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The Brennan Center for Justice at New York University School of Law thanks the Committee for holding this hearing on the First Amendment and Campaign Finance Reform After *Citizens United* and for the invitation to testify.

Since its creation in 1995, the Brennan Center has focused on fundamental issues of democracy and justice, including research and advocacy to enhance the rights of voters and to reduce the role of money in our elections. That work takes on even more urgency after the United States Supreme Court's decision in *Citizens United v. Federal Election Commission* on January 21, 2010. *Citizens United* 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.

By largely ignoring the central place of voters in the electoral process, the *Citizens United* majority shunned the First Amendment value of protecting public participation in political debate. To restore the primacy of voters in our elections and the integrity of the electoral process, the Brennan Center strongly endorses four steps to take back our democracy:

- Promote public funding of political campaigns[1]
- Modernize voter registration[2]
- Demanding accountability through consent and disclosure[3]
- Advance a voter-centric view of the First Amendment.[4]

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[1] Frederick A.O. Schwarz Jr., *Public Financing of Races: If It Can Make It There...*, ROLL CALL, Jan. 28, 2010, *available at* http://www.rollcall.com/issues/55_83/ma_congressional_relations/42688-1.html.

[2] VOTER REGISTRATION MODERNIZATION: COLLECTED BRENNAN CENTER REPORT AND PAPERS (The Brennan Center for Justice 2009), http://brennan.3cdn.net/329ceaa2878946ba17_kwm6btu6r.pdf. Upon request, the Brennan Center is happy to provide hard copies of the report to this Committee and other members of Congress.

[3] Ciara Torres-Spelliscy, CORPORATE CAMPAIGN SPENDING: GIVING SHAREHOLDERS A VOICE (The Brennan Center for Justice 2010), http://brennan.3cdn.net/0a5e2516f40c2a33f6_3cm6ivqcn.pdf. Upon request, the Brennan Center is happy to provide hard copies of the report to this Committee and other members of Congress.

[4] Monica Youn, *Giving Corporations an Outsized Voice in Elections*, THE L.A. TIMES, Jan. 10, 2010, *available at* http://www.latimes.com/news/opinion/commentary/la-oe-youn10-2010jan10,0,1203910.story.

This five-vote majority on the Supreme Court has imposed a radical concept of the First Amendment, and used it to upend vital protections for a workable democracy. We must push back against this distorted version of the Constitution. We must insist on a true understanding of the First Amendment as a charter for a vital and participatory democracy. And there are other values in the Constitution, too, that justify strong campaign laws – values such as the central purpose of assuring effective self-governance. The Court blithely asserts that unlimited corporate spending poses no threat of corruption. That is simply not the case. We urge, above all, that this Committee build a record to expose the actual workings of the campaign finance system. Such a record is vital for the public's understanding, and even more to make clear to Justices in future litigation that a strong record undergirds strong laws.

1. The Political Stakes of *Citizens United*

Last week, the Supreme Court's decision in *Citizens United v. FEC* 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 voices of the voters. There is reason to believe that future elections will see a flood of corporate spending, with the real potential to drown out the voices of every-day Americans. As Justice Stevens warned in his sweeping dissent, American citizens "may lose faith in their capacity, as citizens, to influence public policy"[5] as a result.

After news of the *Citizens United* ruling sent shock waves through political, legal, and news media circles throughout the nation, some commentators took a jaundiced view, arguing, in essence, that since the political system is already awash in special-interest dollars, this particular decision will have little impact.[6] It is undoubtedly true that heretofore, 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.[7] However, the sums spent by corporations in previous elections are miniscule in comparison to the trillions 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. Now however, the *Citizens United* decision will allow corporations that wish to directly influence the outcome of

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[5] Citizens United, No. 08–205, Slip op. at 81 (Jan. 21, 2010) (Stevens, J., dissenting).
[6] *See, e.g.*, Nathaniel Persily, *The Floodgates Were Already Open*, SLATE, Jan 25, 2010, *available at* http://www.slate.com/id/2242558/; Joseph Sandler and 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.
[7] VICTORIA MCGRANE, *Lobbyists on pace for record year*, POLITICO, Dec. 22, 2009, *available at* http://www.politico.com/news/stories/1209/30882.html.

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 merely a difference in degree, as demonstrated by the following:

- In the 2008 election cycle, the nation's largest corporation, Exxon-Mobil, formed a PAC that collected approximately $700,000 in individual contributions.[8] Thus, Exxon-Mobil was limited to spending this amount on advertisements directly supporting or opposing a federal candidate. During the same 2008 election, Exxon-Mobil's corporate profits totaled more than $80 billion.[9] 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.[10]

Furthermore, corporations have demonstrated that they are willing to spend vast sums of money to influence federal politics. Since corporations have been banned from contributing to candidates and restricted in their campaign spending, their political spending has generally taken the form of lobbying.

- In the same year that it was able to raise only $700,000 for its federal PAC, Exxon Mobil spent $29 million on lobbying.[11]
- In 2008, the average expenditures in a winning Senate race totaled $7.5 million and $1.4 million for the House.[12]
- The health care industry in 2009 spent approximately $1 million per day to lobby Congress on health care reform.[13]
- During the 2008 election, all congressional candidates spent a total of $1.4 billion on their campaigns.[14] This is only 26 percent of the $5.2 billion corporations spent on lobbying during the same two-year period.[15]

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[8] Statistics on Exxon Mobile, Corp.'s Political Spending, Center for Responsive Politics, http://www.opensecrets.org/orgs/summary.php?cycle=A&type=P&id=D000000129.
[9] Exxon Mobile, Corp., 2008 Annual Report 16 at 38 (2009), *available at* http://www.exxonmobil.com/Corporate/Files/news_pub_sar_2008.pdf.
[10] CORPORATE DEMOCRACY: POTENTIAL FALLOUT FROM A SUPREME COURT DECISION ON *CITIZENS UNITED*, *available at* http://www.commoncause.org/atf/cf/{fb3c17e2-cdd1-4df6-92be-bd4429893665}/CORPORATEDEMOCRACY.PDF.
[11] Statistics on Exxon Mobile, Corp.'s Lobbying Efforts, Center for Responsive Politics, http://www.opensecrets.org/lobby/clientsum.php?year=2008&lname=Exxon+Mobil&id=.
[12] Statistics on Average Cost of Congressional Races in 2008, Center for Responsive Politics, http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&Type=W&Display=A.
[13] 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.
[14] Statistics on Total Cost of Congressional Races in 2008, Center for Responsive Politics, http://www.opensecrets.org/bigpicture/stats.php?cycle=2008&Type=A&Display=T.
[15] LEGISLATING UNDER THE INFLUENCE, *supra* n.13.

Thus, merely by diverting a fraction of their political spending budgets from lobbying to direct campaign advocacy, corporations could easily outspend the candidates themselves by a factor of many multiples. The same is true even if one factors in party spending:

- 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.[16] Thus, this single corporate-backed trade association is able to outspend the national committees of both political parties *combined.*
- According to *The Atlantic*'s Marc Ambinder, the Chamber's 2009 spending included electioneering in the Virginia and Massachusetts off-year elections, as well as "sizeable spending on advertising campaigns in key states and districts aimed at defeating health care, climate change, and financial reform legislation."[17]

Even corporations that are reluctant to throw their hat into the ring of political spending may find themselves drawn into the fray just to stay competitive in the influence-bidding arms race this decision creates.[18]

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 that absent such safeguards, special interests will attempt to use all means at their disposal to insure favorable legislative treatment.

- In 2006, the FEC levied a $3.8 million fine—the agency's largest in history—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 that corporation. Approximately 90% of those funds directly benefited the chair of the subcommittee.[19]

Moreover, corporate campaign ads may be a much more effective route than lobbying for corporations to pressure elected officials to comply with their agendas. Even the most aggressive lobbying effort cannot exert the same direct political pressure on an elected official that a campaign expenditure can. Such corporate campaigning impacts the political survival of elected officials in a way that mere lobbying cannot. An elected official might hesitate to oppose a corporation on a particular piece of legislation if she knows that the corporation could unleash a multimillion attack ad blitz in her next reelection campaign.

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[16] 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.
[17] *Id.*
[18] Supplemental Brief of the Committee for Economic Development as Amicus Curiae in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 10-16 (2009), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_ced_supp_brief_amici.pdf.
[19] Jim Drinkard, *Freddie Mac to Pay Record $3.8 M to Settle FEC Allegations*, USA TODAY, April, 18, 2006, *available at* http://www.usatoday.com/money/companies/regulation/2006-04-18-freddie-mac_x.htm.

Such an example came before the Court just last year in *Caperton v. Massey Coal Co.*[20] In that case, the Supreme Court recognized that large independent expenditures can create actual and apparent bias in the context of judicial elections. In *Caperton*, the CEO of a coal company with $50 million at stake in a case before the West Virginia Supreme Court spent almost $3 million dollars in independent expenditures in support of that candidate's campaign. Writing for the majority, Justice Kennedy, wrote 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."[21]

In *Citizens United*, the Supreme Court has handed corporate special interests a loaded weapon – whether they ever fire the weapon is, arguably, beside the point. There is every reason to believe that the threat of corporate funded campaign attack ads is likely to distort policy priorities and to allow special interests to dominate federal politics.

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. If even a few major corporations with stakes in current policy battles take the Court up on its invitation, the resulting wave of special interest money could undermine the foundations of our democracy.

2. 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 unconstitutional.[22] As Professor Richard Hasen has explained, this "deregulatory turn" represents an about-face – by contrast, the Rehnquist Court had generally taken a deferential approach to campaign finance

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[20] 129 S.Ct. 2252 (2009).

[21] *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 the holding of *Caperton* was limited to the context of judicial elections, where a litigant possesses a "due process right to a fair trial before an unbiased judge." *Citizens United*, Slip op. at 44. Justice Kennedy's reasoning, however, is patently 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 69 (Stevens, J., dissenting). If an independent expenditure campaign could create "bias" in an elected judge, then there is no reason to believe that an identical independent expenditure campaign could not create equivalent "bias" if deployed on behalf of a legislative candidate. Although Justice Kennedy is willing to uphold litigants' due process to 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.

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

reform regulations enacted by federal and state lawmakers.[23] 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."[24]

With *Citizens United*, the current Supreme Court's majority's hostility to campaign finance law has become apparent to even the most casual observer. At oral argument in *Citizens United*, Justice Antonin Scalia exemplified the majority's 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.[25]

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.[26] 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."[27] 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."[28] The Court has used its skepticism of congressional motives – based not on facts or a record below but on the 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'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, now advancing rapidly toward the Supreme Court.[29]

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[23] 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).
[24] *Citizens United*, Slip op. at 23 (Stevens, J., dissenting).
[25] Transcript of Oral Argument at 50-51, *Citizens United*, No. 08–205 (Sept. 12, 2009).
[26] *Id*. at 52.
[27] *Citizens United*, Slip op. at 23.
[28] *See* 551 U.S. at 478.
[29] *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 LAW J., Feb. 1, 2010; Mike Scarcella, *D.C. Circuit's First Shot at Citizens United*, THE NAT'L LAW J., Feb. 1, 2010.

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. Several of these challenges will be ripe for decision by the Supreme Court within the year.

This Committee has an important role to play in helping to create a factual record that would correct unfounded assumptions about money and politics embedded in the Court's decisions, and could be useful in defending both new and existing reforms against judicial overreaching. In addition, we urge the Committee to endorse several reforms to counter the impact of Citizens United – supporting public financing of congressional and presidential elections; enacting federal voter registration modernization legislation; and enacting federal legislation that requires shareholder approval for corporate political spending, as well as effective disclosure of such spending.

3. 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 such 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 Professor Gerald Gunther famously noted , such a non-deferential standard of review is often considered "'strict' in theory and fatal in fact."[30] However, campaign finance reform laws have survived the application of strict scrutiny in the past,[31] 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 *Citizens United*, the Supreme 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, requesting reargument on 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

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[30] 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).

[31] 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 percent of cases. *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 845 (2006).

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, as was pointed out by BCRA's congressional sponsors, in deciding this landmark case, the Court lacked a developed factual record on key factual issues, including (1) whether corporate independent expenditures posed similar risks of corruption as direct corporate donations to parties and candidates;[32] (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.[33] Rather than remanding to the district court for development of these central factual issues, the majority simply enacted its own assumptions about political and financial behavior into law, as we explain at greater length below.

The Brennan Center urges this Committee – perhaps jointly with other interested Committees – to hold hearings to create a record demonstrating how the Supreme Court majority has distorted the political reality of how money in politics threatens to erode democratic values. Making such a record – and shining the public spotlight on the faulty assumptions that underlie the Court's deregulatory agenda – would prove valuable for the defense of existing reforms and the enactment of new democratic safeguards, for the development of constitutional doctrine, and for the public's understanding of money in politics. While Congress cannot directly repair the damage done by the Court's distortion of the First Amendment, hearings like those we suggest could provide a critical forum to demonstrate that the approach taken by this Court is a dead-end for democracy and to point a better way forward.

A. Connecting the Dots between Corporate Political Spending and Corruption

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

> [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?[34]

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[32] Although 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, Slip op. at 45 (citing *McConnell v. Federal Election Comm.*, 251 F.Supp.2d 176, 555–557 (D.D.C. 2003) (opinion of Kollar-Kotelly, J)), 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.

[33] Supplemental Brief of Amici Curiae Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan in Support of Appellee, *Citizens United v. FEC*, No. 08-205 at 9-10 (2009), *available at* http://www.fec.gov/law/litigation/citizens_united_sc_08_mccain_supp_brief_amici.pdf.

[34] Transcript of Oral Argument at 50.

The *Citizens United* majority did not wait for these questions to be answered. Instead of remanding to a lower court for a factual determination on the nexus between corporate independent expenditures and political corruption, the *Citizens United* majority simply assumed that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[35] By reaching this conclusion, the Supreme Court has constitutionally enshrined what Senator John McCain has described as the Court's "extreme naïveté"[36] regarding the influence of corporate money in politics. Even in the absence of a developed factual record, examples from the real world of money and politics cast doubt upon the Court's premature conclusion:

- In a 2006 house election in California, 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.[37]
- 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 the $1 million on independent expenditures in support of a state controller who opposed the creation of a free-on-line tax preparation program for California residents.[38] The candidate himself spent only slightly more than $2 million on his own campaign.[39]
- 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.[40]

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[35] *Citizens United*, Slip. Op. at 45.

[36] *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.

[37] 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.

[38] *See* Campaign Finance Reports for Intuit and Alliance for California Tomorrow, *available at* http://cal-access.ss.ca.gov/default.aspx; Dennis J. Ventry Jr., *Intuit Uses Clout to Stymie State Innovation*, SACRAMENTO BEE, Oct. 6, 2009, *available at* http://www.sacbee.com/1190/story/2233219.html.

[39] Campaign Finance Reports for Tony Strickland's Candidate Committee, *available at* http://cal-access.ss.ca.gov/Campaign/Candidates/Detail.aspx?id=1005462&session=2005.

[40] HIDDEN RIVERS (Center for Political Accountability 2006), *available at* http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/932 at 13; JOHN R. WILKE, *Microsoft Is Source of 'Soft Money' Funds Behind Ads in Michigan's Senate Race*, WALL STREET JOURNAL, Oct. 16, 2000.

- There is also ample reason to believe that in states that allow corporate independent expenditures, this loophole is used 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.[41]

Fortunately, the Court has left a door open for Congress to craft narrow regulation over corporate expenditures so long as such regulation is based on a strong factual showing of the relationship between such expenditures and corruption. Despite its assumption regarding corruption and independent expenditures, the Court in *Citizens United* 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."[42] Thus, a potential response to *Citizens United* is for Congress to convene hearings to investigate the link between corporate independent expenditures and the creation of political debt.

There is precedent for such a record. As demonstrated by the Court's decisions in *McConnell v. Federal Election Commission*[43] and *Caperton*, the Supreme Court is willing to find that corporate political spending and independent expenditures can lead to actual or apparent corruption where there is 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 connections between 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 the adequacy of disclosure laws to safeguard democratic values against subversion. Justice Kennedy's argument that limits on corporate political spending are unnecessary is premised upon his unsupported assumption that disclosure laws allow both the electorate and corporate shareholders make informed decisions and give proper weight to different speakers and messages.

> 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

[41] CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, *supra* n. 38.
[42] *Citizens United*, Slip Op. at 45.
[43] 540 U.S. 93 (2003).

> 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.[44]

Unfortunately, Justice Kennedy's vision of transparency and free flow of information bears no relation to what occurs in real life.[45] In fact, in today's political environment, corporations regularly hide behind false names to disguise their true identity and agenda:

- 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. Another group called "Littleton Pride" spent $35,000 in support of the prohibition. When the disclosure reports for these groups were filed, however, voters discovered that "Littleton Neighbors" was not a grassroots organization but a front for Wal-Mart —the group was, in fact, exclusively funded by Wal-Mart. Behind a grassroots facade, Wal-Mart was able to outspend "Littleton Pride," a true grassroots group, by a 5:1 ratio.[46]
- As the record in *McConnell* demonstrated, corporations commonly veil their political expenditures with misleading names —the "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.[47]

The majority's assumption that corporate political spending must be disclosed to shareholders or the public at large 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.[48] In short, corporate managers could be using shareholder funds for political spending, without the knowledge or consent of investors.

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[44] *Citizens United*, Slip Op. at 55 (citations omitted).

[45] 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), https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1.

[46] Def.'s Response Br. to Pls.'s Mot. for Summary Judgment, *Sampson v. Coffman*, 06-cv-01858 at 43-44 (D. Co. 2007) (Dkt. #34).

[47] *See* 540 U.S. at 128, 197.

[48] *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.").

1. Giving Shareholders a Voice

The Brennan Center has proposed a remedy to this disclosure gap in our recently-issued report *Corporate Campaign Spending: Giving Shareholders a Voice*.[49] We suggest two specific reforms: first, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require 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 deliberated choices at the polls. The report includes model legislation toward to effectuate the proposed reforms, and we urge Congress to consider this legislation as soon as possible.

2. Empowering Voters Through Disclosure

After the Supreme Court's decision in *Citizens United*, 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 disclosure of 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.[50] The Supreme Court has already granted *certiorari* in *Doe v. Reed*, a case brought by the same lawyers who brought *Citizens United*, and the case will be fully briefed this spring.[51] Although that case, which involves the disclosure of ballot petition signatures, does not implicate campaign finance disclosures directly, 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 against the plaintiffs' challenge, and expressly affirmed the importance of disclosure as a means of "'provid[ing] the electorate with information' about the sources of election-related spending." [52] Even while upholding these disclosure requirements, however, the majority opinion dropped several hints that could provide opponents of disclosure with a roadmap to 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.[53] 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.

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[49] *See* Torres-Spelliscy, *supra* n. 3.
[50] *See* Kirkpatrick, *supra* n.28.
[51] *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009), *cert. granted*, __ S.Ct.__, 2010 WL 144074 (2010) (No. 09-559).
[52] *Citizens United*, Slip op. at 52 (quoting *Buckley v. Valeo*, 424 U. S. 1, 66 (1976)).
[53] *Id*. at 54-55.

However, to strike down valuable disclosure laws on constitutional grounds in order to guard against harassment would be using "a sledgehammer rather than a scalpel."[54] A better tailored approach would use more robust 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.[55] Many of the PAC restrictions that the Court found to be unconstitutionally burdensome – appointing a treasurer, keeping records, and making detailed reports of expenditures – are nothing more than disclosure requirements under another name. The Court assumed the existence of an unconstitutional burden despite the absence of any factual record demonstrating any "chill" or other harm. Using this same rationale, the Court could potentially find that compliance with disclosure laws is burdensome in practice and therefore unconstitutional as applied, while upholding the principle of disclosure in theory.

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 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 and Kennedy's questions at oral argument, the *Citizens United* majority appears to be under the impression 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 decisionmakers.

> 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.[56]

Not surprisingly, the Court cites 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 notes in dissent:

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[54] *Id*. at 7 (Stevens, J., dissenting).
[55] *Id*. at 21.
[56] *Citizens United*, Slip. Op. at 38-39 (citations omitted).

> 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.[57]

In short, the majority bases its censorship analysis on nothing other than the personal views of five justices.

Congress can play an important role by developing a factual record regarding the means available to corporations seeking to advance a political agenda, short of direct electoral support for or opposition to a particular candidate. Moreover, Congress can combat the myth that campaign finance regulations are means for incumbent politicians to insulate themselves against challengers. Indeed, 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.[58]

4. Enhancing First Amendment Values by Empowering Voters

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."[59] 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."[60] 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. Candidates can proudly run "clean" elections, leaving voters assured that their interests – rather than special interests – will be faithfully represented.

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 Rep. 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

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[57] *Id*. at 90 (Stevens, J., dissenting).

[58] *See* Transcript of Oral Argument at 50-51; Ciara Torres-Spelliscy, Kahlil Williams, Dr. Thomas Stratmann, ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS (The Brennan Center for Justice 2009). To aid legal development in this area, Brennan Center will release two scholarly reports this spring: the first will focus on the real-world impact of public financing systems upon competitiveness, diversity, and fundraising behavior; and the second will provide an in-depth analysis of the New York City multiple matching funds system, the nation's longest running and most successful public financing program. We hope that these two reports will provide valuable substance to the policy debates surrounding the benefits of campaign finance reform, and we would welcome Congressional hearings on these issues.

[59] *Citizens United*, Slip Op. at 45.

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

encouraging candidates to seek donations from a large number of voters, such programs encourage broad participation in the election process.

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 state awards funds to qualified publicly-financed candidates.[61] Courts, agreeing that public financing furthers First Amendment values, have consistently upheld such systems against constitutional challenge.[62] 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*, 128 S.Ct. 2759 (2008), has cast doubt on this previously well-settled area of the law. As a result, lawsuits challenging the public funding programs in Connecticut and Arizona are pending before the Second and Ninth Circuits respectively; and two new challenges were recently launched in Wisconsin, once again by the same opponents of reform who brought the *Citizens United* lawsuit.[63]

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."[64] 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

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[61] 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.

[62] *See North Carolina Right to Life Comm. Fund v. Leake*, 524 F.3d 427 (4th Cir. 2008), *cert. denied by Duke v. Leake*, 129 S.Ct. 490 (Nov. 3, 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).

[63] Matching fund provisions were struck down at the district court level in Connecticut and in Arizona. *See Green Party v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. Aug. 27, 2009), *argued* (2d Cir. Jan. 13, 2010); *McComish v. Brewer*, No. CV-08-1550 (D. Ariz. Jan. 20, 1010), *appeal docketed* (9th Cir. Jan. 26, 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*, 09-cv-764 (W.D. Wi. 2009); *Koschnick v. Doyle*, 09-cv-767 (W.D. Wi. 2009).

[64] Eric Holder, Attorney General, Remarks at the Brennan Center for Justice Brennan Legacy Awards Dinner on Indigent Defense Reform (Nov. 16, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html.

adopted internet registration; at least nine have implemented parts of automated registration; eight others have permanent registration; and another eight have Election Day registration.

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.

Conclusion – Advancing A Voter-Centric View of the First Amendment

Perhaps the most troubling aspect of *Citizens United* – worse than its political implications, 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."[65] 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 the voting citizenry.[66] 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."[67] 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.[68]

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[65] *Citizens United*, Slip Op. at 23.

[66] 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 38. *See also id*. at 35-37 (finding differential treatment of media corporations and other corporations troubling); 38-40 (worrying that "smaller corporations may not have the resources" to lobby elected officials like larger corporations); 43 ("'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.'" (quoting Kenndy, J., dissenting in *McConnell*, 540 U. S. at 297)).

[67] *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").

[68] *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. National Right to Work Comm.*, 459 U.S. 197, 560 (1982) (balancing corporate

It is crucial that this Committee, and Congress, 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 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."[69]

In this post-*Citizens United* era, a robust legislative response will be critical. It is similarly imperative, however, that we reframe our constitutional understanding of the First Amendment value of deliberative democracy. In the longer 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.

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interests against the value of promoting "the responsibility of the individual citizen for the successful functioning of that process").

[69] *Shrink Missouri*, 528 U.S. at 400.