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Before the Committee on House Administration

Congressional Forum on Campaign Finance

April 18, 2012

Distinguished committee members, thank you for this opportunity to provide my views on significant changes that have occurred in campaign finance law and practice over the past two years, since the Supreme Court's landmark decision in *Citizens United v. Federal Election Commission* (FEC) and the D.C. Circuit Court decision built upon it, *SpeechNow v. FEC*.

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization founded in 2002 that works in the areas of campaign finance, elections and government ethics. The Legal Center offers nonpartisan analyses of issues and represents the public interest in administrative, legislative and legal proceedings. The Legal Center also participates in generating and shaping our nation's policy debate about money in politics, disclosure, political advertising, and enforcement issues before the Congress, the FEC, the Federal Communications Commission (FCC) and the Internal Revenue Service (IRS). The Legal Center's President is Trevor Potter, former Chair of the FEC, and our Executive Director is Gerry Hebert, former acting head of the Voting Section of the Civil Rights Division at the Department of Justice. I serve as Senior Counsel at the Legal Center and have more than a decade of experience practicing election law.

Citizens United* and *Speech Now

The Supreme Court in *Citizens United* based its decision to unleash a flood of corporate money into U.S. election on two faulty assumptions. First, the Court wrongly assumed that such funds would be spent "independently" of candidates and, therefore, could not give rise to corruption or the appearance of corruption. Second, the Court assumed that the source of such funds would be disclosed, permitting "citizens and shareholders to react to the speech of corporate entities in a proper way" and enabling the "electorate to make informed decisions and give proper weight to different speakers and messages."

Several months after the *Citizens United* decision, the Supreme Court's faulty assumptions were compounded by the D.C. Circuit Court of Appeals in *SpeechNow*, when it relied on *Citizens United* and held that if independent expenditures cannot give rise to corruption, then contributions to groups making such expenditures cannot be limited. The *SpeechNow* decision gave birth to "Super PACs."

I welcome the opportunity to discuss with you today the *Citizens United* Court's faulty assumptions and how they are playing out in the elections currently underway. Specifically, I will detail how current laws and regulations, combined with a dysfunctional FEC, have made this year's elections a "Wild West" of money in politics.

Super PACs

The ability of Super PACs to accept unlimited contributions, including contributions from corporations and labor unions that had for decades been off-limits for federal political committees, poses a serious threat of corruption in U.S. elections. Notwithstanding the Supreme Court's promise that the corporate money it was unleashing would be spent independently of candidates, current laws have been interpreted by the FEC to allow very close relationships between Super PACs and candidates.

Coordination Rules

Congress, in passing the McCain-Feingold law in 2002, ordered the FEC to rewrite its long-ineffective coordination rules. The FEC's coordination rules (11 C.F.R. § 109.21) responding to the mandate of Congress were woefully, and some would argue intentionally, inadequate. They have twice been invalidated by federal courts in two separate lawsuits brought by former Representatives Shays and Meehan over the past decade and remain ineffective today.

Many assume that the coordination rules regulate and restrict general interaction between candidates and outside groups, but instead, current coordination rules regulate only discreet expenditures—discreet ad buys, for example—made by outside groups. Current coordination rules accommodate close personal relationships and regular interaction between candidates and individuals operating Super PACs wholly dedicated to electing those candidates. Indeed, the most prominent Super PACs today are operated by friends and former employees of the candidates they support. And we have seen prominent funders of Super PACs closely involved with candidate campaigns.

Solicitation

The McCain-Feingold law prohibits candidates and officeholders from soliciting unlimited funds, as well as corporate and union funds in any amount—so-called "soft money"—in connection with any election.

However, last year the FEC nonsensically ruled in an advisory opinion (AO 2011-12, Majority PAC) that candidates and their staff may attend, speak and be featured guests at Super PAC fundraising events without violating the soft money solicitation ban—so long as they do not make the actual pitch for unlimited contributions.

Threat of Corruption

The FEC's failure to effectively regulate soft money solicitation and coordination between Super PACs and candidates has allowed the rise of candidate-specific Super PACs operating as shadow campaign committees fueled by soft money. The close relationships between Super PACs and candidates fall far short of the "independence" likely envisioned by the *Citizens United* Court. And unlimited contributions to candidate-specific Super PACs pose precisely the same threat of corruption posed by unlimited contributions directly to candidates.

501(c) Organizations

The *Citizens United* Court's second faulty assumption was that disclosure laws would provide voters with the information needed to hold corporate America accountable for its political activities and to make informed decisions on election day.

Section 501(c)(4) organizations like Crossroads GPS, as well as 501(c)(6) organizations like the U.S. Chamber of Commerce, will likely spend hundreds of millions of dollars on election ads this year without disclosing their donors. Indeed, such tax-exempt corporations will likely play

an even bigger role in this year's elections than Super PACs—precisely because they offer donors anonymity.

This explosion in use of such tax-exempt entities to evade campaign finance disclosure laws was entirely predictable at the time of the Supreme Court's decision in *Citizens United*.

FEC-Created Disclosure Loopholes

Back in 2007, the FEC promulgated a rule (11 C.F.R. § 104.20(c)(9)) gutting the McCain-Feingold law's donor disclosure requirement for "electioneering communication." Whereas the statute (2 U.S.C. § 434(f)) requires groups that spend more than $10,000 in a year on electioneering communication to disclose the names of "all contributors who contributed . . . a $1,000 or more" to the group, the FEC's rule only requires disclosure if the donor gave their funds "for the purpose of furthering electioneering communications." Under the FEC's rule, donors to 501(c)(4) groups have simply refrained from designating their contributions for the specific purpose of funding electioneering communications and, therefore, have evaded disclosure.

Last year Representative Van Hollen sued the FEC challenging this 2007 regulation and, several weeks ago, prevailed in his challenge before a federal district court. However, an appeal is pending and it is unlikely that the FEC will act anytime soon to comply with the court's order. The Campaign Legal Center is proud to be part of the legal team representing Representative Van Hollen.

A similar hole exists in the disclosure law and regulation pertaining to "independent expenditures" (2 U.S.C. § 434(c)(2)(C) and 11 C.F.R. § 109.10(e)(1)(vi)).

The Campaign Legal Center urges Congress to enact the DISCLOSE Act of 2012, which would close these loopholes and dramatically improve our federal campaign finance disclosure laws.

Tax Law Disclosure Loopholes

Section 501(c)(4) of the Internal Revenue Code establishes tax-exempt status for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare…." (26 U.S.C. § 501(c)(4)). Internal Revenue Service (IRS) regulations make clear that spending to influence candidate campaigns does not constitute "promotion of social welfare." (26 C.F.R. § 1.501(c)(4)-l(a)(2)(ii))

The courts, however, have held that section 501(c)(4) organizations are permitted to engage in an "insubstantial" amount of activities that do not further their exempt purposes—including candidate election intervention.

The IRS has interpreted these court decisions allowing "insubstantial" candidate election activities by 501(c)(4)s to allow such organizations to intervene in candidate elections as long as such campaign activities do not constitute the "primary" activity of the organization. (26 C.F.R. § 1.501(c)(4)–1(a)(2)(i))

These regulations are commonly interpreted by practitioners to allow section 501(c)(4) organizations to engage in substantial candidate election intervention—as much as 49 percent of the organization's activities—so long as such activity does not constitute the organization's "primary" purpose.

Importantly, section 501(c)(4) groups are not required by tax law to disclose their donors to the public. Consequently, 501(c)(4) groups have become attractive vehicles for spending millions of dollars on election ads without having to reveal the identities of donor who would rather stay hidden from public scrutiny.

Many newly-created 501(c)(4) groups—including Crossroads GPS, the American Action Network, Americans Elect and Priorities USA—clearly have the overriding purpose of influencing candidate elections and should be deemed ineligible for their claimed tax-exempt status under section 501(c)(4).

The Campaign Legal Center urges Congress to amend the federal tax code to make clear that 501(c)(4) groups may not engage in more than an "insubstantial" amount of candidate election spending, and defining "insubstantial" using a bright-line ceiling on campaign expenditures of no more than 10 percent of an organization's total annual expenditures.

Conclusion

Thank you for the opportunity to testify before you today.