The only public funding mechanism we have today for federal candidates is the Presidential financing system, and fewer and fewer and fewer Americans participate in that system. Ever since Congress tripled the amount of money that people could check off on their income tax to give to that system, the total amount of the funding provided by the American people has gone down. The last year for which there are any statistics, which is 2007, only 8.5 percent of the American people participated. So I think that to say that this is something the American people want is to not look at the facts. They vote on it every year.

Now, specifically with regard to this bill, this bill was first introduced in 2007 in much the same form, and that is why it is a little odd to me to say that this is a response to *Citizens United* because this is the third Congress in which this bill has been introduced. But it was before the 2008 and the 2010 cycles, and I want to quickly share some statistics with you about Senate campaigns in 2010. I am not even going to talk about the 2008 cycle where President Obama opted out of the public financing system and raised and spent substantially more, $750 million to John McCain's $84 million in the general election, that he got from the government. Anyone who is running for President now who would seek to participate in the Presidential financing system probably is not qualified to be President.

But I want to call to your attention what happened in 2010. When you say that you need to have some kind of government program so people can have a chance to run, I want to call to your attention just some Senate races last year.

Let us start with Harry Reid. He raised and spent $26 million in his Committee for re-election. Sharron Angle, his Republican opponent, raised and spent $27 million. Her third quarter report—I represented her, and so I had to make arrangements to file the report because Senate candidates do not file electronically. When we delivered her third quarter report, it was 9,112 pages; it filled three banker's boxes, was three feet high, four feet long, and weighed 103 pounds. She raised $14.4 million in the third quarter alone from 194,000 donors, with an average contribution of $73. The average contribution to her entire campaign was $92. And that is but just one example.

Senator Specter was a co-author of this bill in prior Congresses. He raised and spent $15 million to lose his primary campaign to Joe Sestak, who raised and spent $6 million. And I could go on and on.

The fact is the bill is not needed. It is an anachronism. It is an idea whose time has come and gone. And I would urge the Committee not to move forward with the bill.

[The prepared statement of Ms. Mitchell appears as a submission for the record.]

Chairman DURBIN. Thank you very much, Ms. Mitchell.

Our next witness is Monica Youn. Did I pronounce that correctly?

Ms. YOUN. That is right.

Chairman DURBIN. Thank you. Monica Youn directs the Brennan Center Campaign Finance Reform Project. She was previously in private practice and served as a law clerk to Judge John T. Noonan of the U.S. Court of Appeals for the Ninth Circuit. She received her J.D. degree from Yale Law School, her Master's in philosophy from Oxford, where she was a Rhodes scholar, and her B.A. from Princeton. She has litigated campaign finance and election law issues in State and Federal courts. Ms. Youn was co-lead counsel for intervenor defendants in *McComish* v. *Bennett*, the Arizona public financing case currently pending before the Supreme Court. She is the editor of the forthcoming "Money, Politics, and the Constitution: Beyond *Citizens United*."

Ms. Youn, the floor is yours.

STATEMENT OF MONICA YOUN, SENIOR COUNSEL, DEMOCRACY PROGRAM, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Ms. YOUN. Thank you, Mr. Chairman, Members of the Committee. Thank you for inviting me to testify today.

In the *Citizens United* decision last year, five Justices of the Supreme Court took a look at our federal elections and decided that the real problem is that corporations just do not have enough influence over our politics.

Now, whatever you may think of this diagnosis, we are now starting to feel the results of the Supreme Court's prescription. For the first time in 100 years, we have unlimited spending out of corporate treasuries in federal elections.

So let us look at what happened in 2010. The first thing that we saw there was we saw a massive rise in outside spending, the type of spending enabled by *Citizens United* out of corporate treasuries. We saw $280 million in independent spending, which is a doubling of the figure from 2006, and that figure is widely expected to double again in 2012. We are seeing an escalating arms race of fundraising.

The second phenomenon we saw was an increase in the darkness of our politics. More than a third of the independent spending in the past election was dark. We have no idea who funded these campaign advertisements or what their agendas might be. I mean, we have some glimpses that are provided by independent investigations.

For example, the *New York Times* determined that the American Future Fund, which spent $10 million running ads about, for example, the Ground Zero mosque, was, in fact, funded almost entirely by the ethanol industry, and the true target of that ad campaign was to target Committee members sitting on agriculture policy and energy policy committees.

We also saw in the last election the rise of what are called super PACs, which are PACs that are able to accept unlimited contributions from corporate treasuries and from individuals. Not that they can accept corporate contributions, we can't know if the PAC contribution is coming from corporate or its innocuous conduit

Now, you can think of these super PACS and similar groups as sort of the Godiva chocolates of fundraising. They are very rich; they are very dark; and you have no way of knowing what is inside them.

These super PACs poured tens of millions of dollars into the midterm elections, and in 2012 they have pledged to make that hundreds of millions of dollars.

Now, why is this all a problem? Why is this escalation of especially independent spending a problem for our democracy?

Corporate independent spending poses a major risk of corruption because it is functioning as the new soft money. Corporations view it as an investment, a quid pro quo to buy favorable treatment from elected officials.

For example, my testimony details the example of an Indian tribe in Kansas who went to a legislator and said, "Look, we will run an ad campaign supporting you if you will vote in favor of our casino."

We also detail a North Carolina example where a farmers lobby went to a legislator, ran him a series of smear campaign ads, and said, "You had better switch your vote about the farm subsidies, or we will run this smear campaign against you." Of course, the smear campaign had nothing to do with the farm subsidies. It was simply character assassination.

It is no wonder that, as Senator Durbin outlined so dramatically, the American public is experiencing a crisis of accountability. So let us talk about how *Fair Elections* can help.

Fair Elections allows candidates to make a choice. Who are they going to be accountable to? Are they going to be accountable to the big money backers, the middlemen? Or are they going to be accountable to the electorate at large?

Fair Elections also incentivizes political participation. The point is not to get money out of politics. The point is to expand the field of those who have a stake in our political campaigns.

Ms. Mitchell gave you some examples of a couple of instances where there was some grass-roots fundraising, but I have to tell you, that is not the norm. Currently, only one out of 400 voters contributes to Congressional elections. In the past cycle alone, lobbyists and other DC-based contributors provided almost $300 million of Congressional campaign spending. That is more than the total contribution of 32 States combined.

So if only one out of 400 is currently contributing to political campaigns, *Fair Elections* is about the other 399. Other jurisdictions who have adopted public financing have seen huge increases in the numbers of small donors who now feel that they have something at stake in our political campaigns.

I wanted to end with a story. It is the story of an insurgent candidate who used public financing to challenge a well-known incumbent. This candidate had broad-based popular support at the grass roots, but lacked the support of the money men of the party. During the crucial primary month of January, this candidate was down to $44,000 cash in hand. Only the infusion of $1 million in primary matching funds that was enabled by the widespread donations this candidate had received from small donors across the country enabled this candidate to save his campaign. This candidate's name was Ronald Reagan, and he was the single largest beneficiary of Presidential public financing funds in our Nation's history.

Fair Elections translates popular support into winning campaign without requiring candidates to sell out to big money backers. That is why we urge the Committee to support this bill.

[The prepared statement of Ms. Youn appears as a submission for the record.]

Chairman DURBIN. Thank you.

Senator Simpson, the *Fair Elections Now* law is voluntary. Should I volunteer to be part of the system. I really hold myself to a pretty high standard. By my calculation I have to find about 2,500 folks in Illinois who are willing to make contributions of $100 or less for me to get into the system. So there is some pretty active grass-roots campaigning. It is a big State, but that is still pretty active grass-roots campaigning to get involved in the system. And then I limit myself to how much I can receive, the amount I raise, plus the matching funds and the like. So it's totally voluntary.

There is another side of the equation that Ms. Mitchell alludes to and that the Supreme Court talked about, and that is the larger issue—the larger issue of free speech in America and whether or not corporations should have First Amendment rights to free speech. In other words, should we in any way limit the role of corporations in the election process? That does not relate at all to my bill, because the bill still allows them under existing law to continue whatever they are going to do under *Citizens United* or any other auspices. But if you would for a moment, could you address from your perspective, the flinty-eyed views of a cowboy Republican Senator, this issue of free speech and whether or not there's an inhibition of free speech if we limited the role of corporations?

Mr. SIMPSON. Mr. Chairman, you described me, and then I should describe you, as a tough old prosecutor from Illinois, but we both share the same views on this one.

First of all, if you had to do that and get 2,500, that shows support. You cannot just come in and wade into this bill and say, "I want to run for the U.S. Senate or Congress, and I have two people who love me." You have to show that people care and they are going to put up the bucks. I think that is very critical.

I remember the days in my ancient time when there was a thing called COPE. It meant Committee on Political Education. It was solely union-backed, and then the corporations went goofy thinking how do these guys get away with this. So they formed PACs. So that was the corporate way of getting in to kill off COPE. But now they have both in it, and now they are both playing in this pool big time, unions—I think Republicans who are thrilled with this present system think that it is just going to enrich them. Wait until the unions gear up on this baby, and then there will be real competition for the bucks to pour into the system.

And you get back to the real issue. We were elected to legislate. You cannot legislate when you are raising money day and night. And you finish one cycle. Forget figures, forget—and both of these presentations were excellent. But forget the numbers. The American people think we are on the take. They think that these guys out here are on the take, and if they were not, they would get something done. Why don't they do something? And the issue is they cannot because in wanders Old Slick, who maxed out on you 15 times in your 20 years here, he has taken you to dinner, he has had your staff plastered for 10 years with the finest wine they could ever get hold of they have never seen back in Bug Hollow, and there they are. And they say, "Hey, Eddie, you want to help us." "Yeah, I do." And they do. And that—it may be right, but it stinks. It smells bad. And that is what this is, as I see it.

Chairman DURBIN. So let me, before I go to questions, say——

Mr. SIMPSON. I did not answer your question, but I got a lot off my chest there.

[Laughter.]

Chairman DURBIN. You got real close to it. And my staff wasted no time correcting me. It turns out I need 11,500 donors in Illinois to qualify. That is dramatically more than four times what I originally thought.

Ms. Mitchell, I have read your full testimony in advance here, and it was well written, as I expected it to be.

Ms. MITCHELL. Thank you.

Chairman DURBIN. And it turns out to be a very strong defense for the current system. I do not know if you are in favor of reform or not, but I want you to address Ms. Youn's one element of what is going on in campaigns in America. In her testimony, she says *Citizens United* has actually accelerated "a sharp decline in disclosure of political expenditures."

"Among groups making 'electioneering communications' (campaign advertisements that mention a candidate), disclosure of donors has dropped from 96.8 percent in 2006, to 49.3 percent in 2008, to a scant 34 percent in 2010."

"Among groups making independent expenditures, disclosure of donors dropped from 96.7 percent in 2006, to 83.3 percent in 2008, to 70 percent in 2010."

Back to her Godiva chocolate analogy, do you think it is in the best interest of our country for the donors to political campaigns to be invisible? Do you think secrecy in this process makes a democracy stronger?

Ms. MITCHELL. Well, Mr. Chairman, I have a couple of responses.

First of all, let me correct something that Ms. Youn said which is incorrect when she made reference to super PACs as being the Godiva chocolates. Every contribution to a super PAC of over $200 and every disbursement of over $200 to a super PAC is disclosed publicly to the Federal Election Commission, so I am not sure where it gets to be Godiva chocolate because it is pretty transparent.

With respect to the examples of the Native American tribe and the farmer, the farm subsidies in North Carolina, frankly, if that indeed happened, that is illegal under current law. *Citizens United* only applies to independent spending, and there are very strict regulations regarding what constitutes independence and what constitutes coordinated expenditures. And——

Chairman DURBIN. What about these numbers that I mentioned?

Ms. MITCHELL. These numbers, I am getting to that. The numbers that you refer to, let me just say this: The Federal Election Commission at the instigation of the labor unions—not corporations, but at the instigation of the labor unions—got the FEC to change the regulations on disclosure after 2006. There was a requirement that if an organization was to make independent expenditures or electioneering communications, those had to be made prior to 2006 and during the 2006 cycle from a separate account.

Chairman DURBIN. I need to really bring you back to my——

Ms. MITCHELL. Well, I am getting to that. I am trying to help you understand the——

Chairman DURBIN. You need to answer the question because I am out of time, please.

Ms. MITCHELL. Well, because the system changed at the FEC.

Chairman DURBIN. Is it changing for the better? Do you believe transparency or secrecy is better when it comes to political donations?

Ms. MITCHELL. I do not think that is the right question. I would be——

Chairman DURBIN. That is my question, so I am asking you.

Ms. MITCHELL. Well, I frankly think that when the NRA makes an expenditure, you know where that is coming from. And anyone who makes a contribution to an organization in order for that organization to be able to make an expenditure related to politics, it is required under current law to be disclosed.

Chairman DURBIN. Let me ask Ms. Youn to respond before I turn to Senator Blumenthal.

Ms. YOUN. Sure. The only way in which someone who contributes to an organization that is going to make an independent expenditure is required to disclose it is if that funder specifically earmarks that fund only to be used for these kinds of electioneering communications. If the funder does not earmark the fund, which pretty much none of the sophisticated funders do, then they have no such requirement. The money goes into a general dark slush fund out of which the entity can fund electioneering communications or not.

You know, the real problem here is one of transparency. What *Citizens United* did is it set up categories of corporate treasury funding that do not have robust disclosure. There is no regime in place. Such corporations are not required to disclose such spending even to their shareholders or to their boards of directors under federal law. You know, there is no simple way to track when a corporation is funneling money through a conduit organization that then goes into another organization—you have this series of covers.

Chairman DURBIN. Thank you.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

First of all, let me thank Senator Durbin for his very important and really significant proposal addressing a problem that I think all of us agree is an issue most Americans feel is a problem in today's democracy, and I want to thank Senator Durbin for advancing this debate and for a proposal that I think addresses many of the weaknesses and needs in the present system. And it is a difficult area legally and substantively, and I think none of us in the Senate or in this room, certainly none of our witnesses today, have minimized that problem. But it is one that people feel is an inherent issue in our present democracy because it leads to so many of the abuses that have been outlined by a number of you. And I think that one of the areas that perhaps the proposal does not address is a triggering provision or a provision that somehow enables a candidate who may still be outspent dramatically even with the system that has been proposed here.

So I wonder if perhaps, Senator Simpson or Ms. Youn or Ms. Mitchell, you could address the issue relating to triggering both from a legal and from a substantive point of view.

Mr. SIMPSON. I might say, as Senator Durbin well knows, that in our work, the Chairman and Co-Chairman of the Commission, Erskine Bowles, was the numbers guy and I was the color guy, and I would like to hear these two delightful attorneys rattle around on that question. It would please me greatly, and I would learn greatly. Please.

Ms. YOUN. If I may, the current *Fair Elections* bill was drafted specifically with the sort of legal challenges at issue in the Arizona trigger case in mind. I mean, we knew at the time we were work-

ing on the bill that those were coming up through the courts, and we thought that the prudent choice was to avoid such challenges.

Senator BLUMENTHAL. And as you know, the Connecticut system was struck down by the Second Circuit Court of Appeals.

Ms. YOUN. Exactly, and, you know, we litigated that case as well. And so we are as aware as anyone of the current legal status of the trigger provisions.

Fair Elections contains no such triggers, and even in the Supreme Court's recent oral argument in *McComish* v. *Bennett*, the Court and the petitioning attorneys made it absolutely clear. The constitutionality of public financing is not in doubt. The Court may have taken issue with a particular provision, this trigger provision, and they may vote to uphold it or they may vote to strike that down. But that has nothing to do with the constitutionality of public financing.

If I might address very quickly the practicality of public financing without trigger provisions, I think that your own home State of Connecticut provides a great example there. You had Dan Malloy, the current Connecticut Governor, who was a publicly financed candidate, who fought off much more well-financed private candidates—Ned Lamont and Tom Foley—in both the primary and the general elections, and prevailed using public funds, using exactly the message that Senator Durbin put forward: "I am here. I am not taking special interest money. I am accountable not to special interests but to the constituents."

Senator BLUMENTHAL. Thank you.

Ms. MITCHELL. Mr. Chairman and Senator Blumenthal, I think that the thing that I would ask the Senators to do is to step back and look at what has happened in the last two cycles. I think we have reached a point in our country where individuals can participate in the system through the Internet. When our campaign finance regulatory scheme was created in 1974, there were three networks, no Internet, no cable, no satellite, no talk radio.

And people now can participate directly in supporting candidates that they want to support without a government program. And I only had time to mention in my oral testimony a couple of examples, but if you look at the 2010 cycle and look at 2008 with President Obama, I think we have reached a point where these government programs are no longer necessary for people to be able to run and be successful in raising money and to be competitive with small donations. And I would just urge you to take a step back and look at the system that has been created quite outside the government.

And one last point. This bill does not ask federal contractors to support the system. It mandates federal contractors to fund this proposed system. Under current law, it is illegal for a federal contractor to make a voluntary contribution to a candidate that he or she supports. But this bill would mandate that a federal contractor must support a system which can end up funding a candidate with whom they thoroughly disagree. I do not know how that possibly passes constitutional muster.

Senator BLUMENTHAL. Even with those potential sources of money, however, isn't there a reality here that the imbalances of

funding can be so disparate and the appearances are so corrosive to trust and confidence in the democratic system?

Ms. MITCHELL. Well, every time anyone comes with a campaign finance proposal, with a lobbying reform proposal, it is always, "This is going to restore the faith of the American people in the system." I happen to believe very strongly that it is my right as an American citizen not to like Congress. I am entitled to that. And there is no law that you can pass to make me like Congress. And I think the most important thing to do in analyzing these proposals is to apply First Amendment principles.

What the *Citizens United* Court said was that just because people organize themselves into a corporate form does not render them unable to speak. And what we saw was exactly what I thought would happen. I represent a lot of conservative issue groups. You know, I always say my practice is I am the consigliere to the vast right-wing conspiracy. And what we saw was that they did not raise money from corporations. These are not-for-profit corporations that raised money from individuals and were able to spend it out of their corporate treasuries. That was the impact of *Citizens United*.

Senator BLUMENTHAL. And I do not view this proposal as an attack on corporations or corporate contributions, nor do I view it as an effort to make people like Congress, but perhaps trust Congress a little bit more.

My time has expired, so thank you very much, Mr. Chairman.

Chairman DURBIN. Thank you, Senator Blumenthal.

Senator Franken.

Senator FRANKEN. Yes, I am sorry I was not here for the testimony—hi, Alan—but I did read it last night.

Ms. Mitchell, I was struck by a number of things that you found amusing, and in my old business, anybody who found anything amusing was good.

[Laughter.]

Ms. MITCHELL. Thank you.

Senator FRANKEN. And you are easily amused.

This thing about the public would be upset—Myth Number 3: The public would be upset to know how much time Senators have to spend raising money. And you say there is nothing wrong with Senators having to go out and mix among the people. There is a little difference, you know, mixing among the people, going to town meetings, going to floods like I did this week, talking to different community groups, and doing fundraising. You know that, right?

Ms. MITCHELL. Well——

Senator FRANKEN. You do not?

Ms. MITCHELL. I mean——

Senator FRANKEN. I find that amusing.

Ms. MITCHELL. Those are two different kinds of events, but I also believe very strongly that the last link that requires Senators to do something that they do not want to do is to have to go out and ask people for money and to say, "This is my job. I hope you like the job I am doing. I hope you will help me stay here." I do not think there is anything wrong with that. I think it is un-American to suggest otherwise.

Senator FRANKEN. I am sorry. God, I did not think I was un-American. And I did not think Alan Simpson was either.

Mr. SIMPSON. Yes, but you and I know too much about each other.

Senator FRANKEN. Yes.

You say that you have to go out—you compared yourself to a Senator in this. You say, "If I am to be able to have a paycheck to support my family, I have to not only be able to do my job as an attorney—knowing the substance of the law, doing my work, taking care of my clients' needs . . . but I also have to market my services, ask people to hire me, get paying clients . . . and then I have to keep track of my time, prepare and send invoices, collect receivable and generally run my business."

Do you think that Senators should find people to pay us? Do you think that we really should not be paid by the government but that we should really do that——

Ms. MITCHELL. No.

Senator FRANKEN. No?

Ms. MITCHELL. No.

Senator FRANKEN. Well, that seems to be—see, I find that amusing, because in your testimony you seem to suggest that.

Senator Simpson, did you find what Ms. Mitchell said convincing about going out to ask people to give you money, doing fundraisers, calling people on the phone is the same as just going out and meeting your constituents?

Mr. SIMPSON. No. But I think the people should know, Senator, that you and I did a few shticks together, both members of the Screen Actors Guild, and I do not know why I ever appeared on your program, "LateLine." It was the goofiest thing I ever enjoyed. But I just thought I would throw that in so they knew. And then I invited you to Harvard. You remember that. You set them on fire there.

Now, the question is: All I know about me, I felt used when I had to go raise money. I was embarrassed. I thought it was ugly. I thought it was demeaning. My staff kept saying, "You got to go do it." I said, "I do not like it." And then they would say, "The Republican Eagles are coming to town, and you are going to make a call. And then Presidents night is coming up, and you get a Rolodex and you get to go outside the building for a whole day and dial numbers of jerks you have never heard of in your whole life to get money out of them."

I said, "I will not do that." They said, "Well, you have to. It is for the party." I said, "When they come to town, I will go speak to them at lunch, not to raise money, just, you know, if they wanted to see me or talk, that was great." But I tell you, if you talk to the gut of any guy who is in public life who tells you he just loves to go beg for money, especially after he has just finished one election cycle, you are talking to a delusional person.

Senator FRANKEN. Okay. Let us get into—Ms. Youn, in your testimony you said there are only—not only are third-party groups spending more on elections, they are disclosing less about who is bankrolling spending. Now, Ms. Mitchell writes, "Other than members of labor unions whose dues are mandatory and who are not allowed to withhold amounts that might be spent by their labor

unions for political purposes, generally speaking in America, campaigns are funded from the voluntary after-tax contributions of the citizens."

If I am giving to—if I own stock in a corporation that is giving money to this third party and I do not know it, they do not disclose it, aren't I contributing?

Ms. YOUN. Yes, you are contributing, and I think that the best example of that that people know about is maybe from your home State of Minnesota with the Target example, where Target spent $150,000 of its shareholder money in support of a candidate whose views many of the shareholders of Target simply did not agree with.

Now, the ironic thing about the Target example——

Senator FRANKEN. And that was only because Minnesota had a disclosure law, and we in the U.S. do not have a disclosure law, even though Republicans have said this, who then subsequently voted against disclosure: "Clearly the American public has a right to know who is paying for ads and who is attempting to influence elections. Sunshine is what the political system needs. We can try to"—these are different Republicans who are around. This is what they said during McCain-Feingold. "We can try to regulate ethical behavior by politicians, but the surest way to cleanse the system is let the sun shine in."

I do not like it when a large source of money is out there funding ads and it is unaccountable. Why don't you continue, Ms. Youn? I am sorry to interrupt you. But I just want to—there is a lot of hypocrisy here about just disclosure.

Ms. YOUN. Exactly, because at the same time these statements are being made in favor of disclosure, new organizations, new strategies are being set up, you know, particularly to avoid disclosure. The super PACs that we discussed earlier set up their own arms that are nonprofits that do not have to disclose their donors. And we have found this just escalating, and more and more money is going dark.

Senator FRANKEN. And now in 2010, only 34 percent of these groups made these disclosures. Is that right?

Ms. YOUN. About a third, yes, exactly, of the groups specifically engaging in campaign ads.

Senator FRANKEN. So it would be really inaccurate to say other than members of labor unions.

Ms. YOUN. Yes. I do not know where that——

Senator FRANKEN. Wouldn't that be just inaccurate?

Ms. YOUN. That seems inaccurate to me. What we know and what everyone knows is there is a lot of money out there that is paid for by Americans Who Love Children and Puppies, and we have no idea that Americans Who Love Children and Puppies is actually some corporate-backed interest or some special interest.

Senator FRANKEN. I think there was a corporation that makes its money crushing puppies that was behind that.

Well, I have run out of time, and I am needed back at the Energy markup, so thank you very much.

Ms. MITCHELL. Mr. Chairman, could I just correct one thing that was referenced with regard to my testimony? That reference that you made from my testimony had to do with contributions, not ex-

penditures, and as in reference to S. 749, which is a contributions bill. It not an expenditures bill. It has to do with contributions. And what I said was our system today is funded——

Senator FRANKEN. Excuse me, but how does——

Ms. MITCHELL [continuing]. With voluntary——

Senator FRANKEN. How does it expend money that is not contributed?

Ms. MITCHELL. Well, *Citizens United* dealt only with expenditures. It did not deal with contributions.

Senator FRANKEN. How does a corporation expend money without you having money to spend? And doesn't the people who are contributing to that effort include the stockholders?

Ms. MITCHELL. Well, the Supreme Court rejected the——

Senator FRANKEN. Please answer my question.

Ms. MITCHELL. Well, the corporation, the publicly held corporation you are referring to that makes contributions to a not-for-profit corporation—is that what you are referring to? The not-for-profit corporations are the ones that have made expenditures in 2010.

Senator FRANKEN. I am saying—yes, yes. I am saying that if a corporation gives to a party that makes expenditures, the corporation is contributing to the third party that is making the expenditure. They are contributing, and the people that are contributing include the stockholders. And since they are not disclosing that they are making this contribution, then they fall in the category of someone who is unknowingly contributing to something and has no choice because they do not know.

Ms. MITCHELL. And that would be similar to the labor unions, correct?

Senator FRANKEN. So am I confused then?

Ms. MITCHELL. Yes.

Senator FRANKEN. How am I confused?

Ms. MITCHELL. Well, because my testimony was referring to the system that we have of funding campaigns, which is voluntary after-tax contributions to PACs and to candidates, which is the only source, and all of this talk about the corporate—I am really interested to hear this solicitation of corporate contributions is a problem for Senators because actually that is illegal.

Senator FRANKEN. The present systems includes, though, where—you do not say just candidates. You say causes. So isn't this a cause? Wouldn't you call it a cause, these third parties? Aren't they causes?

Ms. MITCHELL. They are, and I——

Senator FRANKEN. So then I think you are confused, actually, about your own testimony.

Ms. MITCHELL. Well, I think that we should have a confuse-off.

Senator FRANKEN. I think we did, and I think I won. Thank you.

Ms. MITCHELL. I do not.

[Laughter.]

Chairman DURBIN. Well, that is good. Now let us——

[Laughter.]

Chairman DURBIN. Thank you, Senator Franken and Ms. Mitchell.

If I could clarify, a lot of your testimony, Ms. Mitchell, relates to the Presidential campaign financing system?

Ms. MITCHELL. Correct.

Chairman DURBIN. And you say only 8.4 or 8.5 percent of taxpayers contribute to it. I would say it is largely a confusing system. When I read your testimony, I called the accountant who did my tax returns this year and said, "Now, you did check the box where I am giving the money to Presidential"—he said, "I never do." I said, "I want it checked." So some of these things are not necessarily conscious decisions by taxpayers. Some of it is just pure confusion about who is paying for what. But 70 percent of the American people say they do support Presidential campaign financing. And in terms of whether or not there is popular support—you talk about the April 15th referendum. For the record, both Maine, a purple State, and Arizona, a red State, the voters in those States voted for a public financing system paid for by taxes. So they made a conscious decision they would rather clean up the mess in their States and pay a little bit more in taxes than continue what they thought was a corrupting system. I think that is a matter of record.

Ms. Youn, can you comment on whether or not the *Fair Elections Now Act*, what we are talking about, a voluntary system of individual candidates who will decide to only take small donor contributions and be matched and receive some discounts for media, how that stacks up against the *Citizens United* case, whether or not you believe that it addresses any of the elements that have been raised by that decision?

Ms. YOUN. Well, Ms. Mitchell is right to say that *Fair Elections* does not directly address the *Citizens United* decision. The *Citizens United* decision is the Supreme Court. It is the law of the land.

What the *Fair Elections Act* does, however, is it enables candidates to translate popular support into viable campaigns—campaigns that can survive even in the face of independent expenditure attacks. We have seen, for example, Arizona Governor Janet Napolitano, who was a publicly financed candidate, successfully withstand a $400,000 independent expenditure campaign launched against her. We have seen the State of Maine, which has been the target of massive independent funding by the National Organization for marriage, among other groups, also have its publicly financed candidates who constitute the vast majority of both parties of its legislature withstand those attacks.

So what we are saying is that, you know, if you are willing to say, "I am accountable to the people and not to special interests," then as long as you have viable funding, you are able to stand up even against the tide of special interest money of recent elections.

Chairman DURBIN. So I would get back to this point, Ms. Mitchell. I would think—I would stake my reputation on this. If I went to the people of my State, whom I know a little better than some other places, and said, "Okay, here is what I am going to offer you: shorter campaigns, more direct contact between candidates and voters, more disclosure and transparency about where my money is coming from that is being spent on my campaign," I would ask them, "Do you prefer that over the current system?" And my guess is overwhelmingly yes. Overwhelmingly yes.

The trend in America is exactly the opposite. The campaigns go on forever. They inundate the airwaves with organizations we have never heard of before or since. Less likely to be the Democrat or

Republican Party than some other Committee for—fill in the blank—and fewer and fewer disclosures about where the money is coming from.

It seems to me that what you are defending is not exactly what the American people are looking for at this point. Do you disagree?

Ms. MITCHELL. I do disagree, Mr. Chairman. I think that, first of all, every contribution to your campaign over $200 is already disclosed.

Chairman DURBIN. To my campaign.

Ms. MITCHELL. Correct.

Chairman DURBIN. That is not the problem. The problem——

Ms. MITCHELL. Well, I thought you said you would go and offer them about your campaign.

Chairman DURBIN. The point I am getting to is people want disclosure. They want to know, "Durbin, who is it that is supporting you?" And they are going to ask the hard questions. "Now, you voted on such and such a day, and you received this contribution. Was there a linkage?" They assume there is, incidentally. That is a fair question. They know that they can raise the question because I have disclosed.

Now, if the Committee for the Improvement of America comes in and decides to campaign against me and they do not even know where the money is coming from, doesn't that put the voter at a disadvantage?

Ms. MITCHELL. Well, Mr. Chairman, I actually have some proposed reforms that would address most of these problems.

No. 1, if you think that it is going to make for shorter campaigns to raise money in $100 increments, I would beg to differ. And it would seem to me that the way to avoid the constant money chase is to raise the limits or remove the limits and make every contribution, starting with dollar one, disclosed.

Chairman DURBIN. Does money equal time in campaigns? Yes.

Ms. MITCHELL. Yes.

Chairman DURBIN. And now you have just taken the lid off and said spend as much as you want, raise as much as you want.

Ms. MITCHELL. Raise as much as you want.

Chairman DURBIN. And I would say to you at that point it raises a serious question if, instead of a limitation of—what is it, $4,800, $5,200? I have forgotten what the number is.

Ms. MITCHELL. It is $5,000: $2,500 primary, $2,500 general, this cycle.

Chairman DURBIN. Okay. So now you say now you can take $50,000.

Ms. MITCHELL. Yes, and tell me who it is from and tell me that before the election.

Chairman DURBIN. See, if I really thought that you were committed to transparency, I would wonder how you could defend the system now which each year is less and less transparent, less and less disclosure, more secrecy in terms of where the money is coming from. On the one hand, you are all for disclosure, but the current system is moving in exactly the opposite direction.

Ms. MITCHELL. Mr. Chairman, there is a reason for that. Because of the limits——

Chairman DURBIN. *Citizens United*.

Ms. MITCHELL. No, no. Because of the limits on contributions to candidates and political parties, it drives money outside the campaign system. If you remove——

Chairman DURBIN. Secret.

Ms. MITCHELL. Exactly.

Chairman DURBIN. Secret.

Ms. MITCHELL. If you remove the limits——

Chairman DURBIN. That is the current system.

Ms. MITCHELL. I am saying remove the limits on what you can give to campaigns. At least remove the aggregate limits.

Chairman DURBIN. I have yet to have anybody in my State ever come up to me and say, "You know what the problem is? You are not spending enough money on your campaign. We want to see you more on television." No. They say, "When are you going to get those darn ads off so we can get back to normal life?" That is really what most people say in my State and I think in most other States.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you. And I would agree. Whether you favor reform or not, most folks would rather see less of us on TV rather than more.

But I want to ask you, Senator Simpson, if you could pick just two or three critical things to change about this current finance system, as a member of this body for many years and someone who has been a veteran campaigner and knows a lot more about it than I do, what would you change?

Mr. SIMPSON. I think the biggest thing—and this is heresy perhaps—is that whatever amount you give, you have to disclose who you are and what you own and what shares you have in something. And if you are the big donor, I do not care how big you get—and, actually, there should be some limits, obviously. But if there are none, I have always believed—and I tried it in the Wyoming Legislature—in total disclosure. Never got to first base because they said, "We are a small State and everybody knows what we are doing." They did not know that one family is in railroads, trucking, oil, gas, trona, you name it. No one with any knowledge of all the things they were involved in. And I say if you are going to have anything, it has got to be totally, totally transparent from top to bottom, no hiding, certainly no anonymous—I mean, if you think that—the American people just almost barfed when they heard that people could put in money in this last campaign and not tell anybody who they were, and then you get the right—you get the extremists on both sides, you get the right and the left, you get the nut cases on both sides to gather up the money, and there was an ad—one of our fine Republicans who I think some of you served with, Craig Thomas, he finally had to call the Republican Party and say, "Get these people out of the State. I am not saying this stuff." They said, "Well, they are on your side." He said, "You would never know it by looking at it." He said, "Get them out of here."

And so to me the singular thing is the absolute total transparency, who are you, what are you into, what is your octopus, how far do your arms reach in this great country of ours, so that you can go back to doing what you are supposed to do, which is to campaign, to have caucuses, to have hearings, to have markups, to

have floor debate—almost unheard of now—to have conference committees and craft legislation that is understood by the governed. That is the purpose of our craft.

Senator BLUMENTHAL. Ms. Mitchell, do you disagree?

Ms. MITCHELL. I do disagree, because I think that it ignores the situation that could be remedied if the Congress would do a couple of things.

If I am a wealthy person and I say, "All right, I am just going to support candidates. I am not going to give to outside groups. I just want to support candidates," do you know how many candidates I can max out to in a given cycle? Eight. Now, there is something wrong, and the reason for that is the aggregate limits.

Take off the aggregate limits. Let people give to the political——

Senator BLUMENTHAL. But do you disagree with the point about disclosure?

Ms. MITCHELL. If you do it through the candidates and the political parties, you will drive money back into the system to support candidates and political parties. Let political parties—right now—the example that Senator Simpson used about the outside spending. Senator Thomas calls the Republican Party and says, "Get those ads off the air." Do you realize that right now most of the money that the RNC, DNC, DCCC, DSCC, the two Senate committees, do you realize that the bulk of the money that they raise, which is all disclosed, it has to be handed over at some point during the cycle to some consultants who go and make the decisions about the expenditures because of the prohibition, the limits on the coordinated expenditures that party committees can make on behalf of their nominees. That is a preposterous system.

Remove those coordinated limits. Let parties coordinate with their candidates. Let the parties raise the money. Remove the aggregate limits so that donors do not have to choose between the RNC, the NRSC, and the NRCC. Look, I do this for a living, and I know——

Senator BLUMENTHAL. But I take it you do not disagree with the disclosure mandates, regardless of how the aggregates and the coordination is done.

Ms. MITCHELL. I do not disagree with the disclosure mandates, but we have disclosure today.

Senator BLUMENTHAL. Even if there are corporate——

Ms. MITCHELL. We do not allow corporate contributions to candidates or political parties.

Senator BLUMENTHAL. But if there are independent expenditures, as happens under *Citizens United*, do you think there should be no disclosure?

Ms. MITCHELL. We have disclosure. We have—someone made the comment that there is no disclosure required under federal law. That is simply not true. There are disclosures required. The change in the disclosure laws was brought about because the unions did not want to have to disclose all their members' contributions to electioneering communications. So that was changed.

Senator BLUMENTHAL. Ms. Youn, do you have any comment?

Ms. YOUN. There are some disclosure requirements that are easily evaded by sophisticated players. That is why the decline in disclosure for electioneering communications and independent expend-

itures that I have detailed in my testimony has occurred in the past few cycles.

Senator BLUMENTHAL. Thank you. Well, I thank all of you for your participation, and I have learned something, and, again, thank you, Mr. Chairman.

Chairman DURBIN. Thank you, Senator Blumenthal.

Before I recognize Senator Whitehouse, I find it interesting that we think it is corrupting for a corporation to give me money which I then use to buy ads, but not corrupting for the same corporation to buy its own ads through *Citizens United*. I do not understand that double standard.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman, and thank you for holding this hearing.

I think that the effect of *Citizens United* on our electoral process is very pronounced and very degrading, frankly. The first thing that it does is it encourages the true party in interest, like an oil company or the insurance association, to disguise itself and to set up some kind of phoney-baloney entity with a name like Americans for Mom and Apple Pie, and then when you see the ad on TV that slams, you know, Senator Snooks for being the worst thing since who knows what, it is done on behalf of Americans for Mom and Apple Pie, and there is no timely way to get behind Americans for Mom and Apple Pie and find out actually that was Exxon.

So that is a real problem, I think, in addition to the sort of phoney-baloney—as if there is not enough phoney-baloney in politics, we now have to add an inducement to set up these phoney-baloney organizations. And then, effectively, we are encouraging people who have a lot of money and corporations that have a lot of money to basically money launder through the phoney-baloney organization and to hide their actual role in it. And none of that can be prevented unless we pass a statute that requires better disclosure and timely disclosure, more to the point, because everybody knows that it gets close before the election, and if somebody drops a million bucks' worth of advertising in Rhode Island in the last week before an election and nobody sees it coming, you do not know that your client—your opponent has, you know, a million dollars left in their account. You know that they are going to spend it. You can sort of guess what is going to come. But if it comes in out of the clear blue sky, you have no idea, and the election could be over by the time the reporting is done as to who was the real party in interest.

So it just helps make all of this so seamy and so sordid, and when the previous finding of the United States Supreme Court was that unchecked corporate spending in elections is, in fact, a form of corruption, and then this Supreme Court, or at least the five conservative members of it reversed that on no legislative record—because they did not have one. They actually sculpted the trajectory of the case so they would not have any legislative finding or record and they could operate with impunity. And then they make a finding of fact, which is what Supreme Courts are not supposed to do. They are supposed to leave fact finding to the lower courts. And the finding of fact is that this cannot have an effect, there is just no possibility that corporate spending in an election could lead

to or create a reasonable inference of corruption, which, as anybody knows who has ever been through an election, is just flat false. Not only is it an improper finding of fact, it is a complete falsity. It is just nonsense.

So it is really a spooky thing that has happened in terms of the effect it had on the Supreme Court, in terms of the effect that it is going to have on our elections, and I would add that the scariest part of it is not going to be the advertisement that gets run against a Senator or a Representative or a Governor under the guise of Americans for Mom and Apple Pie. The scariest part of it is the big corporate coming into that Senator's office and sitting down with them privately and playing the ad, saying, "Here is what you are going to see. We are going to put five million bucks behind this ad, and this is what it says." And then on comes the horrifying negative attack ad. And then they say, "But we do not have to run that. You just vote right with us. You just vote right when the Wall Street bill comes up. You just vote right when the gulf clean-up bill comes up." And away they go, and enormous damage is done by that threat, and nobody will ever even see that. You do not even know that there is a phoney-baloney Americans for Mom and Apple Pie that you can at least start looking into and later find out was really a big corporate.

And so I just think that the *Citizens United* decision, in addition to reversing all the precedent and standing the facts on their heads, has really created enormous opportunities for mischief, particularly on behalf of the people with money. And for the life of me, I do not see why in a country in which we try to give one person one vote and we try to equalize as much as we can, we allow one particular privileged class, which is the chief executive officer of a corporation, to have a thousand, a million times the weight of anybody else by being able to direct corporate funding into a race in his official capacity and have an influence on politics that he or she could never have in their individual capacity.

So I do not know. That is more of an expression of shock and pain and horror at what this opens up than it is a question, but particularly is there anything we can do to focus on the behind-the-scenes influence, the threat of here is our five million, here is our ad, do what you are told or this is coming at you?

Mr. SIMPSON. Well, Senator, I have watched you and have enjoyed visiting with you during the Commission activities. I respectfully say you should have added unions to the same scenario that you just gave, and that is what is going to happen. It will be the union guys, too, who will walk in with the ad and say, "Here you are, Buster, and this is what we are going to do to you."

Senator WHITEHOUSE. They do not have anything like the money. Not even close.

Mr. SIMPSON. What?

Senator WHITEHOUSE. They do not have anything like the money. It is not even close.

Mr. SIMPSON. Well, they have got some, just little tidbits laying around perhaps. But, anyway, I would just say if we are going to go this way, then I am probably the only living Republican right now trying to help get this thing done. I always get in these marvelous causes. But the Republicans believe just as you have sug-

gested, but let me tell you, on the other side of that coin is the union people sitting right in front of that guy saying, "We may not have what the big shots have, but we got a little kitty here and we are going to blow it on you, and here is the ad."

I mean, to leave out all aspects—the only way to get anything done here is a balance, and if we cannot get a balance in what we do here or what we did here, I think it is a mistake.

Senator WHITEHOUSE. I would be happy to have it apply to both. I think the danger is less because the money is less.

Mr. SIMPSON. I do not hear well. I do not hear well. What was that?

Senator WHITEHOUSE. I am sorry, sir. I said I would be happy to have it apply across the board. I used the corporate example because I think the danger is worse.

Mr. SIMPSON. Oh, good. I hear that. And I would just throw out the other example as a thought.

Senator WHITEHOUSE. You take Exxon-Mobil's last profits, and if I recall correctly, with five percent of their annual profits they could outspend both Presidential Candidate McCain and Presidential Candidate Obama, who collectively spent $1 billion in the last race. And for a really big issue that is going to affect their corporate bottom line, that is not a very big spend. So it creates these deafening voices in the public arena that no individual can compete with, no union even can compete with.

Mr. SIMPSON. Well, we know that we will not make any progress if it comes down to the usual battering of all those things, the big versus the small, the class warfare and all that stuff. We will never get through where we are.

Ms. YOUN. And that is, I think, why the simple removal of limits that Ms. Mitchell advocates is not sufficient. I mean, you can say to me, "Oh, you are free as a voter to make your voice heard. All you have to do is outspend the corporate treasury of ExxonMobil." That is not freedom for me. You know, I am an American citizen, I am a voter. The elections are supposed to be about me. Elections are not supposed to be about these proxy fights between the moneyed middlemen.

Ms. MITCHELL. Mr. Chairman, if I might, I would like to ask the—you have made reference to the Arizona law and the law enacted by the voters of Arizona voluntarily. In 2001, I did a study called "Who Is Buying Campaign Finance Reform?" to trace the sources of funding of the campaign finance reform movement, and the amount of money that was spent promoting campaign finance reform vastly outweighs the other side. And one of the chapters of that study included a study and an analysis of the funding of the Arizona Clean Elections Act, which was actually funded by George Soros. And what I would like to ask is leave to add that to the official record of this hearing, that study.

And I am fascinated, Mr. Chairman, that the hue and cry has come after the 2010 election. If one goes to the Center for Responsive Politics, a very strong supporter of campaign finance reform and probably supportive of this proposal, and just looks at the data for the last decade, one will find that in every cycle until 2010 the outside spending by the left, by liberal groups—and I beg to differ with Senator Whitehouse, but the unions have far outspent con-

servatives and corporations in terms of independent spending for candidates and the political parties. And the left far outspent the conservatives in 2000, 2002, 2004, 2006, 2008. And only in 2010, when conservative groups actually competed with the liberal groups, is there this hue and cry. There was no outcry about the secrecy of the Democracy Alliance created by George Soros after the 2004 cycle, which does not report any of its contributions and funds a number of groups. The SEIU has spent over $400 million that we know of since 2004.

And, finally, Mr. Chairman, there are 26 States that allow corporate contributions to candidates: Missouri, Virginia, Oregon, to name a few. So I do think that the idea that somehow corporations can make independent expenditures but they cannot give contributions, I do think that is worth looking at, because half the States allow it.

Chairman DURBIN. Ms. Mitchell, as your testimony noted, I introduced this bill several years ago. This did not come in after the 2010 election. I have been in favor of public financing, and I still am. And I understand the value of incumbency. Most incumbents do not support reform—we do not have a single Republican Senator who cosponsors this legislation—because most incumbents believe we have an advantage when it comes to fundraising. And we do. We have got a stable of friends and contributors who can come to our side. But maybe I am off in some idealistic land here, but I would step away from that advantage and be willing to take on an opponent with a lot less money, flat out debate them as often as necessary, and let the voters decide. And I think at the end of the day we would have a healthier democracy.

I do not believe that running these numbers up in the millions and millions, billions of dollars in campaign spending really informs voters that much. I am afraid voters are misled.

And let me say in response to Senator Simpson, any rules that I would be for—and I think Senator Whitehouse would agree—apply to both across the board, right and left. So if it is corporations, it is unions, too. Same standard, same rules, no exceptions. And I think that is the way it should be.

We also got another question of, you know, whether or not there would be a disclosure. One of the proposals we have on *Citizens United* is legislation that requires some disclosure at the end of a corporate-sponsored campaign ad as to who paid for it. Perhaps the CEO of the corporation will proudly stand up and say, "This oil company paid for it," or "This bank paid for it." So be it. I think the voters are entitled to know that. You know, we are not stopping the expenditure. We are just saying disclose, which, as I understand here, everybody is for. We could not get support for that reform when we offered it.

So I thank you for coming. I enjoyed the conversation.

Mr. SIMPSON. Mr. Chairman, may I just add one note?

Chairman DURBIN. Of course.

Mr. SIMPSON. You remember my friend Al Cranston. I think Senator Whitehouse would like to hear this. Al Cranston was a great friend of mine, and we chaired the Veterans Affair Committee alternately, and I was minority or I was Chairman. He left here in

a cloud because of what happened, and he had no knowledge of it, and it left him tarnished, and it was a shame.

His scheduler forgot to check every day what the fundraising arm of Cranston for Senate was doing, and the media went into the stack and said, "We see that so-and-so gave 10 grand in May, and then they came to see you in June." And he was eaten alive by that thing he knew nothing of. He said, "I did not know that the scheduler did not know what the fundraising campaign was doing." And it appeared that if you gave the money, you saw Al within a week, and it brought him down. A very sad situation.

It was a perception. Everything we do here is perception. There is no reality to what any of us do here. It is all perception.

Chairman DURBIN. And I would say, Senator Simpson, I did not know Senator Cranston as well as you did, but this tangled web that we live in elected officials raising money, across the street, literally across the street from this building, is the Democratic Senate Campaign Committee. Why is it across the street from this building? Because we cross that street regularly to go over there and raise money for our campaigns and for our causes.

I think America would be a better Nation if both political parties declared a truce on this fundraising run-up, this escalation, and said shorter campaigns, cheaper campaigns, more direct contact between candidates, let the voters decide, and transparency about where the money is coming from. I think we would be stronger, and that is what my bill is trying to achieve.

Thank you for being here. The Subcommittee received written statements from more than 25 national organizations that support *Fair Elections Now*, including AFSCME, Alliance for Justice, Americans for Campaign Reform, American Sustainable Business Council, the Brennan Center for Justice, Common Cause, Demos, Democracy Matters, NAACP, Public Campaign, Public Citizen, SEIU, U.S. Public Interest Research Group, and U.S. Action.

Additionally, there are more than 120 former elected officials, civic leaders, and business leaders from major corporations that have endorsed this bill. They include Democrats like Senators Bill Bradley, Bob Kerrey, of course, permanent Republican line Alan Simpson, Warren Rudman, EPA Director Christie Todd Whitman; and business leaders like Bill Gates, Paul Volcker, Frank Carlucci, Lee Iacocca.

[The statements appear as a submission for the record.]

Chairman DURBIN. We will keep the record open for a week if there are additional materials from interested individuals, and questions may be directed to witnesses, which I ask them to respond to as quickly as possible.

Thank you. The hearing stands adjourned.

APPENDIX

Witness List

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

On

The Fair Elections Now Act: A Comprehensive Response to *Citizens United*"

Tuesday, April 12, 2011
Dirksen Senate Office Building, Room 226
10:00 a.m.

The Honorable Alan Simpson
Former United States Senator
Cody, WY

Monica Youn
Senior Counsel, Democracy Program
Brennan Center for Justice at NYU School of Law
New York, NY

Cleta Mitchell
Partner, Foley & Lardner
Washington, DC

PREPARED STATEMENT OF SUBCOMMITTEE CHAIRMAN DICK DURBIN

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

"The Fair Elections Now Act:
A Comprehensive Response to *Citizens Untied*"
Tuesday, April 12, 2011

Sen. Dick Durbin (D-IL)
Chairman

*As Prepared for Delivery

On November 19, 1863, Abraham Lincoln stood before 10,000 Americans to formally dedicate the Soldiers National Cemetery.

President Lincoln was not the main speaker that day. That honor belonged to Edward Everett, the former Secretary of State who spoke for more than two hours.

In about two minutes, President Lincoln delivered the Gettysburg Address, one of the most famous speeches in American history.

President Lincoln paid respect to the soldiers who died at Gettysburg and challenged their survivors to uphold the principle for which they sacrificed -- a "government of the people, by the people, and for the people."

My guess is that President Lincoln would be very disappointed if he were alive today and aware of the outsized influence that special interests have on Congress.

Senators and Congressmen are forced to spend so much time chasing campaign donations that Congress has become more responsive to lobbyists and corporate donors than it is to everyday Americans.

Some argue that our government of, by, and for the people has morphed into one that is bought and paid for by special interests.

Our fellow citizens see the corrosive impact that special interest money is having on our political system – and they don't like it one bit.

Recent surveys confirm that Americans are losing faith in Congress.

- 8 out of 10 Americans surveyed in February believe that Members of Congress are **"controlled"** by the people who fund their campaigns.
- 7 out of 10 Americans believe that "most members of Congress [are] **willing to sell their vote** for either **cash or a campaign contribution**."

Let me be clear: the overwhelming majority of people serving in American politics are good, honest people who are guided by the best of intentions.

The problem is that we are stuck in a terrible, corrupting system. This system creates a perception among average Americans that politicians are corrupted by big money interests.

This system has only been made worse by the Supreme Court's decision in *Citizens United.*

In that decision, which ignored decades of precedent, a divided Supreme Court held that corporations and unions can spend as much money as they want to influence congressional elections.

That is exactly what they did in 2010.

- Last year, **a record $4 billion was spent on federal elections** by outside organizations, political parties, and congressional campaigns
- Outside groups spent **500%** more on congressional campaigns than they did just four years earlier.
- The amount of money these lobbyists and corporations are willing to spend is **expected to increase dramatically in 2012**.

Big money donors, corporations, and lobbyists are spending tens of millions of dollars to elect candidates. So, no one should be surprised to see these folks walking the halls of Congress after Election Day – hoping to cash in on their investment.

This flood of campaign spending from big corporations and special interest lobbyists is drowning out the voice of everyday Americans – and crippling Congress's ability to solve problems.

The Supreme Court may strike another blow in favor of special interests this term when it rules on the Arizona campaign finance law.

Clearly, it is time for Congress to step in.

Transparency is critical. We need to know which special interests are donating to candidates, and how much they are giving. But our system is in desperate need of comprehensive reform.

That is why I introduced the Fair Elections Now Act with 12 of my Senate colleagues.

Our bill will allow candidates to get out of the fundraising business and focus on responding to the needs of their constituents.

The voluntary system created by the Fair Elections Now Act will allow Congressional candidates to run competitive campaigns without raising a dime from special interest lobbyists or corporations.

Qualified candidates will receive grants, matching funds, and television vouchers to help run their campaigns.

In return, these candidates will agree to only accept campaign donations of $100 or less from citizens in their state.

Fair Elections candidates will be able to say, "I didn't take a dime from special interests lobbyists. I am beholden to no one but you and I will represent only your interests."

Not one penny of taxpayer money will be used to fund the Fair Elections system. We'd pay for Fair Elections by asking businesses earning more than $10 million a year in federal contracts to pay a fee of one-half of one-percent, up to $500,000 per year.

The Fair Elections Now Act will amplify the voice of everyday Americans and it will finally help break the gridlock preventing Washington from solving our nation's biggest problems.

You might wonder why it's so hard to cut a defense program the Pentagon doesn't even want or why Congress can't get rid of tax benefits for corporations shipping jobs overseas.

Unfortunately, the answer is clear.

For every program, tax break, or government contract, there is usually a lobbyist on deck ready to pounce when their client's pet project is threatened.

Members of Congress thinking about whether to cut a program often have to ask these very same lobbyists for contributions during campaign season.

It's a vicious cycle in a corrupting system. And it needs to end.

Lobbyists and special interest donors won't have that kind of influence over candidates participating in the Fair Elections system.

Restoring government of, by and for the people requires reforming the way we finance congressional campaigns.

The Fair Elections Now Act is the ideal vehicle for that reform.

PREPARED STATEMENT OF COMMITTEE CHAIRMAN PATRICK LEAHY

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing on the Fair Elections Now Act
April 12, 2010

I thank the witnesses who are here today to testify about the Fair Elections Now Act. I have joined Senator Durbin again this Congress to introduce this bill, which I hope will help to stem the tide of corporate influence and restore public confidence in congressional elections. This legislation will improve our democracy by reducing the effect of large donors and special interests. A similar system has been extremely successful in Vermont, and is long overdue in our Federal elections.

I first supported this legislation last Congress because I recognized the need to level the playing field in congressional politics, and minimize the role of special interests in our elections. Now, in the wake of last year's *Citizens United* decision, this legislation is more important than ever.

In *Citizens United*, five Supreme Court justices cast aside a century of law and opened the floodgates for corporations to drown out individual voices in our elections. The broad scope of the decision was unnecessary and improper, and gives corporations virtually unfettered influence over American elections by removing limits on independent expenditures. At the expense of hardworking Americans, the Supreme Court ruled that corporations could become the predominant influence in our elections for years to come. We have already seen the consequences of this decision last November, as business contributions overwhelmed individual voices in elections across the country.

I was disappointed last summer when the Senate was unable to proceed to consideration of the DISCLOSE Act, another important legislative proposal that would help curtail corporate influence in elections. In the months leading up to the midterm elections, the minority party in the Senate joined together to prevent even debate on the bill. Those efforts to filibuster a motion to proceed to the legislation ignored the real world impact of the *Citizens United* decision, and its influence on our democratic process.

It is difficult to overstate the potential for harm embodied in the *Citizens United* decision, which threatens the fairness of our political process. Action is needed to prevent special interests from unduly influencing our elections, and to ensure that legislating, not fundraising, is the full-time job of any member of Congress. This legislation will ensure that candidates can mount viable campaigns without relying on corporate money to fund their candidacies.

The Fair Elections Now Act is one step toward countering the harmful effects of *Citizens United*. Today, the cost of a congressional campaign is higher than ever before. This bill will establish a voluntary program for viable congressional candidates to accept Federal grants, matching funds, and vouchers to supplement money from small dollar donors. Rather than fundraising, this legislation will enable incumbent candidates more time to better represent their constituents, and it will level the playing field to give challengers the chance to better compete with established candidates without relying on wealthy donors to fund their entire campaign. No

candidate will be required to participate in this program, but it will be available to any viable candidate who needs to compete without relying on wealthy donors and corporate interests.

The Fair Elections Now Act represents one important step toward minimizing corporate influence in the electoral process, and ensuring that candidates for Congress are neither beholden to corporate influence, nor so consumed with fundraising that they do not have the time necessary to legislate. Americans should expect bipartisan support for any legislation that would prevent corporations from drowning out citizens' own voices. This legislation does that, and I hope that Senators on both sides of the aisle will work to enact this important measure.

I look forward to working with Senator Durbin and all Senators to pass this important legislation, as well as other measures to open our electoral process, and push back against the impact of *Citizens United.*

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PREPARED STATEMENT OF HON. ALAN K. SIMPSON

Testimony of Senator Alan K. Simpson
Hearing: "The Fair Elections Now Act: A Comprehensive Response to Citizens United"
Senate Committee on the Judiciary, Subcommittee on the Constitution,
Civil Rights and Human Rights - April 12th, 2011

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

Thank you for this opportunity to testify in support of Senate Bill 750, the Fair Elections Now Act.

I come before you at this time of fiscal crisis as co-chair of Americans for Campaign Reform and as someone deeply committed to addressing the two defining long-term challenges I know: fiscal and campaign finance reform. Together with my friends and fellow co-chairs of Americans for Campaign Reform – Bill Bradley, Bob Kerrey, and Warren Rudman – I have come to the conclusion that a wholesale restructuring of our campaign finance system, and of the dynamics of political power itself, is necessary if we are to right our fiscal ship of state. I see this testimony not as a diversion from, but rather an extension of, my ongoing work with Erskine Bowles and the Committee for a Responsible Federal Budget.

Growing older has a way of focusing the mind on the things we'll leave behind. When I take stock of the country that my children and grandchildren inherit, I shudder. The causes of concern are many and I won't pretend that any explanation we offer here today will capture them in full. As is the custom in Washington these days, we tend to hear two quite different stories from the Left and Right about what is wrong with America and how we can set things right. I've spent enough time counting votes as Majority and Minority Whip to know what party means, and I find I don't have much patience for partisan politics these days.

Nevertheless, I believe there is one challenge confronting the country on which both sides can agree: the corrosive effects of private money in politics and the constant fundraising by Senators and Representatives that our system of privately-financed elections demands.

I know the pundits and plenty of Americans like to say that Senators and Congressmen are corrupt. I don't buy it. I've spent enough time in these halls to be pretty confident about the will to public service that lives in all of you. But I also know that perception matters in politics. Our current system of financing congressional campaigns with it's ever-increasing cost and the heedless will to spend on the part of wealthy interests, works counter to the good intentions of those who came to Washington to serve the public interest. As you know, every hour spent fundraising – and Lord knows they add up in a campaign – means one hour less spent studying the issues of our day, engaging in dialogue and compromise with one another, or meeting and hearing from constituents.

Consider the conflicting incentives in our electoral system today that drive the public's perception of corruption. On the demand side, you as Senators require millions of dollars to win and keep your seats – over $9 million, on average, in 2010. Unless you have a fortune of your own, you must turn to private citizens and groups for campaign contributions. All too often, those with the means and incentive to contribute large amounts do not represent the needs or interests of your constituents back home. In fact, just one quarter of one percent of the American people contributed to political campaigns in 2010, most of them representing organized lobbies with a vested tax and

spending interest before the federal government. Lobbyists and other contributors based in Washington, DC alone provided almost $300 million of the record campaign spending, more than the total contributions of 32 states combined.

I believe that private campaign contributions facilitate an unholy alliance between those with the means to fund political campaigns and those who depend on their contributions to get elected. The consequences for our nation's finances are severe.

Why is it that a quarter century since the last comprehensive tax reform, Washington has riddled the system with countless tax expenditures, which are simply spending by another name? These tax earmarks, which add up to more than $1 trillion of tax spending a year, can mean handsome profits for those interests who fought for their inclusion, but they do little to promote economic growth and competitiveness for the nation as a whole.

Why is it that the same Congress that for years has authorized the Department of Veterans Affairs to negotiate discounts on pharmaceuticals for military families has made it illegal for the government to negotiate such discounts for millions more of our elderly and disabled citizens under Medicare Part D?

Why is it that Congress continues to approve multi-billion dollar defense programs the Pentagon never requests, or that public employee pensions often far exceed their private-sector equivalents?

Why is it that all of these issues and more, which together account for hundreds of billions in tax expenditures each year, have not factored more strongly into our current budget debate?

To end these conflicts of interest once and for all, I urge the Senate to enact a system of small donor public funding of Congressional elections. Under the Fair Elections Now Act, serious and hardworking candidates for U.S. Senate and House who agree to limit donations to $100 apiece would receive matching public funds for every small donation they raise in-state. To qualify for matching funds, candidates would have to show a broad base of constituent support by raising donations of between $5 and $100 each. If they can meet the qualifying threshold, they would have enough money to run a competitive campaign. As you know, you do not need to have the most money to win but you need enough for the voters to hear your message and make their choice.

The Fair Elections Now Act isn't your granddad's campaign reform. For decades, campaign reform has meant limits and restrictions on private campaign spending, which this Supreme Court has all but taken off the table as unconstitutional. In its Citizens United decision last year, the Court ruled that corporations and unions are free to spend unlimited money to influence elections, asserting a right of corporate personhood that I have yet to find in the Constitution.

But the Citizens United ruling need not take real reform off the table. To the contrary, it can serve to focus our gaze on the root of the campaign finance problem: changing not so much the amounts, but rather the source of money that funds political campaigns. By providing qualifying candidates with enough public matching funds on small donations to run a viable campaign, we can ensure that money itself does not determine who gets to compete for public office, but rather character, experience, and ideas.

In keeping with my values as a fiscal and constitutional conservative, the Fair Elections Now Act does not limit freedom of speech. Rather, it expands First Amendment rights by allowing those with wealth to continue to fund their own speech while also enabling those with widespread public support in the form of small donations to get in the game. Candidates wishing to raise and spend big money the old-fashioned way would be free to do so.

Stemming the tide of special interest money and restoring fiscal responsibility for the long-term are no easy task, but it's high time we got started. From my years of service in Washington, and in the years since, I have come to the firm belief that campaigns for public office are a public good, plain-and-simple, and therefore must be owned by the people.

In the final report of the President's Commission on Fiscal Responsibility and Reform, Erskine Bowles and I observed that, "In the weeks and months to come, countless advocacy groups and special interests will try mightily through expensive, dramatic, and heart-wrenching media assaults to exempt themselves from shared sacrifice and common purpose. The national interest, not special interests, must prevail."

Our future as a great nation depends on it.

Thank you.

PREPARED STATEMENT OF CLETA MITCHELL, ESQ.

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS & HUMAN RIGHTS
HEARING ON APRIL 12, 2011

"The Fair Elections Now Act: A Comprehensive Response to *Citizens United*"

TESTIMONY OF CLETA MITCHELL, ESQ.
PRESIDENT, REPUBLICAN NATIONAL LAWYERS ASSOCIATION

Mr. Chairman, Ranking Member Graham, Members of the Subcommittee:

Thank you for the opportunity to appear before you today to offer my thoughts and perspective on S 749, the so-called "Fair Elections Now Act of 2011". I appear here before you today both as a campaign finance attorney and practitioner and also in my capacity as President of the Republican National Lawyers Association ("RNLA").

As background, my day job is as an attorney, specializing in the field of campaign finance, election law, ethics and lobbying compliance – my field of expertise is advising candidates, campaigns, political parties, issue groups, individuals, corporations and organizations on matters involving what I describe as the 'business and regulation of politics'.

I am a bit puzzled at the title of today's hearing, which couches S749 in terms of a 'response' to the Supreme Court's decision in *FEC v. Citizens United.* I am puzzled for several reasons:

For starters, this bill was first introduced by the Chairman in the 110th Congress and was reintroduced in the 111th Congress. The *Citizens United* decision was handed down by the Supreme Court in January, 2010, nearly three years after the Fair Elections Now legislation was first introduced. So I'm wondering how this legislation is in 'response' to a decision of the Supreme Court three years after its initial introduction.

Secondly, *Citizens United* has nothing to do with contributions to candidates or how they finance their campaigns. In fact, the Court in the decision specifically stated that none of the provisions of federal law related to contributions were disturbed by the decision. The ruling applies solely to political expenditures by

corporations (and labor unions) that are made independently of campaigns, candidates and political parties.

The legislation at issue here today deals not with expenditures, but rather, with contributions to candidates and their campaigns and creating a public financing scheme for Senate campaigns.

It would seem, then, that the very essence of S749 is wholly different from the principles at issue in *Citizens United.*

I realize that *Citizens United* has become something of a proxy for everything that liberals detest about our American system of financing campaigns through the voluntary, after tax contributions from individuals. But to suggest that this legislation is in 'response' to a court decision nearly three years after this legislation was first introduced in Congress is nonetheless more than a bit odd.

About *Citizens United:* what the Supreme Court decided in the case is that the metastasizing regulation of political speech in America had created a nationwide, chilling effect on political speech during the election process that simply could not withstand strict scrutiny under the First Amendment.

Citizens United addressed the ability of citizens, organized in the corporate form, to associate and speak through that form. The Court concluded that because speech is an essential mechanism of democracy, political speech must prevail against laws that would suppress it by design or inadvertence.

Speech is the means to hold officials accountable to the people - -and the highest protections of the Constitution must be applied to such expression. *That* is the meaning of *Citizens United.*

The Supreme Court essentially held that citizens *must* be allowed to speak, whether individually or collectively organized even if the collective form chosen is the corporate form. The First Amendment has long been applied to corporations by the Supreme Court. *Citizens United* is hardly the first instance of such an application: the Court determined in 1978 in *First National Bank of Boston v. Bellotti,* that the government lacks the power to restrict political speech based on the speaker's 'corporate identity'.

Then, in a departure from that reasoning, the Court in 1990 upheld Michigan's ban on independent corporate political expenditures. That decision

(*Austin v Michigan Chamber of Commerce)* recognized a 'new' governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of corporate wealth…"

The Supreme Court in *Citizens United* was confronted with pre and post *Austin* lines of reasoning, which were clearly in conflict. Before *Austin,* the Court had found that the government could not confer preferred status on some speakers over others. *Austin* had concluded the opposite – and *Citizens United* is merely a reaffirmation of the principles that existed before the Court's 1990 decision in *Austin*—namely, that restricting the speech of a corporation merely because of the corporate identity is not permissible under the First Amendment.

Political speech is "indispensable in a democracy, and this is no less true because the speech comes from a corporation". That is what the Supreme Court held in 1978…and it is that principle to which the Supreme Court rightly returned in *Citizens United.*

The court also reaffirmed the principle in *Buckley* in 1976 that the prevention of corruption or the appearance of corruption is a proper rationale for the government to prohibit corporate contributions…but that restrictions on expenditures are not likewise susceptible to the same concerns. Thus, the prohibition on corporate political expenditures made independently of a candidate or campaign may not constitutionally be subject to the same rationale, restrictions or prohibitions.

The Court's decision in *Citizens United* reveals a thoughtful analysis and a proper reliance on longstanding principles of First Amendment jurisprudence, regardless of the uninformed, hysterical and reactionary outrage of the *New York Times* and *Washington Post* editorial pages.

The correlation between the Supreme Court's reasoning and conclusion in *Citizens United* that it is beyond the authority of Congress to deprive citizens of their rights to engage in political speech if they are organized in a corporate form, and the bill before the subcommittee today as somehow being a 'response' to that decision is, as I have said, puzzling.

But since the Subcommittee has linked the two together, I would turn my attention to the Fair Elections Now legislation.

Reading S749 reminds me that in Washington and, indeed, in the Congress of the United States, there are those who seem to *yearn* for the days when only the wealthy and powerful could get elected to the Congress, when money from big donors was all that mattered in getting elected and re-elected and when there were only three networks, no internet, no cable tv, no talk radio, no Bill O'Reilly and no tea party movement. Unfortunately, those days are not the America of 2011 and will never be the America of the future.

S749 is premised upon a number of myths that simply are that: myths. The guiding principles of S749 are centered around beliefs that, while sincerely and fervently held, are factually incorrect. This bill simply ignores reality

It is hard to know where to actually begin to dissect this proposal, but I will focus my testimony on just a few of its flaws. The bill's stated purpose(s) are, themselves, myths.

Myth #1: "This is something 'the people' want".

This Friday, there will be a national referendum on the essence of S749…something that sponsors of other legislation could only *dream of.*

This Friday is April 15 – and as millions and millions of Americans go to the polls….their local post offices….they will be voting on this very issue: whether or not the federal government should provide public funds to political campaigns.

And guess what!!! If this year is anything like the LAST 35 years, the American people will answer that question in a very loud voice – and they will say NO. Again. As they have done every year since 1976.

There are simply no facts to assert that the public wants anything akin to public financing of political campaigns. And the people have shown that through their lack of appetite for the public financing system we already have, the presidential financing system.

All the facts since the inception of the presidential election public financing system demonstrate that 'the people' do *not* want tax subsidies for political campaigns.

I've attached as an exhibit to my testimony a chart from the Federal Election Commission which demonstrates that the American people are on to this system…and they have rejected it. Soundly. Annually.

In fact, the presidential election financing system has less support today than at any time in its history. At its zenith, only 28.7% of taxpayers supported the system….that was in 1978. Now, in the last year of reporting (2007), only 8.3% of American taxpayers chose to support this welfare for politicians. There is *less* money being contributed to the presidential campaign financing fund than ever in its history. And since Congress tripled the amount of the checkoff from $1 to $3 in 1994, the actual amount of funds voluntarily contributed by American taxpayers has declined every year since.

Why is that? How about being fairly sickened to see payments from the public coffers of nearly $3 million to Leonore Fulani or almost $2 million to Lyndon LaRouche….even when he was in prison in the 1992 campaign. Only in Washington would anyone think that this is a system worth expanding.

So S749 would mimic the failed presidential financing system and impose it on campaigns for the United States Senate. In the name of 'the people'. Which people are those?

I noticed that the sponsors of this legislation had Alec Baldwin present at the press conference to endorse this bill. I wonder if anyone asked Mr. Baldwin if he participates in the current public financing system for presidential elections.

The reason I ask is because I looked at Mr. Baldwin's record on contributing to candidates for office….and his last reported contribution to any federal candidate or political committee was his 1999 contribution of $10,000 to the Democratic Senate Campaign Committee. Mr. Baldwin makes more than $1 million per episode of his tv show….and it is certainly his choice to contribute or not contribute to candidates and political parties.

But now, Mr. Baldwin urges Congress to enact a law that would levy a mandatory fee on those who contract with the federal government, to force those individuals and companies to pay to fund the campaigns of US Senate candidates…whether the candidates espouse views or philosophies the federal contractors agree with or not.

Ironically, it is illegal under federal law for a federal contractor – *any* federal contractor – to make a contribution of his/her personal funds to any federal candidate, PAC or political party. But *this* bill would change the statute to now *force* federal contractors to finance the campaigns of Senate candidates with whom they may disagree. They still could not contribute voluntarily to candidates they support…but they would be forced to pay into a fund to finance candidates whose views and philosophies are contrary to their own. How does that possibly pass constitutional muster?

Myth #2: We Must Have Government Subsidies for Politicians to "Fix" a Broken System.

I'm not exactly sure what is broken about the present system, where citizens voluntarily contribute funds to candidates and causes with which they agree. Other than members of labor unions whose dues are mandatory and who are not allowed to withhold amounts that might be spent by their labor unions for political purposes, generally speaking in America, campaigns are funded from the voluntary after-tax contributions of the citizens. I'm wondering what exactly is wrong with that system. If people don't want to contribute – they don't have to. Like Alec Baldwin.

But since liberals are for anything as long as it is mandatory, perhaps we should look at the facts of the last two election cycles and ascertain whether the facts support the 'concerns' of the sponsors of S.749, that somehow only certain people get to run for office because the 'real' people can't raise the money without government intervention as envisioned by S749.

If we want to focus on what is broken in our system, the only thing broken *is* the presidential election funding system…not the system of private funding of Senate campaigns through voluntary contributions.

In 2008, we witnessed the rejection by the Democratic Party standard bearer Barak Obama of the presidential financing system and he has now indicated his reelection plans do not include participation in 2012 in the government program.

Which is par for the course. I've always said that the reason Democrats have no compunction about enacting these cockamamie campaign finance regulations and proposals is that they have absolutely no intention of abiding by them, and S.749 would absolutely be *no* exception.

And, actually, if one just looks at the numbers from 2008, it is clear that the government funding system is hopelessly outdated and *should* be rejected by all prospective candidates. According to reports of the Federal Election Commission, the GOP nominee for President, Sen. John McCain received $84.1 million in public funds to conduct his general election campaign.[1] That is the amount Barack Obama would have received had he accepted government funding for the 2008 general election. However, by staying outside the government funding system, the Obama campaign raised a total of $745.7 million in private funds for his primary nomination and general election campaign. It was the first time in the history of presidential public financing that a major party nominee declined to accept public funds for the general election.

Hillary Clinton also rejected the government funding – and raised and spent $224 million in the 2008 primaries. John Edwards, on the other hand, received $12 million in federal matching funds and spent a total of $48 million in the primaries. If there was an imbalance in the system, it was between those who opted into the government funding system and those who rejected public funds.

Of note: the Obama campaign's total receipts of $745.7 million for the 2008 election are equivalent to more than half of the $1.49 billion provided in public funds to all presidential candidates, parties, and conventions since the inception of the public funding program.

And looking forward to 2012....President Obama and his political allies are now projecting that they will raise and spend $1 billion in 2012...from voluntary donations....compared to no more than $90 million they could anticipate receiving for the 2012 general election from government funding. Any candidate who looks at those numbers from 2008 and the projections for 2012 and would then decide to accept the government money isn't qualified to be President

But what about the Senate...and the so-called 'broken' system of electing senators....really? Seriously? Have you even *looked* at the facts before reintroducing S 749?

Let's just go through some of the races last year.

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[1] McCain-Palin raised an additional $46.4 million for legal and accounting expenses, which may not be spent for campaign activities

Let's start with Harry Reid vs. Sharron Angle. Sen. Majority Leader Harry Reid raised and spent $26 million in his reelection campaign during 2010.

His opponent, Sharron Angle, raised and spent....$27 million.

Sharron Angle's 3d quarter FEC had some interesting statistics that you should know:

The report reflected contributions to the campaign for THAT quarter alone of almost $14.4 million dollars...from 194,178 donors, with an average contribution of $73.00. The average contribution to Sharron Angle's entire campaign was $92.00. Less than 1% of the contributions to her campaign came from PACs or anything like 'political insiders'.

The Angle 3d Quarter 2010 report, like all FEC reports for Senate campaigns was filed on paper, rather than electronically. And I might say that the only good thing in S749 is to remedy that absurd situation.

When the Sharron Angle 3d Quarter FEC report was delivered, it was 9112 pages, filled 3 bankers boxes, was almost 3 feet high and 4 feet long and weighed 103 lbs.

What that demonstrated then and now is the *power* of the internet, small donors, the excitement around ideas both for and against candidates and the willingness of the American people to support candidates through their voluntary contributions *when the spirit moves them.*

And the Reid-Angle race is but one example.

Sen. Lisa Murkowski raised and spent $3.6 million and lost her Republican primary to Joe Miller, who raised and spent $179,443.23 during the same period of time.

Charlie Crist was the endorsed candidate of the National Republican Senatorial Committee because he could raise money in the expensive state of Florida...and Crist had indeed raised a sizeable warchest of $8.8 million by year end 2009....with a seemingly insurmountable advantage....until Marco Rubio came along and raised money from more than 100,000 donors in an average contribution of $85...and reported $6.8 million in contributions by the end of March 2010...and the rest, as we know, is history.

And how about the Democratic Senate primary in Pennsylvania....Sen. Arlen Specter raised and spent approximately $15 million to lose his primary election to former Congressman Joe Sestak...who spent $6 million in his primary victory.

The point is this: S749 is an anachronism. It is an idea whose time has long since passed *if* it ever was a good idea, which I believe it wasn't.

The internet, the ability of grassroots citizens to get involved in the electoral process, the ability of candidates to reach the people without going through party bosses, national party committees, Washington insiders, the mainstream media or any power broker anywhere is self-evident.

The only broken campaign finance system is the presidential public funding system...after which S749 appears to be patterned.

S749 should be quietly shredded and the presidential financing system ended along with it.

No serious candidate in 2012 will participate in the system and it is time to get rid of it.

Myth #3: The public would be upset to know how much time Senators have to spend raising money.

This is the one that is most amusing...when it is not the most infuriating. The public would not be the least bit upset to know that Senators have to spend time raising money....because, actually, that's what people in the private sector have to do. Every day.

If I'm to be able to have a paycheck to support my family, I have to not only be able to do my job as an attorney – knowing the substance of the law, doing my work, taking care of my clients' needs...but I also have to market my services, ask people to hire me, get paying clients...and then I have to keep track of my time, prepare and send invoices, collect receivables and generally run my business.

I could say and I know a lot of attorneys who DO say..."it is beneath me to have to do those things...to have to ask people to hire me...to pay me...to be able to build and maintain my law practice...I would just much rather have someone pay me without ever having to worry about those pesky things like whether or not I'm doing a good enough job to warrant their continued investment in me..." And those people should go to work for the government.

There is nothing wrong with Senators having to go out and mix among the people…and to say, "this is what I'm doing…and I need your support to keep doing it…"

Frankly, the most disturbing aspect of long tenure in the United States Senate is a tendency of entrenched Senators to become removed and remote from their constituents. One of the last vestiges of a real life connection for many Senators is their obligation to meet with people to raise money.

It doesn't have to be that way. Senators could have townhall meetings every weekend of the year if they wanted to. It doesn't take S749 to keep Senators in touch with their constituents.

Finally, S749 purports to "level the playing field" of candidates in a democratic society. That is something the Supreme Court has rejected repeatedly, starting *not* with the Roberts court, as some on the left allege, but as far back as 35 years ago in *Buckley v. Valeo,* when the Supreme Court opined that such an approach is anathema to the First Amendment. The Supreme Court recently struck down the "Millionaires' Amendment" added on the Senate floor to McCain-Feingold…and the Court may well invalidate the Arizona so-called "Clean Elections" law this term which was designed by the same forces who now bring us S749. Leveling the playing field is a governmental effort to pick winners and losers in the political arena and is, thankfully, not allowed under the First Amendment.

In fact, government funding of political campaigns is nothing more than a concerted effort to shape the debate and the outcomes in our democracy…and to the extent S749 *is* in response to *Citizens United*, it is an effort by liberals to silence or drown out certain voices that they deem objectionable.

In sum, S749 is a terrible idea for a myriad of reasons. It is patterned after a presidential funding system that is demonstrably failed and failing. S749 ignores facts, is based on myths and is constitutionally flawed. It should never see the light of day.

I am pleased to answer any questions from the Committee. Thank you.

FEDERAL ELECTION COMMISSION
PRESS OFFICE
(202)694-1220
(800)424-9530

January 2011

PRESIDENTIAL FUND INCOME TAX CHECK-OFF STATUS, 1992 — 2010

CALENDAR YEAR	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995
January	466,641	$599,877	$846,999	$962,479	$945,837	$464,790	$1,068,404	$637,817	$649,921	$ 659,769	$ 832,310	$ 682,118	$ 900,431	$ 347,156	$ 550,538	$ 167,947
February	6,513,585	8,145,784	$8,640,012	8,740,717	9,194,047	10,809,718	8,133,502	9,501,495	9,191,141	7,755,317	8,357,437	7,160,713	11,225,906	5,422,131	7,112,244	3,539,297
March	9,485,983	11,445,405	$9,496,635	11,633,940	9,595,764	10,304,832	11,185,186	14,507,389	15,906,289	14,173,273	11,965,656	15,056,055	12,547,379	15,527,503	16,183,625	18,346,748
April	11,469,516	12,300,016	$15,443,291	12,750,897	12,169,194	(10,804,802)[1]	19,437,213	13,969,648	14,173,160	12,047,202	15,460,118	13,046,401	12,737,129	8,339,168	12,575,755	16,265,609
May	6,788,373	5,942,158	$6,436,485	8,297,539	10,340,088	13,836,470	7,830,862	11,324,602	10,418,188	9,804,590	10,477,020	11,638,596	10,088,026	20,167,271	12,209,799	11,725,288
June	2,747,565	3,065,890	$5,033,242	3,711,580	4,239,057	4,950,478	4,300,154	5,719,837	7,577,444	9,901,642	8,049,595	8,426,579	10,783,635	9,083,785	10,371,308	8,139,411
July	706,596	646,744	$676,869	562,691	967,148	594,059	738,541	710,639	889,186	1,527,213	2,301,129	1,677,614	1,597,795	3,839,190	3,630,064	6,083,985
August	528,910.29	405,966	$486,276	636,213	703,258	893,324	912,454	722,967	1,064,410	809,255	771,149	1,340,194	910,566	1,345,731	1,202,288	970,554
September	348,885	474,174	$489,324	404,056	446,325	759,147	683,657	647,404	658,454	1,122,208	1,059,687	613,697	1,095,238	983,225	1,058,048	1,246,608
October	886,284	906,645	$1,011,873	1,150,998	1,064,010	476,586	410,209	750,951	505,242	489,497	464,013	557,739	552,528	366,390	988,141	427,348
November	914,310.39	1,245,648	$1,075,581	850,077	854,278	867,899	890,302	615,340	859,159	796,265	772,627	787,870	742,728	934,075	899,590	748,524
December	122,481	142,221	$111,102	105,026	160,782	117,924	135,795	108,400	103,568	204,020	174,274	122,249	91,722	122,007	122,397	198,013
TOTAL CHECK-OFF YEAR-TO-DATE	**40,379,129.68**	**$45,320,518**	**$49,547,489**	**$49,806,213**	**$50,679,786**	**$53,311,420**	**$55,726,279**	**$59,416,489**	**$61,998,162**	**$59,290,251**	**$60,685,015**	**$61,089,725**	**$63,273,081**	**$66,347,632**	**$66,903,797**	**$67,860,127**
TOTAL REPAYMENTS YEAR-TO-DATE	–	0	0	$250,304	$334,109.59	0	0	0	$88,728	$84,778.94	$29,328.00	$148,161.67	$13,767.82	$1,226,425.00	$286,448.41	$1,879,413.18
TOTAL DISBURSEMENTS YEAR-TO-DATE	–	$202,017	$106,559,804.59	$42,712,000	$51,013,897.39	$293,130.87	$178,044,734.74	$29,184,000	0	$689,594.11	$216,015,006.45	$28,916,921.00	$0.00	$1,324,836.82	$216,395,091.09	$24,541,355.41
FUND BALANCE at 12/31	194,823,481.89	$154,444,351.41	$109,325,850.50	$166,338,165.55	$145,993,648.55	$97,979,752.96	$44,961,483.83	$167,279,235.13	$137,046,745.86	$74,959,810.86	$16,214,320.03	$165,514,076.77	$133,194,011.05	$69,907,362.23	$3,657,886.05	$146,862,731.73

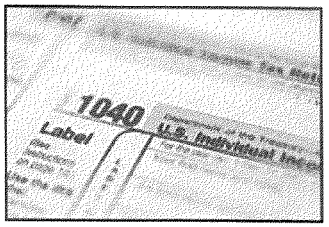
NOTES:
- MONTHLY DEPOSIT FIGURES ARE NOT AVAILABLE FOR THE YEARS 1973 – 1975.
- 1973 TAX RETURNS PROVIDED TAXPAYERS THE OPPORTUNITY TO DESIGNATE FUNDS FOR 1972 AND 1973.
- FIGURES FOR 1973 THROUGH 1976 CAN NOT BE VERIFIED.
- ALL MONTHLY DEPOSIT FIGURES HAVE BEEN PROVIDED BY THE U.S. DEPARTMENT OF THE TREASURY.
- I.R.S. "ADJUSTMENT" FOR 1992 OF $51,068.84 HAS BEEN DEBITTED. NO EXPLANATION IS AVAILABLE.

ACCORDING TO INTERNAL REVENUE SERVICE INFORMATION, THE PERCENTAGE OF TAX RETURNS PROCESSED INDICATING $1, $2, $3, OR $6[2] DESIGNATIONS WAS:

1976 RETURNS—27.5%	1981 RETURNS—27.0 %	1986 RETURNS—21.7 %	1991 RETURNS—12.7 %	1996 RETURNS—12.64%	2001 RETURNS—10.99%	2006 RETURNS—10.9%
1977 RETURNS—28.6 %	1982 RETURNS—24.2 %	1987 RETURNS—21.0 %	1992 RETURNS—18.9%	1997 RETURNS—12.49%	2002 RETURNS—11.25%	2007 RETURNS—8.3%
1978 RETURNS—25.4 %	1983 RETURNS—23.7 %	1988 RETURNS—20.1 %	1993 RETURNS—14.5%	1998 RETURNS—12.47%	2003 RETURNS—10.13%	
1979 RETURNS—27.4%	1984 RETURNS—23.0 %	1989 RETURNS—19.8 %	1994 RETURNS—13.0%	1999 RETURNS—11.83%	2004 RETURNS—9.21%	
1980 RETURNS—28.7 %	1985 RETURNS—23.0 %	1990 RETURNS—19.5 %	1995 RETURNS—12.9%	2000 RETURNS—11.52%	2005 RETURNS—9.12%	

[1] BRACKETS INDICATE THAT THE AMOUNT WAS REMOVED FROM THE FUND.
[2] AMOUNT IN THE ACCOUNT AS REPORTED BY THE U.S. TREASURY, 12/31/04

Presidential Matching Fund Income Tax Check-Off Status



January 2010

Federal Election Commission
Press Office

PRESIDENTIAL FUND INCOME TAX CHECK-OFF FUND, 1973 — 1993

CALENDAR YEAR	1994[1]	1993	1992	1991	1990	1989	1988	1987	1986	1985
January	$ 840,258	$ 496,442	$ 185,784	$ 55,917	$ 191,076	$ 51,752	$ 189,239	$ 180,021	$ 93,644	$ 22,489
February	9,603,292	4,169,736	5,350,532	3,859,981	3,851,840	3,350,332	3,577,465	2,193,576	2,453,902	758,295
March	13,670,027	5,626,467	6,543,877	8,967,739	9,103,550	7,231,448	7,217,478	9,554,967	7,928,518	7,535,879
April	16,726,728	5,020,155	5,731,339	6,419,427	6,395,132	6,300,921	6,998,769	7,148,608	9,944,248	8,590,753
May	11,537,867	5,582,833	5,808,728	5,854,209	5,319,508	7,336,050	7,295,836	6,615,806	6,718,371	8,235,644
June	9,281,193	3,555,265	3,635,585	4,845,602	4,707,103	3,903,518	3,216,574	4,071,899	4,092,492	2,986,813
July	5,567,974	1,936,487	1,119,885	958,772	1,228,985	1,402,031	2,219,724	2,033,012	2,453,593	3,455,350
August	903,072	337,847	254,933	506,805	454,132	1,347,288	1,096,980	830,094	947,562	1,910,141
September	1,155,429	458,471	402,316	364,392	545,024	669,189	686,710	100,870	690,902	587,237
October	1,181,278	172,882	201,739	144,866	162,037	172,340	155,329	550,265	100,254	310,643
November	722,307	227,725	194,241	294,056	258,973	250,685	279,726	267,288	260,196	229,308
December	128,420	52,672	63,781	50,570	65,619	70,052	80,317	105,541	90,065	90,209
TOTAL CHECK-OFF YEAR-TO-DATE	$71,316,995	$27,636,982	$29,592,735	$32,322,336	$32,462,979	$32,285,646	$33,013,987	$33,651,947	$35,753,837	$34,712,761
TOTAL REFUNDS YEAR-TO-DATE	$136,601.00	$129,707.22	$566,078.68	$595,419.14	$39,148.13	$22,024.32	$104,499.76	$357,307.09	$61,640.21	$61,839.97
TOTAL DISBURSEMENTS YEAR-TO-DATE	$568,434.92	$1,048,364.31	$153,191,153.59	$21,200,000.00	$2,426.42	$1,843,016.67	$158,560,804.63	$17,784,000.00	$6,396.22	$1,617,841.66
FUND BALANCE	$101,664,546.86	$30,779,385.78	$4,061,060.87	$127,144,468.62	$115,426,713.48	$82,927,012.77	$52,462,359.12	$177,905,676.99	$161,680,422.90	$125,870,541.41

CALENDAR YEAR	1984	1983	1982	1981	1980	1979	1978	1977	1976
January	$ 169,832	$ 319,570	$ 457,372	$ 684,510	$ 326,184	$ 482,973	$ 689,488	$ 746,885	$ 876,771
February	3,769,428	4,077,295	3,790,858	4,141,426	7,247,271	4,583,893	5,986,202	7,811,426	7,487,457
March	8,732,837	8,847,655	11,013,954	11,254,856	8,625,855	9,637,824	9,006,764	10,472,773	8,828,310
April	5,482,270	7,527,099	6,338,933	7,424,019	7,186,840	6,713,117	9,765,133	7,054,795	7,090,211
May	8,465,697	5,778,132	7,477,745	7,665,407	6,563,699	6,581,790	5,941,937	8,029,693	6,073,861
June	2,757,257	2,987,695	4,145,079	4,592,000	3,933,738	4,233,077	4,851,826	3,818,171	2,725,832
July	3,171,247	3,000,431	4,193,252	3,773,685	4,061,737	3,035,907	2,224,813	350,497	323,616
August	1,133,469	2,071,316	1,049,706	871,842	409,085	284,192	409,288	225,626	128,536
September	669,569	583,082	272,412	300,194	235,375	166,705	136,750		88,028
October	208,484	172,454	143,312	140,723	109,983	123,841	127,755		47,965
November	205,530	182,126	129,027	134,997	104,440	83,457	69,867	40,564	36,411
December	291,141	84,213	61,382	65,376	34,210	34,571	36,716	33,632	24,895
TOTAL CHECK-OFF YEAR-TO-DATE	$35,036,761	$35,631,068	$39,023,882	$41,049,052	$38,838,417	$35,941,347	$39,246,689	$36,606,008	$33,731,945
TOTAL REFUNDS YEAR-TO-DATE	$305,807.15	$21,899.13	$50,399.69	$202,287.60	$1,094,097.68	$23,473.82	$163,725.41	$1,037,029.10	-0-
TOTAL DISBURSEMENTS YEAR-TO-DATE	$120,149,768.18	$11,786,485.65	$1,070.22	$630,235.73	$101,427,115.89	$1,850,000.00	56,000.00	$521,124.42	$69,467,521.18
FUND BALANCE	$92,713,782.10	$177,320,982.13	$153,454,500.65	$114,373,289.18	$73,752,205.31	$135,246,806.52	$100,331,985.70	$60,927,571.29	$23,805,658.61

PRE-1975 ACTIVITY

Total Check-Off YTD

1973	$ 2,427,000
1974	27,591,546
1975	31,556,525

Total Disbursements YTD

1973	0
1974	0
1975	$ 2,590,502.21

Fund Balance

1973	$ 2,427,000.00
1974	27,591,546.00
1975	59,551,241.75

[1] THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993, (P.L. 103-66—SIGNED INTO LAW AUGUST 1993) INCREASED THE CHECK-OFF FROM $1 TO $3 (FROM $2 TO $6 FOR MARRIED COUPLES FILING JOINTLY) BEGINNING WITH THE FILING OF 1993 TAX RETURNS IN CALENDAR YEAR 1994.

PREPARED STATEMENT OF MONICA YOUN

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Testimony of Monica Youn
Brennan Center for Justice at NYU School of Law
***before the* Subcommittee on the Constitution, Civil Rights and Human Rights**
***of the* U.S. Senate Judiciary Committee**
***on* "The Fair Elections Now Act: A Comprehensive Response to Citizens United"**
April 12, 2011

The Brennan Center for Justice thanks the Subcommittee on the Constitution, Civil Rights and Human Rights for the opportunity to offer testimony in support of the Fair Elections Now Act, S. 750.[1] Providing public financing for federal elections is a necessary, effective, and constitutional response to last year's game-changing Supreme Court decision in *Citizens United v. FEC*.[2] The Fair Elections Now Act fights corruption and the appearance of corruption by reducing elected officials' dependence on large donors. It encourages constituent-focused campaigns, and increases the power and participation of small donors in elections. Ultimately, public financing restores voters to their central role in our democracy.

With *Citizens United*, the age-old problem of big money in politics has reached a historic inflection point. In that case, the Court overturned decades of law restricting corporate campaign spending. In doing so, the Court re-ordered the priorities in our democracy—amplifying special interests while displacing the voices of the voters.

The 2010 midterm elections gave us a preview of what we can expect in 2012, and beyond. In the first post-*Citizens United* election, tens of millions of dollars from corporate treasuries were spent to influence the electoral process, leaving voters and grassroots groups consigned to the political margins. Many big spenders—including corporate interests—were able to shield their

[1] The Brennan Center for Justice is a nonpartisan public policy and law institute that focuses on issues of democracy and justice. The Brennan Center supports disclosure requirements that inform voters about potential influences on elected officials, contribution limits that help to mitigate the real and perceived influence of donors on those officials, and public funding that preserves the significance of voters' voices in the political process and allows serious candidates to run competitive campaigns, regardless of their wealth or wealthy connections. We defend federal, state, and local campaign finance and public funding laws in courts across the country. We also give legal guidance and support to state and local campaign finance reformers through informative publications, direct counseling, legislative drafting, and testimony in support of reform proposals.
[2] 130 S.Ct. 876 (2001).

identities through gaping loopholes in federal disclosure law. In fact, 35 percent of all independent spending was done in the dark.[3]

Indeed, a detailed study on political spending in the 2010 elections by New York City Public Advocate Bill de Blasio illustrates the pernicious impact of *Citizens United* on accountability and transparency in American politics. De Blasio's report focused on the races where *Citizens United* had the most pronounced impact—namely, elections to the U.S. Senate. After examining the ten most expensive Senate races, De Blasio discovered that:

- "Anonymous or uncapped entities" (that is, organizations taking advantage of the lifting of restrictions on political spending by *Citizens United*) spent over $85 million on U.S. Senate races—of which $65.4 million was spent on the top ten races alone.[4]

- Over 30% of outside spending in these Senate races was funded by anonymous donations.[5] These funds included single donations totaling millions of dollars.

In other words, in the last federal election cycle, more spending than ever was made by outside organizations that are wholly unaccountable to voters—indeed, such organizations routinely fail to publicly disclose the names of the corporations and wealthy individuals who are bankrolling their campaigns. This influx of secret money poses major risks of corruption, since such independent spending has been used as a *quid pro quo* for favorable political treatment for large spenders, as explained below.

Moreover, an electoral system dominated by secret spending threatens a crisis of accountability. Indeed, large majorities of registered voters from each major party continue to agree that reducing the potentially-corrupting influence of money on politics is an issue of critical importance.[6] Voters have lost faith that their government is serving their interests. According to a recent Gallup poll, "[a] record-low 36% of Americans have a great deal or fair amount of trust and confidence in the legislative branch of government, down sharply from the prior record low of 45% set last year."[7] Meanwhile, the public—by overwhelming numbers—believes that our government's policies are more likely to benefit large corporations and wealthy individuals than middle-class or poor Americans.[8] A 2010 poll by the Pew Research Center found that while 70% of respondents agreed that government policies helped large corporations, only 27%

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[3] BILL DE BLASIO, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS 9 (Dec. 2010), *available at* http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf.
[4] *Id.* at 5.
[5] *Id.* at 6.
[6] *See* Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.
[7] Frank Newport, *Trust in Legislative Branch Falls to Record-Low 36%*, GALLUP, Sept. 24, 2010, *available at* http://www.gallup.com/poll/143225/Trust-Legislative-Branch-Falls-Record-Low.aspx.
[8] Pew Research Ctr. for the People & the Press, *Government Economic Policies Seen as Boon for Banks and Big Business, Not Middle Class or Poor*, July 19, 2010, http://pewresearch.org/pubs/1670/large-majorities-say-govt-stimulus-policies-mostly-helped-banks-financial-institutins-not-middle-class-or-poor.

believed that government policies helped the middle class.[9] The increasing influence of populist movements reflects a pervasive sense among the electorate that our government is for sale to the highest bidder.

Former Justice John Paul Stevens had foreseen this state of affairs in his powerful *Citizens United* dissent, warning that American citizens "may lose faith in their capacity, as citizens, to influence public policy" as a result of that decision. As the days pass, it is clear that Justice Stevens' prediction is being realized. In one survey, 72% of respondents worried that the decision will negatively impact the political process.[10] At a moment of such clear public disenchantment, there is a pressing need for reforms that better effectuate the ability of voters to hold their representatives accountable and that demonstrate that members of Congress are accountable to the electorate, not to big-money backers. The integrity of our electoral process is a necessary ingredient for a healthy democracy—we can wait no longer for fair elections.

By providing voluntary public financing for federal congressional candidates, the Fair Elections Now Act ("Fair Elections") is key to restoring accountability to American democracy. Fair Elections boosts the voices of small donors by providing public matching funds for small contributions. The innovative multiple match of small donations, which was modeled on New York City's groundbreaking program, makes it possible for candidates to run competitive campaigns, while rewarding the grassroots outreach that spurs greater citizen participation. In short, political candidates can run competitive campaigns relying only on small individual donations, not large infusions of special interest cash.

For these reasons, detailed in full below, we urge this Committee to support the Fair Elections Now Act, and recommend the Act for full consideration by the Senate.

I. *Citizens United* Released a Torrent of Corporate Spending and Secretive Special-Interest Money into the 2010 Election—and Even More is Expected in 2012.

In *Citizens United v. FEC*, decided in January 2010, the Supreme Court ruled that the First Amendment does not permit distinctions between the electoral speech of corporations and that of natural persons. In one swift stroke, the Court rendered unconstitutional more than 60 years of federal law restricting corporate electioneering expenditures, and overthrew the statutes of 22 states that previously prohibited election spending from corporate general-treasury funds.[11] The Court reached this radical result, and reversed decades of precedent, by rejecting the long-standing doctrine that corporate electoral spending creates unique risks of corruption and the appearance of corruption in the political process. As recently as 2003, in *McConnell v. Federal*

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[9] *Id.*

[10] PUBLIC CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF *CITIZENS UNITED* ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 18 (2011), *available at* http://www.citizen.org/documents/Citizens-United-20110113.pdf.

[11] The federal ban on direct corporate spending in elections goes back to the 1907 Tillman Act, which prohibited corporate contributions in federal campaigns (it was assumed to cover "independent expenditures" too). In 1947, the Taft-Hartley law made explicit that corporations and unions could not directly spend their treasury funds on electioneering. Congress—every time it has passed a law to deal with this—only has strengthened this prohibition.

Election Commission,[12] the Supreme Court had reaffirmed this holding. The Supreme Court made this abrupt about-face without any new legal or factual basis; as Justice John Paul Stevens observed in dissent, "the only relevant thing that has changed...is the composition of this Court."[13] The Court simply assumed that independent expenditures posed no risk of corruption, whether or not such independent expenditures were funded from corporate treasuries.

Overall, *Citizens United* gave an unequivocal green light for unlimited corporate spending in elections. A corporation may now spend its shareholders' money on direct electoral advocacy. This game-changing decision has already made its effects felt in the 2010 midterm elections, and the reverberations of *Citizens United* will only grow in the years to come.

Since *Citizens United*, we have seen very little *direct* spending on political ads by for-profit corporations. According to the Center for Responsive Politics, during the 2010 election cycle only three corporations ran their own independent expenditures.[14] Instead, wealthy corporations and individuals are taking advantage of *Citizens United* to funnel political spending through political committees like Super PACs and other non-profit organizations. Undisclosed spending has reached record-breaking levels even in the first post-*Citizens United* election, and political operatives are gearing up to flood the 2012 elections with cloaked campaign cash.

A. Political Spending by Corporations and Wealthy Special Interests has Increased Exponentially Since *Citizens United.*

As noted above, corporate cash swamped federal, state and local elections in 2010, relegating voters to a position at the margins of political power.[15]

- According to the Campaign Finance Institute, independent spending and electioneering in Congressional elections grew to $280.2 million in 2010.[16] This was more than double the $119.9 million spent by outside groups on Congressional elections in 2008, and more than five times the $53.9 million spent by outside groups in 2006.[17]

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[12] McConnell v. FEC, 540 U.S. 93 (2003).
[13] Citizens United, 130 S. Ct. at 942 (Stevens, J. dissenting).
[14] Michael Beckel, *Influx of Corporate Political Cash Followed Pivotal Federal Court Decision*, OPENSECRETS, Mar. 25, 2011, http://www.opensecrets.org/news/2011/03/influx-of-corporate-political-cash.html ("These three companies—DGS Construction, Penneco Oil and Central Arizona Block Co.—spent a combined $54,500 to aid . . . four federal-level Republican candidates.").
[15] *See, e.g.*, Michael Luo, *Money Talks Louder Than Ever in Midterms*, N.Y. TIMES, Oct. 8, 2010, at A13, *available at* http://www.nytimes.com/2010/10/08/us/politics/08donate.html.
[16] Press Release, Campaign Fin. Inst., Non-Party Spending Doubled in 2010 But Did Not Dictate the Results (Nov. 5, 2010), *available at* http://www.cfinst.org/Press/PReleases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx (follow "Table 1" hyperlink).
[17] *Id.*

- The U.S. Chamber of Commerce alone spent more than $32 million on federal electioneering communications during the 2010 election cycle, more than any other outside organization.[18] This nearly doubled the amount the Chamber spent in the 2008 cycle.[19]

This was not solely due to *Citizens United*, since even prior to *Citizens United,* a series of deregulatory decisions had opened up loopholes in federal campaign finance regulation.[20] *Citizens United*, however, put the stamp of Supreme Court approval on corporate campaigning, so that the effect of the decision extended far beyond its narrow holding. Campaign finance lawyers have described *Citizens United* as a "psychological green light," granting corporations a greater comfort level with inserting themselves into the heart of political campaigns.[21] We can only expect these trends to worsen in the upcoming 2012 election cycle, as other interests follow the paths blazed by the early adopters of corporate electioneering. Indeed, prominent special interests have already announced plans to smash spending records in the 2012 election cycle.[22]

Such high levels of corporate campaign spending carries a substantial risk of corruption, as explained *infra*, Section II.A.1. Corporate campaign spending has historically involved attempts to purchase *quid pro quo* favorable political treatment, often at taxpayers' expense.

B. *Citizens United* has Exacerbated Preexisting Problems of Undisclosed Spending by Wealthy Special Interests.

The *Citizens United* majority wrongly assumed that current disclosure laws allow both the electorate and corporate shareholders "to make informed decisions and give proper weight to different speakers and messages."[23] However, that vision of transparency and free flow of information bears no relation to what occurs in real life.[24] Most corporations are not required to

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[18] Center for Responsive Politics, *U.S. Chamber of Commerce Outside Spending 2010*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/detail.php?cmte=C30001101&cycle=2010.

[19] Center for Responsive Politics, *U.S. Chamber of Commerce Outside Spending 2008*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/detail.php?cmte=C30001101&cycle=2008.

[20] *See, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (holding that federal restrictions on electioneering communications were unconstitutional unless such communications were the "functional equivalent" of express advocacy).

[21] Luo, *supra* note 15.

[22] *See, e.g.*, Eliza Newlin Carney, *Democrats Join the Battle*, NAT'L J., Feb. 27, 2011, http://www.nationaljournal.com/columns/rules-of-the-game/democrats-join-the-battle-20110227; Tom Hamburger & Matea Gold, *Some Democrats Favor a Shift to More Outside Campaign Spending*, L.A. TIMES, Nov. 4, 2010, http://articles.latimes.com/2010/nov/04/nation/la-na-money-politics-20101104; Andy Kroll, *Will Secret Spending Divide Democrats?*, MOTHER JONES, Nov. 15, 2010, http://motherjones.com/politics/2010/11/obama-outside-spending-2012-election; Peter H. Stone, *Democrats Desperately Seek Their Own Rove*, CTR. FOR PUB. INTEGRITY, Mar. 14, 2011 http://www.publicintegrity. org/articles/entry/3019.

[23] Citizens United, 130 S. Ct. at 916.

[24] For example, independent expenditures—the very type of political expenditures unleashed by *Citizens United*—are underreported in most states. As one report explained, "holes in the laws—combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws—results in the poor public disclosure of independent expenditures. The result is that millions of dollars

disclose political spending, either to the general public, or to their own shareholders and corporate boards.[25] Contrary to the Court's expectations, recent elections have shown a sharp decline in the disclosure of political expenditures.

- Among groups making "electioneering communications" (campaign advertisements that mention a candidate), disclosure of donors has dropped from 96.8% in 2006, to 49.3% in 2008, to a scant 34% in 2010.[26]

- Among groups making independent expenditures, disclosure of donors dropped from 96.7% in 2006, to 83.3% in 2008, to 70% in 2010.[27]

These numbers are hardly surprising: Under the current laws, corporations can hide their political spending in several different ways.

First, it is perfectly legal for businesses that want to influence federal elections to funnel money through nonprofit trade associations such as the Chamber of Commerce to avoid disclosure.[28] For example, in a 2000 Michigan senate race, Microsoft used the Chamber of Commerce to fund $250,000 in attack ads against a candidate; this undisclosed donation would have remained hidden but for a newspaper investigation that exposed Microsoft's contribution.[29] Similarly, America's Health Insurance Plans (AHIP), a trade association, was found to have solicited $10 million to $20 million from six leading health insurers, and funneled this money secretly to the U.S. Chamber of Commerce to underwrite anti-health reform attack ads.[30] Although businesses must reveal their identities to the Federal Election Commission if they spend large amounts of money directly, they can give money to trade associations and other nonprofits anonymously. These nonprofits, in turn, only have to disclose the source of their advertising money if the donors specified that their contributions were intended for political ads—a requirement that almost all sophisticated players avoid.[31]

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spent by special interests each year to influence state elections go essentially unreported to the public." LINDA KING, NAT'L INST. ON MONEY IN STATE POLITICS, INDECENT DISCLOSURE: PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/5807.pdf.

[25] *See* CIARA TORRES-SPELLISCY, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 10 (2010), *available at* http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice/.

[26] KING, *supra* note 24, at 4.

[27] PUBLIC CITIZEN, *supra* note 10, at 11.

[28] TORRES-SPELLISCY, *supra* note 25, at 12.

[29] See CTR. FOR POLITICAL ACCOUNTABILITY, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING, ITS THREAT TO COMPANIES, AND WHAT SHAREHOLDERS CAN DO 13 (2006), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932; John R. Wilke, *Microsoft Is Source of "Soft Money" Funds Behind Ads in Michigan's Senate Race*, WALL ST. J., Oct. 16, 2000.

[30] Brad Jacobson, *Exclusive: How Corporations Secretly Move Millions to Fund Political Ads,* RAW STORY, Feb. 4, 2010, *available at* http://rawstory.com/2010/02/exclusive-trade-groups-swiss-bank-accounts-campaign-finance/.

[31] *See* Ciara Torres-Spelliscy, *Hiding Behind the Tax Code*, NEXUS CHAPMAN'S J. OF L. & PUB. POL'Y (forthcoming 2011). Although trade associations must report contributions received from other

Second, corporations and wealthy individuals often cloak their political spending by utilizing conduit organizations to avoid disclosing their true identity. As the Supreme Court observed in its 2003 decision in *McConnell v. FEC*, veiled spending is not a new problem.[32] But *Citizens United* gave corporations and other political spenders more cover to hide behind non-profits and trade associations than ever before. So while spending surged in 2010, the public's knowledge about that spending plummeted. For example:

- In September 2010, a mysterious group called Concerned Taxpayers of America started running ads targeting Rep. Peter A. DeFazio (D-Ore.).[33] It was only after the organization's FEC filings were made public that the truth came to light. The Concerned Taxpayers of America turned out to be only *two* concerned taxpayers—a privately-owned construction corporation based in Maryland, and a New York hedge fund executive—who poured nearly $1 million into this Super PAC.[34]

- The American Future Fund—based in Des Moines, Iowa—is a 501(c)(4) non-profit corporation that spent over $9.6 million in the 2010 election cycle, ranking fifth among independent spenders nationwide.[35] The group paid for a variety of ads targeting candidates on issues such as the so-called "Ground Zero Mosque." Media reports suggest, however, that the organization was in fact funded by ethanol interests, and that its true agenda was to target members sitting on energy and agricultural policy committees.[36] Because the American Future Fund was organized as a 501(c)(4), it has no obligation to disclose its funders publicly, and the interests and identities of its funders may never be known for certain.

This lack of accountability endangers the entire legislative process by allowing corporate special interests to hide behind political campaigns that claim to speak for the general welfare. As explained above, this hidden spending impairs the ability of voters to make informed decisions on Election Day. Inadequate disclosure of corporate spending similarly limits the ability of

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corporations to the Internal Revenue Service, the document itself remains confidential and is not made available to the public. *See* DEP'T OF TREASURY, IRS, INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 4 (2010), *available at* http://www.irs.gov/pub/irs-pdf/i990.pdf.

[32] *See* McConnell, 540 U.S. at 128, 197 (citing record evidence that corporations commonly veil their political expenditures with misleading names such as "The Coalition-Americans Working for Real Change" (a business organization opposed to organized labor) and "Citizens for Better Medicare" (funded by the pharmaceutical industry)).

[33] Karen Tumulty, *An Anonymous Group Tries to Ignite a Sleepy Congressional Race*, WASH. POST, Sept. 24, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/24/AR2010092406362.html.

[34] Dan Eggen, *Concerned Taxpayers of America Supported by Only Two Donors*, WASH. POST, Oct. 16, 2010, http://www.washingtonpost.com/wp-dyn/content/story/2010/10/13/ST2010101306021.html; FEC SUMMARY REPORT FOR CONCERNED TAXPAYERS OF AMERICA, 2009-2010 ELECTION CYCLE, *available at* http://query.nictusa.com/cgi-bin/cancomsrs/?_10+C00488437 (last visited Apr. 6, 2011).

[35] PUBLIC CITIZEN, *supra* note 10, at 9-10.

[36] *See* Editorial, *Secret Money in Iowa*, N.Y. TIMES, Oct. 27, 2010, at A28, *available at* http://www.nytimes.com/2010/10/27/opinion/27wed1.html; Jim Rutenberg, Don Van Natta, Jr. & Mike McIntire, *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 12, 2010, http://www.nytimes.com/2010/10/12/us/politics/12donate.htm.

legislators and policymakers to evaluate the true interests behind lobbying campaigns. Take one example: Recently, the non-profit Institute for Liberty—claiming an affiliation with the Tea Party movement—launched an extensive campaign against a proposed tariff on paper imported from Indonesia.[37] The Institute's campaign invokes the Declaration of Independence to defend the rights of foreign corporations and attacks American businesses, unions and environmentalists who have criticized Indonesian paper manufacturers. Suspiciously, this campaign coincided with a massive public relations push by Asia Pulp & Paper—a huge Indonesian paper manufacturer. But, because the Institute for Liberty is not required to disclose its donors, it is impossible to know whether Asia Pulp & Paper is actually funding this effort. Our chronic lack of transparency prevents citizens and legislators from knowing whether this purported grass-roots campaign is actually being funded by corporate special interests, and may lead voters to be misled in their choices at the ballot box.

C. *Citizens United* Led to the Creation of "Super PACs."

Citizens United also led directly to the creation of massive new independent expenditure vehicles nicknamed "Super PACs." After *Citizens United*, the D.C. Court of Appeals extended the Supreme Court's logic to strike down contribution limits imposed on federal PACs that only engage in independent spending (as opposed to donating directly to candidates' campaigns). In other words, these independent expenditure "Super PACs" can take in and spend unlimited amounts, including monies from corporate treasury funds.

Such Super PACs can function as "shadow parties," sharing personnel, office space, and strategies with each other, but without being subject to the federal campaign finance laws' restrictions on political parties and candidates.[38] Thus, Super PACs offer a ready-made vehicle to circumvent federal contribution limits which place a ceiling on individual contributions and bar corporate contributions. As Republican political strategist Karl Rove, the founder of American Crossroads—perhaps the best known Super PAC—told Fox News, "What we've essentially said is, if you've maxed out to the Senate committee, the congressional committee, or the R.N.C. and you'd like to do more, under the *Citizens United* decision you can give money to American Crossroads."[39] Indeed, Rove's two organizations—American Crossroads and Crossroads GPS—raised seventy-one million dollars in the 2010 cycle. During August 2010 alone, American Crossroads raised $2.4 million from just three billionaire donors.[40] Such unlimited contributions to outside spending groups raise the risks of corruption and the appearance of corruption that federal contribution limits were enacted to prevent.

Moreover, according to Politifact, the Pulitzer Prize winning fact-checking website of the *St. Petersburg Times*, Super PACS and other outside groups "overwhelmingly spread[]

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[37] Mike McIntire, *Odd Alliance: Business Lobby and Tea Party*, N.Y. TIMES, Mar. 30, 2011, http://www.nytimes.com/2011/03/31/us/politics/31liberty.html.
[38] Jonathan D. Salant & Kristin Jensen, *The Ties that Bind GOP Fundraisers*, BUSINESS WEEK, Oct. 21, 2010, http://www.businessweek.com/magazine/content/10_44/b4201034335872.htm.
[39] Jeffrey Toobin, *Money Talks*, NEW YORKER, Apr. 11, 2011, http://www.newyorker.com/talk/comment/2011/04/11/110411taco_talk_toobin.
[40] Justin Elliott, *Billionaires Give 91 Percent of Funds for Rove-tied Group*, SALON, Sept. 20, 2010, http://www.salon.com/news/politics/war_room/2010/09/20/rove_group_more_millionaire_donations.

exaggerations and falsehoods."[41] If a candidate or political party were to have such a dismal record for accuracy, voters could hold that candidate or party accountable at the ballot box. However, with such distortions attributable only to supposedly independent outside groups, voters are powerless to react as our electoral discourse is flooded with misleading and deceptive advertisements funded by undisclosed backers.

D. The Outlook for 2012 is Bleak.

These troubling trends will continue—and likely worsen—in 2012. Observers predict that outside political spending may double again during the upcoming election cycle.[42] Candidates are already gearing up for the most expensive federal election cycle in American history.[43] Both political parties have announced plans to include Super PACs as a major component of their 2012 fundraising strategies. American Crossroads and Crossroads GPS have announced a target of $120 million for the 2012 cycle.[44] Democratic strategists have announced their own Super PACs, such as the "Majority PAC," which will operate in tandem with issue advocacy nonprofits (organized under 501(c)(4) of the tax code), enabling big donors to make contributions in secret.[45] Some have warned that—given the amount of secret money inundating our elections—there is a serious likelihood of future political and ethical scandals of Watergate-sized proportions.[46] All in all, the full impact of *Citizens United* is almost certainly still yet to come.

II. The *Fair Elections Now Act* Will Benefit Voters and Candidates.

Public financing generally, and Fair Elections in particular, can help restore our democracy, even in the face of the torrent of special interest money post-*Citizens United*. Most importantly, by allowing candidates to run viable campaigns through reliance on small donations and public funds alone, public funding programs restore integrity and accountability to the electoral process. By doing so, public financing reduces the threat that big money will have a corrupting influence on the political process. Moreover, public financing programs—particularly small-donor matching systems like that proposed by Fair Elections and currently active in New York City—incentivize political participation by candidates and by voters, thus promoting electoral debate and competition and allowing more of the electorate to have a stake in our campaigns.

A. Public Financing of Campaigns Reduces Corruption.

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[41] Bill Adair, *'Super PACs' and other groups have poor record for accuracy*, POLITIFACT, Oct. 14, 2010, http://www.politifact.com/truth-o-meter/article/2010/oct/14/super-pacs-and-other-groups-have-poor-record-accur/.

[42] *See* Shane D'Aprile, *Midterms May Have Just Tested the Waters of Campaign Finance Ruling*, HILL, Nov. 13, 2010, http://thehill.com/blogs/ballot-box/fundraising/129005-ultimate-impact-of-outside-campaign-spending-remains-to-be-seen.

[43] *See, e.g.*, Glenn Thrush, *Barack Obama Reelection Starts Cash Chase*, POLITICO, Mar. 5, 2011, http://www.politico.com/news/stories/0311/50643.html.

[44] Brian Montopoli, *Karl Rove-Linked Group Seeks to Raise $120 million for 2012 elections*, CBS NEWS, Mar. 1, 2011, http://www.cbsnews.com/8301-503544_162-20037742-503544.html.

[45] Carney, *supra* note 22.

[46] Albert Hunt, *Watergate Return Inevitable as Cash Floods 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.

1. *Reducing Actual Corruption*

Our system of private financing for congressional races carries a significant risk of corruption. Members who receive significant donations from particular special interests may feel compelled to support their biggest donors' interests, creating a *quid pro quo* where legislative decisions are implicitly exchanged for campaign funds.[47] As Senator John McCain (R-Arizona) once put it, "it would be hard to find much legislation enacted by any Congress that did not contain one or more obscure provision that served no legitimate national or even local interest, but which was intended only as a reward for a generous campaign supporter."[48] In addition to generating favors for special interests, large donations can lead to inaction on legislation that would benefit the public good. As Senator McCain has explained, "There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation."[49] Former Senator Russ Feingold (D-Wisconsin) has similarly warned of the appearance of *quid pro quo* corruption that emerges when "a $200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA."[50]

Indeed, business leaders readily acknowledge that corporate political spending is intended as a *quid pro quo* to win influence and favorable treatment, rather than to merely express an opinion on political issues. This is why corporations routinely spend money supporting both major parties, and why corporate political spending generally flows to the party in power and tracks changes in the partisan make-up of legislatures.[51] A recent poll of 301 business opinion leaders confirmed that most believe that corporate political spending serves a non-ideological function:

- Fifty-five percent said that corporate America engages in campaign spending "to gain access to influence the legislative process."[52]

- Only 16% said that corporate political spending was intended "to promote a certain ideological position."[53]

- And, 17% of business leaders complained that corporate political donations were primarily necessary "to avoid adverse legislative consequences."[54]

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[47] CTR. FOR GOV'TAL STUDIES, INVESTING IN DEMOCRACY 6-7 (2003) [hereinafter CGS STUDY].
[48] 143 Cong. Rec. S9994-02 (daily ed. Sept. 26, 1997) (statement of Sen. John McCain), 1997 WL 593557, at *S10000 (Westlaw).
[49] McConnell v. FEC, 251 F. Supp. 2d 176, 684 (D.D.C. 2003) (quoting statement of Sen. John McCain).
[50] *Id.* (quoting statement of Sen. Russell Feingold).
[51] Brief of the Committee for Economic Development as *Amicus Curiae* in Support of Respondents at 11-12, McComish v. Bennett, Nos. 10-238 & 10-239, 2011 WL 661709, at *11-12 (U.S. Feb. 22, 2011) [hereinafter CED Amicus Brief].
[52] CHERYL KORN, ZOGBY INT'L, COMM. FOR ECON. DEV., OCTOBER BUSINESS LEADER STUDY 8 (2010), *available at* http://www.ced.org/images/content/issues/moneyinpolitics/2010/zogbypoll2010.pdf.
[53] *Id.*
[54] *Id.*

This problem is fostered by political candidates, whose reliance on big-money donations leads them to reinforce the understanding that corporate campaign spending translates into political access.[55]

Many business leaders believe that the pressure for corporations to enter the political fray has increased since *Citizens United*. According to an October 2010 poll by the Committee for Economic Development, "48% of business leaders state that the level of pressure placed on them to make political contributions has increased since 2008, with 28% saying it has "increased a lot."[56] The same poll found that 29% of business leaders describe the amount of money solicited as "excessive" and another 22% say it is "high, but not excessive."[57]

Our current campaign finance system is particularly problematic where lawmakers on key committees benefit from campaign spending by the very interests they are charged with regulating. For example, during the passage of the Medicare Prescription Drug, Improvement, and Modernization Act in 2003, Rep. Walter Jones (R-North Carolina) decried the House vote as "political Sodom and Gomorrah night. It was absolutely ugly."[58] As Members entered the House chamber, lobbyists representing prescription drug companies who had given millions in political contributions stood at the entrance to the chamber, pressuring legislators for their support.[59] In the aftermath of the extremely close vote, allegations of bribery swirled, as one of the deciding votes claimed he had been offered campaign funds in exchange for his support.[60] Congressman Jones, deeply affected by the experience, has been a vocal supporter of Fair Elections: "Let the people, not the special interest groups, control Washington."[61]

Direct political contributions are not the only cause of potential corruption in our current campaign finance system. Independent political spending, of the type that has been unleashed by *Citizens United*, can also create substantial risks of corruption. Indeed, independent campaign ads—or even the threat of unleashing such an ad—may be a more direct route than lobbying for special interests to pressure elected officials. Such campaign ads allow outside spenders to threaten politicians' ability to remain in office. For example, in 1998, a Native American tribe offered to undertake a substantial independent spending campaign on behalf of a Kansas Congressman in an extremely close reelection race, if the Congressman would switch his position on—and subsequently support—legislation that would allow the tribe to build a casino.[62]

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[55] CED Amicus Brief, *supra* note 51, at 11.
[56] *Id.* at 17.
[57] *Id.*
[58] *A Look at H.R. 1826 and the Public Financing of Congressional Campaigns: Hearing on H.R. 1826 Before the Comm. on H. Admin.*, 111th Cong. (2009) (statement of Rep. Walter Jones) [hereinafter Jones].
[59] *Id.*
[60] Sheryl Gay Stolberg, *Inquiry Set on Bribery Claim in Medicare Vote*, N.Y. TIMES, Mar. 18, 2004, at A30.
[61] Jones, *supra* note 58, at 49.
[62] Def.'s Proposed Findings of Facts, Speechnow.org v. FEC, No. 1:08-cv-00248-JR at ¶¶ 288-297 (D.C. 2008).

Corporations may be able to use their new ability to run campaign attack ads to coerce elected officials into compliance with a particular agenda, even if the corporations never have to make good on their threats by actually running the ads. One egregious example arose in North Carolina and is discussed at length in Judge M. Blane Michael's dissenting opinion in the 4th Circuit case of *North Carolina Right to Life, Inc. v. Leake*:

> The campaign waged in North Carolina by the independent group Farmers for Fairness (Farmers) provides another example of the corruptive influence of independent expenditures. 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.[63]

As this example demonstrates, the *Citizens United* decision gives corporations a new and powerful weapon – whether they ever actually use this weapon is, arguably, beside the point. A corporation's explicit or implied threat to use its general treasury funds as a political war chest places great pressure on legislators and can be expected to distort the decision-making of elected officials in ways that will often be difficult to trace.

Public financing can help break this vicious cycle of corruption. When special interest political spending carries less weight, legislation can be considered on its merits rather than by its fundraising consequences. As former Arizona governor Janet Napolitano explained with regard to that state's prescription drug bill:

> If I had not run [using public financing], I would surely have been paid visits by numerous campaign contributors representing pharmaceutical interests and the like, urging me either to shelve the idea or to create it in their image. All the while, they would be wielding the implied threat to yank their support and shop for an opponent in four years. [Instead,] I was able to create this program based on one and only one variable: the best interests of Arizona's senior citizens.[64]

Similarly, the Center for Governmental Studies, which has studied campaign finance programs across the nation, has catalogued numerous other instances (in New Jersey, Maine, Los Angeles and elsewhere) where candidates and legislators endorse public financing for this very reason:

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[63] North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 335-36 (4th Cir. 2008) (Michael, J., dissenting) (citation omitted).

[64] *Why Fair Elections?*, RHODE ISLANDERS FOR FAIR ELECTIONS, http://www.fairelectionsri.org/benefits.php (last visited April 10, 2011).

Public financing enables elected officials to place their constituents' interests above special interests.[65]

2. *Reducing Perceived Corruption*

As the Supreme Court has often reaffirmed, "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the *appearance* of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[66] Public polling confirms that the current system of private fundraising fosters the appearance of corruption, eroding trust in government and leading the public to believe that political spending buys political favors.

- A Greenberg-McKinnon national survey in February 2010 found that 79% believed members of Congress are "controlled" by those who fund their campaigns as opposed to just 18% who thought voters were in charge.[67]

- A compilation of 19 swing district Survey USA polls in March 2010 showed that voters across the board think that members of Congress listen to donors more than them by a 87% to 12% margin, including a wider average gap of 90% to 8% gap among independents.[68]

- A Rasmussen national survey in August 2010 found that 70% of voters believe that "most members of Congress [are] willing to sell their vote for either cash or a campaign contribution."[69]

A shift to a system of public financing could help restore this lost faith in government. Already, participants in state public financing systems have seen a change in public opinion. "Overall people are excited about [public financing] because they feel that their particular legislator will not be tied to special interest dollars and that means a lot to them," said Leah Landrum Taylor, an Arizona state representative who participated in her state's public financing program.[70] Even candidates who chose not to participate in the state's program have noticed the shift. In a recent GAO survey, an anonymous nonparticipating Arizona candidate wrote, "I believe the program has helped restore the public's faith in the integrity of candidates. Hopefully, many other states,

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[65] Brief of *Amicus Curiae* Center for Governmental Studies in Support of Respondents at 11-12, McComish v. Bennett, Nos. 10-238 & 10-239, 2011 WL 639368, at *11-12 (U.S. Feb. 22, 2011) [hereinafter CGS Amicus Brief].
[66] Buckley v. Valeo, 424 U.S. 1, 27 (1976) (emphasis added).
[67] GREENBERG ET AL., GREENBERG QUINLAN ROSNER RESEARCH, STRONG CAMPAIGN FINANCE REFORM: GOOD POLICY, GOOD POLITICS 2 (2010), *available at* http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf.
[68] Memorandum from David Donnelly et al. on Polling in 19 Battleground Districts Finds Voters Will Reward Candidates Who Support Fair Elections Now Act to Interested Parties (Mar. 16, 2010).
[69] *Toplines - Campaigns*, RASMUSSEN REPORTS (Aug. 7-8, 2010), http://www.rasmussenreports.com/public_content/politics/questions/pt_survey_questions/august_2010/toplines_campaigns_august_7_8_2010.
[70] CGS Study, *supra note* 47, at 4.

and eventually Congress, will adopt public funding of elections."[71] Public financing can ease voters' distrust and suspicion of their elected officials, fostering greater trust in the government.

B. Public Financing Reduces Elected Officials' Dependence on Large Donor Fundraising and Encourages Constituent-Focused Campaigns.

Under the existing system of private campaign contributions, fundraising monopolizes a candidate's time, with elected officials spending many of their hours "dialing for dollars" or attending closed-door fundraisers. For instance, Representative Chellie Pingree (D-Maine) reported spending nearly 20 hours a day on the phone, trying to coax donations, not from her constituents, but from wealthy out-of-state interests.[72] Senator Tom Harkin (D-Iowa) recently estimated that, "[o]f any free time you have, I would say fifty per cent, maybe even more," is spent on fundraising.[73] Senator Lamar Alexander (R-Tennessee) has stated that fundraising "sucks up time that a senator ought to be spending getting to know other senators, working on issues."[74] On average, federal congressional candidates in contested elections report spending about 34 percent of their time raising money.[75]

Crucially, public financing permits candidates to spend less time fundraising, allowing those who are elected officials to spend a greater percentage of their time legislating in their constituents' interest. Indeed, a 2003 University of Maryland study confirmed that candidates who participate in robust public funding programs spend significantly less time raising money than other candidates.[76] Another study recently concluded that candidates with full public financing are able to devote 10% more of their time to direct engagement with voters compared to traditional candidates.[77]

And, candidates around the country report that public financing improves their ability to connect with voters. For example, Albuquerque, New Mexico Councilor M. Debbie O'Malley, an incumbent who ran as a publicly funded candidate in 2007, stated that with public funding, "you do a lot more outreach and the voters have a lot more ownership of the election process, because

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[71] U.S. GEN. ACCOUNTING OFFICE, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCE OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 122 (2003).

[72] *A Look at H.R. 1826 and the Public Financing of Congressional Campaigns: Hearing on H.R. 1826 Before the Comm. on H. Admin.*, 111th Cong. 43 (2009) (statement of Rep. Chellie Pingree) [hereinafter Pingree], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:52711.pdf.

[73] George Packer, *The Empty Chamber: Just How Broken Is the Senate*, NEW YORKER, Aug. 9, 2010, http://www.newyorker.com/reporting/2010/08/09/100809fa_fact_packer?currentPage=all.

[74] *Id.*

[75] Peter Francia & Paul Hernnson, *The Impact of Public Finance Laws on Fundraising in State Legislative Elections*, AM. POLITICS RESEARCH, Sept. 2003, at 531.

[76] *Id.*

[77] Michael Miller, *Clean Elections vs. Political Speech*, MONKEY CAGE (Mar. 23, 2011), http://www.themonkeycage.org/2011/03/clean_elections_vs_political_s.html; *see also* Ezra Klein, *The Importance of Campaign-Finance Reform in One Graph*, WASH. POST BUS. BLOG, (Mar. 23, 2011, 05:58 PM ET), http://www.washingtonpost.com/blogs/ezra-klein/post/the-importance-of-campaign-finance-reform-in-one-graph/2011/03/18/ABka8iKB_blog.html.

many of them have given $5 to help get a candidate qualified."[78] Running for Governor of Arizona, Janet Napolitano had a similar experience. "[Public financing is] the difference between being able to go out and spend your time talking with voters, meeting with groups,....traveling to communities that have been underrepresented in the past, as opposed to being on the phone selling tickets to a $250 a plate fundraiser."[79]

In short, in a system with less emphasis on large contributions, the focus returns to the candidate's ability to connect with his or her potential constituents.

C. By Incentivizing Grassroots Fundraising, Public Financing Increases Political Participation.

Notably, the goal of Fair Elections is not to "get money out of politics," or any such unrealistic objective. Instead, by using small donor matching funds to incentivize grassroots fundraising, Fair Elections can broaden and deepen the donor pool and allow new voters to have a stake in the electoral process. As the former New York City Campaign Finance Board Chair (and current Brennan Center Chief Counsel) Frederick A.O. ("Fritz") Schwarz, Jr. has put it:

> In their understandable disgust with large contributions, many reformers missed a big point—and a big opportunity. Political contributions are *not* inherently tainted. Political contributions do not always raise the specter of corruption. Large ones may. But small financial contributions are a natural part of a healthy participatory democracy. New York's system should be a model for reform nationwide.[80]

The vast majority of political contributions currently come from a small segment of the wealthiest Americans, particularly in federal congressional campaigns. In 2008, U.S. Senate candidates received only 14% of their funding from donors who gave an aggregate of $200 or less, while U.S. House of Representative candidates received only 8% of their funding from this pool of small donors.[81] Moreover, Senate candidates received only 23% of their funding from donors who gave less than $1000, while House candidates received only 17% of their funding from donors who gave less than $1000.[82] For incumbents, the reliance on small donors is even lower.[83]

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[78] CGS Amicus Brief, *supra* note 65, at 16 (quoting MOLLY MILLIGAN, CTR. FOR GOV'TAL STUDIES, PUBLIC CAMPAIGN FINANCING IN ALBUQUERQUE: CITIZENS WIN WITH CLEAN MONEY ELECTIONS 23 (2011)).
[79] CGS Study, *supra note* 47, at 3.
[80] Frederick A.O. Schwarz, Jr., *Foreword* to ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE (2010).
[81] ANTHONY J. CORRADO ET AL., CAMPAIGN FIN. INST., REFORM IN AN AGE OF NETWORKED CAMPAIGNS 20 (2010), *available at* http://cfinst.org/Press/PReleases/10-01-14/Reform_in_an_Age_of_Networked_Campaigns.aspx.
[82] *Id.* at 21.
[83] *Id.* at 20.

A shift to public financing—particularly, moving to a system that matches small donations with public funds—can dramatically increase the influence of small donors and thus widen the scope of political participation. Small donor participation in Arizona's gubernatorial races increased after the implementation of the state's public financing system: "a study of Arizona gubernatorial contributions found a 3-fold increase from 11,234 in 1998 to 38,579 in 2002, with the majority of contributors earning $50,000 or less."[84] In Connecticut, most state legislative candidates who participated in the public financing program received money from a larger number of individual donors in 2008 than the predecessor candidate of the same party and district in 2006, the last year without the program.[85] Similarly, under New York's system, which features a multiple match like the one included in Fair Elections:

- The number of overall contributors and the number of small donors has increased.[86] In particular, the number of contributors has risen dramatically—by an average of 35%—since the enactment of the multiple match. In 1997, the last year before the enactment of the multiple match, 72,082 donors gave to participating candidates. In 2001, the first year of the multiple match, the number of donors skyrocketed to 146,949 donors.[87]

- Participating candidates rely on more donors, and on more small donors, than do nonparticipants. In 2009, the typical participating City Council candidate enlisted the support of almost triple the number of small donors than did her nonparticipating counterpart; the median number of small donors for participating candidates was 269 and 91 for nonparticipants. In 2005, participants garnered support from more than double the small donors than nonparticipants; the median number of small donors for participating candidates was 239 and 98 for nonparticipants.[88]

- In 2009, the average contribution to a participating City Council candidate was $199, less than one-third the $690 average contribution for non-participating candidates. In 2005, the average contribution to participating City Council candidates was $321, significantly lower than the $804 average contribution for non-participants.[89]

- Over half of the individuals who contributed to city campaigns during the last three election cycles were first-time donors.[90]

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[84] AMS. FOR CAMPAIGN REFORM, FAIR ELECTIONS: STATE TRACK RECORD OF SUCCESS (2010), *available at* http://www.acrreform.org/wp-content/uploads/2010/12/Fair-Elections-State-Track-Record.pdf.
[85] Press Release, Campaign Fin. Inst., CFI's Review of Connecticut's Campaign Donors in 2006 and 2008 Finds Strengths in Citizen Election Program but Recommends Changes (Mar. 2, 2010), *available at* http://www.cfinst.org/Press/PReleases/10-03-02/Analysis_of_Connecticut_Citizen_Election_Program.aspx.
[86] MIGALLY & LISS, *supra* note 80, at 2.
[87] *Id.* at 12 & n.94.
[88] *Id.* at 15 & n.113.
[89] *Id.* at 15 & n. 114.
[90] CGS Amicus Brief, *supra* note 65, at 19 (citing NYC CAMPAIGN FIN. BD., NEW YORKERS MAKE THEIR VOICES HEARD: A REPORT ON THE 2009 ELECTIONS 104-05 (2009)).

Including more voters in the electoral process naturally leads to a larger, more diverse pool of donors. For instance, the share of donor activity has risen in New York City's outer boroughs; in 2009, donor activity increased almost six-fold in Flushing, a heavily Asian-American neighborhood that is home to Queens' Chinatown.[91] Similarly, a scan of the occupations of 2009 donors to New York City elections reveals a surprisingly diverse group: Amidst the traditional lawyers and businesspeople, contributors included a significant number of artists, administrative assistants, barbers and beauticians, cab and bus operators, carpenters, police officers, students, nurses and clergy.[92]

Just as it creates new contributors, public financing can also lead to a more diverse candidate pool. When extensive private fundraising is no longer a barrier to entry, running for office becomes accessible to community leaders with popular support, but who may lack big-money backers.[93] Thanks to Maine's system of public financing, for example, challengers have run "who never thought they'd have the chance to represent the people who are their friends and neighbors—young people, people from minority communities, people who thought they would never be able to afford the cost of running for public office."[94] Indeed, once they remove the nearly prohibitive costs of candidacy, states with public financing inevitably see a rise in non-traditional candidates. For example:

- The number of women running for office in Connecticut is at an all time high, and many credit public financing with allowing them to run.[95]

- In Arizona, the number of Native American and Latino candidates nearly tripled in just two election cycles after public financing was implemented.[96]

- In New York City, the system has been tied to a series of "firsts" in New York City politics: The City's first African-American mayor, David Dinkins, participated in the program, as have the City Council's first Dominican-American, first Asian-American, and first Asian-American woman members.[97]

On a national level, the presidential public financing system has enabled candidates to translate widespread popular support into viable—and, often ultimately successful—campaigns. Since Watergate, three incumbent presidents have been defeated by challengers who benefited from the

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[91] *Id.* (citing NYC CAMPAIGN FIN. BD., *supra* note 90, at 109-10).
[92] MIGALLY & LISS, *supra* note 80, at 13.
[93] *See* CGS Amicus Brief, *supra* note 65, at 21-24.
[94] Pingree, *supra* note 72, at 46.
[95] *A Look at H.R. 1826 and the Public Financing of Congressional Campaigns: Hearing on H.R. 1826 Before the Comm. on H. Admin.*, 111th Cong. 206 (2009) (statement of Jeffrey Garfield, Exec. Dir., Conn. State Elections Enforcement Comm'n), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings &docid=f:52711.pdf.
[96] CGS Amicus Brief, *supra* note 65, at 24.
[97] MIGALLY & LISS, *supra* note 80, at 21.

presidential public financing system, with the largest beneficiary of public financing being the insurgent candidacy of Ronald Reagan.[98]

In sum, by building on years of positive experience with small donor matching funds in New York City and other jurisdictions, the Fair Elections Now Act provides critical incentives to broaden and deepen political participation in congressional elections.

III. Despite Recent Political and Legal Developments, Public Financing Remains Politically and Constitutionally Viable.

A. Publicly Financed Candidates Can Remain Competitive Even In The Post-*Citizens United* Era.

Multiple states and jurisdictions have had great success with their public financing systems. Indeed, a shining example has operated on the national level for more than 35 years: the presidential public financing system. It was adopted after the Watergate scandal as an effort to address the corruption of the Nixon administration and the abuses of the 1972 presidential election.[99] And it has succeeded in combating corruption—presidential elections since Watergate have been free of large-scale corruption scandals.

Even in the post-*Citizens United* world of increased, often corporate-backed, independent spending, public financing continues to be a viable option. Questions have been raised about the efficacy of public financing program in an environment of unlimited corporate independent expenditures.[100] But the experiences of jurisdictions with public financing demonstrates that, as long as such systems offer candidates sufficient funds to run viable campaigns, publicly financed candidates can run competitive and successful races even in the face of high levels of hostile independent spending.

The Brennan Center has begun to analyze how a publicly financed candidate's chance of winning her race is affected by the amount of hostile independent expenditures targeting her. We have started with Arizona and Maine, the nation's most robust state financing systems. Although our research is ongoing, thus far there is no indication that the electoral success of

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[98] Brief for *Amici Curiae* Anthony Corrado, Thomas Mann and Norm Ornstein in Support of Respondents at 16-17, McComish v. Bennett, Nos. 10-238 & 10-239, 2011 WL 661708, at *16-17 (U.S. Feb. 22, 2011).

[99] 1974 Federal Election Campaign Act, now codified at 2 U.S.C § 431 *et seq.*, 26 U.S.C. § 9001 *et seq.*, and 26 U.S.C. § 9031 *et seq.*

[100] *See* R. SAM GARRETT, CONG. RESEARCH SERV., CAMPAIGN FINANCE POLICY AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: ISSUES AND OPTIONS FOR CONGRESS (2010), *available at* http://assets.opencrs.com/rpts/R41054_20100201.pdf; Colin McEnroe, *The Extreme Court*, HARTFORD COURANT, Jan. 22, 2010, http://blogs.courant.com/colin_mcenroe_to_wit/2010/01/the-extreme-court.html.

publicly financed candidates in these states has been compromised by high levels of independent spending.[101]

- Maine has never banned corporate-funded independent expenditures in state elections. Thus, candidates participating in the state's 10-year-old public financing system have regularly conducted campaigns in the midst of heavy independent spending from the National Organization for Marriage and other well-financed outside groups.[102] Despite this, the vast majority of Republican and Democratic candidates participate in public financing. In the 2010 state senate elections, 94% of Republican candidates, and 82% of Democratic candidates ran their campaigns on public funding. In state house campaigns, 89% of Democratic candidates and 68% of Republican candidates participated.[103]

- Arizona's 13-year old public financing system has also enjoyed a strong bipartisan majority of candidates participating in public financing. Again, publicly financed candidates there have run successful campaigns despite hundreds of thousands of dollars in opposing independent expenditures.[104] In 2008, 72% of Democrats and 50% of Republicans used public financing in their primary elections, and 82% of Democrats and 52% of Republicans used public financing in the general election.[105]

- Overall, our research indicates that, in both Maine and Arizona, the level of hostile outside spending appears to have no correlation to a publicly financed candidate's chance of victory, demonstrating that adequately-funded publicly financed candidates are able to prevail against well-funded outside attacks.

We have also examined public financing systems in the nation's costliest municipal races – in New York City and Los Angeles, as well as San Francisco.

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[101] We looked at the electoral success of publicly financed candidates in the 2006, 2008, and 2010 state legislative elections in Arizona and Maine, both of which give full public financing to qualifying candidates and provide reliable disclosure of independent expenditure data. We examined the outcomes for 375 publicly financed legislative candidates in the primary elections and 284 publicly financed legislative candidates in the general elections in Arizona; in Maine we looked at the outcomes for 868 publicly financed legislative candidates in the general elections. We analyzed the impact of spending on the probability of victory for publicly financed candidates by examining candidate and independent expenditure data, and controlled for incumbency and the partisan breakdown of each district.

[102] *See* Nat'l Org. for Marriage v. McKee, 723 F. Supp. 2d 245, 251-52 (D. Me. 2010).

[103] MAINE COMM'N ON GOV'TAL ETHICS AND ELECTION PRACTICES, MAINE CLEAN ELECTION ACT: OVERVIEW OF PARTICIPATION RATES AND PAYMENTS, 2000-2010, at 1 (2011), *available at* http://www.maine.gov/ethics/pdf/publications/2010_MCEA_Summary.pdf.

[104] In 2006, gubernatorial candidate Janet Napolitano faced $430,000 in directly opposing independent expenditures, yet still won the election. Jan Brewer was similarly successful in 2010, facing $200,451 in directly opposing independent expenditures. *See Campaign Finance Reporting Database*, OFFICE OF THE ARIZ. SEC'Y OF STATE, http://www.azsos.gov/cfs/CandidateSummarySearch.aspx.

[105] U.S. GOV'T ACCOUNTABILITY OFFICE, CAMPAIGN FIN. REFORM: EXPERIENCES OF TWO STATES THAT OFFERED FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 30-31 (2010), *available at* http://www.gao.gov/new.items/d10390.pdf.

- In New York City in 2009, 66% of the general election candidates and 93% of primary candidates financed their elections through the City's program. "These rates have been consistent for over a decade. Indeed, nearly every credible candidate participates: in 2009's contest, the Public Advocate, the Comptroller, all five Borough Presidents, and all but two of the 51 City Council candidates who were elected to office participated."[106]

- In San Francisco, 45% of candidates in 2008 and 48% of candidates in 2010 participated in the public financing program. Of the candidates who won their elections, 71% were publicly financed in 2008, and 60% were publicly financed in 2010.[107]

- In Los Angeles, between 1993 and 2005, more than 75% of all citywide candidates have chosen to participate in the City's public matching funds program, and 83% of all Council candidates have participated. "A sizable majority, or 71 percent, of those elected to City office between 1993 and 2005 have had the advantage of public funding in their campaigns."[108]

In sum, there is little doubt that the small donor matching fund model can succeed in providing sufficient funds to viable candidates so that candidates who wish to participate can compete vigorously and win.[109]

B. Public Financing is the Robust Reform that Can Address Congress' Crisis of Accountability.

The tangible benefits of public financing, discussed at length above, are well understood by the general public. Voters recognize that public financing is the most effective reform to restore accountability to government, and have expressed their support for public financing in recent polling.

- Two-thirds of Maine voters recently expressed overall approval for the state's 10-year old public financing law, agreeing that public financing is necessary to combat the disproportionate influence previously wielded by big-moneyed special interests.[110]

- An April 2010 poll found that a majority of likely Arizona voters approved of the Arizona Clean Elections Program, which voters enacted by initiative in 1998. In contrast, 77% of

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[106] MIGALLY & LISS, *supra* note 80, at 10.
[107] S.F. ETHICS COMM'N, REPORT OF THE BOARD OF SUPERVISORS PUBLIC FINANCING PROGRAM OF 2010, at 9 (forthcoming 2011) (on file with Brennan Center).
[108] L.A. CITY ETHICS COMM'N, INVESTING IN THE PUBLIC TRUST: CAMPAIGN FINANCE REFORM IN THE CITY OF LOS ANGELES 15 YEARS AFTER PROPOSITION H, at 59, 83 (2006), *available at* http://ethics.lacity.org/pdf/2005ElectionStudy/Investing_in_the_Public_Trust.pdf.
[109] Michael J. Malbin & Peter W. Bruscoe, *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States* 20 (Campaign Fin. Inst., Working Paper, 2010), *available at* http://www.cfinst.org/pdf/state/NYC-as-a-Model_Malbin-Brusoe_RIG_Dec2010.pdf.
[110] *See Critical Insights on Maine Tracking Survey: Summary Report of Finding from Proprietary Items* 5, 7, 10 (May 2010), *in* Declaration of Mimi Marziani, Exhibit 3, Cushing v. McKee, No. 10-cv-330 (D. Me. Dec. 6, 2010), ECF No. 46 attachment No. 1.

respondents opposed efforts to eliminate the Clean Elections Program, and 62% of respondents said they would be likely to vote against a ballot measure to repeal the Arizona Clean Elections Program.[111]

Moreover, polling indicates that strong reforms, particularly public financing, have become issues that will affect voters' choices at the ballot box. A significant segment of respondents—by a 40% to 23% margin—would be more likely to vote for their member of Congress if he or she supported the Fair Elections Now Act.[112] The results are particularly noteworthy because public financing—a large-scale reform—significantly outpolled transparency and disclosure reforms, which are less comprehensive. On top of that, a significant segment of swing-district voters appear to realize that public financing—a political game-changer—is the appropriate response to the Court's deregulation of our campaign finance laws.

C. Despite Recent Challenges to Other Public Financing Systems, Fair Elections Stands on Firm Constitutional Ground.

Fair Elections, like other voluntary public financing system, is on solid constitutional footing. Voluntary public financing programs have been consistently upheld—and praised—by the U.S. Supreme Court and federal courts of appeals.[113] In upholding the constitutionality of the presidential public financing system, the *Buckley* Court explained that a public funding system aims, "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[114] The Court further noted that:

> [T]he central purpose of the Speech and Press Clauses was to assure a society in which "uninhibited, robust, and wide-open" public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish. Legislation to enhance these First Amendment values is the rule, not the exception. Our statute books are replete with laws providing financial assistance to the exercise of free speech.[115]

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[111] *See* Letter from Zogby Int'l to Public Campaign & Common Cause (Apr. 7, 2010) (on file with Brennan Center).

[112] *New Election Day Polling: Strong Support for Fair Elections*, FAIR ELECTIONS NOW COALTION, http://fairelectionsnow.org/2010polling (last visited April 10, 2011).

[113] *See. e.g.*, Buckley, 424 U.S. at 88-103 (per curiam) (upholding the presidential public financing system); Green Party of Conn. v. Garfield, No. 09-3941-cv, 2010 WL 2737153 (2d Cir. July 13, 2010) (upholding majority of Connecticut's Clean Election Program); McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010) (upholding Arizona's Clean Elections Act); N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008) (upholding North Carolina's judicial public financing system); Daggett v. Comm'n on Gov'tal Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding program); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 39 (1st Cir. 1993) (upholding Rhode Island's public financing law).

[114] Buckley, 424 U.S. at 92-93.

[115] *Id.* at 93 n.127 (citations omitted).

Public financing promotes "uninhibited, robust, and wide-open public debate" not only through direct subsidies for speech but also through more indirect means. Instead of relying on the deep pockets of special interests, public financing makes it possible for candidates to run a viable, competitive campaign through grassroots outreach alone, leaving them indebted to no one but their constituents. In this way, a public financing system serves key anti-corruption interests, combating "both the actual corruption threatened by large financial contributions and the erosion of public confidence in the electoral process through the appearance of corruption."[116] Moreover, "[b]ecause the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action,'. . . measures aimed at protecting the integrity of the process . . . tangibly benefit public participation in political debate."[117]

In recent years, litigious plaintiffs, most of them ideological opponents to public funding, have advanced a series of attacks to such systems across the country, as well as to other campaign finance reforms. The Supreme Court recently heard the case of *McComish v. Bennett*, and will be issuing its first opinion on public financing since *Buckley* shortly. The issue in *McComish* is, however, a narrow question that is entirely unrelated to the Fair Elections Now Act—the constitutionality of trigger funds. Trigger funds, also known as "rescue funds" or "fair fight funds," are additional public grants made available to a publicly-funded candidate facing high spending from either a privately-funded opponent or from an independent spender. Extra public money is "triggered" by an opponent or outside party spending above a set monetary threshold.

Regardless of how the trigger funds issue is ultimately decided by the Supreme Court, Fair Elections will remain on sound constitutional footing. Indeed, at the *McComish* oral argument, Petitioner's counsel conceded that the constitutionality of public financing systems in general was not in doubt.[118] Fair Elections was carefully structured to survive judicial scrutiny and to avoid challenges like those at issue in *McComish*. Thus, Fair Elections does not have any trigger provisions. Instead, participating candidates retain the ability to gather small private contributions throughout the election cycle; they can respond to a high-spending opponent or hostile independent expenditures at any point by raising more small donations from their constituents.

Fair Elections, like the presidential public financing program and those in several states, furthers First Amendment values by directly enlarging public discussion, preventing corruption and its appearance, providing candidates an alternative to special interest money, and encouraging candidates to reach out to a broader grassroots network of constituents. Fair Elections, in other words, clearly constitutes a congressional effort "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[119]

Fair Elections will encourage more people to get involved in the political process, foster grassroots political activity among small donors, and ensure a robust political dialogue between

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[116] McConnell v. FEC, 540 U.S. 93, 136 (2003) (internal quotation omitted).
[117] *Id.* at 137 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).
[118] Transcript of Oral Argument at 15, McComish v. Bennett, No. 10-238 (U.S. Mar. 28, 2011).
[119] Buckley, 424 U.S. at 92-93.

candidates and voters. In these and many other ways, it will further the core values of the First Amendment—more political participation and more speech. As the Supreme Court most recently declared in *Citizens United*, these values are at the heart of our constitutional democracy: "[I]t is our law and our tradition that more speech, not less, is the governing rule."[120]

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This Committee should act swiftly to counter an impending crisis of accountability and to restore the electorate's faith in our elected officials. We urge this Committee to support the Fair Elections Now Act, and recommend the Act for full consideration by the Senate.

[120] Citizens United, 130 S. Ct. at 911.

QUESTIONS SUBMITTED BY SENATOR GRAHAM FOR CLETA MITCHELL, ESQ.

Senator Lindsey Graham
Subcommittee on the Constitution, Civil Rights and Human Rights
"The Fair Elections Now Act: A Comprehensive Response to Citizens United"

Cleta Mitchell Questions for the Record

Please give your understanding of the current state of the law relating to the following. Also, please discuss any examples of relevant activity brought up in the hearing that may need clarification.

1. Campaign contributions by federal government contractors.
2. Campaign contributions by corporations and labor unions.
3. The distinction between campaign contributions and independent expenditures.
4. The distinction between independent expenditures and coordinated communications.
5. Disclosure requirements for campaign contributions and independent expenditures.

RESPONSES OF CLETA MITCHELL TO QUESTIONS SUBMITTED BY SENATOR GRAHAM

At the time of printing, after several attempts to obtain responses to the written questions, the Committee had not received any communication from Cleta Mitchell.

AMERICANS FOR
CAMPAIGN REFORM

OVERVIEW

Civic Leaders for Fair Elections

Hon. Bruce Babbitt Chairman, World Wildlife Fund
Max Bazerman Professor, Harvard Business School
John Bonifaz Founder, National Voting Rights Institute
Hodding Carter III Former President, Knight Foundation
Peter Edelman Professor of Law, Georgetown Univ.
Douglas Foy Former President, Conservation Law Fdn.
William Gates, Sr. Chairman, Gates Foundation
Wade Henderson Pres, Leadership Conf. on Civil Rights
John Hennessey Former Dean, Dartmouth Tuck School
Jack Herney Director, New Hampshire Humanities Council
Hon. Phil Hoff Former President of the Board, Vermont Law
Jonathan Lash President, World Resources Institute
Paul Lawrence Retired Prof, Harvard Business School
Hon. Barbara Lawton Founder, Educational Resource Fdn.
Bill McKibben Author, Educator, and Environmentalist
Hon. Don Petterson Former U.S. Ambassador to Sudan
James Brian Quinn Former Prof, Dartmouth Tuck School
Dr. George Rupp Former President, Columbia University
Michael Sandel Professor, Harvard University
James Gus Speth Cofounder, Nat Resources Defense Council
Sandra Swan President Emerita, Episcopal Relief & Dev.
Roger Wilkins Pulitzer Prize-winning journalist

Business Leaders for Fair Elections

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Howard Behar Former President, Starbucks Coffee
Julie Belaga Former COO, U.S. Export-Import Bank
Alan Belzer Former President and CEO, Allied Signal
Peter A. Benoliel Chairman Emeritus, Quaker Chemical
Andrew Bernstein CEO, Cymfony
Eli Broad Cofounder & CEO, SunAmerica
Edgar M. Bronfman, Sr. Former CEO, Seagram's
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Donald K. Clifford Retired Partner, McKinsey & Co.
Charlie Couric Founder and President, Brita Products
John Degnan Vice-Chairman and COO, Chubb Corp.
Hon. William H. Donaldson 27th Chairman of the SEC
T.J. Dermot Dunphy Former CEO, Sealed Air Corp.
Stanley Eisenberg Former CEO, Sunnydale Farms
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Murray Galinson Chairman, San Diego National Bank
Tony Grassi Former Managing Director, CS First Boston
Jerry Greenfied Co-Founder, Ben & Jerry's
Jerry Grinstein Former CEO, Delta Airlines
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Arnold Hiatt Former CEO, Stride Rite Inc.
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Mellody Hobson President, Ariel Investments
Jeffrey Hollender President, Seventh Generation
William Hubbard President, Center Development Co.
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G. David Hurd Emeritus Chairman, Principal Financial
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Michael J. Johnston Senior Partner, The Capital Group
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Henry Kamen Former CEO, Metropolitan Life
Ed Kangas Former Global Chairman & CEO, Deloitte
Mitchell Kapor Founder, Lotus Development Corp.
Stephen Kay Senior Director, Goldman Sachs
Joe Keefe President & CEO, Pax World Investments
Steve Kirsch CEO, Abaca Technology Corporation
Charles Kolb President, Committee for Economic Dev.
Peter Malkin Chairman, Wien & Malkin LLC
Alonzo McDonald Former CEO, McKinsey & Company
Paul Montrone Former CEO, Fisher Scientific
Kenneth F. Mountcastle Former Senior VP, Dean Witter
Chang Park Chairman, Universal Remote Control, Inc.
Alan Patricof Managing Partner, Greycroft, LLC
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Arthur Rock Venture Capitalist
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William F. Simmons President, Group Benefit Services
Jim Sinegal Co-Founder & CEO, Costco
Paul Sittenfeld Managing Director, Robert W Baird & Co
Betty Tamposi Partner, Tamposi-Nash Real Estate Group
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Frank Weil Former Dir, U.S. International Trade Admin.
Peter Workman President, Workman Publishing Co.
George Zimmer CEO, Men's Wearhouse

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AMERICANS FOR
CAMPAIGN REFORM

OVERVIEW

Government Leaders for Fair Elections

Former Executive Officials

1. **Bruce Babbitt** Governor of Arizona
2. **Jim Blanchard** Governor of Michigan
3. **Frank Carlucci** Defense Secretary under Pres. Reagan
4. **William H. Donaldson** 27th Chairman of the SEC
5. **Angus King** Governor of Maine
6. **Madeleine Kunin** Governor of Vermont
7. **Richard Lamm** Governor of Colorado
8. **Peter Peterson** Commerce Secretary under Pres. Nixon
9. **Paul Volcker** Chairman of the Federal Reserve
10. **Christine Todd Whitman** Governor of New Jersey

"We have all seen how the influx of big money distorts our agenda, limits competition, and undermines democracy. With Fair Elections, the power rests with voters, not special interests."

SEN. BILL BRADLEY (D-NJ)

"Congress can't function on the great national issues of the day under the system we've got. The time is now to go to citizen-funded elections for Congress and the President."

SEN. ALAN SIMPSON (R-WY)

Former U.S. Senators

11. **Jim Abourezk** (D-SD)
12. **Nancy Kassebaum Baker** (R-KS)
13. **Bill Bradley** (D-NJ)
14. **Carol Moseley Braun** (D-IL)
15. **Bill Brock** (R-TN)
16. **William Cohen** (R-ME)
17. **Gary Hart** (D-CO)
18. **J. Bennett Johnston** (D-LA)
19. **Bob Kerrey** (D-NE)
20. **Vice Pres. Walter Mondale** (D-MN)
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23. **David Pryor** (D-AR)
24. **Don Riegle** (D-MI)
25. **Charles Robb** (D-VA)
26. **Warren Rudman** (R-NH)
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28. **Richard Schweiker** (R-PA)
29. **Alan Simpson** (R-WY)
30. **Adlai Stevenson III** (D-IL)
31. **Joe Tydings** (D-MD)
32. **Timothy E. Wirth** (D-CO)
33. **Harris Wofford** (D-PA)

Former U.S. Representatives

34. **Don Albosta** (D-MI)
35. **Tom Andrews** (D-ME)
36. **Chet Atkins** (D-MA)
37. **Michael Barnes** (D-MD)
38. **Carlos Barcelo** (D-PR)
39. **Jim Bates** (D-CA)
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52. **Butler Derrick** (D-SC)
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69. **Micheal Harrington** (D-MA)
70. **James Hastings** (R-NY)
71. **Earl Hilliard** (D-AL)
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104. **Tom Osborne** (R-NE)
105. **Dick Ottinger** (D-NY)
106. **Leon Panetta** (D-CA)
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108. **Otis Pike** (D-NY)
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110. **Graham Purcell** (D-TX)
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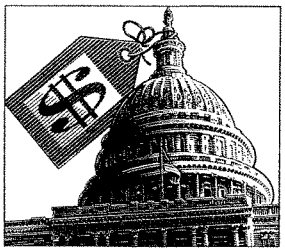
131. **Samuel Young** (R-IL)

AMERICANS FOR
CAMPAIGN REFORM

OVERVIEW

Building the Movement for Reform

Americans for Campaign Reform (ACR) is a national, nonpartisan organization committed to strengthening American democracy through comprehensive campaign finance reform. Chaired by a bipartisan team of former U.S. Senators, ACR has worked since 2003 to educate and engage the American people on citizen-funded Fair Elections. The Fair Elections Now Act is a small donor alternative to special interest-funded campaigns, backed by more than 150 Members of Congress and dozens of national advocacy organizations across the political spectrum. Nearly 40,000 citizen members in all fifty states make up ACR's grassroots campaign.



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Eli Broad Cofounder and CEO, SunAmerica
Bill Brock Former U.S. Senator (R-TN) and RNC Chair
Frank Carlucci Secretary of Defense under Pres. Reagan
William Cohen Former Senator (R-ME) and Defense Sec.
William H. Donaldson 27th Chairman of the SEC
Charles Fried Solicitor General under President Reagan
Lee Hamilton Former Member of Congress (D-IN)
Wade Henderson Pres, Leadership Conf. on Civil Rights
Mellody Hobson President, Ariel Investments
Amory Houghton Former Member of Congress (R-NY)
Henry Kamen Former CEO, Metropolitan Life
Ed Kangas Former Global Chairman & CEO, Deloitte
Richard Lamm Former Governor of Colorado
Madeleine Kunin Former Governor of Vermont
Alonzo McDonald Former CEO, McKinsey & Company
Walter Mondale Former Vice President
Paul Montrone Former CEO, Fisher Scientific International
Connie Morella Former Member of Congress (R-MD)
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Peter Peterson Secretary of Commerce under Nixon
Charles Robb Former U.S. Senator (D-VA)
Marty Russo Former Member of Congress (D-IL)
James Gustave Speth Co-Founder, NRDC
Paul Volcker Former Chairman of the Federal Reserve
David Walker Former Comptroller General of the U.S.
Christine Todd Whitman EPA Director under Pres. Bush
Roger Wilkins Pulitzer Prize-winning journalist
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Citizens United: The Aftermath

By Monica Youn

June 2010

The American Constitution Society takes no position on particular legal or policy initiatives. All expressions of opinion are those of the author or authors. ACS encourages its members to express their views and make their voices heard in order to further a rigorous discussion of important issues.

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

Citizens United: The Aftermath

Monica Youn*

I. Introduction

The Supreme Court's recent decision in *Citizens United v. Federal Election Commission*[1] rivals *Bush v. Gore* for the most aggressive intervention into politics by the Supreme Court in the modern era. Indeed, *Bush v. Gore* affected only one election; *Citizens United* will affect every election for years to come. The 5-4 decision undermined 100 years of law that restrained the role of special interests in elections. By holding, for the first time, that corporations have the same First Amendment rights to engage in political spending as people, the Supreme Court re-ordered the priorities in our democracy – placing special interest dollars at the center of our democracy, and displacing the rightful role of voters.

More specifically, the decision held that corporations, nonprofits, and unions have a First Amendment right to use their general treasury funds for campaign ads that directly support or oppose federal candidates, so long as such ads are not directly coordinated with a candidate's campaign. The decision overruled, in whole or in part, two of the Court's own precedents – *Austin v. Michigan Chamber of Commerce*[2] (1990) and *McConnell v. Federal Election Commission*[3] (2003) – and struck down a significant portion of the the Bipartisan Campaign Reform Act of 2002 (BCRA) (also known as "McCain-Feingold"). It called into question dozens of state laws, which will now have to be repealed or amended to comply with the decision.

Four different polls conducted in the weeks after the announcement of the *Citizens United* decision indicate that the Court's analysis was profoundly at odds with the American public's understanding of the role corporate money plays in politics.

- In a *Washington Post-ABC News* poll "[e]ight in 10 poll respondents opposed the decision, with 65% 'strongly' opposed."[4]
- In a Common Cause poll, 64% of voters disapproved of the decision, with 47% strongly opposed. Only 27% of voters agreed. [5]
- In a People for the American Way poll, 78% believed that corporations should be limited in how much they can spend to influence elections, and 70% believed corporations already have too much influence over elections.[6]

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[1] Citizens United v. FEC, 130 S.Ct. 876 (2010).

[2] Austin v. Michigan Chamber of Commerce, 494 U. S. 652 (1990).

[3] McConnell v. FEC, 540 U.S. 93 (2003).

[4] Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.

[5] Memorandum from Stan Greenberg et al. on Strong Campaign Finance Reform: Good Policy, Good Politics to Common Cause et al. 2 (Feb. 8, 2010) *available at* http://www.greenbergresearch.com/articles/2425/5613_Campaign%20Finance%20Memo_Final.pdf.

- In a Pew Research Center for the People & the Press poll, 68% disapproved of the decision, and only 17% approved of it.[7]

Two of the polls broke down support or opposition to the decision by party affiliation, and both found that opposition to the decision was strong among voters of all political beliefs.

- In the Common Cause poll, a majority of Democrats, Republicans and independents were opposed, but independents showed the strongest antagonism, with 72% disagreeing with the ruling.[8]
- In the Pew poll, among Republicans, 22% approve of the decision while 65% disapprove; and, among Democrats, 13% approve of the ruling while 76% disapprove.[9]

Finally, a poll of voters in 19 battleground congressional districts showed significant disapproval of the *Citizens United* decision and support for reforms.[10] Although there was some variation among the 19 districts, the findings in each district, with few exceptions, tracked the overall composite results. The poll found that:

- 67% of voters disagreed with the Supreme Court's decision that corporations should be able to spend money on elections;
- 72% of voters—including 77% of independents—didn't believe that Congress has done enough to address special interest money in politics; and
- 87% believed that members of Congress are influenced more by donors than by constituents' views.

As the consistency among these polls indicates, Americans of all political stripes disagree with *Citizens United* and support strong reforms that can ameliorate the damage wrought by the decision.

This Issue Brief describes the political impact of *Citizens United* and explains how corporate political spending can subvert our democratic values. The brief outlines constructive responses to *Citizens United* that would buttress existing campaign finance safeguards from further attacks and mitigate some of the harmful effects of *Citizens United.*

II. The Political Stakes of *Citizens United*

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[6] People for the American Way, New Poll Shows Broad Support for "Fixing" Citizens United (Feb. 18, 2010), http://site.pfaw.org/site/PageServer?pagename=media_2010_02_new_poll_shows_support_for_fixing_citizens_united.

[7] THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, MIDTERM ELECTION CHALLENGES FOR BOTH PARTIES 31 (2010), *available at* http://people-press.org/reports/pdf/589.pdf.

[8] Memorandum from Stan Greenberg et al., *supra* note 4, at 2.

[9] THE PEW RESEARCH CENTER, *supra* note 6, at 31.

[10] Memorandum from David Donnelly, et al. on Polling in 19 Battleground Districts Finds Voters Will Reward Candidates Who Support Fair Elections Now Act to Interested Parties (Mar. 16, 2010), *available at* http://www.fairelectionsnow.org/files/statepolling/national-polling-memo pdf. This poll was conducted from March 10 to 14, 2010 by SurveyUSA commissioned by Common Cause, MoveOn.org Political Action, and Public Campaign Action. *Id.*

After news of the *Citizens United* ruling sent shockwaves through political, legal, and news media circles throughout the nation, some commentators took a somewhat jaundiced view, arguing, in essence, that since the political system is already awash in special-interest dollars, this particular decision may have little impact.[11] It is undoubtedly true that in the past, corporations have engaged in large-scale spending in federal politics –primarily through political action committees ("PACs") and through more indirect means, such as lobbying and nonprofit advocacy groups.[12] However, the sums spent by corporations in previous elections are miniscule in comparison to the billions of dollars in corporate profits that the Supreme Court has now authorized corporations to spend to influence the outcome of federal elections. The difference, in short, changes the rules of federal politics.

Prior to *Citizens United,* a corporation that wished to support or oppose a federal candidate had to do so using PAC funds – funds amassed through voluntary contributions from individual employees and shareholders who wished to support the corporation's political agenda. Such funds were subject to federal contribution limits and other regulations.[13] Now however, the *Citizens United* decision will allow corporations that wish to directly influence the outcome of federal elections to draw from their general treasury funds, rather than PAC funds, to support or oppose a particular candidate. This difference is significant enough to amount to a difference in kind rather than merely a difference in degree, as demonstrated by the following observations.

- In the 2008 election cycle, the nation's largest corporation, Exxon-Mobil, formed a PAC that collected approximately $700,000 in individual contributions.[14] Thus, Exxon-Mobil was limited to spending this amount on advertisements directly supporting or opposing a federal candidate. During the same 2008 election cycle, Exxon-Mobil's corporate profits totaled more than $80 billion.[15] Thus, *Citizens United* frees this one corporation to increase its direct spending in support or opposition to federal candidates by more than 100,000 fold.
- During the 2008 election cycle, all winning congressional candidates spent a total of $861 million on their campaigns – less than one percent of Exxon-Mobil's corporate profits over the same period.[16]

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[11] *See, e.g.*, Nathaniel Persily, *The Floodgates Were Already Open*, SLATE, Jan. 25, 2010, http://www.slate.com/id/2242558/; Joseph Sandler & Neil Reiff, *Beware the Fortunetellers*, THE NAT'L LAW J., Feb. 1, 2010, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202439595364.

[12] Victoria McGrane, *Lobbyists on Pace for Record Year*, POLITICO, Dec. 22, 2009, http://www.politico.com/news/stories/1209/30882.html.

[13] CIARA TORRES-SPELLISCY, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE 7 (The Brennan Center for Justice 2010), *available at* http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice/.

[14] Center for Responsive Politics, Exxon Mobile, http://www.opensecrets.org/orgs/summary.php?cycle=A&type=P&id=D000000129 (last visited May 24, 2010) (displaying statistics regarding Exxon Mobile, Corp.'s political spending).

[15] EXXON MOBILE, CORP., 2008 SUMMARY ANNUAL REPORT 16, 38 (2009), *available at* http://www.exxonmobil.com/Corporate/Files/news_pub_sar_2008.pdf.

[16] COMMON CAUSE, CORPORATE DEMOCRACY: POTENTIAL FALLOUT FROM A SUPREME COURT DECISION ON *CITIZENS UNITED* (2009), http://www.commoncause.org/atf/cf/{fb3c17e2-cdd1-4df6-92be-bd4429893665}/CORPORATEDEMOCRACY.PDF.

Prior to *Citizens United*, in a regime where direct corporate electioneering was subject to limits, corporate political spending generally took the form of lobbying. The amounts that corporations have spent to influence the political process through lobbying dwarf the amounts they have spent in federal elections.

- In the same year that it was able to raise only $700,000 for its federal PAC, Exxon Mobil spent $29 million on lobbying.[17]
- The health care industry in 2009 spent approximately $1 million per day to lobby Congress on health care reform.[18]

Indeed, corporations have spent dramatically more on lobbying than federal candidates have spent in their own elections. During the 2008 election, all congressional candidates combined spent a total of $1.4 billion on their campaigns,[19] which represents only 26% of the $5.2 billion corporations spent on lobbying during the same two-year period.[20] Now that *Citizens United* has struck down limits on corporate electioneering, if corporations diverted even a small fraction of their political spending budgets from lobbying to campaigns, they could easily outspend candidates by many multiples.

Lobbying organizations—the most powerful of which are funded by corporations—already spend more money than the major political parties, and, as a result of *Citizens United*, will be able to spend their money to directly influence federal campaigns.

- The single largest lobbying organization – the U.S. Chamber of Commerce – spent more than $144 million in lobbying, grassroots efforts, and advertising in 2009, compared to $97.9 million spent by the RNC and $71.6 million spent by the DNC.[21] Thus, this single corporate-backed trade association is able to outspend the national committees of both political parties.
- According to *The Atlantic*'s Marc Ambinder, the Chamber's spending included electioneering in the Virginia off-year and Massachusetts special election, as well as "sizeable spending on advertising campaigns in key states and districts aimed at defeating health care, climate change, and financial reform legislation."[22]
- The Chamber is expanding its grass-roots operation and concentrating on electing its preferred (primarily Republican) candidates in key districts. The Chamber plans to spend at least $50 million on political races and related activities in 2010, a 40% increase from

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[17] Center for Responsive Politics, *supra* note 13.
[18] JOSH ZAHAROFF, LEGISLATING UNDER THE INFLUENCE (Common Cause 2009), *available at* http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/COMMONCAUSE_HEALTHCAREREPORT2009-1.PDF.
[19] Center for Responsive Politics, Price of Admission, http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&Type=A&Display=T (last visited May 24, 2010) (displaying statistics regarding the total cost of Congressional races in 2008).
[20] Common Cause, *supra* note 15.
[21] Marc Ambinder, *The Corporations Already Outspend The Parties*, THE ATLANTIC, Feb. 1, 2010, *available at* http://politics.theatlantic.com/2010/02/the_corporations_already_outspend_the_parties.php.
[22] *Id.*

2008. It expects to focus its new efforts on about 10 Senate races and as many as 40 House districts, targeting vulnerable Democrats with campaign advertisements, among other efforts.[23]

Indeed, despite the campaign finance regulations that – until *Citizens United* – attempted to protect our democracy against overt influence-peddling, there are numerous examples to demonstrate special interests will attempt to use all means at their disposal to insure favorable legislative treatment.

- In 1998, a Native American tribe offered to undertake a substantial independent spending campaign on behalf of a Kansas Congressman in an extremely close reelection race, if the Congressman would switch his position on—and subsequently support—legislation that would allow the tribe to build a casino.[24]
- In 2006, the FEC levied a $3.8 million fine against mortgage giant Freddie Mac for illegally using corporate treasury funds to raise over $3 million for members of the House subcommittee that had regulatory authority over it. Approximately 90% of those funds directly benefited the chair of the subcommittee.[25] Now, post-*Citizens United*, Freddie Mac could accomplish a similar result legally by spending treasury funds to run campaign ads that directly benefit those legislators responsible for regulating it.

Moreover, corporate campaign ads—or even the threat of unleashing such an ad— may be a more direct route than lobbying for corporations to pressure elected officials. Such campaign ads allow corporations to threaten politicians' ability to remain in office. An example in which an independent expenditure ad campaign unseated an elected official who was at odds with a corporate agenda came before the Supreme Court just last year in *Caperton v. Massey Coal Co.*[26] In *Caperton*, Don Blankenship, the CEO of Massey Coal, which had $50 million at stake in a case before the West Virginia Supreme Court, spent almost $3 million dollars in independent expenditures to defeat an incumbent member of the West Virginia Supreme Court and to support the campaign of another candidate. The winning candidate then refused to recuse himself multiple times, and instead voted to support Massey Coal's position. Writing for the majority, Justice Kennedy ruled that such large expenditures—expenditures which exceeded the combined expenditures of both candidate committees by $1 million— had "a significant and disproportionate influence on the electoral outcome" and created a "serious, objective risk of actual bias" on the part of the judge who had benefited from the independent expenditure campaign.[27]

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[23] Dan Eggen, *U.S. Chamber of Commerce Sets Sights on Democrats Ahead of Midterm Elections*, WASH. POST, Mar. 16, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031602040.html?referrer.

[24] Def.'s Proposed Findings of Facts, Speechnow.org v. FEC, No. 1:08-cv-00248-JR at ¶¶ 288- 297 (D.C. 2008).

[25] Jim Drinkard, *Freddie Mac to Pay Record $3.8 M to Settle FEC Allegations*, USA TODAY, Apr. 18, 2006, at 04A, *available at* http://www.usatoday.com/money/companies/regulation/2006-04-18-freddie-mac_x.htm.

[26] Caperton v. Massey Coal Co., 129 S.Ct. 2252 (2009).

[27] *Id.* at 2264-65. Justice Kennedy – the author of both the *Caperton* opinion and the *Citizens United* opinion – attempts to distinguish the holding of *Caperton* as irrelevant to the question raised in *Citizens United:* whether independent expenditures have the potential to corrupt elected officials. He claims that *Caperton* was limited to the

Indeed, corporations may be able to use their new ability to run campaign attack ads to coerce elected officials into compliance with a particular agenda, even if the corporations never have to make good on their threats by actually running the ads. One egregious example arose in North Carolina and is discussed at length in Judge M. Blane Michael's dissenting opinion in the 4th Circuit case *North Carolina Right to Life, Inc. v. Leake*:

> The campaign waged in North Carolina by the independent group Farmers for Fairness (Farmers) provides another example of the corruptive influence of independent expenditures. 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 majority interprets this activity as the "group feel[ing] passionately about an issue and discuss[ing] it." *Ante* at 294. This could not be further from reality. 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.[28]

As this example demonstrates, the *Citizens United* decision gives corporations a new and powerful weapon – whether they ever actually use this weapon is, arguably, beside the point. Mere awareness of a corporation's potential general treasury fund war chest can be expected to affect the decision-making of elected officials in ways that will often be difficult to trace.

Even those corporations that are reluctant to engage in electoral politics may find themselves pulled into a "race to the bottom," where they are subject to the "competitive need to maintain access to and avoid retribution from elected officials of both parties."[29] Such a

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context of judicial elections, where a litigant possesses a "due process right to a fair trial before an unbiased judge." *Citizens United*, 130 S.Ct. at 910. Justice Kennedy's reasoning, however, is unconvincing. As Justice Stevens' dissent pointed out, in *Caperton*, the Court recognized that "some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes." *Id.* at 968 (Stevens, J., dissenting). If an independent expenditure campaign could create "bias" in an elected judge, then it is logical to believe that an identical independent expenditure campaign could create equivalent "bias" if deployed on behalf of a legislative candidate. Although Justice Kennedy is willing to uphold litigants' due process rights to have their case decided by an unbiased judge, he gives no weight whatsoever to the electorate's constitutional interests in elected officeholders who have not been bought and paid for with special interest dollars.

[28] North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 335-36 (4th Cir. 2008) (Michael, J., dissenting).

[29] Supplemental Brief of the Comm. for Econ. Dev. as Amicus Curiae in Support of Appellee, *Citizens United*, 130 S. Ct. 876 (No. 08-205), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_ced_supp_brief_amici.pdf *at* 10-16.

situation existed prior to BCRA's ban on soft money, where corporations often gave to both national parties; these political expenditures were made with the intent to secure preferential access and to avoid antagonizing elected officials, rather than to advance political ideas. The *Citizens United* decision reinstates this corporate influence-bidding arms race.

Perhaps even more profoundly, the Court in *Citizens United* has given the stamp of constitutional approval to corporate electioneering. The Court has invited corporations into elections, telling them that they have a First Amendment right to spend their vast resources to try to influence the outcome of an election. Although before this decision, corporations were able to spend on ads that mentioned the candidate's name, as long as they refrained from direct advocacy or opposition to the election of that candidate, many corporations likely held back for fear of violating complex spending laws as well as concern that such spending would open the corporation to criticism.[30] According to corporate lawyers, the norm of corporate political spending articulated by the *Citizens United* majority may have allayed such fears.[31]

Thus, there are strong reasons to believe that some corporations will take the Court up on its invitation, and that corporate-funded campaign attack ads and the threat of these ads will distort policy priorities, allowing special interests to play a greater role in federal politics, and undermining the foundations of our democracy.

III. The Roberts Court's "Deregulatory Turn"

The limits on corporate campaign spending at issue in *Citizens United* represent the fourth time challenges to campaign finance laws have been argued before the Roberts Court, and the fourth time the Roberts Court majority has struck down such provisions as unconstititional.[32] As Professor Richard Hasen has explained, this "deregulatory turn" represents an about-face, as the Rehnquist Court had generally taken a deferential approach to campaign finance reform regulations enacted by federal and state lawmakers.[33] However, now that Chief Justice Roberts and Justice Alito have replaced Chief Justice Rehnquist and Justice O'Connor on the Supreme Court, the newly constituted majority has moved with stunning haste to dismantle decades-old safeguards intended to limit the effect of special interest money in politics. Indeed, as Justice Stevens wryly noted, "The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court."[34]

With *Citizens United*, the current Supreme Court's majority's ideological hostility to campaign finance reform has become apparent to even the most casual observer. At oral argument in *Citizens United*, Justice Antonin Scalia's comments exemplified the majority's

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[30] Tom Hamburger, *U.S. Chamber of Commerce Grows into a Political Force*, L.A. TIMES, Mar. 8, 2010, *available at* http://www.latimes.com/news/nation-and-world/la-na-chamber9-2010mar09,0,4230154,full.story.

[31] *Id.*

[32] Davis v. FEC, 128 S.Ct. 2759 (2008); FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007); Randall v. Sorrell, 548 U.S. 230 (2006).

[33] Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064, 1064 (2008).

[34] *Citizens United*, 130 S.Ct. 876, 942 (2010) (Stevens, J., dissenting).

unwarranted suspicion of long-standing campaign finance reform safeguards, assuming in his questions that such safeguards represented nothing more than incumbent self-dealing:

> Congress has a self-interest. I mean, we – we are suspicious of congressional action in the First Amendment area precisely because we – at least I am – I doubt that one can expect a body of incumbents to draw election restrictions that do not favor incumbents. Now is that excessively cynical of me? I don't think so.[35]

Justice Kennedy also speculated during oral argument that "the Government [could] silence[] a corporate objector" who wished to protest a particular policy during an election cycle.[36] Similarly, in the *Citizens United* opinion, Justice Kennedy simply assumed, without any factual basis, that Congress' motives were invidious, stating of the law at issue, "[i]ts purpose and effect are to silence entities whose voices the Government deems to be suspect."[37] And Chief Justice Roberts famously expressed his impatience with campaign finance safeguards, striking down regulations on corporate electioneering in the *Federal Election Commission v. Wisconsin Right to Life* decision, saying "Enough is enough."[38]

The Court has used its skepticism of congressional motives – based not on facts or a record below but on the gut instincts of a majority of justices – to justify its utter lack of deference to legislative determinations in this arena. Such a cavalier dismissal of Congress' carefully considered legislation ignores the years of hearings, record, debate, and deliberation involved in creating these reforms.

Unfortunately, *Citizens United* will not be the Roberts Court majority's last word on the issue. Seeking to take advantage of the majority's deregulatory agenda, the same coalition of corporate-backed groups that filed the *Citizens United* lawsuit have launched an armada of constitutional challenges to state and federal reforms, which are now advancing rapidly toward the Supreme Court.[39] These challenges include attacks on public financing systems, campaign finance disclosure requirements, "pay-to-play" restrictions on government contractors and lobbyists, and "soft money" restrictions on political parties and political action committees. Challengers seek to use the First Amendment as a constitutional "trump card" to strike down any reform that attempts to mitigate special interest domination of politics. Significantly, several of these challenges will be ripe for decision by the Supreme Court within the year. Indeed, *Doe v. Reed* – a case in which Plaintiffs advance a sweeping conception of the right of anonymous speech that is broad enough to call into question disclosure of campaign finance information – was argued before the Supreme Court at the end of April.

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[35] Transcript of Oral Argument at 50-51, *Citizens United*, 130 S.Ct. 876 (No. 08–205).
[36] *Id.* at 52.
[37] *Citizens United*, 130 S.Ct. at 898.
[38] *See* FEC v. Wisconsin Right to Life, 551 U.S. 449, 478 (2007).
[39] *See* David Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 25, 2010, at A11, *available at* http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?scp=1&sq=james%20bopp&st=cse; *see also* Marcia Coyle, *Opinion Roils Dozens of Cases*, THE NAT'L L. J., Feb. 1, 2010; Mike Scarcella, *D.C. Circuit's First Shot at* Citizens United, THE NAT'L L. J., Feb. 1, 2010.

IV. Surviving Strict Scrutiny: Creating A Record For Reform

Legislative repair of our system of campaign finance safeguards will be extraordinarily challenging because the Court has awarded its deregulatory agenda the imprimatur of the First Amendment. Since the Court has granted corporate political spending First Amendment protection, it has now indicated that it will treat restrictions on corporate political spending as burdens on political speech, justifying the application of strict scrutiny. This standard requires that if a challenged regulation is to pass constitutional muster, the government must demonstrate that it be "narrowly" tailored to advance a "compelling state interest." This is a high bar to meet – indeed, as the late Professor Gerald Gunther famously noted, such a non-deferential standard of review is often considered "'strict' in theory and fatal in fact."[40] However, campaign finance reform laws have survived the application of strict scrutiny in the past,[41] and will continue to survive even the skepticism of the Roberts Court if one key condition is realized: an adequate factual record evidencing the real threat to democracy that stems from special interest domination of politics as well as the efficacy of campaign finance reform regulations in mitigating such threats.

It was the absence of such a developed factual record that allowed the majority in *Citizens United* to enact into constitutional doctrine their own untested assumptions about money in politics. In taking the rare step of requesting reargument, the Court took the relatively narrow case before it – whether the 90 minute video-on-demand *Hillary: The Movie* should be deemed a corporate campaign advertisement or not – and drastically expanded the issue, calling into question the constitutionality of decades-old restrictions on the use of corporate treasury funds to directly support or oppose candidates. Moreover, the Court required parties and *amici* to brief these broad issues on an expedited basis, allowing them no time to develop and present a factual record regarding the influence of money in politics. Accordingly, in deciding this landmark case, the Court lacked a developed record on key factual issues, including: (1) whether corporate independent expenditures posed similar risks of corruption as direct corporate donations to parties and candidates;[42] (2) whether disclosure requirements can adequately ensure that voters and shareholders can track the uses and abuses of money in politics; and (3) what benefits and burdens have resulted from the real-world functioning of campaign finance regulations.[43] Rather

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[40] Gerald Gunther, *The Supreme Court 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[41] As Professor Adam Winkler has pointed out, in cases between 1990 and 2003, where strict scrutiny was applied to campaign finance laws, such laws survived the application of strict scrutiny in 24% of cases. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 845 (2006).

[42] Justice Kennedy's opinion claims that the 100,000 page factual record in *McConnell v. Federal Election Commission* contains no evidence of "quid pro quo" corruption, and only "scant evidence" that independent expenditures even ingratiate. *Citizens United*, 130 S.Ct. at 965-66(citing McConnell v. FEC, 251 F. Supp. 2d 176, 555–57 (D.D.C. 2003). This claim is somewhat disingenuous. However voluminous the factual record in *McConnell*, that case is not on point since it focused on two different issues – the constitutionality of restrictions on "soft money" contributions to political parties and the use of so-called "sham issue ads" to circumvent regulations on corporate electioneering.

[43] Supplemental Brief of Amici Curiae Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan in Support of Appellee at 9-10, *Citizens United*, 130

than remanding the case to the district court for development of these central factual issues, the majority simply enacted into law its own deeply flawed assumptions about political and financial behavior, as explained at greater length below.

A. Connecting the Dots between Corporate Political Spending and Corruption

In oral argument in *Citizens United,* Justice Alito noted:

> [M]ore than half the States, including California and Oregon, Virginia, Washington State, Delaware, Maryland, [and] a great many others, permit independent corporate expenditures for just these purposes? Now have they all been overwhelmed by corruption? A lot of money is spent on elections in California; has – is there a record that the corporations have corrupted the political process there?

The *Citizens United* majority did not wait for these questions to be answered. Instead of remanding to the lower court for a factual determination about the nexus between corporate independent expenditures and political corruption, the majority simply ruled by judicial fiat that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[44] In reaching this conclusion, the Supreme Court has constitutionally enshrined what Senator John McCain has described as the Court's "extreme naivete" regarding the influence of corporate money in politics.[45]

Even in the absence of a developed factual record, examples from the real world of money and politics cast substantial doubt upon the Court's premature conclusion.

- In a 2006 state legislative race in California, where corporate expenditures have long been unregulated, a group headed by Indian gaming tribes spent $404,323 in independent expenditures in support of the successful candidate. This independent expenditure by a single special-interest group equaled 29% of the total expenditures made by the candidate herself.[46]
- Also in California, Intuit, a software corporation that distributes the "Turbo Tax" software program funneled $1 million through a group called the Alliance for California Tomorrow, which spent that money on independent expenditures in support of a state controller who opposed the creation of a free-online tax preparation program for

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S.Ct. 876 (2010) (No. 08-205), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_mccain_supp_brief_amici.pdf.

[44] *Citizens United*, 130 S.Ct. at 884; Transcript of Oral Argument at 50-51, *Citizens United*, 130 S.Ct. 876 (No. 08–205).

[45] *See* Reid Wilson, *Supreme Court Sharply Questions Ban on Corporate Spending*, THE HILL, Sept. 9, 2009, *available at* http://thehill.com/homenews/campaign/57887-court-sharply-questions-ban-on-corporate-spending.

[46] CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE 40 (2008), *available at* http://www.fppc.ca.gov/ie/IEReport2.pdf.

California residents.[47] The candidate himself spent only slightly more than $2 million on his own campaign.[48]

- In a 2000 Michigan senate race, Microsoft used the Chamber of Commerce to fund $250,000 in attack ads against a candidate. Because the tax code does not require trade organizations such as the Chamber to disclose the identity of its donors, Microsoft's involvement in the election would be unknown but for a newspaper article that exposed its contribution.[49]
- In states that allow corporate independent expenditures, there is ample reason to believe that corporations use this loophole to circumvent contribution limits. For example, independent expenditures skyrocketed after California enacted contribution limits for the first time. According to a report by the state's Fair Political Practices Commission, in the six years after the enactment of these limits, independent expenditures increased by 6,144% in legislative races and 5,502% in statewide races.[50]

Fortunately, the Court has left a door open for Congress to craft regulation over corporate expenditures, as long as the regulation is based on a strong factual showing of the relationship between such expenditures and corruption. Despite its assumption that independent expenditures do not lead to corruption or the appearance of corruption, in *Citizens United* the Court indicated that it would be "concern[ed]" "[i]f elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle."[51] Thus, a potential response to *Citizens United* is an in-depth investigation into the link between corporate independent expenditures and the creation of political debt.

Moreover, as demonstrated by the Court's decisions in *McConnell v. Federal Election Commission*[52] and *Caperton*, the Supreme Court has been willing to find that corporate political spending and independent expenditures can lead to actual or apparent corruption when there was a strong factual record demonstrating such a connection. In *McConnell*, the court upheld Congress's soft money ban because of the strong record of soft-money influence peddling created by Congress in enacting BCRA. Similarly, in *Caperton*, the Court, shocked by the sordid factual record before it, was unable to deny that large independent expenditures can give rise to corruption. A developed factual record demonstrating the clear connection between

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[47] *See* Cal-Access, Campaign Finance: Intuit Company, http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1016260&view=contributions&session=2005; Cal-Access, Campaign Finance: Alliance for California Tomorrow, A California Business Coalition, http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1262979&session=2005&view=received; *see also* Dennis J. Ventry Jr., *Viewpoint: Intuit Uses Clout to Stymie State Innovation*, SACRAMENTO BEE, Oct. 6, 2009, *available at* http://www.sacbee.com/1190/story/2233219.html.

[48] Cal-Access, Campaign Finance: Strickland, Tony, http://cal-access.ss.ca.gov/Campaign/Candidates/Detail.aspx?id=1005462&session=2005.

[49] *See* CENTER FOR POLITICAL ACCOUNTABILITY, HIDDEN RIVERS: HOW TRADE ASSOCIATIONS CONCEAL CORPORATE POLITICAL SPENDING, ITS THREAT TO COMPANIES, AND WHAT SHAREHOLDERS CAN DO, 13 (2006), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932; John R. Wilke, *Microsoft Is Source of 'Soft Money' Funds Behind Ads in Michigan's Senate Race*, WALL ST. J., Oct. 16, 2000.

[50] CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, *supra* note 46, at 4.

[51] *Citizens United*, 130 S.Ct. at 911.

[52] *McConnell*, 540 U.S. 93.

corporate political spending and corruption of our elected officials can inject some much-needed reality into the Court's naïve view of money in politics.

B. Demanding Accountability Through Consent and Disclosure

Another troubling assumption adopted by the *Citizens United* majority is that current disclosure laws allow both the electorate and corporate shareholders to make informed decisions and give proper weight to different speakers and messages. In the opinion, Justice Kennedy made the following unsupported assumption:

> 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.[53]

However, Justice Kennedy's vision of transparency and free flow of information bears no relation to what occurs in real life.[54] Under the current laws, businesses can hide their political spending in several different ways.

First, it is perfectly legal for businesses that want to influence politics to funnel money through nonprofit trade associations such as the Chamber of Commerce to avoid disclosure.[55] Although businesses must reveal their identities to the FEC on public reports if they buy advertising on their own, they can anonymously give money to nonprofits, which only have to disclose the sources of their advertising money if the donors specified that their contributions were intended for political ads—a requirement most sophisticated players avoid.[56] Thus, most

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[53] *Citizens United*, 130 S.Ct. at 916 (citations omitted).

[54] For example, independent expenditures – the very type of political expenditures unleashed by *Citizens United* – are underreported in most states. As one report explained, "holes in the laws – combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws – results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public." LINDA KING, INDECENT DISCLOSURE: PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL 4 (National Institute of Money in Politics 2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/5807.pdf.

[55] TORRES-SPELLISCY, *supra* note 13, at 12.

[56] Although trade associations must report contributions received from other corporations to the Internal Revenue Service, the document itself remains confidential and is not made available to the public. *See* DEP'T OF TREASURY, I.R.S., INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 4 (2009), *available at* http://www.irs.gov/pub/irs-pdf/i990.pdf.

money coming through trade associations cannot be traced back to corporations and is never disclosed to the public. Examples of corporations hiding their involvement through the use of trade associations abound.

- As mentioned in the first section, in 2009 the Chamber of Commerce spent $144.5 million on advertising, lobbying and grass-roots activism, all while legally concealing the names of its funders.[57] Included in this $144.5 million was a $2 million campaign to defeat financial regulatory reform legislation. Additionally, a Chamber-backed group pledged to spend $200 million to fight the Employee Free choice Act in 2009. It hasn't disclosed which corporations funded either of these campaigns.[58]
- The America's Health Insurance Plans (AHIP), a trade association, was recently found to have solicited $10 million to $20 million from six leading health insurers, and funneled this money secretly to the US Chamber of Commerce to underwrite anti-health reform attack ads.[59]
- A 2007 study of independent expenditures in state politics found that, although 39 states required some disclosure by political advertisers, the laws in most were riddled with loopholes, such that only five states required enough detail to link sponsors with specific ads.[60]

Indeed, in the wake of *Citizens United*, law firms have advised clients that the law allows them to contribute to trade associations to avoid public scrutiny.[61] As demonstrated in the first section of this paper, trade associations plan to take full advantage of this new ability—all without disclosing which corporations have donated the money to fund the ads.

Second, corporations have regularly cloaked their political spending by using conduit organizations to disguise their true identity, often making it difficult for voters to determine the true agenda of those funding the passage of their laws.

- In a recent Colorado 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 merely a front for Wal-Mart —the group was exclusively funded by Wal-Mart, and not a grass roots organization at all. Another group called "Littleton Pride," a true grassroots organization, spent only $35,000 in support of the

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[57] Chisun Lee, *Higher Corporate Spending on Election Ads Could Be All but Invisible*, PROPUBLICA, Mar. 10, 2010, *available at* http://www.propublica.org/article/higher-corporate-spending-on-election-ads-could-be-all-but-invisible.
[58] Zachary Roth, *Chamber CEO's 'Striking Innovation': Helping Corporate Backers Fund Attack Ads On The Down-Low*, TALKING POINTS MEMO, Jan. 14, 2010, *available at* http://tpmmuckraker.talkingpointsmemo.com/2010/01/chamber_ceos_striking_innovation_helping_corporate.php.
[59] Brad Jacobson, *Exclusive: How Corporations Secretly Move Millions to Fund Political Ads*, THE RAW STORY, Feb. 4, 2010, *available at* http://rawstory.com/2010/02/exclusive-trade-groups-swiss-bank-accounts-campaign-finance/.
[60] LINDA KING, *supra* note 54.
[61] *See, e.g.*, Tim L. Peckinpaugh & Stephen P. Roberts, Citizens United: *Questions and Answers Public Policy and Law Alert*, K&L GATES, Feb. 12, 2010, *available at* http://www.klgates.com/newsstand/Detail.aspx?publication=6214.

prohibition. Thus, Wal-Mart was able to outspend the true grassroots group by a 5:1 ratio.[62]

- As the record in *McConnell* demonstrated, corporations commonly veil their political expenditures with misleading names. For example, "The Coalition-Americans Working for Real Change" was a business organization opposed to organized labor and "Citizens for Better Medicare" was funded by the pharmaceutical industry.[63]
- The North Carolina Association of Realtors spent $2.7 million to defeat 20 local referendums on land transfer taxes and pushed this money through nearly 30 organizations. Nearly $1 million of this money went to a group misleadingly named the "North Carolina Homeowner's Alliance," which developed ads and mailers critical of the tax proposal. The rest went to almost two dozen local referendum committees, which filed money with their local boards of election, and not with the state, to make the money harder to track.[64]

Moreover, the *Citizens United* majority's assumption that corporate political spending must be disclosed to shareholders is similarly incorrect. Under current laws regulating corporations, nothing requires corporations to disclose to shareholders whether funds are being used to fund politicians or ballot measures, or how the political money is being spent.[65] In short, corporate managers could be using shareholder funds for political spending, without the knowledge or consent of investors.

1. Giving Shareholders a Voice

The Brennan Center has proposed a remedy to this disclosure gap in its recently-issued report *Corporate Campaign Spending: Giving Shareholders a Voice.*[66] The report suggests two specific reforms: first, require corporate managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require corporate managers to report corporate political spending directly to shareholders.

These requirements will increase corporate accountability by placing the power directly in the hands of the shareholders, thereby ensuring that shareholders' funds are used for political spending only if that is how the shareholders want their money spent. Moreover, the disclosure requirement serves valuable information interests, leaving shareholders better able to evaluate their investments and voters better-equipped to make informed choices at the polls. The report includes model legislation to effectuate the proposed reforms.

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[62] Def.'s Response Brief to Pls.'s Mot. for Summary Judgment, Sampson v. Coffman, No. 06-cv-01858 at 43-44 (D. Co. 2007).
[63] *See McConnell*, 540 U.S. at 128, 197.
[64] Scott Mooneyham, *State Legislators Playing Whack-a-Mole with Campaign Finance Laws*, THE DAILY REFLECTOR, Mar. 12, 2010, *available at* http://www.reflector.com/opinion/scott-mooneyham-state-legislators-playing-whack-mole-campaign-finance-laws-26683.
[65] *See* Jill Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1613 (2006) ("Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls").
[66] *See* TORRES-SPELLISCY, *supra* note13 .

2. Empowering Voters Through Disclosure

Although disclosure laws alone are not sufficient to safeguard democracy, the importance of disclosure to the health of our democracy cannot be overstated.

Unfortunately, there is currently a sustained and unrelenting wave of legal challenges aimed at eliminating the (already weak) disclosure requirements for independent expenditures. Indeed, the *New York Times* recently quoted the attorneys who brought the *Citizens United* suit as stating that disclosure was their next target in a ten-year strategy to eliminate campaign finance regulations.[67] As noted above, *Doe v. Reed*, which was brought by the same lawyers as *Citizens United*, was argued at the end of April, close on the heels of *Citizens United*.[68] Although *Doe* does not implicate campaign finance disclosures directly (it involves the disclosure of ballot petition signatures), the plaintiffs advance a broad conception of a right to anonymous speech, which would clearly undermine campaign finance disclosure regimes.

To be sure, *Citizens United* upheld BCRA's disclosure requirements, and expressly affirmed the importance of disclosure as a means of "'provid[ing] the electorate with information' about the sources of election-related spending." [69] Nonetheless, the majority opinion dropped several hints that could provide opponents of disclosure with a roadmap for a successful constitutional challenge to these laws.

First, the Court sent a subtle message that evidence of harassment or retaliation might be a sufficient foundation for a successful challenge to disclosure laws.[70] The majority specifically remarked that examples of harassment against contributors to various initiatives were "cause for concern," but noted that Citizens United had demonstrated no record of harassment. However, as the dissent noted, striking down valuable disclosure laws on constitutional grounds to guard against harassment would be using "a sledge hammer rather than a scalpel."[71] A more tailored approach would increase the robustness of anti-harassment laws to protect the constitutional interests of both contributors and the public at large.

Second, the Court sent a worrying signal for supporters of disclosure in holding that requiring corporations to form a PAC for corporate political expenditures was so burdensome as to constitute a ban on political speech.[72] The Court assumed the existence of an unconstitutional burden despite the absence of any factual record demonstrating any "chill" or other harm.

A vision of the First Amendment which privileges secrecy and anonymity over transparency and accountability has no place in our representative democracy. To defend existing laws and enact new reforms, a factual record is needed. Specifically, we must push back

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[67] *See* Kirkpatrick, *supra* note 39.
[68] *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, 130 S.Ct. 1133(U.S. 2010) (No. 09-559).
[69] *Citizens United*, 130 S.Ct. at 914 (quoting *Buckley v. Valeo*, 424 U. S. 1, 66 (1976)).
[70] *Id.* at 914-16.
[71] *Id.* at 933 (Stevens, J., dissenting).
[72] *Id.* at 882.

against arguments that disclosure requirements chill speech as a matter of course, or are necessarily unduly burdensome.

C. Combating the Majority's Myth of Government Censorship

Finally, as indicated by Justices Scalia's and Kennedy's questions at oral argument, the *Citizens United* majority appears to believe that the true purpose of campaign finance disclosure laws is to silence potential critics who might otherwise be able to use corporate resources to criticize governmental policy and decision makers. The majority stated:

> The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.[73]

Unsurprisingly, the Court cited no evidentiary basis whatsoever for its conclusions on government censorship. Accordingly, there is no support for the Court's assumption that regulations on corporate political spending had in any way "silenced" any corporation from effectively expressing its "opinions" regarding any policy, candidate, or any other matter. As Justice Stevens wryly noted in his dissent:

> While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.[74]

In short, the majority based its censorship analysis on nothing other than the personal views of five justices. In fact, as Solicitor General Kagan pointed out at oral argument and as a Brennan Center study has demonstrated, the available evidence shows that campaign finance reforms such as contribution limits and public financing appear to benefit challengers rather than incumbents.[75] Further investigation of the effects of campaign finance laws on such factors as incumbency rates, electoral competition, fundraising patterns, and candidate diversity is urgently needed to push back against the majority's censorship myth.

V. Enhancing First Amendment Values by Empowering Voters

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[73] *Citizens United*, 130 S.Ct. at 907 (citations omitted). At another point in the decision Justice Kennedy similarly assumed that Congress's motives were invidious, stating "[the law's] purpose and effect are to silence entities whose voices the Government deems to be suspect." *Id.* at 898.

[74] *Id.* at 979 (Stevens, J., dissenting).

[75] *See* Transcript of Oral Argument, *supra* note 35, at 50-51; CIARA TORRES-SPELLISCY, KAHLIL WILLIAMS, & DR. THOMAS STRATMANN, ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS (The Brennan Center for Justice 2009); Thomas Stratman, *The Effect of Public Financing on the Competitiveness of Elections* (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400809.

A. Public Funding of Political Campaigns

The Court in *Citizens United* reaffirmed that "it is our law and our tradition that more speech, not less, is the governing rule."[76] The Court thus reiterated the "more speech" principle on which the Court upheld the presidential public financing system in *Buckley v. Valeo*. The *Buckley* Court broadly approved of public funding programs, finding that they represent a governmental effort, "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[77] By making it possible for candidates to run a viable, competitive campaign through grassroots outreach alone, public funding programs decrease the need for deep-pocketed supporters. By opting into such a system, candidates can choose to be beholden to the electorate, rather than to deep-pocketed special interests.

Public funding programs also have the potential to promote meaningful electoral participation by a diverse range of citizens. Systems that award multiple matching funds for small contributions, like that proposed in the *Fair Elections Now Act,* introduced by Illinois Senator Richard Durbin and Connecticut Representative John Larson, as well as the public financing system in New York City, amplify the voices of actual citizens, and can be an effective counterbalance to unrestrained corporate spending. Moreover, by encouraging candidates to seek donations from a large number of voters, such programs facilitate broad participation in the election process.

The swing district polling discussed above indicates that strong reforms, particularly public financing, have become issues that will affect voters' choices at the ballot box.

- A significant segment of respondents—by a 40% to 23% margin—would be more likely to vote for their member of Congress if he or she supported the Fair Elections Now Act.
- By a margin of 6% (36% to 30%), respondents would be more likely to support a politician voting for a transparency and disclosure measure.[78]

It is worth noting that, in the above polling, public financing – a large-scale reform – significantly outpolled transparency and disclosure reforms, which are less comprehensive. A significant segment of swing-district voters appear to realize that public financing – a political game-changer – is the appropriate response to the Court's deregulation of our campaign finance laws.

Ever since public financing systems were enacted, they have faced constitutional challenges brought by those who claim that their First Amendment rights are violated when the

[76] *Citizens United*, 130 S.Ct. at 911.
[77] *Buckley*, 424 U.S. at 92-93.
[78] *See* Memorandum from David Donnelly, *supra* note 10.

state awards funds to qualified publicly-financed candidates.[79] Courts, agreeing that public financing furthers First Amendment values, have consistently upheld such systems against constitutional challenge.[80] Recently, however, a new slew of challenges have been launched. These new challenges claim that the Roberts Court's 2008 decision in *Davis v. FEC*[81] has cast doubt on this previously well-settled area of the law. The Ninth Circuit recently upheld Arizona's public funding program against such an attack,[82] but the plaintiffs in the suit have already filed an emergency motion to stay the functioning of the decade-old program pending appeal to the Supreme Court. A similar lawsuit challenging Connecticut's public funding programs is pending before the Second Circuit, and two new challenges were recently launched in Wisconsin, again by the same opponents of reform who brought the *Citizens United* lawsuit.[83]

B. Voter Registration Modernization

Bringing new eligible voters into the political process is another "more speech" solution to *Citizens United*. This can be accomplished by bringing our voter registration system into the 21st century, an initiative which, in the words of Attorney General Eric Holder, would "remove the single biggest barrier to voting in the United States."[84] Indeed, if today's system were modernized, it could bring as many as 65 million eligible Americans into the electoral system permanently – while curbing the potential for fraud and abuse.

Voter registration modernization ("VRM") necessitates that the government automatically and permanently register all eligible citizens, and provide failsafe mechanisms to ensure same-day registration. A bipartisan coalition actively supports federal VRM legislation, and states from around the country are currently moving to implement the idea. A dozen states have already adopted internet registration; at least nine have implemented parts of automated registration; eight others have permanent registration; and another eight have Election Day registration.

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[79] Matching fund provisions, that disburse additional money to participating candidates when they are targeted by independent expenditures or high spending opponents, have been particularly targeted. These mechanisms, usually known as matching funds, are used to incentive participation in public financing programs while still preserving public monies.

[80] *See* North Carolina Right to Life Comm. Fund, *supra* note 28 *cert. denied,* 129 S.Ct. 490 (2008) (affirming denial of preliminary injunction against North Carolina's public financing system for appellate judicial elections); Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's Clean Election Act); Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996) (upholding Minnesota's public funding system for elections); Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38 (1st Cir. 1993) (upholding Rhode Island's public funding system).

[81] Davis v. FEC, 128 S.Ct. 2759 (2008).

[82] McComish v. Brewer, No. 10-15166, 2010 WL 2011563 (9th Cir. May 21, 2010).

[83] Matching fund provisions were struck down at the district court level in Connecticut. *See* Green Party v. Garfield, 648 F. Supp.2d 298 (D.Conn. 2009), *argued* No. 09-3769 (2d Cir. Jan. 13, 2010). In Wisconsin, recently-filed lawsuits challenge the mechanism by which Wisconsin's program distributes money to participants and the reporting requirements of the system. *Wisconsin Right to Life v. Brennan*, No. 09-cv-764 (W.D. Wis. Dec. 18, 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D. Wis. Dec. 21, 2009).

[84] Eric Holder, Attorney General, Remarks at the Brennan Center for Justice, Brennan Legacy Awards Dinner on Indigent Defense Reform (Nov. 16, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html.

Voter registration modernization would help us live up to our ideal of being a nation governed with the consent of the governed. We should aspire to get as close to full registration of eligible voters as possible. If enacted, voter registration modernization could be the most significant voting measure since the Voting Rights Act.

C. Advancing A Voter-Centric View of the First Amendment

Perhaps the most troubling aspect of *Citizens United* – worse than its political implications, and worse than its aggressive deregulatory stance – is that the Court embraces a First Amendment where voters are conspicuously on the sidelines. At the start of the *Citizens United* opinion, Justice Kennedy correctly noted that "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[85] As the opinion proceeded, however, it became evident that the majority was in fact taking a myopic view of campaign finance jurisprudence, one that focuses exclusively on campaigns, candidates, parties, and corporate interests at the expense of voters.[86] The Court's ultimate judgment held, in effect, that whatever interest is willing to spend the most money has a constitutional right to monopolize political discourse, no matter what the catastrophic result to democracy.

This aspect of *Citizens United*, like many others, constitutes a break with prior constitutional law. The Court has long recognized that "constitutionally protected interests lie on both sides of the legal equation."[87] Accordingly, our constitutional system has traditionally sought to maintain a balance between the rights of candidates, parties, and special interests to advance their own views, and the rights of the electorate to participate in public discourse and to receive information from a variety of speakers.[88]

It is essential to recognize the Roberts Court's one-sided view of the First Amendment as a distortion, one which threatens to erode First Amendment values under the guise of protecting them. In truth, our constitutional jurisprudence incorporates a strong First Amendment tradition

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[85] *Citizens United*, 130 S.Ct. at 898.

[86] The Court's central concern was that "[t]he Government ha[d] 'muffle[d] the voices that best represent the most significant segments of the economy.'" *Id.* at 907 (quoting *McConnell*, 540 U.S. at 257-58). *See also id.* at 906 (finding differential treatment of media corporations and other corporations troubling); 908 (worrying that "smaller corporations may not have the resources" to lobby elected officials like larger corporations); 910 (quoting Kennedy, J., dissenting in *McConnell*, 540 U. S. at 297)("'It is well understood that a substantial and legitimate reason, if not the only reason . . . to make a contribution . . . is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness'").

[87] Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring); *see also* United States v. Int'l Union United Auto. Workers, 352 U.S. 567, 590 (1957) (noting "delicate process" of reconciling labor union's rights with value in promoting "active, alert responsibility of the individual citizen in a democracy").

[88] *See, e.g.*, *Shrink Missouri*, 528 U.S. at 390 (balancing candidate's and political committee's claims with threat that "the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"); Federal Election Commission v. Mass. Citizens for Life, 479 U.S. 238, 257-58, n.10 (1986) (balancing nonprofit organization's interests with importance of protecting "the integrity of the marketplace of political ideas" necessary for citizens to "develop their faculties"); Federal Election Commission v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) (balancing corporate interests against the value of promoting "the responsibility of the individual citizen for the successful functioning of that process").

of deliberative democracy – an understanding that the overriding purpose of the First Amendment is to promote an informed, empowered, and participatory electorate. This is why our electoral process must be structured in a way that "build(s) public confidence in that process," thereby "encouraging the public participation and open discussion that the First Amendment itself presupposes."[89]

VI. Conclusion

In this post-*Citizens United* era, a robust legislative response, supported by an equally robust factual record, will be necessary to restore the primacy of voters in our democracy. The immediate enactment of stop-gap measures such as shareholder consent and increased disclosure, as well as structural reforms such as public financing and voter registration modernization, will mitigate the damage that *Citizens United* may cause.

However, in the long term, reclaiming the First Amendment for the voters will be the best weapon against those who seek to use the First Amendment for the good of the few, rather than for the many. Judges whose conception of the First Amendment takes account of the interests of voters can speed this process. As the nation seeks a successor to Justice Stevens, we hope that his successor advances a vision of a democratic, deliberative, and voter-centric First Amendment.

[89] *Shrink Missouri*, 528 U.S. at 400.

Who's Buying Campaign Finance Reform?

Notes/Bibliography

Below is a list of source materials we used for this report. This is just a sampling of the information available from and about these organizations. Further, due to the sheer size of the campaign finance reform network of organizations, this is by no means an all-inclusive list of groups involved in the effort.

This is just the beginning.

Organizations Working on Campaign Finance Reform:

Arizonans for Clean Elections

3336 N. 32nd Street, Suite 106
Phoenix, AZ 85018
(602) 840-6633

- 1998 Campaign Finance Disclosure Reports filed with the Arizona Secretary of State:

  --January 31 Report
  --June 30 Report
  --Pre-Primary Election Report
  --Post-Primary Election Report
  --Pre-General Election Report
  --Post-Primary Election Report

- Balazs, Diana. "Mechanic Savoring Newfound Freedom," *The Arizona Republic*, February 4, 2001; p. B01.
- Ivins, Molly. "Arizona Takes a Shot at Campaign Finance Reform," *Chicago Sun-Times*, October 11, 1998.

Brennan Center (William J. Brennan Jr. Center for Justice)

161 Avenue of the Americas, 5th Floor
New York NY 10013
(212) 998-6730
www.brennancenter.org

- 1999 Form 990 Tax Return
- 1998 Form 990 Tax Return
- GuideStar report (www.guidestar.org)

Campaign for America/Jerome Kohlberg

Address as of July 1998:
50 F Street, NW, Suite 1198
Washington, DC 20001
(202) 628-0610

- Doyle, Kenneth P. "FEC Drops Case Involving Reform Group Founded by Financier Jerome Kohlberg," *Money & Politics Report*, Bureau of National Affairs, Inc.; March 22, 2001.
- Babcock, Charles R.. "Parties Rack Up 6-Figure Gifts of 'Soft Money'," *The Washington Post*, September 28, 1992; p.A 15.
- "Victory Fund Members," *The Washington Post*, July 19, 1998; p.A21.
- Marcus, Ruth. "Campaign Finance Ads Target GOP," *The Washington Post*, October 16, 1997; p. A04..
- Dewar, Helen. "Road Testing Campaign Finance Bill," *The Washington Post*, March 31, 1997; p. A01.
- Anderson, Jack and Michael Binstein. "PAC-Busting Afoot," *The Washington Post*, June 22, 1995; p. S14.
- Wertheimer, Fred. "Our Leaders Preach Values But Still Follow the Money," *The Washington Post*, December 24, 1995; p. C01.
- Full-page ad in *New York Times* paid for by Campaign for America, July 22, 1998; p. A13.
- Campaign and committee contribution records for Jerome Kohlberg are available at the FEC at www.fec.gov.

Campaign for America's Future

1025 Connecticut Avenue, NW, Suite 205
Washington, DC 20036
Phone: 202-955-5665
www.ourfuture.org

- *StraightTalk 2000: A Handbook for Activists*, available on the organization's website. See "Section III: Strengthening Democracy, Renewing Community," pp. 115-124.

Center for Responsive Politics

1101 14th Street, NW, Suite 1030
Washington, DC 20005-5635
(202) 857-0044
www.opensecrets.org

- 1999 Form 990 Tax Return
- 1998 Form 990 Tax Return
- 1997 Form 990 Tax Return
- GuideStar report (www.guidestar.org)

Center for Public Integrity

910 17th St., NW, 7th Floor
Washington, DC 20006
(202) 466-1300
www.publicintegrity.org

- 1998 Form 990 Tax Return
- GuideStar report (www.guidestar.org)

Common Cause/Common Cause Education Fund

1250 Connecticut Avenue, NW, Suite 600
Washington, DC 20036
(202) 833-1200
www.commoncause.org

- See www.commoncause.org/about/today.htm for information about Common Cause and its activities.
- Common Cause Education Fund non-profit ruling year is 2000. Tax forms are unavailable as of March 2001.

Democracy 21/Democracy 21 Education Fund

1825 I Street, NW
Washington, DC 20006
(202) 429-2008

- 1999 Form 990 Tax Return
- GuideStar report (www.guidestar.org)

League of Women Voters/League of Women Voters Education Fund

1730 M Street, NW, Suite 1000
Washington, DC 20036
202-429-1965
www.lwv.org

- See http://www.lwv.org/takeaction/107_2001_cfr.html for the League's position on campaign finance reform.
- 1999 Form 990 Tax Return
- GuideStar report (www.guidestar.org)

Public Campaign

1320 19th Street, NW, Suite M-1
Washington, DC 20036
(202) 293-0222
www.publiccampaign.org

- 1999 Form 990 Tax Return for Public Campaign Action Fund
- 1999 Form 990 Tax Return for Public Campaign
- 1998 Form 990 Tax Return for PubliCampaign aka Public Campaign
- GuideStar report (www.guidestar.org)

Public Citizen/Public Citizen Foundation

1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
www.citizen.org

- 1999 Form 990 Tax Return for Public Citizen, Inc.
- 1999 Form 990 Tax Return for Public Citizen Foundation, Inc.
- 1998 Form 990 Tax Return for Public Citizen, Inc.
- 1998 Form 990 Tax Return for Public Citizen Foundation, Inc.
- 1997 Form 990 Tax Return for Public Citizen, Inc.
- 1997 Form 990 Tax Return for Public Citizen, Foundation, Inc.

(all tax returns available on the organization's website)

U.S. Public Interest Research Group

218 D Street, SE
Washington, DC 20003-1900
(202) 546-9707
www.pirg.org

Organizations Providing Funding for Campaign Finance Reform:

Carnegie Corporation of New York

437 Madison Avenue
New York, NY 10022
(212) 371-3200
www.carnegie.org

- 1999 Annual Report
- 1998 Annual Report
- 1997 Annual Report
- 1996 Annual Report
- Grants list on website is searchable.

Florence and John Schumann Foundation

33 Park Street
Montclair, NJ 07042
(973) 783-6660

- 1995-96 Annual Report
- 1998 Form 990-PF Tax Return

Ford Foundation

320 East 43rd Street
New York, NY 10017
(212) 573-5000
www.fordfound.org

- Various reports and searchable grants list are available on website.

Joyce Foundation

Three First National Plaza
70 West Madison Street, Suite 2750
Chicago, IL 60602
(312) 782-2464
www.joycefdn.org

- Various reports and searchable grants list are available on website.
- 1997 Annual Report
- 1996 Annual Report

Kirsch Foundation/Steven Kirsch

60 South Market Street, Suite 1000
San Jose, CA 95113-2336
(408) 278-2278
www.kirschfoundation.org

- Various reports and searchable grants list are available on website.
- Campaign and committee contribution records for Steven Kirsch are available at the FEC at www.fec.gov.

Open Society Institute/George Soros

400 West 59th Street
New York, NY 10019
(212) 548-0600
www.soros.org

- Various reports and searchable grants list are available on website.
- 1998 Form 990-PF Tax Return
- 1997 Annual Report
- 1996 Annual Report
- Valentine, Paul W. "For Baltimore, Uncommon Gift From Unorthodox Source," *The Washington Post*, November 17, 1997; p. A01.
- See also disclosure reports for Arizonans for Clean Elections (above).
- See also disclosure reports for the Arizona committee, The People Have Spoken (below).

Peace Development Fund

44 N Prospect, PO Box 1280
Amherst, MA 01004
(413) 256-8306
www.peacefund.org

- GuideStar report (www.guidestar.org)
- 1998 Form 990 Tax Return
- 1997 Form 990 Tax Return
- Conconi, Chuck. "Concerned about next month's House vote on construction moneys," *The Washington Post*, June 13, 1983; p. C3.

Pew Trusts

2005 Market Street, Suite 1700
Philadelphia, PA 19103-7017
(215) 575-9050
www.pewtrusts.org

- Various reports and searchable grants list are available on website.
- GuideStar report (www.guidestar.org)

Proteus Fund

264 N. Pleasant Street, 2nd Floor
Amherst, MA 01002
(413) 256-0349
www.funder.org/proteus

- Campaign and committee contribution records for Proteus board members are available at the FEC at www.fec.gov.
- 1998 Form 990 Tax Return

Other Information:

The People Have Spoken—House Bill 2518
The People Have Spoken—SB 1373

(Two 1998 Arizona ballot measure committees supporting liberalization of Arizona's drug laws)
PO Box 34506
Phoenix, AZ 85067
(602) 222-6639

- 1998 Campaign Finance Disclosure Reports filed with the Arizona Secretary of State:

  --January 31 Report
  --June 30 Report
  --Pre-Primary Election Report
  --Post-Primary Election Report
  --Pre-General Election Report
  --Post-Primary Election Report

Congress—legislation, statements, etc.

Information about campaign finance legislation in the Congress can be found online at http://thomas.loc.gov/.

Miscellaneous Media Articles

- Balz, Dan. "A Blessing Disguised as McCain?" *The Washington Post*, August 2, 2000; p. A20.
- "McCain Wants Campaign Finance Vote at Start of New Congress," The Associated Press, December 15, 2000.
- Mintz, John. "The Interest Groups, Liberals Mobilize Against Bush, GOP," *The Washington Post*, November 3, 2000; p. A22.
- Mann, Judy. "Mobilizing the Family Planning Vote," *The Washington Post*, October 11, 2000; p. C13.

ADDITIONAL DOCUMENT FOR THE RECORD

FROM SENATOR LINDSEY GRAHAM

Following the Senate Judiciary Committee Hearing:

"The Fair Elections Now Act: A Comprehensive Response to *Citizens United*"

Held on April 12, 2011

In the interest of efficiency, the following document, which is lengthy, is incorporated by reference into the record:

- The American Conservative Union Foundation Election Law Enforcement Project: "Who's Buying Campaign Finance 'Reform'?" can be found here: http://www.foley.com/files/tbl_s31Publications/FileUpload137/2285/campaignfinancereform.pdf

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Justice Policy Institute
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Lambda Legal
Lawyers' Committee for Civil Rights Under the Law
League of Conservation Voters Education Fund
Legal Aid Society of New York
Legal Aid Society-Employment Law Center
Legal Momentum
Mexican American Legal Defense
and Educational Fund
NARAL Pro-Choice America Foundation
National Abortion Federation
National Association of Criminal Defense Lawyers
National Campaign for Sustainable Agriculture
National Center for Law and Economic Justice
National Center for Lesbian Rights
National Center for Youth Law
National Center on Poverty Law
National Citizens' Coalition for Nursing Home Reform
National Committee for Responsive Philanthropy
National Council for Research on Women
National Council of Nonprofit Associations
National Education Association
National Employment Lawyers Association
National Family Planning and Reproductive Health Assoc.
National Immigration Forum
National Immigration Law Center
National Law Center on Homelessness and Poverty
National Lawyers Guild
National Legal Aid & Defender Association
National Low Income Housing Coalition
National Mental Health Association
National Partnership for Women & Families
National Senior Citizens Law Center
National Veterans Legal Services Program
National Women's Law Center
National Youth Advocacy Coalition
Native American Rights Fund
Natural Resources Defense Council
New York Lawyers for the Public Interest
One Connecticut
Physicians for Human Rights
Planned Parenthood Federation of America
Public Advocates
Service Employees International Union
Seton Hall School of Law
Center for Social Justice
States United to Prevent Gun Violence
The Sierra Club Foundation
The Wilderness Society
Tides Center
University of Pennsylvania Law School
Public Service Program
USAction
Violence Policy Center
Women's Law Project

April 11, 2011

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

Dear Chairman Durbin,

The Alliance for Justice expresses its strong support for the Fair Elections Now Act (S.750), legislation that would make Congress accountable to the American people, not the corporations and special interests who currently provide much of the funding for political campaigns.

Alliance for Justice is a national association of over 100 organizations dedicated to advancing justice and democracy. For over 30 years, we have been leaders in the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil and women's rights, children's, seniors and other groups. Alliance for Justice believes that all Americans have the right to secure justice in the courts and to have their voices heard when government makes decisions that affect their lives.

Encouraging nonprofits and individuals to fully participate in our democracy underlies all of our work. We strongly urge passage of this act because it seeks to encourage more people to participate in the elections for the House and Senate. Under the bill, a candidate's spending is tied to the amount of small donations received from residents of the district/state in which she is running. The Fair Elections Act Now (FENA) does not discourage certain types of speech, but rather focuses on encouraging more citizen participation at the district and state level. FENA truly seeks to "make democracy work" for us all.

The Fair Elections Now Act would allow candidates to run competitive campaigns for office by relying on small donations from their home districts or states. With Fair Elections, candidates can focus on their constituents—instead of on corporate interests and wealthy individuals. Paid for by the sale of broadcast spectrum, FENA is not funded with taxpayer dollars.

As we saw in the 2010 election, some members of Congress spent more time raising money and less time focused on our nation's many challenges. This increase has been amplified by the Supreme Court's recent *Citizens United* decision, which allows for unlimited independent spending by corporations to influence federal elections. It's time that Congress act to put the voters back in charge of our political process. With Fair Elections, candidates can focus on their constituents instead of spending so much of their time attending fundraisers and "dialing for dollars."

We fully support the Fair Elections Now Act and urge Congress to quickly pass this necessary legislation.

Sincerely,

Nan Aron, President
Alliance for Justice

Gerald W. McEntee
President

Lee A. Saunders
Secretary-Treasurer

Vice Presidents

Ken Allen
Portland, OR

Henry L. Bayer
Chicago, IL

George Boncoraglio
New York, NY

Anthony Caso
Boston, MA

Greg Devereux
Olympia, WA

Danny Donohue
Albany, NY

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Harrisburg, PA

Michael Fox
Harrisburg, PA

Albert Garrett
Detroit, MI

Raglan George Jr.
New York, NY

Sherryl Gordon
Trenton, NJ

Lakesha Harrison
Oakland, CA

Danny J. Homan
Des Moines, IA

Salvatore Luciano
New Britain, CT

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Worthington, OH

Roberta Lynch
Chicago, IL

Gerard S. Middleton Sr.
Baltimore, MD

Gary Mitchell
Madison, WI

Doug Moore
San Diego, CA

Henry Nicholas
Philadelphia, PA

Eddie L. Parks
Westerville, OH

Randy Perreira
Honolulu, HI

George E. Popyack
Oakland, CA

Greg Powell
Austin, TX

Laura Reyes
San Diego, CA

Eddie Rodriguez
New York, NY

Lawrence A. Roehrig
Lansing, MI

Joseph P. Rugola
Columbus, OH

Kathy J. Sackman
Pomona, CA

Eliot Seide
South St. Paul, MN

Mary E. Sullivan
Albany, NY

Braulio Torres
San Juan, PR

David Warrick
Indianapolis, IN

Jeanette D. Wynn
Tallahassee, FL

April 11, 2011

The Honorable Richard J. Durbin
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Durbin:

On behalf of the 1.6 million members of the American Federation of State, County and Municipal Employees (AFSCME), I am writing to express our support for the Fair Elections Now Act (S. 750).

AFSCME members, like many Americans, are frustrated by the tremendous influence of corporations and special interests on their elected officials. Severing the link between money and politics will bring much needed balance to our political process and ensure that elected officials govern in the broader of working families. The Fair Elections Now Act's model of citizen-funded congressional elections would combine public funds with small campaign donations, thus eliminating candidates' reliance on large donors and special interests.

We look forward to working with you to secure final passage of the Fair Elections Now Act.

Sincerely,

Charles M. Loveless
Director of Legislation

CML: bcr

American Federation of State, County and Municipal Employees, AFL-CIO
TEL (202) 429-1000 FAX (202) 429-1293 TDD (202) 659-0446 WEB www.afscme.org 1625 L Street, NW, Washington, DC 20036-5687

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1401 New York Ave., N.W., Suite 1225
Washington, D.C. 20005
202 595-9302
www.asbcouncil.org

April 7, 2011

The Honorable Richard J. Durbin
Chairman, Senate Judiciary Subcommittee on the Constitution
U.S. Senate
Washington, DC 20510

The Honorable Lindsey O. Graham
Ranking Member, Senate Judiciary Subcommittee on the Constitution
U.S. Senate
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

American Sustainable Business Council would like to express our full support for the Fair Elections Now Act (S. 750), in order to limit the influence of special interest donations and enable legislators to focus on the America's challenges rather than on fundraising.

American Sustainable Business Council is a national coalition of business networks that supports policies leading to a vibrant, just and sustainable economy. Through its member organizations, ASBC represents over 70,000 businesses and social enterprises and more than 200,000 entrepreneurs, owners, executives, investors and business professionals. ASBC works to unite the sustainable business community, reframe the debate, and catalyze policy change for a new economy.

ASBC believes that the best way to build a prosperous economy is to support innovation, entrepreneurship, and corporate responsibility—and reject practices that damage the economy such as protecting "too big to fail" banks, subsidizing non-renewable energy, and allowing multinationals to use off-shore tax havens to dodge the taxes that Main Street businesses must pay.

Business leaders understand the importance of getting the incentives right. This bill would provide legislators with a strong incentive and the means to focus on the urgent challenges facing America, and end their dependence on special interest money that comes with strings attached.

Sponsored by Sen. Dick Durbin (D-IL), the Fair Elections Now Act would allow candidates to run competitive campaigns for office by relying on small donations from back home. With Fair Elections, candidates can focus on their constituents—instead of lobbyists and special interests—to fund their campaigns.

We fully support the Fair Elections Now Act and urge the House to quickly pass this essential legislation. It's time we put voters back in charge of our political process.

Sincerely,

David Levine

David Levine, Co-founder, Executive Director

Celinda Lake
President

Alysia Snell
Partner

Michael Perry
Partner

David Mermin
Partner

Robert G. Meadow, Ph.D.
Partner

Daniel R. Gotoff
Partner

Joshua E. Ulibarri
Partner

Tresa Undem
Vice President

Rick A. Johnson
Managing Director

Robert X. Hillman
Chief Financial Officer

To: Interested Parties

From: Lake Research Partners

Re: Summary of Polling on Clean Elections Law in Arizona[1]

Date: April 18, 2011

A recent poll of 500 likely 2012 Arizona voters shows strong support for the Citizens Clean Elections Act—with a majority supporting the current law with no description and almost three out of four supporting with a basic description. Additionally, Arizona voters are strongly opposed to efforts to repeal—with almost two thirds of voters opposing a repeal and a majority saying they would be less likely to vote for a state legislative candidate who supported a repeal.

- **Voters in Arizona strongly support the Citizens Clean Elections Act, and even more so after they hear basic information about the law—with strong super majorities of support across party lines.**
  - When read with no description (see below for question wording), Clean Elections are supported by 52% of Arizonans, with just 7% opposed and 42% undecided. Importantly, self-identified independents support the Clean Elections law by a margin of 53%-9%, as do a majority of Democrats (64%-1%) and a plurality of Republicans (42%-15%).
  - After getting a short description (see below for question wording) support rises with 77% of Arizonans in favor, 14% opposed, and just 9% undecided. Again, independents very strongly support Clean Elections with a description (79% favor, 12% oppose), as do Democrats (80%-7%) and Republicans (74%-19%).
- **Support for Clean Elections is more than just an issue preference for Arizona voters, it is a core value to them as shown by the intensity of their support.**

[1] Lake Research Partners designed and administered this survey (of 500 likely 2012 voters in Arizona) which was conducted by telephone using professional interviewers between April 13 and April 17, 2011. The margin of error is +/- 4.4%.

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WASHINGTON, DC | BERKELEY, CA | NEW YORK, NY | LOS ANGELES, CA | RICHMOND, VA
www.lakeresearch.com

- On the Clean Elections with a description, a majority (57%) say they strongly favor, as well as a majority (54%) who strongly oppose a repeal.

- **The demand for reform becomes stronger when voters consider a gift ban.**
  - Arizona voters are near unanimous in support of a law that would ban any candidate or public official from receiving any gifts from lobbyists. Just under nine out of ten voters (68%) support with only 8% opposed and 6% undecided. Again, support remains strong across party lines with 91% of Democrats in favor, 88% of independents in favor, and 81% of Republicans in favor.

- **The ballot referendum for repeal of Clean Elections is a non-starter with voters.**
  - When asked about a possible repeal of Clean Elections (text below) almost two-thirds of Arizona voters (66%) oppose the repeal, with only 16% in favor and 19% undecided. Opposition toward the repeal ranges from 59% to 79% across party lines.

- **Arizona voters, including independent voters, are ready to punish candidates who support a repeal of Clean Elections at the polls.**
  - By a margin of 45% to 5%, independent voters would be less likely to support a candidate who favors repeal of Clean Elections. Republicans (47% would be less likely to support such a candidate) and Democrats (64%) agree.

Clean Elections w/o description:

As you may know, there is currently a law in Arizona called the Citizens Clean Elections Act. Would you say you favor or oppose this law, or are you undecided? [IF FAVOR/OPPOSE] And is that strongly or not so strongly? [IF UNDECIDED] Well, which way do you lean?

Clean Elections with description:

Here is a little more information about the Citizens Clean Elections Act in Arizona. Passed by a voter referendum in 1998, it allows candidates running for the legislature or statewide offices to receive limited public funding for their campaigns, paid for by voluntary donations and civil penalties and criminal fines, if they agree to take no campaign money from lobbyists, interest groups, or any other private source. Now having heard this, would you say you favor or oppose this law, or are you undecided? [IF FAVOR/OPPOSE] And is that strongly or not so strongly? [IF UNDECIDED] Well, which way do you lean?

Repeal of Clean Elections

Now for a slightly different question. Some members of the Arizona state legislature who oppose the Clean Elections Act in Arizona are trying to put a repeal of the law on the ballot in 2012. Do you favor or oppose repealing the Clean Elections Act, or are you undecided? [IF RESPONDENT IS CONFUSED, USE THIS PROMPT] To be clear, favoring a repeal would end the Clean Elections Act in Arizona. Opposing repeal would keep the Clean Elections Act in place. [IF FAVOR/OPPOSE] And is that strongly or not so strongly? [IF UNDECIDED] Well, which way do you lean?

*****

The Boston Globe

THURSDAY, NOVEMBER 19, 2009

The high cost of private campaign funding

By Daniel Weeks

WHEN MASSACHUSETTS-based kSARIA Corp. set out to develop a fiber-optic cable repair tool for the Navy, it did not petition the Pentagon for funding or support. Instead, as The Boston Globe recently reported, it followed a far more lucrative path by going to the newest authority on military spending: members of Congress.

In a story that is all-too familiar in the days of trillion-dollar deficits and multi-million-dollar campaigns, kSARIA Corp. hired a former congressional staffer to lobby on its behalf and began making campaign donations to relevant members of Congress. The lobbyist, Bill McCann, had served as chief of staff to retired Representative Marty Meehan of Lowell, when kSARIA's first request for funds was made.

The result for the little contractor that could: $3.5 million in congressional handouts over the past few years, and another $2.5 million pending in the latest defense appropriations bill — all for a tool the Navy did not request and that is still in prototype form. When asked for comment, a spokesman for Representative Niki Tsongas, the Lowell Democrat who inserted the latest requests on kSARIA's behalf, called the funding justified in the interest of "creating and retaining jobs."

At $6 million from taxpayers to keep 25 people at work, it is little wonder that public confidence in the government's ability to responsibly steward our public funds is low. But $6 million only begins to scratch the surface. According to the watchdog group Citizens Against Government Waste, taxpayers spent $271 billion on earmarks — appropriations inserted directly by members of Congress and not subject to standard budgetary review — between 1991-2008.

A report by Americans for Campaign Reform found that the top 10 recipients of defense industry earmarks in 2008 contributed an average of $2.7 million each to federal candidates from 2003-2008. In return for their investment, the defense contractors received an average of $88 million in taxpayer-funded earmarks, a payoff rate of 1,300 percent. And in a now-familiar pattern, the largest single earmark appropriation in 2008 — $588 million for the production of naval submarines — was specifically rejected by the Navy itself.

But the real story goes deeper still. At issue in the case of kSARIA Corp., and the estimated 11,286 other earmarks adopted in 2009, is the way we fund campaigns.

Members of Congress rely on millions of dollars in private contributions to fund their never-ending bids for re-election. Private companies and other interest groups, keen to advance their bottom line by helping to write government regulation, willingly meet the demands of incumbents for campaign cash. Free market principles of fairness, competition, and accountability are routinely compromised for the benefit of special interests, while taxpayers foot the bill.

Our system is not so much broken as it is fixed. So long as lawmakers in Congress must spend a third of their time or more raising private campaign funds, they will be trapped in a cloud of suspicion and prone to conflicts of interest that undermine their ability to meet the considerable challenges facing the country today.

To address this mounting concern, 120 members of the House and Senate have cosponsored new legislation for citizens-funded elections. The Fair Elections Now Act would replace large donations from wealthy individuals and groups with broad-based small donations and matching public funds. Candidates seeking to participate in the voluntary program would be required to collect at least 1,500 checks of $100 or less from their constituents; once qualified, they would receive a public match on every small donation they raise from their home state, up to a competitive threshold in campaign funds.

Although a radical departure from current campaign practice, citizen-funded elections is hardly a novel idea. President Theodore Roosevelt first pitched the concept in 1906 and seven states from Arizona to Maine have responded to Roosevelt's call. In a time of soaring budget deficits and falling public faith in the integrity of government, Congress would do well to follow suit.

Daniel Weeks is president of Americans for Campaign Reform.

Comments on

S. 750: The Fair Elections Now Act

United States Senate Subcommittee on the
Constitution, Civil Rights, and Human Rights

April 12, 2011

by

Sean Parnell
President
Center for Competitive Politics

The Center for Competitive Politics has serious concerns about S. 750, the Fair Elections Now Act (FENA). Simply put, programs of this nature do not work, and only waste significant amounts of taxpayer dollars.

The Center has conducted extensive research and analysis of programs similar to that proposed in S. 750. While the shortcomings of FENA are numerous, I would like to focus here on two central failures:

- Providing taxpayer dollars to political candidates as a replacement to private contributions does not in any way reduce the ability or desire of organized interest groups to support favored candidates, and in fact can force candidates to rely on interest groups for aid in fundraising

- The Act would primarily benefit incumbents, along with candidates backed by well-organized interest groups and party insiders as well as celebrity candidates who are already well known, while most outsider and challenger candidates would be unable to qualify

Interest group influence not diminished, and possibly is increased

While government-financed political campaigns are often touted as a way to reduce the influence of organized interest groups, there is little reason to believe this is the case. Research by the Center on New Jersey's 2007 pilot project found that approximately half of all $10 qualifying contributions collected by candidates came from the members of a handful of major interest groups, such as unions, the National Rifle Association, pro-life and pro-choice groups, and the Sierra Club.[1]

In Arizona, the practice of interest groups soliciting the necessary qualifying contributions on behalf of favored candidates is so common and widespread that a news report noted "...special interest groups routinely collect the necessary number of $5 contributions to help candidates qualify for public funding."[2]

And in Maine unsuccessful gubernatorial candidate John Richardson enlisted unions endorsing his campaign to supply manpower for his effort to qualify for funding.[3] This was reported in the media with little fanfare, again suggesting that this practice is common and unremarkable.

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[1] Sean Parnell, Laura Renz, Sarah Falkenstein, *Special Interests, Partisan Pouts, and the Usual Suspects: A Study of Donors to New Jersey's "Clean Elections" Candidates in 2007*, p. 4, Center for Competitive Politics, February 2009

[2] Christian Palmer, "Clean Elections Institute loses national money stream, seeks donations," *Arizona Capitol Times*, December 29, 2008

[3] Sasha Issenberg, "Maine blazes a trail in funding," Boston Globe, March 29, 2009. Available at: http://www.boston.com/news/local/maine/articles/2010/03/29/maine_blazes_path_in_funding/?page=1

S. 750 would essentially compel candidates to rely on organized interest groups to raise the large number of qualifying contributions that are needed to receive millions in tax dollars, particularly non-incumbents.

Consider the case of someone running in the state of Illinois for U.S. Senate were S. 750 to become law. According to the qualifying standards contained in FENA, that person would need to raise approximately $231,000 from a minimum of 11,000 Illinois citizens in a 5 month period.[4]

Because of the extremely low limit on contributions, it will be nearly impossible for a candidate to raise sufficient funds early in the process to establish a viable campaign without significant outside support. Just as we have seen in Arizona, Maine, and New Jersey, where the number of contributions to be raised is far fewer than 11,000, we can expect candidates to turn to well organized interest groups in order to provide the volunteer support and infrastructure capable of raising so many small contributions.

Primarily benefits incumbents and other political insiders

While advocates of FENA and similar programs often tout how outsider, non-traditional, and challenger candidates benefit, there is little evidence suggesting this is accurate. And the specific structure of this program make it all but certain to primarily benefit incumbents, candidates favored by the political establishment, and celebrity candidates.

As noted earlier, a key to qualifying under this program will be the involvement of well-organized interest groups. An incumbent is almost always going to have the support of their own party, and just as we typically see PAC contributions generally favor incumbents, we are likely to see a similar pattern for which candidates organized interest groups throw their support behind.

A review of the New Jersey pilot project in 2005 demonstrates how difficult it is for non-incumbents and those without the support of their party infrastructure and organized interest groups to qualify. As described in *Fairly Flawed*, the Center's analysis of an earlier version of FENA, only two out of ten candidates who attempted to qualify in New Jersey's program were able to do so, the incumbent in the race and his slate partner.[5]

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[4] Based on the following statutory provisions of S. 750: Sec. 501(3) and Sec. 512(a)

[5] *Fairly Flawed: Analysis of the 2009 Fair Elections Now Act*, p. 20, Center for Competitive Politics, July 2009.

By establishing substantial qualification standards to receive tax funding for political campaigns, FENA would make it nearly impossible for a candidate who is not backed by their political party establishment or well-organized interest groups to qualify.

Looking again at a candidate attempting to qualify in Illinois, it is simply not feasible for such an "outsider" candidate to find a way to raise a minimum of $231,000 from 11,000 state residents. They could not afford direct mail or rely on an established network of volunteers, and without prospects for success they are unlikely to receive positive media coverage that might get them enough attention to kickstart a fundraising drive.

Incumbent re-election rates also do not appear to have been noticeably affected by tax funding of political campaigns. Connecticut's program has been in existence since 2008, and incumbent re-election rates have ranged between 88% and 97% of incumbents running for re-election.[6]

Likewise, New York City's program has seen a high rate of re-election under the program, with 43 out of 44 incumbents winning in 2005[7] and 34 of 39 in 2009.[8]

Simply put, FENA is a program that is designed for use by incumbents and others favored by the political establishment, who will be the only candidates capable of raising the large number of small contributions in the required time frame.

Other failings of similar tax funded political campaigns

Briefly, I'd like to list further failures of similar programs:

- The number of women and people from non-traditional backgrounds elected to the legislature has not increased as a result of "clean elections"[9]
- Taxpayers have not realized any savings as a result of "clean elections" programs[10]

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[6] Ibid at page 8, see also *Citizens Election Program 2010:A Novel System with Extraordinary Results*, p. 22, Connecticut State Elections Enforcement Commission, January 2011.
[7] Public Dollars for the Public Good, A Report on the 2005 Elections, p. 20, New York City Campaign Finance Board, 2006
[8] "Analysis: Public Funds Provided through the Campaign Finance Program Help Fuel Competitive Races," p. 3, New York City Campaign Finance Board, November 5, 2009, available at: http://www.nyccfb.info/press/news/press_releases/2009-11-05.pdf and Rachael Fauss, "New York City Council Races Get More Competitive," December 2009, available at: http://www.gothamgazette.com/article/governing/20091216/17/3127
[9] Laura Renz, Issue Analysis #2, *Legislator Occupations: Change or Status Quo after Clean Elections*, April 2008, Center for Competitive Politics, and Laura Renz, Issue Analysis #3 *Do "Clean Elections" Laws Increase Women in State Legislatures*, August 2008, Center for Competitive Politics
[10] Sean Parnell, Issue Analysis #4, *Do Taxpayer-Funded Campaigns Actually Save Taxpayer Dollars?*, September 2008, Center for Competitive Politics

- The number of candidates running for election has not appreciably increased since Maine's "clean elections" program began[11]
- Public confidence in state government has not increased as a result of the "clean elections" program[12]
- There is little real evidence that campaign contributions influence the votes or behavior of candidates or elected officials[13]

Finally, a word of caution about tales of the alleged success of FENA-like programs in the states. Advocates of these schemes often resort to anecdotal stories claiming that were it not for the program, some particularly important or popular bill would not have passed because legislators, beholden to their campaign contributors, would have prevented the bill from advancing.

One example of this is the testimony of Hannah Pingree, former Speaker of the Maine House of Representatives, to a Congressional committee in July 2009 considering tax financing of Congressional campaigns. In her testimony, Speaker Pingree claimed that a bill regulating chemicals was able to pass with bipartisan support because the state's "clean elections" program meant legislators could ignore a "fierce lobbying effort" by the chemical and consumer products industries.[14]

But a closer look at this bill, LD-2048, tells a much different tale.[15] In 2008, when the bill was voted on, six of 35 Maine State Senators had been elected relying on private contributions, three Republicans and three Democrats. All six voted for LD-2048, which passed unanimously.

In the House, 23 state legislators ran their campaigns on private contributions, 18 Republicans and five Democrats. All five Democrats voted for LD-2048, as did 14 of 18 Republicans who had not participated in the "clean elections" program. LD-2048 passed with 129 votes for and

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[11] *Experience of Two States That Offered Full Public Funding for Political Candidates*, p. 41, General Accounting Office, May 2010. Available at: http://www.gao.gov/new.items/d10390.pdf

[12] Ibid at p. 75

[13] See: Stephen Ansolobehere, James Snyder Jr., and Michiko Ueda, *Did Firms Profit from Soft Money?*, 3 Election Law Journal 193 (2004); Stephen Ansolobehere, John de Figueiredo, James Snyder Jr., *Why Is There So Little Money in U.S. Politics*, 17 Journal of Economic Perspectives 105 (2003): Robert Franciosi, "Is Cleanliness Political Goodliness? p. 2, The Goldwater Institute, November 2001. Available at: http://www.goldwaterinstitute.org/article/899; Sean Parnell, "Meet the New Legislature, Same as the Old Legislature," p. 9, March 2, 2010, Center for Competitive Politics. Available at: http://www.campaignfreedom.org/research/detail/meet-the-new-legislature-same-as-the-old-legislature

[14] Testimony of Speaker Hannah Pingree to the Committee on House Administration of the U.S. House of Representatives, July 30, 2009, on H.R. 1826, the 'Fair Elections Now Act.' Available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:52711.wais

[15] Voting and candidates funding information found online at the web sites of the Maine State Legislature and the Maine Commission on Governmental Ethics and Campaign Practices

nine votes against, with five of the nine 'no' votes coming from Republicans who had participated in the "clean elections" program.

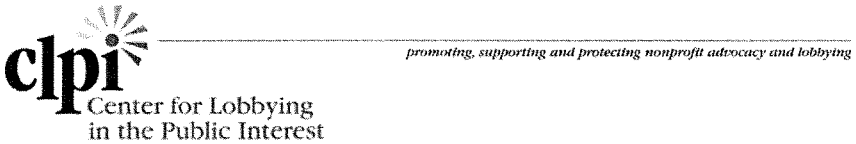
So, of the 29 Senators and Representatives supposedly inclined to favor donor interests over the public interest, 25 voted the way Speaker Pingree presumably felt was the "right," non-corrupt way. Plus, the bill was signed into law by Governor John Baldacci, who also rejected "clean elections" funding for both of his gubernatorial campaigns.

Clearly, whatever impulses and motivations were behind decisions to vote 'yes' or 'no' on LD-2048, the role of campaign contributions and whether or not a legislator had been elected as a "clean" candidate played little if any role.

Conclusion

The Fair Elections Now Act relies upon false premises and flawed analysis to advance a bill that, in operation, would almost exclusively benefit entrenched incumbents and other political insiders without providing any noticeable benefits to the public. Should FENA be enacted into law, it would represent simply one more failed effort to "reform" campaign finance in America, distinguishable only for the fact that it would cost hundreds of millions or even billions of taxpayer dollars wasted.

Public confidence in government is unlikely to be improved by such an outcome, and it may in fact be diminished as the public sees politicians helping themselves to public funds while otherwise continuing to go about business as usual. For these reasons, I urge the Senate to reject the Fair Elections Now Act.



April 11, 2011

Sen. Dick Durbin, Chairman
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
711 Hart Senate Office Building
Washington, DC 20510

Sen. Lindsay Graham, Ranking Member
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
290 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham:

We write to express our strong support for the Fair Elections Now Act (S.750, H.R. 1404). Sponsored by Sen. Dick Durbin (D-IL) and Reps. John Larson (D-Conn.) and Walter Jones (R-N.C.), this legislation would give ordinary Americans – including tens of millions of employees, volunteers and constituents from our nation's nearly one million public charities – a greater voice in our elections and democracy.

Founded in 1998 originally as a project of Independent Sector, the Center for Lobbying in the Public Interest is a respected, nonpartisan 501(c)(3) organization that promotes, supports, and protects nonprofit policy involvement in order to advance charity missions and democracy.

By matching contributions from small donors and enabling candidates to run for office without relying on large financial interests, Congress would make itself more accountable to the American people and more faithful to the Constitution and vision of our founders. With the enormous challenges we face as a nation, this Act would allow members of Congress to focus more time on their constituents and on the merits of policy choices rather than on catering to the demands of big money special interests.

There's been a lot of misplaced talk about "cleaning up" Washington. This legislation actually would do something to restore faith in government of, by and for the people. We urge you to pass this legislation now and put voters back in charge of our political process.

Sincerely,

Lawrence S. Ottinger

Lawrence S. Ottinger
President
Center for Lobbying in the Public Interest

CREW | **citizens for responsibility and ethics in washington**

September 21, 2010

The Honorable Robert Brady
Chairman, Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515

The Honorable Dan Lungren
Ranking Member, Committee on House Administration
1313 Longworth House Office Building
Washington, DC 20515

Dear Chairman Brady and Ranking Member Lungren:

Citizens for Responsibility and Ethics in Washington ("CREW") strongly supports H.R. 1826, the Fair Elections Now Act. As a public interest organization actively promoting good governance and fighting public corruption, CREW believes the Fair Elections Now Act would greatly enhance candidates' accountability and promote competition for public office.

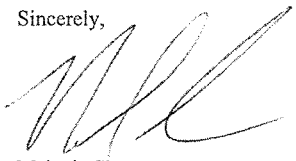
As you know, both candidates and politicians are forced to spend endless hours dialing for dollars, all too often soliciting donations from special interests, creating a toxic pay-to-play environment in Washington. Each election, candidates need to raise more and more money to stay competitive in their elections. The Fair Elections Now Act would free candidates and elected leaders to devote more of their time and energy on the people's business instead of on raising money. Most importantly, it would create an atmosphere in which politicians would be less captive to special interests and less susceptible to corruption.

Another positive attribute of the Fair Elections Now Act is that it would promote robust competition for public office. Several states have had positive experiences after adopting similar provisions. In Maine, for example, a fair elections law increased participation by first-time candidates, allowed more challengers to compete, provided more choices to voters, and sharply reduced large private contributions. In Arizona, the average number of candidates for state office has increased 23% since the law's passage in 2000. Furthermore, the evidence has shown that women and minorities are more likely to run in elections under such a scheme.

1400 Eye Street, N.W., Suite 450, Washington, D.C. 20005 | 202.408.5565 phone | 202.588.5020 fax | www.citizensforethics.org

In a post-*Citizens United* world, Congress should make every effort to reform our elections. While CREW strongly supports the DISCLOSE Act, transparency is only one component to real campaign finance reform. The Fair Elections Now Act is a powerful approach to dealing with special interests and corruption in American politics. We strongly urge the swift passage of this important legislation.

Sincerely,



Melanie Sloan
Executive Director

Democracy Matters
PO Box 157
Hamilton, NY 13346

April 7, 2011

Sen. Dick Durbin, Chairman
711 Hart Senate Office Building
Washington, DC 20510

Sen. Lindsay Graham,
290 Russell Senate Office Building
Washington, DC 20510

Dear Senator Durbin & Senator Graham

We are writing to express Democracy Matters' support for the Fair Elections Now Act (S. 750 & H.R. 1404).

Democracy Matters, founded by NBA player Adonal Foyle, has more than 40 chapters at colleges and high schools across the country. Democracy Matters fights student disillusion and cynicism concerning politics. Advocating for public financing of election campaigns, students understand that with Fair Elections, politicians will listen to the voices of young people when they speak out on the issues they care about -- the environment, civil rights, healthcare, war and peace, and more.

As you know, the Fair Elections Now Act is designed to make Congress accountable to the American people, not the big money special interests and their lobbyists who now fund campaigns. Democracy Matters believes that passing this act would demonstrate that members of Congress are hearing voters' desire—that government must be more responsive to the concerns of everyday Americans.

We fully support the Fair Elections Now Act and urge Congress to act on this important legislation.

Thank you,

Joan Mandle, Executive Director
Democracy Matters

Democracy For America
38 Eastwood Drive Suite 300
South Burlington, VT 05403
802-651-3200
www.DemocracyforAmerica.com

Sen. Richard J. Durbin
711 Hard Senate Office Building
U.S. Senate
Washington, DC 20510

Dear Senator Durbin:

Democracy for America, on behalf of our over one million members nationwide, applauds the reintroduction of the Fair Elections Now Act and commends you for sponsoring this important piece of legislation. The bill would create a voluntary system of campaign financing to provide qualified U.S. Senate candidates with the option to receive federal campaign funds with a five to one match on small dollar donations up to a limit.

Money plays an outsized role in policy-making in our nation's capitol. For example, the coal, oil and gas industries use their wealth to spend money lobbying and donating to congressional campaigns to win influence in Washington, so they can block Congress from passing legislation to halt the climate crisis and green our economy. Instead of chasing big contributions to pay for their next elections, members of Congress could spend time doing their jobs – like listening to their constituents who want real progress on achieving universal health, ending the war in Iraq, and solving the climate crisis.

The Fair Elections Now Act will help change the face of our democracy. It will empower people from all walks of life to be more active in the political process. Democracy for America looks forward to working with you to ensure final passage of the Act. Thank you for your time and for taking leadership in on this issue.

Sincerely,

Jim Dean
Chair, Democracy for America

Dēmos

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220 Fifth Ave., 5th Floor
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Washington, DC 20036
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Committee on the Judiciary
United States Senate
Dirksen Senate Office Building, SD-224
Washington, DC 20510-6275

Re: Support the Fair Elections Now Act

April 11, 2011

Dear Members:

Dēmos respectfully urges the Committee on the Judiciary to give swift approval to the Fair Elections Now Act.

Dēmos is a non-partisan public policy research and advocacy organization committed to building an America which achieves its highest democratic ideals – a nation where democracy is robust and inclusive, with high levels of electoral participation and civic engagement; an economy where prosperity and opportunity are broadly shared and disparity is reduced; and a strong and effective government with the capacity to plan for the future.

Passage of the Fair Elections Now Act will be an enormous step forward for Americans' confidence that their government works to serve the public interest rather than the special interests that fund campaigns. The bill will encourage congressional candidates to raise funds from their own communities in small amounts of no more than $100. Candidates who successfully inspire enough small donations, and agree not to take larger donations from private interests, will qualify for Fair Elections funding in amounts sufficient to run competitive campaigns. The bill will further encourage small donor participation by providing matching funds to qualified candidates of $5 for every $1 raised in additional small donations up to $100.

The Fair Elections Now Act will free congressional candidates from the need to raise large donations from private interests, and from the burden of constant fundraising. Instead of spending endless evenings attending lobbyists' receptions and hours every week dialing for dollars from high-end donors, members of Congress will be able to focus on serving the interests of their constituents – the job they were sent to Washington to do. The Fair Elections

Now Act will also empower ordinary Americans to participate politically through the 5-1 match for small donations.

Every issue of importance to our country in these difficult economic times will be positively affected by passage of the Fair Elections Now Act. Whether it is ensuring Wall Street's accountability through financial regulation; encouraging

Dēmos

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policies for middle-class job creation; addressing educational needs; restoring stability to the housing market, or protecting the environment, voters need to see that decisions in Washington are being made for the good of the public, not because of the influence of wealthy special interests that dominate campaign funding.

Reform that amplifies the voices of average citizens and frees candidates from the fundraising chase has never been needed more. Dēmos urges the Committee to approve the Fair Elections Now Act.

Sincerely,

Miles Rapoport
President

The Detroit News

Friday, May 8, 2010 detnews.com Metro Final

America's campaign finance system violates free market principles

BY FRANK CARLUCCI
MAY 8, 2010

Since Democratic leaders last week introduced new campaign finance legislation in response to the Supreme Court's *Citizens United* ruling, much has again been made on both sides of the aisle about the meaning of unlimited corporate and union spending in our elections.

Yet the business community, whose political spending is at issue in this case, has largely remained silent. Our interests may not be as straightforwardly placed in the "more spending-more influence" camp as the commentators assume.

As one who has served in both business and government, I have long believed that our free enterprise system requires a strict separation between the two. The job of American business is to deliver goods and services at shareholder profit. The job of our government is to represent the interests of all Americans -- including our common interest in open, competitive markets. Washington and the private sector should not overlap.

Yet, that is precisely the effect of the Supreme Court ruling and years of steady deterioration in our campaign finance laws. Since leaving Washington 20 years ago, I have come to see that the influx of corporate and union money in politics is damaging to the interests of American business and the American people alike.

Consider the prevailing incentives. Firms have a fiduciary responsibility to maximize profits, while increasing competition – a public good – is not in their rational self-interest. They will therefore naturally seek to influence government regulation in ways that strengthen their competitive advantage relative to other firms.

At the same time, politicians rely on millions of dollars in private contributions to win and keep their seats. To raise the necessary funds, incumbents naturally solicit the firms and other interest groups with business before their committees in a system of pay-to-play.

The price we pay for this unhappy alliance between private special interests and government regulators is tens of billions of taxpayer dollars in the form of earmarks, wasteful spending programs, and other market inefficiencies that undermine competition. So long as just a fraction of one percent of (interested) Americans continue providing the lion's share of campaign funds, government regulation of the economy is unlikely to serve our common interest in a competitive free market.

I know of only one way to fundamentally address this conflict-of-interest problem: citizen-funded elections, combining small constituent donations with matching federal funds for qualifying candidates who forgo large donations. Such a reform would apply basic market principles of competition and free choice to the electoral process, by lowering the barrier of entry for qualified candidates and ensuring greater accountability once in office.

To meet the Supreme Court's commitment to First Amendment free speech, citizen funding would expand political speech for serious and hardworking candidates – irrespective of wealth – without added regulation of independent groups.

The bipartisan Fair Elections Now Act in Congress, combining $100-or-less donations with matching federal funds, is a worthy start. It would leave non-participating candidates, as well as independent groups, free to spend unlimited money to communicate their ideas – even as it boosts competition by providing candidates who show broad-based public support with sufficient matching funds to run a competitive campaign. More than 160 members of Congress have co-sponsored the legislation.

Experience with citizen funding in states like Connecticut and Maine has shown that most candidates willingly forego the big-money game, and the countless fundraising hours it demands, when presented with viable alternative to special interest funds. More than three-quarters of candidates in Fair Elections states voluntarily participate in the programs, leading to increased competition and public participation in politics.

If there is one lesson to be drawn from the recent Supreme Court ruling, it is that politicians' longstanding reliance on private contributions undermines competition and the free market principles that made our country great.

Business and political leaders would do well to break the connection between special interest money and politics through citizen-funded elections.

Frank Carlucci is the former Secretary of Defense under President Reagan and Chairman Emeritus of the Carlyle Group. He serves on the Advisory Committee of Americans for Campaign Reform, a national bipartisan group.

Noteworthy Facts and Figures Related to Money and Politics

- Over $4 billion was spent by outside organizations, political parties, and congressional campaigns in the 2010 congressional elections.[1]

- Spending in the 2010 congressional elections increased more than 40% over spending in the 2006 mid-term elections.[2]

- The average cost to win a House and Senate seat was $1.1 million and $6.5 million, respectively, in the 2008 elections.[3]

- The average cost to win a House and Senate seat was $1.5 million and $9.2 million in the 2010 elections--a 36% and 42% jump over 2008, respectively.[4]

- If the average House Member is running for re-election, s/he has to raise about $2000 each day or $14,000 each week of one's two-year term.

- If the average Senator is running for re-election, s/he has to raise about $4200 each day or $29,400 each week of one's six-year term. That's roughly equivalent to the 2011 U.S. Department of Health and Human Services poverty guideline for a family of six for an entire year ($29,990).

- Less than one-quarter of 1% of the U.S. population (0.24%) made itemized contributions of $200+ to federal candidates or PACs in 2010, accounting for $1.3 billion.[5]

- Fewer than one out of 2,000 Americans (0.04%) contributed amounts of $2,300 or more in 2010, accounting for about $1 billion.[6]

- The top 5 metro areas by political contributions – Washington, D.C., New York, Chicago, Los Angeles, and Boston – contributed nearly $700 million in 2010, half the overall total and more than the bottom 43 states combined.[7]

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[1] Kurtzleben, Danielle, "2010 Set Campaign Spending Records," *U.S. News and World Report*, January 7, 2011, http://www.usnews.com/news/articles/2011/01/07/2010-set-campaign-spending-records.html

[2] Krumholz, Sheila, "Post Election: What Follows the Money? Discussion at the National Press Club," Center for Responsive Politics, Washington, D.C., 10 a.m., November 11, 2010, http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=4773613&ct=8864487

[3] Center for Responsive Politics, "Money Wins Presidency and 9 of 10 Congressional Races in Priciest U.S. Election Ever," November 5, 2008, http://www.opensecrets.org/news/2008/11/money-wins-white-house-and.html

[4] http://www.opensecrets.org/overview/index.php?cycle=2010&Display=A&Type=R

[5] Americans for Campaign Reform Fact Sheet, "Money in Politics: Who Gives," http://www.acrreform.org/research/money-in-politics-who-gives/

[6] Americans for Campaign Reform Fact Sheet, "Money in Politics: Who Gives," http://www.acrreform.org/research/money-in-politics-who-gives/

[7] Ibid.

1133 19th Street, NW, 9th Floor Washington, DC 20036
(202) 833-1200 202 659 3715 www.commoncause.org

April 11, 2011

Sen. Dick Durbin, Chairman
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
711 Hart Senate Office Building
Washington, DC 20510

Sen. Lindsay Graham, Ranking Member
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
290 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

Common Cause strongly supports S 750, the Fair Elections Now Act, sponsored by Senator Richard Durbin and others. This legislation would provide a voluntary system of public financing of congressional elections through a mix of low dollar contributions and government matches and grants.

The current system of financing congressional elections through the solicitation by incumbents and challengers of large donations from individual donors and PACs is corrosive to our system of representative democracy. Forcing congressional candidates to beg for huge amounts of money from the very people and industries Congress regulates is an invitation to corruption. It gives us a Congress full of lawmakers with political debts, obligations often repaid in the support of policies and appropriations for donors. The voices of the 99.9% of Americans with little or no cash to give candidates get drowned out in the flood of money from wealthy donors.

Today's hearing on the Fair Elections Now Act offers Congress a chance to spare itself and the country from an all-consuming chase for special interest campaign contributions in 2012. By letting candidates run on a mix of small donations from individuals and matching public funds, this legislation would put participating candidates in closer touch with the people they hope to represent and break the grip big-money interests have on our political system. It's time to get it passed.

This Fair Election campaign finance system has been needed for a very long time. But the recent Supreme Court decision in *Citizens United v FEC* allows corporations to use unlimited money from their corporate treasuries, not just money raised specifically for political purposes, on campaign activities. Even worse, these funds can be provided without shareholder approval and funneled through non-profit organizations with absolutely no disclosure. It is absolutely critical that this bill and a sister bill in the House be passed in this Congress. Otherwise, our democracy will be indistinguishable from an auction where public policy and public appropriations go to the highest bidder.

Sincerely,

Bob Edgar,
President
Common Cause

Sarah Dufendach,
Vice President for Legislative Affairs
Common Cause

Members of Congress and Time Spent Fundraising

Extremely little research that has been conducted on the amount of time Members of Congress spend fundraising; most accounts on Member time spent fundraising are anecdotal.

- A 1998 Center for Responsive Politics survey of Members and congressional staff revealed that 52 percent of the Senators surveyed thought the demands of fundraising cut significantly into the time available for legislative work; an additional 12 percent viewed fundraising as having some deleterious effect.[1]

- In 2000, the Center for American Politics and Citizenship at the University of Maryland conducted a survey of congressional candidates (both incumbents and challengers) about the amount of time they spend fundraising. Of those who returned surveys, 43 percent estimated they spent at least one-quarter of their time raising campaign funds.[2]

- An expert in congressional fundraising at the Campaign Finance Group, Inc. found that congressional candidates spend an average of 42 hours per week fundraising.[3]

- A recent analysis by a University of Illinois at Springfield professor detailed how candidates for local or statewide office receiving full public financing spend nearly ten percent more time with voters than do candidates receiving partial or no public subsidies.[4]

- Describing fundraising, former Senator Evan Bayh (D-IN) said,

> It's miserable. It is not uncommon to have a fundraiser for breakfast, for lunch and for dinner, and if you have spare time in between, you go to an office off Capitol Hill and you dial for dollars. Then the weekend rolls around, and you get on a plane and travel the countryside with a tin cup in your hand. And it gets worse each cycle... When candidates for public office are spending 90 percent of their time raising money, that's time

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[1] Lindstrom, Peter, *Congress Speaks—A Survey of the 100th Congress*, Center for Responsive Politics, Washington, 1998, pp. 18-19.
[2] Herrnson, Paul, "Campaign Fundraising a Top Priority for New Members of Congress," Center for American Politics and Citizenship at the University of Maryland, December 20, 2000, http://www.newsdesk.umd.edu/archive/release.cfm?year=2000&ArticleID=266.
[3] McSherry, Alison, "Peeling Back The Curtain: Q & A with Fundraiser Doug Jaraczewski, *Roll Call*, July 12, 2010, http://www.congress.org/news/2010/07/12/how_do_fundraisers_work or http://www.rollcall.com/news/jaraczewski_fundraising_campaign_money-65002-1.html.
[4] Miller, Michael, "Clean Elections vs. Political Speech," in Klein, Ezra, "The Importance of Campaign-Finance Reform in One Graph," *Washington Post*, March 23, 2011, http://www.washingtonpost.com/blogs/ezra-klein/post/the-importance-of-campaign-finance-reform-in-one-graph/2011/03/18/ABka8iKB_blog.html?wpisrc=nl_politics.

they're not spending with constituents or with public policy experts.[5]

- Recently-retired Senator George Voinovich (R-OH) described fundraising as a key reason he decided to retire: "I'm so glad that I made up my mind two years ago that I wasn't going to run." He has "been able to be a senator for two years" because he did not have to spend the 20 to 25 per cent of his time fundraising that he estimated he would have had to if he ran for re-election.[6]

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[5] Klein, Ezra, "For lawmakers like Evan Bayh, the price of fundraising is too steep," *Washington Post*, October 31, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/29/AR2010102905851.html.

[6] Milbank, Dana, "As Voinovich leaves Senate, he sees a deficit of good sense," *Washington Post*, December 6, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/06/AR2010120605913.html.

Small business owners. Small business values.

April 8, 2011

The Honorable Dick Durbin
Assistant Majority Leader, United States Senate
711 Hart Senate Office Building
Washington, DC 20510

Re: Small business support for Fair Elections Now Act (S. 750, H.R. 1404)

Dear Senator Durbin,

On behalf of the Main Street Alliance, a national network of small business coalitions in states across the country, we write to express our strong support for the Fair Elections Now Act (S. 750, H.R. 1404).

The Main Street Alliance is committed to creating opportunities for small business owners to speak for themselves on important policy issues ranging from health care to Wall Street reform to the health of our democracy. We promote policies that level the playing field for small businesses to create jobs, build local economies, and support thriving communities.

The ever-growing influence of corporate special interests and other big money donors in our elections and politics puts small businesses at a severe disadvantage. Across the spectrum of issues, small businesses must contend with well-heeled special interests: on health care, it's the insurance and drug companies; on clean energy, it's big oil and big coal; on closing tax loopholes and tax havens, it's a host of major U.S. and multinational corporations. In each case, the influence of corporate and high-roller donors threatens to drown out small business concerns, producing policies that benefit narrow special interests at the expense of our businesses, our communities, and our democracy.

That's why we support the Fair Elections Now Act. By creating a voluntary alternative to the big money chase, this legislation will free up candidates for office to spend more time hearing from small business owners and other constituents in their districts, and less time courting the favor of deep-pocketed special interests. It will ensure that the winners of elections will be free to champion the concerns of their constituents, not hamstrung by the need to pay back favors to big money donors. And it will restore faith in the integrity of our democracy.

On behalf of small businesses across the Main Street Alliance network, we urge your support for the Fair Elections Now Act, and we pledge to work with you to advance meaningful campaign reform that levels the playing field in elections and politics for small businesses and for the communities we serve.

Sincerely,

Sam Blair
Network Director
The Main Street Alliance

The Main Street Alliance – 3518 S. Edmunds St. – Seattle, WA 98118 – (603) 831-1835
www.mainstreetalliance.org – info@mainstreetalliance.org

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
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E-MAIL: WASHINGTONBUREAU@NAACPNET.ORG · WEB ADDRESS WWW.NAACP.ORG

April 7, 2011

The Honorable Richard Durbin
United States Senate
Washington, DC 20510

RE: NAACP SUPPORT FOR S. 750, THE *FAIR ELECTIONS NOW ACT*

Dear Senator Durbin;

The NAACP, our nation's oldest, largest and most widely-recognized grassroots based civil rights organization, would like to express our support for S. 750, the *Fair Elections Now Act*, and to thank you for your leadership on this important issue. This vital legislation would restore public confidence in the election process and allow qualified candidates for the United States' Senate to focus their campaigns on the voters, rather than on raising money from special interests. Furthermore, if enacted, this legislation will encourage qualified candidates for federal office who might otherwise be unenthusiastic about running by the need to court special interests.

The *Fair Elections Now Act* which is based on working state models, would create a voluntary system that gives candidates the option to stop attending fundraisers and dialing their "friends" for donations without risking a loss to a well-funded opponent. Qualified candidates for Congress who choose to participate would be provided with grants, matching funds, and vouchers from the Fair Elections Fund to replace campaign fundraising that largely relies on big donors and special interests.

If enacted, the *Fair Elections Now Act* would restore the confidence of the voters that their federally elected officials were responsive to them, not just to big donors. It would also allow candidates to spend less time talking to special interests and more time listening to their potential constituents.

Thank you again for your leadership on this important issue; I look forward to working with you to restore public confidence in elected officials. Should you have any questions or comments, please feel free to contact me at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director, NAACP Washington Bureau &
Senior Vice President for Advocacy and Policy

CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS

December 2010

THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK
Bill de Blasio – PUBLIC ADVOCATE

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Executive Summary

In January of 2010, the Supreme Court rendered a decision, Citizens United v. Federal Election Commission, which opened the door for increased corporate involvement in our elections. In the 2010 midterm elections, money flowed through that open door. The Court's decision expanded opportunities for anonymous spending that mask the full extent of corporate participation in elections.

Public Advocate Bill de Blasio's office examined campaign finance records from the 2010 election cycle, the first election since the court's ruling, to better understand the full impact of the Citizens United decision on our democratic process. The Office's analysis provides a more complete picture of the role Citizens United spending played in this election cycle, including the following findings:

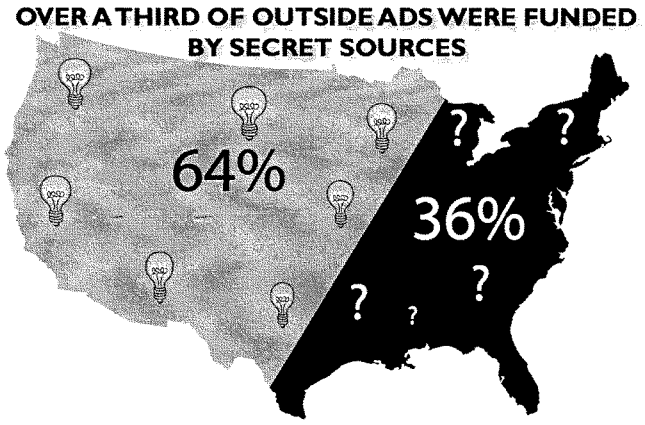
- **CITIZENS UNITED LED TO A SIGNIFICANT UPTICK IN SPENDING ON ELECTIONS.**
  - **Citizens United spending represented 15 percent of total political spending**
  - **Citizens United spending was responsible for over $85 Million in all U.S. Senate races**

- **CITIZENS UNITED SIGNIFICANTLY INCREASED ANONYMOUS SPENDING**
  - **New anonymous spending allowed by Citizens United represented 30 percent of all spending by outside groups.**
  - **Anonymous donations funded over $40 Million in the 10 most costly U.S. Senate races**

- **CITIZENS UNITED HAS CREATED A MORE NEGATIVE ELECTORAL ENVIRONMENT.**
  - **Anonymous spending groups created by Citizens United spent 20 percent more on negative advertisements than groups required to disclose**

The new spending that occurred this election cycle has far reaching implications for voters and investors, both of whom have to fear the new anonymous spenders in our campaign finance environment. Right now voters and the general public cannot see the whole picture a fact that is especially troubling since anonymous groups spend more on negative advertisements.

An academic consensus is growing around the negative impact that corporate political spending has on company bottom lines. Anonymous spending denies investors the means to evaluate their companies' spending practices, and the risks they may face on account of those practices. Investors must act to urge corporate transparency and Congress must act to give voters transparency.



The Court's Decision

In Citizens United the Supreme Court held that the First Amendment precludes limiting corporate funding of independent political broadcasts in elections. The majority opinion reasoned that limits on independent expenditures by corporations violate the First Amendment right to free speech. The Bipartisan Campaign Reform Act prohibited corporations and labor unions from airing broadcast messages that refer to a political candidate 30 days before a primary election and 60 days before a general election (so-called "electioneering communications"). The majority opinion struck down the electioneering communications rule as applied to corporations. As a result, corporations may now spend unlimited sums on independent political expenditures.

Additionally, Citizens United , along with the Court' s earlier decision in Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007), enabled non-profit corporations to spend unlimited amounts on independent political broadcasts and to accept unlimited political contributions for the purpose of such advertising spending. While the Court acknowledged the permissibility of disclosure requirements for political spending, the decision enabled many corporations to spend money on independent political broadcasts without disclosing the donors that fund their activities.

2010: The World Post-Citizens United

During the 2010 election cycle, outside groups spent over $290 million on federal independent expenditures. Much of that spending took advantage of recent changes in the law: 527 groups (referred to as 527 groups because of the section of the tax code that regulates them) gathered pools of uncapped donations to fund political spending while tax-exempt non-profit corporations amassed anonymous contributions to support independent political expenditures.

While public records provide an incomplete picture, one can piece together an idea of how some of this spending occurred by considering several sources. The few groups that solicited unlimited contributions and disclosed their donors showed a mix of wealthy individuals, privately held companies, and publicly traded companies funding their efforts.[1] Investigative journalists unearthed examples of companies and special interests that contributed to independent expenditure efforts.[2][3][4] With a significant amount of outside spending coming from groups that do not disclose their sources of support, corporate spending likely played a greater role than is currently known.

Companies clearly took advantage of the ability to make uncapped contributions. After the Citizens United decision, 527 organizations had the option— upon filing additional paperwork — to solicit uncapped contributions from individuals and corporations to spend on independent political efforts. 527 organizations are required to disclose their donors. American Crossroads, a 527 organization formed by former Bush administration officials including former White House Deputy Chief of Staff Karl Rove and former Republican National Committee Chairman Ed Gillespie, is a prime example. The group accepted contributions of unlimited size and disclosed large contributions from corporations that would not have been possible before the Citizens United decision.

Some groups also took advantage of the ability to spend on independent expenditure campaigns without disclosing funding sources. Social welfare organizations, known as 501(c)(4)s for the section of the Internal Revenue Code under which they are organized, could spend on independent political efforts in the aftermath of the Citizens United decision. They are not required to disclose their funders. The founders of the American Crossroads organization created a companion 501(c)(4) organization called Crossroads Grassroots Policy Solutions ("Crossroads GPS"). Crossroads GPS could accept uncapped anonymous donations like its 527 companion, but did not disclose its donors. The two groups closely coordinated their spending, so anonymous contributions to Crossroads GPS bolstered the shared mission of both organizations.

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[1] Exempt from Limits Donors, American Crossroads, Accessed 11/26/10
[2] "News Corp. gave $1 million to pro-GOP group," Politico, 9/30/10;
[3] "Offering Donors Secrecy, and Going on Attack," New York Times, 10/11/10;
[4] "Spending blitz by outside groups helped secure big GOP wins," MSNBC, 11/4/10

Trade associations and business leagues, organized under section 501(c)(6) of the internal revenue code, also capitalized on the new ability to spend on independent expenditure campaigns. 501(c)(6)s are funded by payments from member corporations. Since the Supreme Court lifting the ban on corporate funding of electioneering, trade associations are freer to directly engage the electoral process. They, like 501(c)(4) organizations, are not required to disclose their donors. The activities of the U.S. Chamber of Commerce in the 2010 elections offer a notable example of trade association spending post-Citizens United. The Chamber of Commerce spent $32.9 million from its corporate-funded treasury on independent political communications. The Chamber of Commerce boasts a deep roster of corporate members, but did not disclose whose contributions provided the funding for its political advertising.

While these are a few notable examples, the activities of the above-mentioned groups did not represent fringe activity in 2010 elections. This spending represented a significant portion of outside spending in this year's elections.

Methodology & Findings

To gauge the impact of changes brought about by the Citizens United ruling, we examined three sets of data. First, we considered aggregate spending data for the 2010 election cycle. We also examined a dataset containing records of independent expenditures undertaken in the 2010 election cycle filed with the Federal Election Commission. Finally, we conducted a deeper analysis of the 10 most costly federal races in 2010, all of which were races for the U.S. Senate. Examination of public records makes clear that this spending occurred at a massive scale.

- **In the 2010 Election Cycle, Groups Accumulating Anonymous Donations Spent More Than $130 Million.** In the 2010 midterm election, tax-exempt non-profits reported spending $132.5 Million on independent expenditures – a little less than half of all outside spending by non-party committee groups. These groups, social welfare organizations, trade associations, and unions, have to disclose that they spent but not the sources of funds used for independent expenditures.

- **In the 2010 Election Cycle, Groups Spent Anonymous Or Uncapped Donations Totaling Over $85 Million on U.S. Senate Races.** In the fall of 2010, anonymous or uncapped entities spent $65.4 million on the 10 top senate races, and over $80 million on all Senate races.

To take a closer look at the spending, my Office focused on the 10 Senate races where the most money was spent. Our key findings:

- **Anonymous Donations Funded over $40 Million in the 10 Most Costly Senate Races in 2010.** Tax-exempt non-profits spent $42.9 Million in the 10 most costly races (Nevada, California, Connecticut, Pennsylvania, Colorado, Florida, Illinois, Missouri, Wisconsin, and Kentucky).

- **Outside Spending That Took Advantage Of Citizens United Represented 20% Of Candidate Spending, 15% Of The Spending In Races.** In aggregate, outside spenders taking advantage of Citizens United spent $1 for every $5 dollars spent by candidates in the races examined. Ads from groups that raised uncapped funds for political expenditures or raised anonymous contributions for political expenditures amounted to 15% of all spending in the races analyzed.

- **Over 30% of All Outside Spending Was Funded By Anonymous Donations.** 30% of the ads not funded directly by campaigns were bought by groups that did not fully disclose their donors. There is an imperfect match between money and advertising time, but in basic terms, if viewers in the ten states examined ads that were not funded by candidates, for only 7 out of the 10 ads could the viewer find out information about the funders supporting the advertisement.

- **Anonymous Spenders Were More Likely To Fund Negative Advertisements Than Outside Spenders Required To Disclose.** To gain a better sense of the manner and scope of spending in the most costly races, we examined a data set of independent expenditures notices filed with the FEC in the 2010 election. In that time period, anonymous spenders spent almost 20% more of their total spending on negative ads than spenders who were subject to disclosure requirements. 527 groups, which are required to disclose their donors on a regular basis, spent a substantial amount (46%) of their money on positive efforts. Trade associations and social welfare organizations, which are not required to disclose their donors, spent a fraction of that amount (24%) on positive efforts.

- **An Influx of Spending Taking Advantage of Citizens United Did Not Strictly Predict Election Outcomes.** In some of the 10 Senate races examined by our Office, candidates won despite significant spending from outside groups that accepted anonymous donations. 37% of anonymous spending in these races supported candidates who lost, while 56% supported winning candidates. In the three most expensive races (California, Nevada, and Connecticut), candidates won despite outside anonymous spending being directed against them.

Implications for Investors

The Citizens United decision has a special relevance for investors. A growing body of evidence shows that political spending has a negative effect on the bottom line of businesses. Studies by academics at the University of Minnesota[5] and Harvard Law School[6] show a strong relationship between outsize political spending and negative excess returns. Returns suffer when managers forsake investments in the core business of the corporation in favor of investing management time and energy in working the political system. As managers at companies take advantage of the ability to spend anonymously, risks to the company, from diversion of attention, waste of capital on losing races, to reputational risk increase.

As companies contribute to independent political expenditure efforts, they also further an arms race mentality of sorts – managers at each company will feel bound by the actions of their peers. Justice Stevens spoke to this issue in his dissent in Citizens United.

> *"Some corporations have affirmatively urged Congress to place limits on their electioneering communications. These corporations fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded …. A system that effectively forces corporations to use their shareholders' money both to maintain access to, and to avoid retribution from, elected officials may ultimately prove more harmful than beneficial to many corporations."*[7]

While investors have reason to be concerned about the impact of increased corporate political spending in light of Citizens United, they lack information necessary to incorporate that concern into their investment decisions. Because many non-profit groups organized under section 501(c) of the internal revenue code do not have to disclose the sources of contributions, they have emerged as a top outlet for independent expenditures. Corporations can give to social welfare organizations or trade associations without disclosing their contributions, allowing them to spend anonymously in elections.

Investors need to ensure that companies adopt transparent political spending practices. Companies should not make contributions to groups that do not disclose their donors, and should adopt policies that require disclosure of all contributions to external parties that could spend directly in elections. Investors are well positioned to demand that companies take these steps, using shareholder resolutions and director elections to directly engage companies and their directors on the issue of corporate political spending.

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[5] "Corporate Political Contributions: Investment or Agency?" Rajesh Aggarwal, Felix Meschke, and Tracy Wang, Carlson School of Management, University of Minnesota, June 2009

[6] "Corporate Governance and Corporate Political Activity: What Effect will Citizens United have on Shareholder Wealth?" Dan Coates, Harvard Law School, September 2010

[7] Citizens United v. Federal Election Commission, 130 S. Ct. 876, 929 (2010) (Stephens, J., dissenting).

Conclusion

The 2010 midterm elections offered a glimpse of the impact that the Citizens United decision will have on our elections. Increased anonymous spending translated to more political advertisements and little information about the interests behind them. Entities that did not disclose their sources of support accounted for a significant amount of outside spending and few corporations made commitments to disclose their contributions to independent expenditures or to refrain from making independent expenditures.

The sea change in the law regarding corporate political spending wrought by Citizens United presents a multitude of risks for investors. In the face of these risks, investors should consider corporate political spending practices with the same level of scrutiny given to other basic corporate governance standards. Companies can spend more money in politics and are subject to few requirements to disclose their actions. Moving forward, investors must use all tools at their disposal to ensure transparency and accountability.

National Tables

Fig. 1.1 – "Positive vs. Negative Advertising by Group Type"

Positive and Negative Advertising By Group Type		
Group Type	**Type of Advert**	**Percent of Spending**
527* (Contributions Disclosed)	Positive	45.99%
	Negative	54.01%
501(c)† (Contributions Not Disclosed	Positive	24.03%
	Negative	75.41%
*527 refers to the section of the Internal Revenue code under which regular political action committees and independent expenditure committees are organized. This grouping includes both normal political action committees and those gathering unlimited contributions		
†501(c) refers to the section of the Internal Revenue code under which certain politically active groups are organized. Social Welfare Organizations (Action Funds) are organized under Section 501(c)4. Trade Associations are organized under Section 501(c)6. Labor Unions are organized under Section 501(c)5. 501(c) organizations are tax-exempt entities, and are not required to disclose the donors who fund their political activities.		
Source: Independent Expenditure Data, Accessed from Federal Election Commission Disclosure Data Catalog, http://www.fec.gov/data/IndependentExpenditure.do		

Fig. 1.2. – "Key Campaign Finance Ratios, 10 Most Costly Senate Races, Fall 2010"

Key Campaign Finance Ratios, 10 Most Costly Senate Races, Fall 2010	
Percentage of Outside Spending That Used New post-Citizens United Rules	**55.48%**
Percentage of Outside Spending Funded by Anonymous Sources	**35.72%**
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org	

Fig. 1.3 – "Aggregate Spending By Race, 10 Most Costly Senate Races, Fall 2010"

Aggregate Spending By Race, 10 Most Costly Senate Races, Fall 2010						
Race State	**Type**	**Total Spending**	**Total Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Nevada	Senate	$59,105,399	$17,523,111	$5,580,446	$4,034,803	$9,615,249
California	Senate	$52,654,436	$11,261,288	$6,706,861	$1,522,944	$8,229,805
Connecticut	Senate	$50,870,207	$2,742,198	$504,692	$16,720	$521,412
Pennsylvania	Senate	$49,046,141	$25,739,595	$4,625,069	$3,309,669	$7,934,738
Colorado	Senate	$48,236,654	$34,526,670	$13,720,491	$8,232,487	$21,952,978
Florida	Senate	$43,490,607	$6,435,959	$2,786,761	$2,730,133	$5,516,894
Illinois	Senate	$37,144,075	$18,776,587	$7,542,421	$2,825,674	$10,368,095
Missouri	Senate	$30,439,243	$12,789,166	$5,916,079	$3,288,744	$9,204,823
Wisconsin	Senate	$30,832,668	$4,125,860	$1,631,165	$356,434	$1,987,599
Kentucky	Senate	$19,694,001	$9,355,105	$2,168,186	$1,986,626	$4,154,812
Totals		$421,513,431	$143,275,539	$51,182,171	$28,304,234	$79,486,405
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Fig. 1.4 – "Notable Independent Group Spending"

Notable Independent Group Spending		
Group	**2010 Total Reported Spending**	**Notes**
U.S. Chamber of Commerce	$32,851,997	Did not disclose donors who were funding independent expenditures
American Action Network	$26,088,031	Did not disclose donors who were funding independent expenditures
American Crossroads	$21,553,277	Raised uncapped donations from corporations, both privately held and publicly traded
Crossroads Grassroots Policy Strategies	$17,122,446	Did not disclose donors who were funding independent expenditures
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org		

Fig. 1.5 – "How Have the Rules Changed?"

2006 Midterms vs. 2010 Midterms: How Have The Rules Changed?		
Issue	2006	2010
Corporate Contributions	Independent expenditure groups organized under Section 527 of the Internal Revenue code (527s) mayaccept uncapped donations, but not from companies	527s can take uncapped donations, including donations from companies
Limits on Electioneering	Corporations could not engage in direct electioneering. Certain qualified non-profits couldfund "issue ads"	Corporations can now engage in direct electioneering - their disclosure requirements do not change
Independent Expenditure Disclosure	All groups that could electioneer had to disclose (Some groups, like 527(s), disclose later than others, or disclose to the IRS instead of the FEC)	Many non-profit organizations can engage in direct electioneering without disclosing sources of funding.

State Tables

Nevada:

Spending Breakdown, 2010 Nevada Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Nevada - Senate	$59,105,399	$41,582,288	$17,523,111	$5,580,446	$4,034,803	$9,615,249
Outside Spending / Total Spending	29.65%	Anonymous Spending / Total Outside Spending -->	31.85%	Citizens United Spending / Outside Spending -->	54.87%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

California:

Spending Breakdown, 2010 California Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
California - Senate	$52,654,436	$41,393,148	$11,261,288	$6,706,861	$1,522,944	$8,229,805
Outside Spending / Total Spending	21.39%	Anonymous Spending / Total Outside Spending	59.56%	Citizens United Spending / Outside Spending	73.08%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Connecticut:

Spending Breakdown, 2010 Connecticut Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Connecticut - Senate	$50,870,207	$48,128,009	$2,742,198	$1,004,692	$16,720	$1,021,412
Outside Spending / Total Spending	5.39%	Anonymous Spending / Total Outside Spending	36.64%	Citizens United Spending / Outside Spending	37.25%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Pennsylvania:

Spending Breakdown, 2010 Pennsylvania Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Pennsylvania - Senate	$49,046,141	$23,306,546	$25,739,595	$4,625,069	$3,309,669	$7,934,738
Outside Spending / Total Spending	52.48%	Anonymous Spending / Total Outside Spending	17.97%	Citizens United Spending / Outside Spending	30.83%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Colorado:

Spending Breakdown, 2010 Colorado Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Colorado - Senate	$48,236,654	$13,709,984	$34,526,670	$13,720,491	$8,232,487	$21,952,978
Outside Spending / Total Spending	71.58%	Anonymous Spending / Total Outside Spending	39.74%	Citizens United Spending / Outside Spending	63.58%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Florida:

Spending Breakdown, 2010 Florida Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Florida - Senate	$43,490,607	$37,054,648	$6,435,959	$2,786,761	$2,730,133	$5,516,894
Outside Spending / Total Spending	14.80%	Anonymous Spending / Total Outside Spending	43.30%	Citizens United Spending / Outside Spending	85.72%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Illinois:

Spending Breakdown, 2010 Illinois Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Illinois - Senate	$37,144,075	$18,367,488	$18,776,587	$7,542,421	$2,825,674	$10,368,095
Outside Spending / Total Spending	50.55%	Anonymous Spending / Total Outside Spending	40.17%	Citizens United Spending / Outside Spending	55.22%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Missouri:

Spending Breakdown, 2010 Missouri Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Missouri - Senate	$30,439,243	$17,650,077	$12,789,166	$5,916,079	$3,288,744	$9,204,823
Outside Spending / Total Spending	42.02%	Anonymous Spending / Total Outside Spending	46.26%	Citizens United Spending / Outside Spending	71.97%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Wisconsin:

Spending Breakdown, 2010 Wisconsin Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Wisconsin - Senate	$30,832,668	$26,706,808	$4,125,860	$1,631,165	$356,434	$1,987,599
Outside Spending / Total Spending	13.38%	Anonymous Spending / Total Outside Spending	39.54%	Citizens United Spending / Outside Spending	48.17%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

Kentucky:

Spending Breakdown, 2010 Kentucky Senate						
Race State	**Total Spending**	**Candidate Spending**	**Third-Party Spending**	**Anonymous Spending**	**Spending From Groups Gathering Unlimited Contributions**	**Citizens United Spending**
Kentucky - Senate	$19,694,001	$10,338,896	$9,355,105	$2,168,186	$1,986,626	$4,154,812
Outside Spending / Total Spending	47.50%	Anonymous Spending / Total Outside Spending	23.18%	Citizens United Spending / Outside Spending	44.41%	
Source: FEC Data Accessed through Center for Responsive Politics, OpenSecrets.org						

April 11, 2011

Sen. Dick Durbin, Chairman
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
711 Hart Senate Office Building
Washington, DC 20510

Sen. Lindsay Graham, Ranking Member
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
290 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

On behalf of ProgressNow and our over 2.4 million members, we would like to proclaim our support for the Fair Elections Now Act (S.750, H.R. 1404), legislation that would allow candidates to rely on small contributions from individuals rather than corporate and other special interest donors and their lobbyists.

Sponsored by Sen. Dick Durbin (D-IL) and Reps. John Larson (D-Conn.) and Walter Jones (R-N.C.), the Fair Elections Now Act would make candidates accountable to the American public rather than big money donors. It would invite political activity by thousands of low- and moderate-income Americans who now feel they can't afford to compete against special interest candidates.

We fully support the Fair Elections Now Act and urge the Senate to quickly pass this essential legislation. It's time we put voters back in charge of our political process.

Sincerely,
Aniello Alioto
National Political Director
ProgressNow

Sen. Dick Durbin, Chairman
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
711 Hart Senate Office Building
Washington, DC 20510

Sen. Lindsay Graham, Ranking Member
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
290 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

I write to register our support for the Fair Elections Now Act (S.750, H.R. 1404), legislation that promotes political equality and the interests of ordinary citizens.

If passed by Congress, the Fair Elections Now Act would help to build a small-donor democracy in which candidates are able to rely on low-dollar contributions from individuals rather than large donations from wealthy individuals, special interest donors and their lobbyists. This would make candidates accountable to the American public rather than big money donors. And, it would invite political activity by thousands of low- and moderate-income Americans who now feel they can't afford to compete against special interest candidates.

We fully support the Fair Elections Now Act and urge the Senate to quickly pass this essential legislation. It's time we put voters back in charge of our political process.

Sincerely,

Adam Lioz
Program Director and Counsel
Progressive Future

ProgressivesUnited
RUSS FEINGOLD, FOUNDER

April 11, 2011

Sen. Dick Durbin, Chairman
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
711 Hart Senate Office Building
Washington, DC 20510

Sen. Lindsay Graham, Ranking Member
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
290 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

On behalf of Progressives United, and our members, I am pleased to announce our support for the Fair Elections Now Act (S.750, H.R. 1404), legislation that would allow candidates to rely on small contributions from individuals rather than corporate and other special interest donors and their lobbyists.

The Fair Elections Now Act is similar in important ways to the public campaign system that enabled me and many other candidates to run for the Wisconsin State Legislature despite having only average means and without having to depend on special interest funding. Not only will it open the doors of Congress to average Americans, it will take the election process – fundamental to our democratic form of government – back from the special interest influences. Those interests, especially the corporate special interests, have grown steadily, and thanks to the lawless *Citizens United* decision are poised to dominate our representative government. Progressives United and I strongly support the efforts of Senator Durbin and Congressmen Larson and Jones to confront that threat.

We fully support the Fair Elections Now Act and urge the Senate to quickly pass this essential legislation. It's time we put voters back in charge of our political process.

Sincerely,

Russell D. Feingold
Former United States Senator
Founder, Progressives United

www.ProgressivesUnited.org

Progressives United, P.O. Box 620062, Middleton, WI 53562 • Phone: 608-831-7877

Authorized and Paid for by Progressives United Political Action Committee, Ashok Bhargava, Fitchburg, WI, Treasurer

April 12, 2011

U.S. Senate Committee on the Judiciary
The Subcommittee on the Constitution,
Civil Rights, and Human Rights
224 Dirksen Senate Office Building
Washington, D.C. 20510

Chairman Durbin and Ranking Member Graham,

The hearing, "The Fair Elections Now Act: A Comprehensive Response to Citizens United," before your committee comes at a crucial time in our democracy. The costs of our elections are spiraling out of control, forcing members of Congress to rely more and more on an elite set of wealthy special interests to fund their campaigns, drowning out the already weak voice of everyday Americans in our political process.

We see the broken system's influence everyday through tax breaks for some of our biggest corporations, earmarks for campaign donors, and sweetheart deals for those with the extra money to give. Those with the money and access to it get the attention from politicians and everyone else suffers the consequences.

The Fair Elections Now Act would change this. Under Fair Elections, Senate candidates would be able to spend more time listening to the people they represent, instead of raising money from special interests and their lobbyists who want a return on their investment. With Fair Elections, instead of spending their time dialing for dollars or jetting off to meet with wealthy donors in posh neighborhoods, candidates get to talk to and interact with a broader range of constituents across their state.

Fair Elections benefits you and it also benefits your constituents. People that donate to your campaign, either through a qualifying contribution or a small donation that gets matched, feel more connected to the political system and the people who seek to represent them. The $20, $50, or $100 donation from the people I see in line at the supermarket or at my local diner is the same as that of a lobbyist or CEO. These small dollar donors feel like a part of your campaign, and anyone who has spent time in the field knows how important that is.

In poll after poll, Democrats, Republicans and independents all agree that our political system is broken. They believe our elections are sold to the highest bidder.

1133 19th Street NW, 9th Floor | Washington, C 20036 | Tel: 202-640-5600 Fax: 202-640-5601
E-Mail: info@publicampaign.org | Web Site: www.publicampaign.org

It's bad for you, it's bad for your constituents, and it's bad for our democratic institutions.

The Fair Elections Now Act would go a long way to restoring integrity to our political system and help the American people believe that their government works for them, not just moneyed insider interests. I urge you to support this important legislation.

Sincerely,

Nick Nyhart
President and CEO
Public Campaign

1133 19th Street NW, 9th Floor | Washington, C 20036 | Tel: 202-640-5600 Fax: 202-640-5601
E-Mail: info@publicampaign.org | Web Site: www.publicampaign.org

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

The Hon. Richard Durbin
United States Senate
Washington, D.C. 20510

April 6, 2011

The Hon. John Larson
U.S. House of Representatives
Washington, D.C. 20515

Dear Sen. Durbin and Rep. Larson:

On behalf of more than 225,000 members and activists, Public Citizen enthusiastically applauds your legislation – known as the "Fair Elections Now Act" – that would help take large special interest money out of elections and empower small donors. Especially in light of the extremely troubling Supreme Court decision of *Citizens United v. FEC*, which unleashed secretive and unlimited corporate money into elections, your bold measure to address apparent and actual corruption stemming from special interest money in politics could not come at a better time.

At no time in history has a strong congressional public financing program been so sorely needed – and so demanded by the American public. Poll after poll shows that wide majorities of Americans are stunned with the Court's decision opening the floodgates of unlimited corporate money in elections. Just as many Americans are infuriated with the primacy of money in elections, as well as all the time and resources officeholders spend cozying up to campaign contributors.

Americans are demanding far more accountability from Congress. One of the best ways to achieve this accountability is to replace big money with public funds and small donations from average Americans. This is precisely what the Fair Elections Now Act would do.

The Fair Elections Now Act is the product of many years of legislative deliberation by your offices. It has already has gained editorial support nationwide and is favored by strong majorities of voters across the political spectrum.

Public Citizen is proud to stand firmly behind your newest reform effort.

Sincerely,

David Arkush
Director,
Public Citizen's Congress Watch division

Craig Holman, Ph.D.
Government Affairs Lobbyist,
Public Citizen

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

The Fair Elections Now Act Is a Declaration of Independence for Congress

Public Citizen Enthusiastically Endorses S. 750 and H.R. 1404

April 12, 2011

The Fair Elections Now Act (S. 750 and H.R. 1404) – which offers a new system for financing campaigns that relies on public funds matching small private donations – would help improve the openness, honesty, and accountability of government. It would also free public officials to respond to the interests of voters without worrying about hurting their ability to raise money from deep-pocketed donors. Most observers would agree that money plays far too large a role in elections – and that politicians spend too much time fundraising, detracting from the time they spend developing good public policy.

If we want to protect the environment, design a better health care system or improve our energy policy, we need a political system that encourages lawmakers to listen more to voters than to oil and gas companies, pharmaceutical giants and other industries. The Fair Elections Now Act is a bold solution to the problem of special interest money in politics.

Several states and localities have been operating under comprehensive public financing systems for years. These systems work. Public funding programs in the states today draw rave reviews from lawmakers while producing more diverse fields of candidates. They also provide voters with an immediate return on their small investment of faith and money: lawmakers who run under the systems spend significantly less time raising money than those who do not, giving them more time to do the work of the people.

The Fair Elections Now Act carefully builds upon the successes of public financing systems in the states while accommodating new political realities, such as the growing small donor phenomenon and recent Supreme Court rulings.

The Fair Elections Now Act is sensible. It is entirely voluntary and imposes no new restrictions on the campaign fundraising or spending of those who do not participate. And it transforms elections into true contests of ideas and merit, rather than fundraising prowess.

The cost of winning an election for Congress is getting more and more expensive. The winners of House elections in 1976 spent an average of about $334,500 on campaigns

in 2010 dollars. In contrast, the average House winner in 2010 spent about $1.4 million. In 1976, successful Senate candidates spent an average of $2.3 million in 2010 dollars. In 2010, the average Senate winner spent an astonishing $7 million.[1]

Starting the day after they are elected, House members must begin raising more than $1,000 a day – including Saturdays and Sundays – to amass large enough war chests to wage their next campaign. On average, a U.S. Senator must raise more than $3,000 per day, every day. The burden is particularly heavy on members who only narrowly won their last election. Freshman House Democrat Tim Walz (Minn.) recalls that former Rep. Rahm Emanuel (D-Ill.) told him in the middle of December 2006, "Start raising money now . . . . And here's your goal: Have $1 million in the bank by the time this race gets ready next time."[2]

The high cost of running campaigns compromises a member's ability to truly represent voters. Former Sen. Ernest F. "Fritz" Hollings (D-S.C.) estimated that almost one-third of a senator's time is spent on fundraising. Hollings contrasted today's Senate with the institution of the 1960s, which typically worked full weeks: "Now you can't find the Senate until Monday evening, and it's gone again by Thursday night. We're off raising money. We use every excuse for a 'break' to do so," Hollings wrote. "In February it used to be one day for Washington's birthday and one for Lincoln's. Now we've combined them so we can take a week off to raise money," he continued. "There's Easter week, Memorial Day week, Fourth of July week and the whole month of August. There's Columbus Day week, Thanksgiving week and the year-end holidays. While in town, we hold breakfast fundraisers, lunch fundraisers, and caucuses to raise funds."[3]

A study by researchers at the University of Maryland confirmed that candidates who participate in full publicly funded electoral systems spend significantly less time raising money than other candidates. U.S. House candidates in contested elections reported spending an average of 34 percent of their time raising money. Meanwhile, privately funded state legislative candidates reported spending an average of 24 percent of their time fundraising and publicly funded candidates reported spending only 8 percent.[4]

A congressional Fair Elections system would free incumbent and prospective office holders to better connect with all of their constituents, not merely those most able to contribute to campaigns.

The vast majority of Americans support a Fair Elections system. According to a recent poll conducted by a bipartisan group, more than two-thirds of voters (67 percent) support providing qualified congressional candidates public financing if they agree to

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1 Joseph Cantor, "Campaign Finance: An Overview," Congressional Research Service (July 31, 2006); and Campaign Finance Institute, "The Cost of Winning An Election: 1986-2010" (2011).

2 Adam Nagourney, "With Their Eye on 2008, Democrats Nurture Vulnerable House Freshmen," *New York Times* (Dec. 22, 2006).

3 Ernest Hollings, "Stop the Money Chase," *Washington Post* (Feb. 19, 2006).

4 Peter Francia and Paul Herrnson, "The Impact of Public Financing Laws on Fundraising in State Legislative Races," *American Politics Research* (Sep. 2003).

refuse to take large campaign contributions, while just 20 percent of those surveyed opposed the idea.[5] Every major demographic group solidly favors the proposal. This includes support across party lines (69 percent of Democrats, 64 percent of Republicans, and 66 percent of independents). Even the least supportive demographic group still favors the proposal by a 2-to-1 ratio.

The same poll confirmed why Americans support Fair Elections. A solid majority of voters believe Congress prioritizes the will of their political contributors rather than constituents. Sixty percent of voters say members of Congress are more likely to vote in a way that will please their political contributors, compared to just 20 percent who think that they vote for the best interests of their constituents. Voters see large campaign contributions as a roadblock to solving the most pressing economic issues facing America. More than three quarters (79 percent) of voters agree with the statement "I am worried that large political contributions will prevent Congress from tackling the important issues facing America today, like the economic crisis, rising energy costs, reforming health care, and global warming."

The Fair Elections Now Act is not expensive – it is very affordable, especially given the savings offered from reducing costly and unnecessary special interest projects and earmarks, the time spent fundraising by lawmakers, and the greater public confidence in the integrity of government. Furthermore, the Fair Elections Now Act pays for itself through reasonable fees assessed on large government contracts.

Fair Elections systems open up democracy by encouraging people from a broader range of economic backgrounds to become politically active through campaign contributions. By dramatically reducing the maximum allowable contribution – to $100 for participating candidates – the systems enable almost everyone to make meaningful campaign contributions. A study of contributions to gubernatorial candidates in Arizona found that privately funded candidates in the 1998 and 2002 election cycles received more than 70 percent of their campaign contributions from people living in areas with per capita incomes of $40,000 or more. In contrast, following adoption of public financing in Arizona, candidates who opted into the state's public funding system received up to 68 percent of their qualifying and seed contributions from people living in zip codes with per capita incomes below $40,000.[6]

The average individual contribution to each publicly funded candidate in the study ranged from $6 to $13. The profile of contributors to publicly funded candidates in Arizona contrasts starkly with contributions to federal candidates, who receive the overwhelming percentage of their campaign contributions from people with household incomes of $100,000 or more.

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[5] Lake Research Partners and The Tarrance Group, Memorandum: National Polling on Support for a Proposal to Tackle Big Money in Congressional Elections (2009).

[6] Clean Elections Institute, "Reclaiming Democracy in Arizona" (2004).

Most candidates who have used public financing programs in state elections appear to like the alternative system of financing their campaigns. A survey of candidates who participated in Maine's public financing system in the 2002 elections found that 96 percent of the respondents said that they were either "very" or "reasonably" satisfied with the system, 94 percent said they were at least "somewhat likely" to use it again, and 96 percent said they were at least "somewhat likely" to recommend the program to others.[7]

Many elected officials who ran their campaigns under the state's public funding system spent more time with the voters and less time fundraising. When Maine's 2002 candidates were asked why they decided to participate in the program, 55 percent answered: "No fundraising; time better spent on issues and voters." Another 20 percent cited "strategic or pragmatic reasons," and 18 percent cited "fear of corruption by special interests."[8]

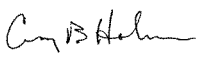
The United States is a diverse nation, and yet the people we elect to represent us at both national and local levels of government do not reflect that diversity. The money available to candidates is part of the problem. Fair Elections systems remove many of the barriers to candidacy. In states with comprehensive public financing systems, both minorities and women are availing themselves of public funds at a higher rate than other candidates.

For all these reasons, Public Citizen enthusiastically rallies in support of the Fair Elections Now Act and applauds the campaign to clean up elections by Sen. Richard Durbin (D-Ill.), Rep. John Larson (D-Conn.) and all their colleagues who have cosponsored this important legislation.

Our elections are far too important to leave to auctioneers and well-financed special interests.

Sincerely,

David Arkush
Director
Public Citizen's Congress Watch division



Craig Holman, Ph.D.
Government Affairs Lobbyist
Public Citizen

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7 Alison Smith, "Clean Elections at Work," Maine Citizens Leadership Fund (April 3, 2003).
8 Id.

April 8, 2011

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

The Honorable Lindsay Graham
U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

On behalf of young Americans, Rock the Vote is writing to express our support for the Fair Elections Now Act (S. 750 and H.R. 1404), legislation that would make Congress more accountable to the American people.

In our most recent poll of young Americans, Rock the Vote found that 86 percent of 18- to 29-year olds said that the influence of corporations and special interests in our political system is a top concern. Only the issues of unemployment and the national debt rated higher. The importance of this issue is clear: it is time to put voters back in charge of our political process.

The Fair Elections Now Act – which is sponsored by Reps. John Larson (D-Conn.), Walter Jones, Jr. (R-N.C.), and Chellie Pingree (D-Maine) in the House of Representatives – would allow candidates to run campaigns for the U.S. Senate and House by relying on small donations from back home. With Fair Elections, candidates can focus on their constituents, instead of large donors, big bundlers, lobbyists and corporate interests funding campaigns. Paid for by the sale of broadcast spectrum and on a small fee on large government contractors, the Fair Elections Now Act is not funded with taxpayer dollars.

We fully support the Fair Elections Now Act and urge the Senate to pass this necessary legislation.

Sincerely,

Thomas Bates
Vice President, Civic Engagement

1001 Connecticut Avenue NW · Suite 640 · Washington, DC 20036 · Phone 202. 719. 9910 · Web www.rockthevote.com

ROLL CALL

Time for a New Approach to Campaign Finance Reform

BY DANIEL WEEKS
June 23, 2010

Last week's unsavory compromise between Democratic leaders in Congress and the National Rifle Association over the extent of donor disclosure in the so-called DISCLOSE Act contained a sobering lesson about the way that Washington works: Even legislation expressly designed to rein in special interest influence in campaigns is subject to constant compromise at the hands of special interests.

Notwithstanding the NRA's defection to the campaign reformer's camp, the DISCLOSE Act has reignited a familiar tug-of-war in our nation's campaign finance debate. On the one side are reformers who favor basic regulation of private campaign money, including limits on corporate electioneering to influence campaigns. On the other are conservatives, backed by a five-vote majority on the Supreme Court, who argue that campaign limits — on individuals and corporations alike — run afoul of the First Amendment.

But there is a third way forward for campaign finance reform — one that even the conservative NRA, as the nation's self-styled "premier grass-roots organization," should logically support. Participation-centered "Fair Elections" reform acknowledges both the reformer's legitimate concern with the power of big money to corrupt, and the conservative's fair defense of no-holds-barred political speech. Call it the "more speech" solution to the free speech problem in campaign finance law.

Enshrined in the Fair Elections Now Act, this reform uses targeted federal dollars to expand the "purchasing power" of ordinary citizens in campaigns, so they can effectively compete with wealthy special interests. The aim is not to limit or discourage spending by outside groups, but rather to ensure that their voices are not the only ones that can get heard in public debate. The method is a match on small donations made to qualifying candidates by their constituents, paid for by a deficit-neutral fee on major government contractors. Dozens of former Republican and Democratic Members of Congress have endorsed this legislation.

Unlike past reforms, which aimed to limit campaign spending by individuals and groups, Fair Elections "levels up" political speech for participating candidates to a credible threshold of debate, regardless of the amount of private spending with which they are opposed. Such a course steers clear of even the most recent Supreme Court logic for protecting the free speech rights of corporations and unions. Where challenged, it has been upheld in the courts.

To be sure, leaving the wealthiest Americans free to spend their largesse on political speech will seem unsavory to many people: the idea of millionaire candidates "buying" their election through a barrage of fancy ads hardly squares with our vision of a reluctant Gen. George Washington being pressed into service as president for the good of his nation.

But Americans can take comfort in a simple, if counterintuitive, fact: Money cannot buy election to public office. Even as the absence of sufficient funding to make your message known all but dooms a candidate's prospects of success, spending above a reasonable threshold simply does not correspond with more votes in the vast majority of races. Sometimes, it even produces the opposite effect.

A 2008 survey of all 3,480 races for U.S. House between 1992 and 2006 analyzed the relationship between spending and votes and found that candidates who spent about $1 million (in 2006 dollars) on their campaigns performed no worse than those whose spending far exceeded that mark. Candidates who could not approach the million-dollar threshold stood little chance of success, but rarely did a multimillion-dollar candidate for House do better than his reasonably funded opponent. It is a testimony to the prevailing good sense of the American electorate when given a meaningful choice.

Congressional leaders are right to attempt a quick fix to the anticipated flood of corporate and union money in the aftermath of the Supreme Court's Citizens United v. Federal Election Commission ruling. But Congress must do much more than that if it is to take a meaningful stand against special interest influence in our elections. Already, 175 bipartisan Members of the House and Senate have stepped forward to co-sponsor the Fair Elections Now Act; fewer than 100 more are needed to put the legislation into law.

Participation-centered Fair Elections reform would deal a crippling, and constitutional, blow to the power of big money in our democracy — not by limiting the speech of a wealthy few, but by expanding the speech of the many. That is the free speech tradition that George Washington and his cohort envisioned.

Daniel Weeks is president of Americans for Campaign Reform, a bipartisan group chaired by former Sens. Bill Bradley, Bob Kerrey, Warren Rudman, and Alan Simpson.

April 2011

This is a background memo and fact sheet on the presidential public financing system, the need to repair the system and efforts being made in Congress to repeal the system. The fact sheet is based on information provided by presidential campaign finance scholar Anthony Corrado, a professor at Colby College and Senior Fellow at Brookings Institution.

Background Memo

The presidential public financing system has served the nation and presidential candidates of both major parties well for most of its 36-year existence.

The system has provided presidential candidates with the funds needed to mount viable candidacies and wage competitive campaigns, has provided more meaningful choices to voters and has helped to ensure that more candidates have the opportunity to share their views with the electorate. For many candidates, public funding has been the source of sorely needed funds at crucial points in their presidential races.

The presidential system also has protected against government corruption and has given average citizens and small donors a vital role to play in our presidential elections.

The system became outmoded in recent years, however, as the costs of presidential campaigns outstripped the public funds being provided to participating candidates and as frontloading occurred in the presidential nominating process. Congress has made no legislative adjustments to the presidential public financing system since it was first enacted in 1974.

Republican leaders in Congress are currently attempting to eliminate the presidential public financing system. On January 26, 2011, in a partisan vote, the House passed legislation (H.R. 359) to repeal the system. The estimated savings from repealing the system is some $60 million per year, an amount that is dwarfed by the amount of government spending and tax breaks that occur from private campaign money influencing government decisions.

On February 18, 2011, House Republicans passed a rider to H.R. 1, the FY 11 budget legislation to prevent any funds in the legislation from being used to administer the presidential system. The rider was dropped from the final FY 11 budget agreement.

Senate Republican Leader Mitch McConnell has introduced similar legislation (S.159) to repeal the presidential system. The repeal legislation would turn the presidency over to big givers, bundlers, corporate spenders and other special interest spenders, at the great expense of the American people.

The presidential financing system needs to be repaired, not repealed, to again serve as a viable alternative system for presidential candidates to use in financing their campaigns.

Representatives David Price (D-N.C.) and Chris Van Hollen (D-Md.) have re-introduced their legislation in this Congress to fix the presidential public financing system. Similar legislation is expected to be re-introduced in the Senate shortly. The estimated cost of modernizing the presidential system is $250 million per year. The key goal of the repair legislation is to greatly increase the role and importance of average citizens and small donors in presidential campaigns and greatly decrease the role and importance of influence-seeking money.

Presidential candidates have long recognized the importance and value of the presidential system. Since 1976, the system has been used by most candidates from both major parties.

Recent editorials in *The New York Times* (January 23, 2011), *The Washington Post* (January 25, 2011), *The Los Angeles Times* (January 25, 2011) and *USA TODAY* (February 2, 2011) also have recognized the importance of the presidential system in calling for the system to be repaired and in opposing efforts to eliminate it.

President Obama has recognized the importance of continuing the presidential financing system in calling for the system to be fixed and in strongly opposing the effort in Congress to repeal the system. In a statement issued on January 25, 2011, the Obama Administration said:

> The Administration strongly opposes House passage of H.R. 359 because it is critical that the Nation's Presidential election public financing system be fixed rather than dismantled.
>
> .....
>
> After a year in which the *Citizens United* decision rolled back a century of law to allow corporate interests to spend vast sums in the Nation's elections and to do so without disclosing the true interests behind them, this is not the time to further empower the special interests or to obstruct the work of reform.

Most importantly, the American people by a large majority have recognized the importance of the presidential public financing system as shown in a poll taken as the 2008 presidential election was drawing to an end. According to *a USA TODAY* article (October 29, 2008):

> A *USA TODAY/Gallup* Poll taken Tuesday [October 28, 2008] finds wide support for public financing of presidential campaigns, including a third who say the current voluntary system should be mandatory.... Four in 10 Americans say the nation should maintain the voluntary system, and 32% say candidates should be required to participate. Only 1 in 5 say the system should be eliminated.

Thus, the *USA TODAY/Gallup* poll showed more than 70 percent of the public supported continuing the presidential system while only 20 percent said the system should be eliminated.

Reform groups are strongly opposed to the McConnell bill in the Senate to repeal the presidential public financing system and are supporting legislation to repair the system. The groups include

Americans for Campaign Reform, Brennan Center for Justice, Campaign Legal Center, Common Cause, Democracy 21, League of Women Voters, People For the American Way, Public Campaign, Public Citizen and U.S. PIRG.

Presidential Public Financing Fact Sheet

- The 1974 Federal Election Campaign Act (FECA), enacted in response to the Watergate scandal, fundamentally reformed the rules governing campaign financing in federal elections. The hallmark of this legislation was the creation of a voluntary program of public financing for presidential elections. This innovative reform, which stands to this day as the flagship of public financing systems used in the United States, was designed to establish a safeguard against corruption in the political system by reducing the emphasis on fundraising in presidential campaigns and diminishing the influence of private donations by providing an alternative source of funds.

- The presidential system has provided candidates with the funds needed to mount viable candidacies and wage competitive campaigns, has provided more meaningful choices to voters and has helped to ensure that more candidates have the opportunity to share their views with the electorate. For many candidates, public funding has been the source of sorely needed funds at crucial points in their presidential races

- The presidential system also has protected against government corruption and has given average citizens and small donors a vital role to play in our presidential elections.

- Under the existing system, in the primary period, a candidate may qualify for public matching funds on a dollar-for-dollar basis for the first $250 contributed by an individual donor. To be eligible, a candidate must raise a threshold amount from private contributions in amounts of $250 or less and agree to limit personal contributions to his or her own campaign to a maximum of $50,000.

- In the general election campaign, the major party nominees can choose to receive a public grant that provides full funding for their campaigns. The amount of the grant is based on a formula that is indexed for inflation and, by 2008, was $84.1 million.

- Since 1976, the first presidential election in which public funds were available, every presidential election has been financed in part with public funds. From 1976 through 1996, every winner of the major parties' respective presidential nominations did so with the assistance of public matching funds in the primary elections. From 1976 through 2004, every major party presidential nominee relied exclusively on public money for the financing of the general election campaign.

- The presidential public financing system was voluntarily used by every Republican presidential nominee from 1976 to 2008 to finance their general election campaigns. This included President Gerald Ford, President Ronald Reagan (twice), President George

H.W. Bush, Senator Bob Dole, President George W. Bush (twice) and Senator John McCain.

- Similarly all Democratic presidential nominees during this same period, with the exception of President Barack Obama, used the system to pay for their general election campaigns. This included President Jimmy Carter (twice), Vice President Walter Mondale, Governor Michael Dukakis, President Bill Clinton (twice), Vice President Al Gore and Senator John Kerry.

- The Republican and Democratic parties have asked for and received public funds to pay for their national presidential nominating conventions for every nominating convention from 1976 to 2008.

- The use of the presidential public financing system by candidates declined in recent years as a result of increased campaign costs outstripping the public funds made available to participating candidates and the frontloading of presidential primaries. The presidential system needs to be repaired, not repealed.

- The *Citizens United* decision that unleashed corporate expenditures in our national elections has demonstrated just how essential it is to repair the presidential public financing system. A repaired system would provide presidential candidates with a viable alternative way to finance their elections without having to become obligated to big donors, bundlers, lobbyists, corporate spenders and other outside special interest spenders.

- Public funding has provided substantial support to a wide range of presidential aspirants. In the eight presidential elections from 1976 through 2004, presidential candidates and national party committees voluntarily asked for and received more than $1.3 billion in public funds. Candidates seeking their party's nomination asked for and received about $342 million of public money in total during this period; candidates in the general asked for and received a total of $839 million. Republicans and Democrats alike, as well as some minor party candidates, have participated in the program.

- Public financing has been valuable because it has provided candidates with the monies needed to mount viable candidacies and wage competitive campaigns, particularly in the critical early primary races. In this way, public funding has not only served to promote competition in elections and provide more meaningful choices to voters, but it has also helped to ensure that more candidates have the opportunity to share their views with the electorate. For many candidates, public funding was the source of sorely needed funds at crucial points in a presidential race.

- President Ronald Reagan benefited from public financing as much as any candidate who has used the system, participating in the presidential public financing system for three of his presidential campaigns in 1976, 1980 and 1984. Due to his broad base of supporters throughout the nation, Reagan was able to capitalize on his small-donor fundraising capacity to accrue substantial sums of public money. In fact, in 1984, when as President

he was seeking reelection without significant opposition from with his own party, President Reagan raised about 60 percent of the funds for his campaign from small donors. As a result, he received $9.7 million in matching funds. Most notably, this was the maximum amount of public money a primary candidate could receive in accordance with the law at the time. To date, President Reagan stands as the only candidate to ever reach the public funding primary campaign maximum.

- Ronald Reagan is not the only example of a candidate who was able to mount a competitive campaign as a result of receiving public money at a time when his campaign needed funds. Almost every election has featured candidates who faced better-funded opponents and benefitted from public funding in this way. These include Jimmy Carter in 1976, George H. W. Bush in 1980, Gary Hart in 1984, Jesse Jackson in 1988, Paul Tsongas in 1992, Pat Buchanan in 1996 and John McCain in 2000.

- In terms of dollar totals, Democratic contenders and their national party committee received a total of $646 million in public funding through the 2004 election, while Republican candidates and their national party committee received $628 million. In all, 91 challengers for a presidential nomination in the elections from 1976 through 2004 qualified for and accepted primary campaign matching funds, including 53 Democrats, 29 Republicans, and 9 minor party aspirants.

- In the first two decades under the public funding programs, the vast majority of contenders for the Republican and Democratic Party presidential nominations chose to participate in the public matching funds program. Of all those who ran as Democrats or Republicans for president in the six elections between 1976 and 1996, only four (all Republicans) decided to forgo public money during their primary campaigns. (They were John Connally in 1980, Steve Forbes in 1996, Robert Dornan in 1996 and Maurice Taylor in 1996).

- Presidential aspirants have embraced public funding because these monies proved to be an invaluable resource. The general election grants freed candidates of the need to raise money and gave them more time to make their case to the electorate. Without public funding, candidates would have had to spend much more of their time between July and November raising funds in order to accrue the tens of millions of dollars needed to mount a national campaign. The public funds also helped to hold down campaign expenses, since candidates did not have to spend the millions of dollars that would be needed to generate the sums offered through public funding.

- Public financing has benefited candidates who challenged their party's establishment or lesser-known aspirants. In these instances, public funding provided them with the resources to mount viable campaigns and present their case to the voters.

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April 11, 2011

Sen. Dick Durbin, Chairman
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
711 Hart Senate Office Building
Washington, DC 20510

Dear Senator Durbin:

The Sierra Club commends you for your continued leadership of the Fair Elections Now Act. As you are aware, the bill would create a voluntary system of campaign financing to provide qualified congressional candidates with the option to receive federal campaign funds with a five to one match on small dollar donations up to a limit.

Sierra Club endorses the Fair Elections Now Act because this proposal reduces the excessive dependence on large dollar contributions from corporate polluters like the oil, gas, and coal industries who repeatedly block legislation that protects our environment and strengthens our economy. Instead of focusing on major issues facing our nation like ending our dependence on foreign oil, keeping our air and water clean, and increasing American competitiveness in the clean energy economy, some elected official in Washington are spending too much time raising money from lobbyists and the industries they were elected to oversee.

The Fair Elections Now Act would help strengthen public confidence in our electoral process by reducing the importance of fundraising in the electoral process. It is time for us to change the way we fund our campaigns and this legislation is a critical step in the right direction. We look forward to working with you to ensure final passage of the Fair Elections Now Act.

Sincerely,

Michael Brune

Michael Brune
Executive Director
Sierra Club

408 C Street, N.E. Washington, D.C. 20002 TEL: (202) 547•1141 FAX: (202) 547-6009 www.sierraclub.org

Tax Payer Checkoff Protects Against Corruption

Update and preserve public funding for presidential campaigns
By FRED WERTHEIMER
Posted: April 11, 2011
U.S. News and World Report

Fred Wertheimer is president of Democracy 21, a nonpartisan group supporting campaign finance reform.

John Gardner, the founder of Common Cause and the modern campaign finance reform movement in the early 1970s, wrote, "The citizen can bring our political and governmental institutions back to life, make them responsive and accountable, and keep them honest. No one else can."

In 1974, citizens spoke loud and clear about the need for fundamental anticorruption reforms in the wake of the Watergate scandals. The result was the current presidential public financing system, described by campaign finance scholar Anthony Corrado as "the most innovative change in federal campaign finance law in American history." It has served the nation and presidential candidates of both major parties well for most of its 37-year existence.

This landmark reform has safeguarded against corruption while providing candidates with the resources to wage competitive campaigns. The reform has promoted competition in elections, provided more meaningful choices to voters, and helped ensure that more candidates had the opportunity to share their views with the electorate.

GOP Rep. Tom Cole of Oklahoma, leading an effort to repeal that system, has said, "The only people who benefit from taxpayer financing of campaigns are a handful of long-shot presidential candidates." This is simply not true. Every president since 1976, except Barack Obama, voluntarily used the system to finance their general election campaigns. Ronald Reagan, Bill Clinton, and George W. Bush each used the system twice. From 1976 through 1996, furthermore, all but four of the Republican and Democratic presidential primary candidates used the system to finance their primary races.

In recent years, the system has become outdated as the growing costs of presidential campaigns outstripped the public funds provided to participating candidates, but Congress has not updated the system. It needs to be repaired, not repealed, to again provide a viable alternative for presidential candidates to use in financing their campaigns.

A repaired system became all the more essential with the Supreme Court's disastrous *Citizens United* decision last year that unleashed the opportunity for massive corporate expenditures in presidential campaigns. This decision has left two funding options: a privately financed system dominated by influence-seeking corporate spenders and other special interests, big givers, and bundlers; or a revitalized publicly financed system funded by average citizens and small donors. [*Read the U.S. News debate: Is* Citizens United *hurting Democracy?]*

The public has recognized the importance and value of this presidential financing system. Opponents claim that low tax checkoff rates to fund the system show the public opposes public

financing, but the checkoff is not a poll. If you want polling information, use a poll. For example, while that low tax checkoff rate occurred in 2008, a *USA Today*/Gallup poll found that more than 70 percent of the public supported continuing the system while only 20 percent said it should be eliminated.

Legislation has been introduced in Congress to fix the system to reflect the realities of conducting presidential campaigns and to build on the ability to raise small contributions on the Internet.

Congress and President Obama should reject any effort to kill or cripple the most important anticorruption campaign finance reform of our generation. Instead, Congress should modernize the public financing system so that it can continue to protect against corruption and serve the interests of the American people.

USA TODAY

Biggest election winner: Big money

FRIDAY, NOVEMBER 5, 2010

BY BOB KERREY AND LARRY PRESSLER

Long before the ballots were cast and counted in this election, the larger outcome was clear: a bipartisan win for big money.

For a campaign system already impaired by special interest money, the Citizens United Supreme Court ruling this year dealt a crippling blow to our basic American ideals of fairness and accountability in government. The effects of the ruling on this election were as predictable as they were dire: with corporations and unions free to spend unlimited sums of money in campaigns, groups with vacuous names and undisclosed donors unleashed some $300 million to elect or defeat their candidates.

Voters on both sides of the aisle have long agreed that the ways of Washington must change before policy can adequately serve the public interest. As the President himself observed in his campaign, "Unless we're willing to challenge the broken system in Washington, and stop letting lobbyists use their clout to get their way, nothing else is going to change."

As former senators from both political parties, we have come together to urge the Congress to begin the difficult work of repairing a broken system by ending their unholy reliance on special interest money. We are joined by former senators Bill Bradley, Warren Rudman, and Alan Simpson, and more than 125 former members of Congress.

From our years of service in Washington, we have come to the shared belief that it is dangerous to our system of government to continue the present system of funding political campaigns. If the election showed that ordinary citizens have limited ability to influence the political debate when faced with millions in corporate spending, the likely consequence will be that more and more Americans opt out of politics altogether. If and when a majority of citizens decide to throw in the towel, our democracy will be at risk.

Indeed, confidence in Congress has reached an all-time low in part because Americans perceive that their representatives are primarily accountable to those who fund their campaigns. The commitments made to such wealthy interests are among the reasons bipartisan cooperation on great issues of our day, like our deficit and economic stagnation, has become a near impossibility. When all is said and done, big money givers view political spending as an investment and they expect a healthy return.

The need for systemic reform has never been greater than it is today. We worry that things will get a lot worse unless and until we end the unseemly practice of special interest funding of our elections and find a bipartisan solution to this bipartisan mess. There is a good place to begin.

The Fair Elections Now Act, already backed by nearly 200 members of the House and Senate, would offer candidates the ability to say no to special interest money and run for office using a base of small donations gathered from their own constituents, plus matching public funds. To qualify for matching funds, candidates would need to raise a large number of small in-state donations to prove their credibility, and agree to accept no contributions in excess of $100. The Fair Elections fund would be drawn from lease sales of unused, publicly-owned broadcast spectrum, so it wouldn't cost taxpayers a thing.

Fair Elections cherishes First Amendment free speech, as the Supreme Court itself has recognized, by enabling more voices to speak and be heard without added regulation. And far from being "welfare for politicians" as opponents sometimes claim, the Fair Elections Now Act would free our senators and representatives from their dependence on a more dangerous form of welfare — campaign money from corporations, trade groups, unions and all manner of other special interests.

In eight states from Arizona to Maine, Fair Elections systems are already having a positive, transformative effect on who can seek and win public office, and the kinds of policies they enact once in office. Some three-fourths of all candidates in Fair Elections states are voluntarily opting out of the old private money system and choosing to raise broad-based small donations combined with public funds instead. The result has been a rise in competition and genuine public accountability.

As members of different parties, we may not agree on very much when it comes to policy — but process is a different story. It's times like these when the political process in Washington stops working for the American people that we're ready to put party aside and roll up our sleeves to fix a broken system.

Former senators Bob Kerrey, D-Neb., and Larry Pressler, R-S.D., are members of Americans for Campaign Reform.

April 5, 2011

Sen. Dick Durbin, Chairman
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
711 Hart Senate Office Building
Washington, DC 20510

Sen. Lindsay Graham, Ranking Member
U.S. Senate Judiciary Committee, Subcommittee on
the Constitution, Civil Rights, and Human Rights
290 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham,

On behalf of USAction and our 25 affiliates and partners, we would like to proclaim our support for the Fair Elections Now Act (S.750, H.R. 1404), legislation that would allow candidates to run for office without relying on big money and lobbyists. In effect, Congress would be accountable to the American public, not the big money special interests and their lobbyists.

Sponsored by Sen. Dick Durbin (D-IL) and Reps. John Larson (D-Conn.) and Walter Jones (R-N.C.), the Fair Elections Now Act would allow candidates to run successful campaigns for federal office by relying on small and moderate donations in their home state or district. With fair elections, candidates can focus on their constituents—instead of big money lobbyists and other corporate interests

We fully support the Fair Elections Now Act and urge the House to quickly pass this essential legislation. It's time we put voters back in charge of our political process.

Sincerely,

William McNary
President
USAction and USAction Education Fund

Jeffrey Blum
Executive Director
USAction and USAction Education Fund

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FRIDAY, FEBRUARY 5, 2010

The Washington Post

A Republican tradition goes awry

BY WARREN RUDMAN

When I arrived in the U.S. Senate 30 years ago, I was a proud member of a Republican Party known for championing moderation in Congress, restraint in the courts and good-government reform.

In fact, the Republican tradition of campaign finance reform in which I stand dates to the trust-buster, Theodore Roosevelt. In his 1905 message to Congress, President Roosevelt proposed that "contributions by corporations to any political committee or for any political purpose should be forbidden by law." His logic was straightforward enough: "If [legislators] are extorted by any kind of pressure or promise, express or implied, direct or indirect, in the way of favor or immunity, then the giving or receiving becomes not only improper but criminal."

The resulting Tillman Act of 1907 and Federal Corrupt Practices Act of 1910 were the first laws limiting corporate money in federal elections and requiring strict disclosure of campaign funds. With the rise of organized labor in the 1930s, Republican Sen. Robert Taft and Republican Rep. Fred Hartley extended the ban on corporate contributions to unions. Those laws were dealt a serious blow by last month's Supreme Court decision in. That such a rash and immoderate ruling could come from a chief justice once committed to respecting precedent, and win praise from leaders of my party, is beyond my comprehension.

It was congressional Republicans who led the 1971 effort to strengthen existing campaign finance law through the Federal Election Campaign Act. After the Watergate campaign finance scandal, Republicans in Congress joined with Democrats to pass far-reaching amendments to the 1971 law, limiting contributions and campaign spending and establishing a system of public financing for presidential campaigns.

On campaign finance, the GOP should remember that it is not in its nature to side with the moneyed interests against the interest of Americans.

In more recent years, my friend and former Senate colleague John McCain (R-Ariz.) took up the cause of reform with Sen. Russ Feingold (D-Wis.), leading a decade-long effort to stem the flow of unregulated "soft money" from special-interest groups to political parties and to curb spending by outside interests.

That history of Republican leadership on campaign finance reform should remind Republicans in Congress today that it is not in our true nature to side with the moneyed interests against the interests of the American people. The Supreme Court has taken that stand.

It's time to return to our roots and take up Teddy Roosevelt's challenge from over a century ago by enacting the only real and lasting solution I know: citizen-funded elections. Under the proposed Fair Elections Now Act, sponsored by more than 130 members of Congress, money from special interests would be replaced by small donations from constituents and matching federal funds. Matching funds, raised through a fee on large-scale government contracts, would go to serious, hardworking candidates who demonstrate a broad base of public support and who say no to large donations.

Republicans and Democrats in Congress must work together to expand political speech for all citizens by replacing special-interest money in politics with small donations and public matching funds. Supreme Court opinion notwithstanding, corporations are not defined as people under the Constitution, and free speech can hardly be called free when only the rich are heard.

The writer, a Republican from New Hampshire, chairs the bipartisan citizen initiative Americans for Campaign Reform with former senators Bill Bradley (D-N.J.), Bob Kerrey (D-Neb.) and Alan Simpson (R-Wyo.). They are leading a federal push for voluntary public funding of congressional and presidential elections.

The Washington Times

WHITMAN: Too much money in politics

Fair Elections Now Act would collar the cash competition

By Christine Todd Whitman
Tuesday, October 5, 2010

With the midterm elections just weeks away, much has been made of the deeply divided character of the American electorate. It is true that on a variety of policies, from stimulus to health care to immigration, Americans do not see eye to eye. But when it comes to political process - who should influence our policy debate and how we elect our national leaders - there is remarkably little dissent. And there is much work to be done.

Indeed, it would appear that everywhere but Washington, Americans on the left, right and center agree that wealthy special interests have too much sway over the political system and citizens have not enough. According to a recent survey, 95 percent of voters think corporations spend money on politics mainly to buy influence on policy and to elect people who favor their financial interests. Meanwhile, roughly the same percentage (93 percent) think average citizens have too little influence over what happens in Washington.

These sentiments find expression in Tea Party conventions and liberal rallies alike. We may not agree as citizens on the direction our country should take on one policy or another, but we are united in our belief thatAmerican government has stopped working for the American people - and real reform of the electoral process is needed to get it back on track.

I've spent enough time in Washington and my own state capital of Trenton, N.J., to know that most politicians are not bought and sold to corporate or union interests. I believe most people come to Washington genuinely committed to serving the public interest. But if the people we elect to lead us are trying their best, the system in which they operate undermines them every step of the way.

Consider the prevailing incentives that govern modern campaigns. On the demand side, candidates who wish to have a fighting chance at public office must raise millions of dollars in private contributions to get out their message - upward of $10 million, on average, to run for U.S. Senate. To raise the requisite funds, incumbents in Congress devote an estimated one-third to one-half of their working hours dialing for dollars in the run-up to the election, while challengers must either be independently wealthy or have connections to great wealth and be ready to devote a year or two of their lives to fundraising. Not an appealing proposition for everyday working Americans who may aspire to public service.

On the supply side, those with the means and incentive to contribute large amounts to political campaigns share woefully little in common with the average citizen. They are whiter, older, more urban, more often male and very much wealthier than the average. In fact, residents of Manhattan's Upper East Side contributed more money to politics in 2008 than each of the bottom 39 states contributed. Less than 1 percent of the population was responsible for providing the vast majority of campaign funds, with 0.1 percent of citizens contributing $2,300 or more in the last election and accounting for fully 60 percent of total itemized donations.

Most disconcerting of all, those heavy hitters who provide the lion's share of campaign funds overwhelmingly represent special-interest groups with a direct interest in what gets done in Washington. Indeed, the Center for Responsive Politics reports that money from the top five contributing sectors - finance and real estate, lawyers and lobbyists, health care, communications, and energy and transportation - accounted for nearly 50 percent of the total $2.4 billion raised in 2008, compared with just 10 percent from ideological/single-issue groups. One can only imagine the amounts being raised and spent today.

I know of only one way to change fundamentally our broken pay-to-play system: citizen-funded elections. The concept is straightforward: Put ownership of our public elections in the hands of people, not special-interest donors, and the politicians who are elected will be accountable to them. One proposal for citizen-funded elections, the Fair Elections Now Act, is before the Congress and deserves a serious look. Under the proposed act, qualifying candidates who demonstrate a broad base of public support and do not take donations of more than $100 from their own constituents would be eligible for matching federal funds with which to run a viable campaign.

At less than $1 billion per year for all congressional elections, a Fair Elections program could prove the best investment ever made with public money, especially when one considers the $87 billion in annual corporate-welfare subsidies given to major contributors, as tracked by the Cato Institute. Far from limiting political speech as previous regulatory reforms have done, a voluntary Fair Elections system would expand speech on the basis of grass-roots citizen support without imposing any new regulations.

As a lifelong Republican concerned about government accountability, electoral competition and freedom of speech, I can think of no more urgent need for Congress today than citizen-funded elections. Making Washington work for the American people is at least one issue both sides can get behind.

Christine Todd Whitman served as governor of New Jersey and Director of the Environmental Protection Agency under President George W Bush. She is an Advisory Board member of Americans for Campaign Reform.