

I suspect much of what we will hear today at this hearing will be repetitions of the sorts of erroneous statements that none other than President Obama made about the Citizens United decision during his 2010 State of the Union address in which he opined, “The Supreme Court reversed a century of law that I believe will open the floodgates of special interests, including foreign corporations, to spend without limit in our elections.”

Every clause of that sentence was incorrect. Citizens United didn’t reverse a century of law. The Tillman Act of 1907 banned corporate donations to campaigns, and such donations remain banned. Citizens United overturned a 1990 precedent that allowed banning independent spending by corporations, which was itself a stark anomaly in our First Amendment law, as it was the only time the Court had allowed a restriction on political speech for a reason other than the need to prevent corruption.

Second, the “floodgates of special interests” weren’t opened. Instead, dams preventing the free flow of speech were removed. We may not always like that speech, but that is what the First Amendment is about. As Professor Brad Smith, whom we will hear from today, explained recently, “The New York Times accused the justices in Citizens United of having paved the way for corporations to use their vast treasuries to overwhelm elections and thrust back to the robber baron era of the 19th century.” A decade later, most spending comes from the same place it always has, and that is individuals who donate directly to candidates up to legally limited amounts. Corporations contribute well under 10 percent of Federal political spending. Their voice is not dominant, and voters have a right to hear it.

Third and finally, Citizens United said nothing about foreign corporations spending in political campaigns. Indeed, in 2012 the Supreme Court explicitly upheld such restrictions in *Bluman v. Federal Election Commission*. Obviously, there is a lot of misunderstanding and misinformation and even, dare I say, fake news circulated about the Supreme Court’s Citizens United decision. But I expect at least part of today’s discussion may help us correct those misinterpretations, and I look forward to hearing from all of our witnesses here today.

I am going to apologize in advance before I yield back. A lot of us have multiple things going on this morning, so we may be in and out, but it is not a reflection on our view of the importance of this subject matter and this hearing.

I yield back. Thank you.

Mr. COHEN. Thank you, Mr. Johnson.

Now, Mr. Nadler, who is not present, gave us a statement for the record, and we thank Chairman Nadler for his participation in other ways.

[The information follows:]

MR. COHEN FOR THE OFFICIAL RECORD

Statement of the Honorable Jerrold Nadler for the Hearing on “*Citizens United* at 10: The Consequences for Democracy and Potential Responses by Congress” Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties

**Thursday, February 6, 2020 at 10:00 a.m.
2141 Rayburn House Office Building**

I apologize that I was not able to be here earlier to hear from the witnesses, but I want to thank them all for participating.

Before I ask my questions, I want to note that almost 10 years ago to the day, as the Chairman of this Subcommittee at the time, I convened a hearing in the wake of the Supreme Court’s disastrous decision in *Citizens United*. In that hearing, I expressed the concern that this decision posed a great threat to our democracy. Unfortunately, developments over the past 10 years have only borne out my concerns. As a result of *Citizens United*, our political system is now awash in a flood of dark money—primarily from a handful of wealthy donors—which has proven to be corrosive to our democracy.

In effect, *Citizens United* handed a giant megaphone to corporations and the extremely wealthy, which has enabled them to drown out the voices of everyone else and to have an outsized influence on our political system.

Without addressing the impact of *Citizens United*, our democracy will further find itself at the mercy of large moneyed special interests. I am very concerned that the history books may eventually say that, like the Roman Republic, the United States had a good 200 to 250-year run at democracy, and then it degenerated into an oligarchy like all the rest. We must not let that happen.

Now I want to ask our distinguished witnesses a few questions.

Mr. COHEN. Does Mr. Collins have a statement to enter? No?

We welcome our witnesses and thank them for participating. Our first panel will be made up of members of Congress who worked hard on this issue. I will introduce each witness, and after the introduction I will ask them for their testimony.

Your written statement will be entered into the record in its entirety, and you get 5 minutes, and you know the rules of the 5 minutes and the lights.

The first witness is Representative Ted Deutch. Representative Deutch represents the 22nd Congressional District in the State of Florida. He is the Chairman of the House Ethics Committee, Chairman of the House Foreign Affairs Subcommittee on the Middle East, North Africa, and International Terrorism, and a long-time member of this House Judiciary Committee.

He is a co-sponsor or the prime sponsor of H.J. Res. 2, a proposed constitutional amendment that would effectively overturn the Citizens United decision and permit Congress and the states to regulate campaign finance.

Mr. Deutch, you are recognized for 5 minutes.

STATEMENT OF THE HON. THEODORE E. DEUTCH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. DEUTCH. Thank you. Before I begin my testimony, Mr. Chairman, I ask the following documents be included in the record: written testimony of bipartisan advocates from around the country, including Jeff Clement, President of American Promise; John Pudner, the Executive Director of Take Back Our Republic; Jim Rubens, the former Republican New Hampshire state senator; as well as business executives, farmers, educators, health workers from Ohio, New Jersey, Michigan, California, Tennessee, Pennsylvania, and Kansas.

Mr. COHEN. Without objection.

Mr. DEUTCH. Thank you.

[The information follows:]

MR. DEUTCH FOR THE OFFICIAL RECORD

Mr. Deutch for the record – Jeffrey D. Clements, Harvard Law Review article:

<https://docs.house.gov/meetings/JU/JU10/20200206/110456/HHRG-116-JU10-20200206-SD009.pdf>



I'm a conservative against Citizens United

BY JOHN PUDNER, OPINION CONTRIBUTOR — 01/20/20 04:00 PM EST
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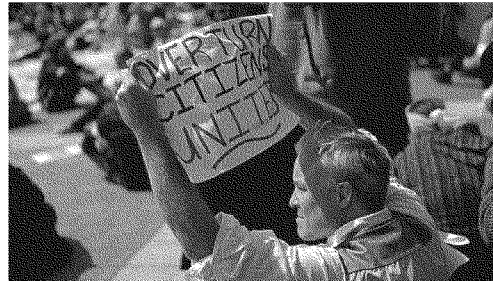
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© Greg Nash

Tomorrow is the 10th Anniversary of the Citizens United decision. Today I'm taking the stage in Washington, D.C., with a bunch of national leaders who argue with me regarding my support of the Electoral College, voter ID laws and opposition to impeachment.

If background music were played when I took the microphone outside the United States Capitol, perhaps the theme should be the old "Sesame Street" song:

One of these things is not like the others.

One of these things just doesn't belong.

And yet, I believe opposition to the far-reaching Citizens United decision is consistent with conservative views across the board.

Conservatives believe that true capitalism is the best supplier of human needs, and proven much more effective than alternatives from communism in Russia to socialism in Venezuela. We cannot continue to support a Citizens United decision that trades competition in the marketplace for the government picking winners and losers based on run

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away, pay-for-play politics.

Conservatives believe that basic religious values Bill Bennett laid out in the Book of Virtues, shared by faithful Christians, Jews and yes Muslims and other religions throughout history is essential for a democratic republic to function. We cannot continue to support an activist Supreme Court inventing rights such as corporations are people that no one from the Founders through almost 200 years judges saw - even while criticizing activists judges in cases we believe attack religious values.

Conservatives believe government closest to the people is usually best, and state legislatures can better determine what laws are needed or not needed based on the situation in their state. We cannot continue to support this decision that now leads others to strike down state laws aimed at stopping corruption in pay for play deals that have stripped farmers of the rights to what is below their land at the bidding of big out of state political donors.

Conservatives believe our military makes the U.S. a force for good far more often than for bad. We cannot support this decision that let's huge anonymous donations from government contractors steer U.S. military policy that puts America's finest in harm's way.

And let's cut to the chase, some conservatives understand all the reasons Citizens United was bad judicial activism, but support it as a means to justify the ends of electing more Republicans. Republicans did benefit from the decision the first several years, but this is no longer the case. Republicans will not win a bidding war with Tom Steyer, Michael Bloomberg and George Soros.

President Trump won in 2016 despite being outspent 2-to-1. In 2018, for the first time there was more dark money on the left than on the right. Nate Silver pointed out the money advantage gave Democrats a far bigger majority in the House than they would have otherwise won. Some say they would rather have the money than the issue - but Republicans are handing Democrats both if they side with the 20 percent of people who support the Citizens United decision.

Even while President Trump became the only first term President besides FDR to defeat four opposition incumbent U.S. senators in his first mid-term, Jon Tester won conservative Montana by touting his support from a group called End Citizens United at every stop on the campaign trail to win over Trump supporters who wanted to drain the swamp.

In Virginia, Republicans were confident of holding the House and Senate last summer, but called me in the fall to tell me they could not hold against the overwhelming money against their candidates.

The Citizens United decision is bad politics for conservatives, but more important, it is bad policy.

John Pudner is Executive Director of TakeBack.org and ran faith-based coalition efforts for Bush 2000.

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Written Testimony of Alan LaPolice
Manhattan, Kansas

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

*Hearing on Citizens United at 10: The Consequences for Democracy
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February 6, 2020

I am a Kansas educator, veteran, farmer, former candidate for Kansas' 1st Congressional District and a member of American Promise. Thank you for holding this extremely important hearing, which I hope will advance an amendment to the U.S. Constitution urgently needed to address the crisis of unlimited money in our political system.

As an educator and father, I am dedicated to creating a future in which my kids, along with your kids and everybody else's kids, have the promise of life, liberty and happiness, and the hope that democracy brings.

As a United States Army combat veteran, I want to ensure that the government of the nation that my fellow servicemembers and veterans have fought and died for is one that represents the voices of Americans, not wealthy special interests, including foreign powers. No one who's ever answered the call and worn the uniform has ever fought for corporations or moneyed interests--we fought for the people of this great nation. We didn't take an oath to defend a rigged political system, we took an oath to defend the Constitution.

As a farmer and Kansan, I want to see my fellow independent family farmers have a seat at the table when decisions are made that affect the nation's food supply. My experience in politics has made concrete my belief that if we the people don't remove, or at least reduce, the toxic, corrupting power of money in politics, we can be all but certain that we won't keep our promise to future generations.

We are at an inflection point in the progression of this great nation. Voter participation and trust in government are at historic lows. But we are an incredibly resilient nation. We've overcome so much and we've always done it as one nation—indivisible and strong. I believe by working together we can once again rebuild our own government, modeled after our modern, inclusive and diverse society. We can aspire to live up to the words of the founding fathers and build a more perfect union. That is why I support a Constitutional amendment and urge Congress to work together to pass this essential Amendment and return it to the states for ratification.

Written Testimony of Carole Ortenzo
Norman Oklahoma/McMurry, PA

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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February 6, 2020

My name is Carole Ortenzo, and I live in McMurray, PA, about one mile from the home of my representative, Congressman Guy Reschenthaler. I am a retired Army surgeon and had the privilege of serving and providing care for our active duty soldiers, retirees, and their dependents for 25 years.

I am also a member of American Promise, a cross-partisan non-profit organization whose goal is to have ratified a U.S. Constitutional amendment to eliminate big money in politics and, thereby, its influence over our lawmakers. Corporations, labor unions, PACs, and the very wealthy dominate political campaigns for access and influence. This unlimited and often undisclosed, or dark, money dilutes the impact of small donors and diminishes their voices and their votes.

I support HJ Res 2 and the premise of a Constitutional amendment to rectify this issue because, this way, the law could not be overturned. The amount of money being spent on campaigns is obscene and, worse yet, it continues to increase each year. Big money has been allowed to impact virtually every aspect of our government. We need to put a stop to it once and for all, and we need to make the solution permanent. Therefore, we need a U.S. Constitutional amendment.

As you are all acutely aware, one major issue for which people want real change is health care. When I served as a surgeon in the Army, our top priority at all times was patient care. Providing care for our active duty population was a given, and whether or not any of the dependents or retirees had some form of outside health insurance was a secondary consideration. Medication costs were a non-issue for our patients. Even when we required very specialized, and often expensive, medications that were not on the formulary, we found a way to procure them without burdening the patient. We took care of our patients for the love of providing patient care. What we might be paid for performing a certain surgery never entered our minds because we were paid the same regardless of the number or types of surgeries we performed. Being part of the military healthcare system was not a way to get rich. But, it was a way to practice medicine without the burden of wondering whether or not our patients could afford their care. Yes, we had to work within a budget. But, we also had freedom to provide high-quality health care without big-money interests trying to influence how we provided that care.

I'm sure Congressman Reschenthaler and anyone else here who served appreciates the stark difference between how the military and the civilian medical systems are run. While there are different theories about how best to address the costs of health care in the U.S., one thing is for

certain. People want change. And, if we don't end the financial influence that pharmaceutical companies and insurance companies have over our lawmakers, nothing is going to change.

Another important aspect of HJ Res 2 is that it will significantly decrease the amount of money needed to run a campaign, particularly for a contested race. As a result, lawmakers would enjoy respite from constant fundraising. Secondly, fundraising would no longer be built into lawmakers' schedules, thus allowing them more time to do the job for which they were elected. And, thirdly, eliminating big money in politics will free lawmakers from being beholden to their financial backers and voting in their best interests rather than those of their own constituents.

I can assure you that, where I live, the thought of ratifying a constitutional amendment to end big money influence in government is viewed as a monumental challenge but also something worth fighting for. Members of our community who are Republicans, Democrats, and Independents are ready to show their support. Their specific reasons may vary, but there is one we all share. We, in the swing state of PA, are sick of the perpetual political ads leading up to every general election. The candidates feel compelled to spend untold amounts of money airing these ads, and the people do not want to see them. While the TV stations profit handsomely, we mute our TVs because the ads quickly become irritating and because we don't know which ones are funded by dark money and, therefore, may be completely devoid of fact. The money spent on TV ads alone could make a significant impact if redirected to serve the people.

Another demonstration of cross-partisan support is that I have been working with my Republican state representative, Natalie Mihalek, to have a law that supports this constitutional amendment introduced in the PA House of Representatives. She told me she was stunned when she learned how much money she would have to raise for her campaign and immediately thought of all the other things that could be done with that amount of money. The Democratic Minority Leader in the PA House of Representatives has also pledged his support. Moreover, one of our Republican county commissioners, who was just elected in 2019, spoke with me on two occasions during his campaign about his support for such a constitutional amendment. Our Democratic county commissioner supports this legislation as well, and I hope to have a county resolution in favor of this bill passed in the coming months.

I want to thank you for the opportunity to present my views to this subcommittee and for moving this amendment forward. I encourage you to work together to pass this resolution and return it to the states for ratification.

Written Testimony of Chet Hunt

Knoxville, Tennessee

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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I am a retired City Manager and Adjunct Professor, a father and grandfather, a Vietnam veteran, and a founding member of American Promise Association of Knoxville. I helped found this organization because I believe we as a nation are once again facing a dreadful menace, one that threatens the very ideals on which our nation was founded. It is the terrible error of judgment in the 2010 Supreme Court decision in *Citizens United v FEC*, which spawned a plague of greed and corruption that is now spreading throughout our governing institutions and infecting the very fabric of our society. The unbridled flow of money from the wealthiest among us, with both foreign and domestic origins, is strangling our political process and creating a pit of paid obstructionists in Congress. The relentless corporatization of our democracy for the self-interests of the few must be halted so "we the people" can speak as free and equal citizens. We must have a 28th Amendment to the Constitution that restores American democracy, ensures the integrity of free and fair elections, and protects both state and federal reform processes as our founders prescribed in Article V of the U.S. Constitution. The framers of the Constitution intended for the Congress of the United States to be dependent on the American people, not on powerful special interests, or third-party groups masquerading as philanthropic organizations, or Super PACs that stealthily channel unlimited amounts of anonymous "dark money" to engineer our elections and pervert our democracy. This is why we must, without waver, advance the 28th Amendment to restore political integrity and equality of citizenship now and forever. I am committed to the demand for a 28th Amendment to expel the corrupting influence of big money in politics, and I urge you to join me by passing this Amendment and returning it to the states for ratification. The times have found us and we must do what needs to be done.

Written Testimony of Devin Hiett
Norman Oklahoma/San Antonio, Texas

U.S. House of Representatives
Committee on the Judiciary
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I'm Devin Hiett, a 2019 graduate from the University of Oklahoma with degrees in international studies and journalism. I am a volunteer with American Promise and attended 2019 Lobby Day in Washington, D.C., to talk with my elected officials about the 28th Amendment on behalf of myself and my fellow students. I am involved in this organization because I believe we are at a critical time in American history that requires us to take swift, substantive action on the myriad issues plaguing our democracy. My voting generation realizes this, and we realize how important our participation in the political system is. Yet, in the 2016 presidential race, people between 18 and 29 made up just 13 percent of the electorate. This isn't because young voters are apathetic or ignorant about the issues. In fact, recent polling of younger voters from the Harvard Kennedy School's Institute of Politics found that when young people don't vote, it's largely because they believe their vote doesn't have the power to bring about meaningful change—and they're right. A study from Princeton University found that public opinion has a "near-zero" impact on public policy.

I know passing a constitutional amendment is a significant undertaking. But I believe if young voters like myself want to see substantive action on the issues we care about most—fighting climate change, reducing student loan debt, controlling the spread of guns, and reforming immigration policy—we must radically decrease the influence of big money in our political system. Young Americans are passionate and want to work together for systemic change, and if we want our generation to become engaged voters, we have to make their votes count by tackling legalized corruption. A 28th Amendment is our best hope of accomplishing this and restoring our democracy, our environment, and our futures. On behalf of myself and others of my generation, I thank you for moving this amendment forward and encourage Congress to work together to pass the amendment and return it to the states for ratification.

Written Testimony of Elizabeth Doty
San Francisco, CA

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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As a business consultant who has spent nearly three decades working with C-Suite leaders on how to live company purpose and values in practice, I understand the many factors that affect the long-term health of our American economy and the value that creates for our society. My company, Leadership Momentum, is focused specifically on helping companies deliver on their most important commitments to customers, employees, shareholders & the world.

One of our most important commitments as business leaders is to support healthy competition and a thriving marketplace. The escalating influence of concentrated—often undisclosed—political spending has created perverse incentives that reward crony capitalism, where companies compete based on legislative favors rather than on better products and services for customers and clients. This undermines our American republic and our free enterprise system—both of which give business leaders across the political spectrum cause for serious concern.

That is why I co-founded Business for American Promise with my father, Jack Doty. In the coming weeks we are excited to publicly announce our Statement of Principle for Business Professionals, in which more than 100 business leaders from across the nation have stated: “As business leaders and citizens with a wide variety of political interests and affiliations, we are convinced that the current dysfunction of our political system will not self-correct but requires systemic change...Therefore, we support a Constitutional amendment to allow limits on political spending, as one of several critical reforms needed to secure our republic.”

Our initial list of signers—without any formal publicity—includes executives and professionals, at all stages of their careers, from small, medium and large businesses and renowned business schools, from 11 states. Here is just an illustrative sampling:

- Peter Schwartz, renowned business futurist, strategic planning expert
- Matt Patsky, CEO of Trillium Asset Management
- Michael Edelman, CEO of Nanoco PLC
- Judy Nagel, retired Vice President-Investment Officer at Wells Fargo Advisors;
- Malcolm Salter, James J. Hill Professor of Business Administration, Emeritus, Harvard Business School
- Jane Greenthal, Regional Consulting Strategy Director of the global design and architecture firm, Gensler
- Don Bender, owner and operator of a small Kansas City manufacturing firm founded by his grandfather

- Erin Spencer, Founder of Brown Dog Veterinary Solutions, LLC in Derry, New Hampshire
- Larry Leon, principal of a commercial real estate firm in Dallas, Texas
- John Montgomery, a corporate attorney instrumental in the “B Corp” movement
- Emily Kanter, CEO + Co-Owner of Cambridge Naturals
- William Fenwick, Partner Emeritus and co-founder of the pioneering Silicon Valley law firm, Fenwick & West
- David Brodwin, Executive Fellow, Center for Higher Ambition Leadership

On behalf of myself and other concerned business leaders and professionals, thank you to the sub-committee for advancing this important and urgent reform. We at Business for American Promise and businesspeople around the country look forward to working with you to pass and ratify this amendment for the benefit of our American republic and our free enterprise system.

Written Testimony of Ellen Greene Bush, Marie HenselderKimmell, and Robbi Duda

Port Clinton, Ohio; Cherry Hill, New Jersey; Ann Arbor, Michigan

U.S. House of Representatives
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We are members of Healthcare Providers for American Promise, and appreciate the opportunity to submit the following statement of principle in support of a Constitutional amendment to address the undue influence of money in our political system and secure free speech, representation and effective self-government for every American.

Healthcare Providers for American Promise
Statement of Principle

As healthcare professionals, we prioritize providing the highest quality of healthcare for all Americans and acting as advocates for public health. Basic tenets of public health are to promote wellness, and to correct underlying causes and eliminate risk factors of disease.

We are convinced that unlimited political spending has a toxic influence on our American healthcare system. Wealthy political donors, who do not represent voters, have overwhelming influences on achieving their own preferred legislative healthcare policies and distort markets to favor their own narrow interests. Average American citizens, who cannot afford to donate politically to amplify their votes and healthcare needs, experience this inequality in a greater prevalence of health issues, in decreased access to comprehensive medical care (including medications), and in reduced affordability of medical care and health insurance.

As healthcare professionals, we prescribe a reduction in the unlimited political spending that has significantly contributed to the dysfunction of our healthcare systems and the dysfunction of our democracy. We believe that these problems are not self-correcting and that the health of our democracy needs systemic change.

Therefore, we call on Congress to pass a constitutional amendment that allows limits on political spending, as one of several critical reforms needed to check the influence of money on health care policy. We commit to act as citizen leaders, informing ourselves and lending our voices as Americans across the political spectrum to work together to craft, pass, and ratify such an amendment.

**Written Testimony of Jeff Clements
President, American Promise**

U.S. House of Representatives
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Mr. Chairman, Ranking Member Johnson, and Members of the Committee:

Thank you for the opportunity to submit testimony in this important hearing. I serve as president and CEO of American Promise. Before founding American Promise in January 2016, in my legal career I have been a partner in a large national law firm and in my own firm, taught election law, and served as Assistant Attorney General and Chief of the Public Protection Bureau in the Massachusetts Attorney General's Office.

American Promise is a national non-partisan organization with a mission to unite and empower Americans to build a strong republic and healthy democracy. American Promise -- our board, staff, advisory council and hundreds of thousands of supporters across fifty states -- is comprised of Republicans, Democrats and independents, and Americans of every walk of life. We come together to pass and ratify the next amendment to the United States Constitution, which will replace the dark, divided, and broken political system driven by out-of-control, concentrated money influence with a Constitutional foundation for government of we the people.

To date, 20 states and more than 800 cities and towns have passed formal resolutions calling on Congress to pass such an amendment, and support for such action receives overwhelming cross-partisan support, whether in polls or at the ballot box. American Promise's programs have brought together legal experts, elected officials, and Americans in every state together to achieve this historic task and renew our national commitment to freedom and self-government.

This testimony summarizes three points:

- (1) we are at a crisis point with respect to the connection between money influence and the breakdown of trust and faith in American democracy;
- (2) a constitutional amendment is necessary because of the unintended consequences of aggressive judicial intervention in traditional checks and balances of election regulation by the elected branches and the states;
- (3) principles and language for the Constitutional amendment are ready, and the time for cross-partisan support in Congress is now.

I also attach an article with greater detail, as well as statements from American Promise members across the country and across the political spectrum, will I hope will be of assistance to the Committee.¹

The Crisis Point

Our current election funding system has us hurtling towards oligarchy. The lack of trust between the American people and our representatives in government has reached a crisis point.

The problem of money influencing elections is not merely about the amount of money, it is that most of the money comes from a small slice of the Americans. Consider political contributions of \$200 or more: Such contributions account for over 70% of national election spending, yet they are coming from only 0.47% of the U.S. population. Let that sink in: The vast majority of election spending (over 70%) is coming from less than ½ of one percent of all Americans.

Americans know that this lop-sided system has an effect on political representation. Overwhelming donor influence is producing a pervasive public cynicism that undermines trust in our political institutions. In the 1990s, more than half of Americans had a favorable view of Congress but now barely 1 in 5 have such a view.² A large majority (72%) now believe that people who contribute to campaigns have more influence than other people. And Americans (76%) believe that government is run by a few self-serving interests.

Although the picture is grim, it is not hopeless. Americans' negative views of our current political system are coupled with a desire for reform. "There is broad support for making sweeping changes to the political system: 61% say 'significant changes' are needed in the fundamental 'design and structure' of American government to make it work for current times." With specific regard to campaign finance, a wide bipartisan majority of Americans (77%) believe that there should be limits on campaign spending.³ There is also bipartisan agreement on the importance of voting: 76% of Republicans and 76% of Democrats say it is very important. On the whole, the public opinion data suggest that Americans are yearning for representative integrity, and overwhelmingly – across partisan divides – support a Constitutional amendment to address the undue influence of money in elections.⁴

An Amendment Is Necessary

A constitutional Amendment is necessary because the Supreme Court has left us with no other choice. From its 1976 decision in *Buckley v. Valeo* to more recent decisions, the Supreme Court

¹ Jeffrey D. Clements, "*But It Will Happen*": *A Constitutional Amendment to Secure Political Equality in Election Spending and Representation*, 13 Harvard Law & Policy Review 373 (2019); Statements of Jim Rubens, Elizabeth Doty, John Pudner, Devin Height, Rod Morrison, Alan LaPolice, Ellen Green Bush-Marie Henseler Kimmel-Robbi Duda, and Chet Hunt.

² Gallup - 2019 https://news.gallup.com/poll/257762/congressional-approval-steady.aspx?g_source=link_NEWSV9&g_medium=TOPIC&g_campaign=item_&g_content=Congressional%2520Approval%2520Steady%2520at%252020%2525

³ Pew, <https://www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy/>

⁴ University of Maryland, School of Public Policy, <https://www.publicconsultation.org/redblue/very-large-majorities-support-congressional-bills-to-reduce-influence-of-big-campaign-donors/>

launched the country into an experiment in aggressive judicial intervention against the traditional balancing of interests that the people and our representatives had brought to free speech and money in elections for the first two centuries of our Republic.

The general public began to understand the drastic nature of the Court's jurisprudence after *Citizens United v. Federal Election Commission* was decided in 2010. In that 5-4 decision, the Court held that corporations and unions could spend unlimited money from their general treasuries to advocate for or against candidates. With several additional decisions, the Court effectively decreed that the American people cannot legislate election funding limits regardless of the loss of equal rights to representation and free speech, and regardless of the problem of systemic corruption.

Because the Court has made an interpretation of constitutional text in these decisions, the only solution is to amend the Constitution and make clear that the Court's approach has been wrong.

Elements of the Amendment

A well-crafted amendment should protect free speech and representation rights of all Americans, restore traditional anti-corruption Constitutional principles, and protect the integrity of the elections and government by enabling Congress and the States to enact reasonable limits on expenditures to influence elections.

H.J. Res. 2 and other proposals for an effective amendment are taking the right direction. However, constitutional amendments require national consensus, and cross-partisan support. We encourage this Committee to work together to craft language that can both be effective and command supermajority support in Congress and in the states. To be effective, such language for an amendment should incorporate the following elements:

- The amendment should explicitly elevate the values of self-government, electoral integrity, anti-corruption, and political equality of Americans.
- The amendment should give Congress and the States some flexibility in experimenting with reasonable election regulations. This might be achieved through language that points to a level of scrutiny based on proportionality or fit between the regulations and the governmental interests being served by those regulations.
- The amendment should affirm the freedom of the press and the freedom of speech of *all* Americans, recognizing that in the political context, from Congress to town meetings to simple conversation and debate among Americans, reasonable limits on volume (but not on ideas) protects the free speech rights of every citizen, and allow more debate, more ideas, more listening, more deliberation, and make effective government of the people possible.
- The amendment should allow Congress and the States to distinguish between human beings and artificial entities (such as corporations or union entities) when regulating campaign finance.

Thank you again. We look forward to being of assistance to your deliberations on this matter and would be happy to provide any additional information.

Written Testimony of Jim Rubens
Hanover, NH

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

*Hearing on Citizens United at 10: The Consequences for Democracy
& Potential Responses By Congress*
February 6, 2020

I am a Republican, past New Hampshire state senator and New Hampshire GOP platform committee chair, and 2014 and 2016 candidate for U.S. Senate. In business, I'm a serial entrepreneur and venture investor, and my non-profit work includes service as a board member for American Promise and New England chair of Take Back Our Republic. My opinions here are my own, not necessarily those of any organization. I am happy to provide hard copies of the hyperlinked sources and can be reached at JimRubens@gmail.com.

Pragmatism partially explains what seems a partisan divide on campaign finance reform in Congress. Until recently, Republicans have been able to marshal larger sums of concentrated, scientifically-targeted campaign money. This tilt reversed with the 2018 election cycle, when liberal dark money groups mastered the concentrated-money game and outspent conservatives by almost 2 to 1. For the 2020 cycle, as measured by total direct and indirect money reported to date, Democrat and liberal groups are again ahead, by more than 2 to 1.

For this coldly pragmatic reason alone, Congressional Republicans might soon join the push for a corruption reform amendment. But Republican backing is far more powerfully compelled by our constitutional conservatism and by fundamental conservative principles.

To defend federalism.

Since the *Citizens United* ruling, concentrated, strategically-targeted, out-of-state money from Tom Steyer, George Soros, Sheldon Adelson and the big unions have flooded campaigns with hundreds of millions of dollars. In swing states and Congressional districts -- even in state legislative races -- money sources controlled by not more than a few hundred San Francisco, Manhattan and likely foreign individuals are picking our candidates. "Outside spending surpassed candidate spending in 126 races since the ruling. That happened just 15 times in the five election cycles prior," according to original analysis by OpenSecrets.org.

Home-grown, locally-funded candidates are often overwhelmed. Campaign ads, increasingly funded by independent money, have become more negative and more false. Debate over key issues is narrowed, voters get even more cynical ... and issues get nationalized. Warns former Congressman Zach Wamp, R-TN, "[T]his should be a wake-up call to Republicans. Secret spending in elections has the potential to denigrate every candidate in every election, and candidates are losing complete control of the messages in their campaigns."

Three people including me (the conservative challenger) ran in New Hampshire's 2016 race for U.S. Senate. \$132 million was spent, \$100 for every living person in my state, 95 percent from out-of-state sources, the race decided for the Democrat by 1,700 votes. It is a near certainty that New Hampshire voters did not determine the outcome of this election.

The 10th Amendment reserves to the states and people, respectively, all powers not expressly granted by the Constitution to the federal government. The 10th Amendment guarantees respect for local preferences and political space to test and replicate successful policies. The 10th Amendment permits Americans to live in peace with one another, despite our differences. The 10th Amendment is our protection against remote, ivory-tower, one-size-fits-all government. The out-of-state, big-money system is now eclipsing federalism, one of our strongest protections against the tyranny that history shows grows in the dark swamps of concentrated power.

To defend capitalism.

American free-market capitalism has bestowed greater aggregate wealth, progress and well-being worldwide than in all of prior human history. But the current system of pay-to-play, concentrated money politics has mutated free-market capitalism into crony capitalism. Under crony capitalism, government picks economic winners and losers by doling out tax breaks, loan guarantees, regulatory favors and contract awards. Instead of delivering better products and services to customers, business competes by buying influence or submitting to extortion in Washington.

The result? Innovation and new business formation have dropped to historic lows. Financial engineering is in, and capital investment and long-term R&D are out. It's why the United States has the world's highest drug prices, broadband and cellular dead zones, and trillion-dollar, sitting-duck weapons systems that don't work. It's why young and non-white voters – who will be the majority in a generation -- now favor socialism over capitalism. The pay-to-play influence economy enabled by our corrupt campaign finance system is the single most direct threat to free-market capitalism.

To defend fiscal sanity.

Sustainably low taxes come from sustainably low spending. Conservatives have learned that big-money donors do not care much about conservative philosophy. Big money is united around the endless push for more spending and tax loopholes for their favored policies. And big money is driving big spending in a big way – because crony capitalism is so much more profitable than slugging it out in the competitive marketplace.

A recent [Forbes magazine](#) study found that, for each one dollar of lobbying, the top ten spenders got \$1,000 in grants and contracts ... paid for by taxpayers. A [Sunlight Foundation](#) study showed that for every dollar of lobbying and political contributions, politically active corporations received \$760 in the form of tax breaks, loan guarantees and contracts ... paid for by taxpayers.

Legalized pay-to-play corruption is why we've got trillion-dollar deficits as far as the eye can see. It's why Washington recklessly loads crushing future debt service onto the backs of young people, our kids and our grandkids. Warns [Admiral Mike Mullen](#), former chairman of the Joint Chiefs of Staff, "... the single greatest threat to our national security is our debt." We can draw a straight line

from the corrupt, big-money system to weakened national security, short-termism, twisted monetary policy, unsustainable spending commitments, and punishing future tax increases.

To defend constitutional conservatism.

Those supporting *Citizens United* view most limits on campaign contributions or spending as violations of First Amendment free-speech protections. However, as the Court has long recognized, the Constitution is to be understood as a whole, with its provisions sometimes in conflict with one another and thereby subject to balancing tests.

Citizens United weighed two such First Amendment tests: “anti-distortion” (i.e., fairness to un-moned speakers) and political corruption. The Court found that neither justified the contribution limits it struck down. While most *Citizens United* opponents view the Court as having erred in not applying both tests, I argue here only for corruption.

Central to its ruling, the Court conjured from thin air and against all evidence to the contrary its assertion as “fact” that billions in concentrated money have not corrupted American politics:

“[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption ... The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt ... The appearance of influence or access ... will not cause the electorate to lose faith in our democracy.”

Objectively considered, *Citizens United* and its progeny enabled the current campaign money system. This system features billions of dollars in increased spending controlled by tiny fraction of voters. The Court’s cribbed conception of corruption (bags of cash for votes) is flatly disproven by a ground-breaking 2014 study by two Princeton political scientists. They traced the outcomes of 1,779 contested federal policy issues over a twenty-year period, finding -- little surprise -- that economic elites and organized business interests enjoy substantial impact. The stunner: average members of public have statistically zero influence.

The Court was also factually wrong about the appearance of corruption. At 17 percent, public trust in our federal government sits today at a historic low. Two recent national polls (Rasmussen 4/24/19; Campaign Legal Center 11/8/19) show that Americans now rank political corruption as our nation’s number one most serious and crisis-level issue.

The corruption we must now address is that American citizens, to whom our Founders designed our government to be solely accountable, now have zero influence. Even more damaging, we know it. Constitutional conservatives have a sound factual basis -- grounded in First Amendment protections and in a careful reading of *Citizens United* -- to support an anti-corruption amendment.

An amendment grand bargain.

The facts about our corrupted political process are blazingly obvious to the public. These facts are why supermajorities -- 66 percent of Republicans and 85 percent of Democrats -- back a constitutional amendment to restore to Congress and the states the power to set reasonable limits on campaign spending and contributions. Resolutions to launch exactly this amendment, H.J.Res.2 and S.J.Res.51, have been introduced into both bodies of Congress. But, of the 256

combined co-sponsors, only two are Republicans, not propitious for the bi-partisan two-thirds majority required for passage.

In the eerily parallel partisan universe, since 1995 when the Supreme Court struck down term limits for members of Congress, Republicans in Congress have repeatedly backed a Congressional term-limits amendment, but never with sufficient Democrat support. But just as with an anti-corruption amendment, a supermajority of voters – 76 percent of Democrats and 89 percent of Republicans -- support term limits. However, the leading resolutions to launch a term-limits amendment, H.J.Res.20 and S.J.Res.1, have a combined 63 co-sponsors, only two of whom are Democrats.

If a bi-partisan group of House members were to agree to such a grand bargain, combining campaign anti-corruption and term limits amendments, Congress would not only give the overwhelming majority of Americans what we have been seeking for years, but would renew the American Republic and government of the people for generations to come. With this grand bargain, Congress could break gridlock and send two extraordinarily popular amendments to the states for potential ratification. (These amendments should be considered by the states as separate questions.)

As a longtime citizen, candidate and elected Republican advocate for both amendments, I strongly believe that advocates for both amendments can be persuaded to get behind a combined resolution. The breakthrough bi-partisanship needed to get this done will be the biggest move in many years to restore faith in democracy and to heal our divided republic.

Written Testimony of John Pudner
Auburn, Alabama

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

*Hearing on Citizens United at 10: The Consequences for Democracy
& Potential Responses By Congress*
February 6, 2020

As former political consultant and longtime conservative Republican, I ran an effort to reach 14 million Catholic and socially conservative Christians in 16 states for George W. Bush in 2000 and have advised many Republican campaigns, including former Representative Dave Brat's successful campaign that challenged former House Majority Leader Eric Cantor in Virginia. I'm now the executive director of Take Back Our Republic. I formed Take Back Our Republic as a full-time endeavor to correct the misconception that "campaign finance reform" was something only progressives should support. In our first year, for example, we successfully helped recruit 52 Republicans to join 31 Democrats to sponsor a bill to discourage foreign donations to campaigns. I also serve on the advisory council of American Promise.

Managing successful political campaigns for nearly three decades, I've seen firsthand the power big money holds over our political system. This is a growing crisis that neither major political party is solely responsible for creating, and that both major parties must act together to fix. One necessary and critical step needed now is a Constitutional amendment so that the people, through our representatives in Congress and the states, may enact reasonable limits and better address the undue influence of money in elections. This amendment is necessary to set a sound foundation for a system in which all Americans may exercise free speech and have representation in our government, while better securing the fundamental role of the states in our federalist system—as our nation's founders intended.

As this hearing concerns the 10th Anniversary of the *Citizens United* Supreme Court decision, I wanted to share with members of the Constitution Subcommittee my reasons for supporting a constitutional amendment to address the unintended consequences, and unanticipated and systemic effects, of that decision. I encourage members of Congress to work across the aisle to make this historic and fundamental reform a reality. Thank you.

Attachment: *I'm a Conservative Against Citizens United*, John Pudner, The Hill, January 20, 2020.

Mr. DEUTCH. Thank you, Chairman Cohen, Ranking Member Johnson, and members of the subcommittee. It has been 10 years since the Supreme Court's disastrous decision in *Citizens United*, and I am here today to call for a constitutional amendment to overturn it.

In the 5–4 majority opinion, Justice Anthony Kennedy dismissed concerns about corruption caused by limitless spending. He wrote, “The appearance of influence or access will not cause the electorate to lose faith in our democracy.” But it has.

The decision knocked down longstanding bipartisan campaign finance laws.

There are three primary problems that have crystallized in the *Citizens United* decade. First, extreme election spending destroys any hope of political equality in America. Second, current disclosure and anti-coordination rules have not prevented corruption or stopped foreign interference. And third, very few very wealthy individuals have extraordinary influence. Government institutions too often focus on their pet projects rather than on the public will.

Citizens United unleashed a torrent of billions of dollars into our elections. In the 20 years before the *Citizens United* decision, \$750 million of outside spending. In the 10 years since, over \$4.5 billion.

Dark money groups are not required to disclose their donors. Their spending jumped from \$129 million in the 10 years before the decision to \$1 billion since. The 10 families who spent the most in our elections in the *Citizens United* decade spent a total of \$1.2 billion.

Now, to put that in perspective, it would take 6 million Americans spending \$200 each to match the spending of these 10 families. This flood of spending has distorted the agenda in Congress, and we now know that it is sapping America's faith in our democracy and our government.

Eighty-four percent of Americans think that special interests come first here. Last year the House passed the For the People Act and the Voting Rights Advancement Act, and these bills would require disclosure and end gerrymandering and make it easier to vote and protect voting rights. But statutory changes alone can't fix the problems created by *Citizens United*.

The Democracy for All Amendment would allow reasonable limits on campaign spending. Americans want to get big money out of our elections. The amendment rejects the Supreme Court's claim that only quid pro quo bribes can corrupt politicians. Our amendment would level the playing field. It would promote political equality, and it would protect the integrity of our government institutions and elections.

I want to thank the millions of advocates and hundreds of organizations who built the movement to get money out of politics. Twenty states and over 800 local governments are calling for a constitutional amendment, and we wouldn't be here today without them.

I want to thank Vice Chair Raskin, Representative McGovern, Representative Katko, and Senators Udall and Shaheen for joining me in introducing this bipartisan amendment. And I want to thank the 210 co-sponsors, including Congresswoman Jayapal and many members of this subcommittee, for their support.

And to be clear, this issue is not partisan among the American people. In 2018, the University of Maryland reported that 75 percent of Americans, three-quarters of all Americans, support a constitutional amendment to allow for limits on election spending. That includes 85 percent of Democrats, 70 percent of Independents, and two-thirds of Republicans.

We must overturn Citizens United to fulfill the ideals we affirmed at our nation's founding. The Democracy for All Amendment is necessary because your status in our democracy should not depend upon your status in our economy. Whether you work three jobs and barely get by, or you own three homes and you barely work, the eyes of our law, the eyes of our government, our elections, must see all Americans as equal. This amendment will get money out of our elections. And most importantly, it will put voters back in charge.

With that, Mr. Chairman, I appreciate the time, and I yield back.
[The statement of Mr. Deutch follows:]

**Testimony of Congressman Ted Deutch
House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

Citizens United at 10:
The Consequences for Democracy and Potential Responses by Congress
February 6, 2020

Thank you, Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee, for the invitation to testify today.

On January 21, 2010, the Supreme Court issued its decision in *Citizens United v. FEC*. In the majority opinion, Justice Anthony Kennedy dismissed concerns that opening our politics to unlimited spending by corporations, unions, and non-profits would corrupt our elections. “The appearance of influence or access... will not cause the electorate to lose faith in our democracy,” he wrote.¹ With that reasoning, four other justices joined him in knocking down longstanding, bipartisan campaign finance laws. The decision ushered in an era of explosive political spending, outsize influence of wealthy individuals and corporate special interests, countless loopholes that leave our elections vulnerable to attack. Together, those impacts have undermined Americans’ faith in our democracy.

Citizens United, together with a few subsequent decisions, shredded nearly all campaign spending limits, leaving those intended to stop *quid pro quo* corruption. Although I’m sure most Americans are now quite comfortable with the Latin phrase itself, they also know very well that buying favors directly from politicians isn’t the only problem facing the American democratic experiment.

It’s been 10 years. What has changed? *Citizens United* prompted a dramatic increase in political spending. Outside groups increased their spending from \$750 million over the two decades before the decision to nearly \$4.5 billion in the *Citizens United* era.² That means 86 percent of all outside spending over the past 30 years came in the 10 years since the decision.

¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

² Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*, Center for Responsive Politics, (Jan. 14, 2020), <https://dkf1tve4js3etk.cloudfront.net/news/reports/citizens-united/OpenSecrets-more-money-less%20transparency-a-decade-under-citizens-united.pdf>.

The explosion of spending includes a massive increase in spending by groups that are not required to disclose their donors. The Center for Responsive Politics found that these so-called “dark money” groups spent \$963 million over the past decade compared to \$129 million in the ten years before *Citizens United*.³

While the five justices who got it wrong in 2010 may have been naive to the reality of political campaigns, those of us who serve in Congress are not. The Court downplayed the risks of a tidal wave of political cash by claiming that disclosure requirements and prohibitions against candidates coordinating with outside groups would prevent corruption. But we now know, just as many of us had feared, that those safeguards have been underutilized and ineffective.

Over the past 10 years, we have seen wealthy individuals and corporations evade disclosure and slip around anti-coordination rules. Candidates are not allowed to coordinate with Super PACs. But that has not stopped top staff from jumping from inside campaigns out to Super PACs and dark money groups, achieving the same result. While candidates are not allowed to ask for high-dollar contributions in excess of annual limits, we have seen them play tag team with super PACs to help tee up million-dollar asks. The Court left intact prohibitions on campaign spending by foreign individuals and corporations. But, without disclosure requirements on tax-exempt groups, we have seen foreign money laundered into American elections.

Last year, the House of Representatives responded to many of these concerns by passing comprehensive reforms in the For the People Act (H.R. 1) and the Voting Rights Advancement Act (H.R. 4) that would make it easier for Americans to vote, bolster voting rights, end gerrymandering, secure our elections, add disclosure requirements, empower all Americans to participate in politics, repair the Federal Election Commission, and fortify ethics laws.

But legislation can only go so far. The deeply rooted problem of money in politics requires a constitutional amendment. The Democracy for All Amendment (H. J. Res. 2) complements these

³ Id.

legislative reforms by overturning *Citizens United* and allowing the American people to put reasonable limits on money spent in our elections.

I want to thank Vice Chair Raskin, Representative Jim McGovern, and Representative John Katko for joining me in introducing this bipartisan amendment to give American voters equal footing in our elections.

Our amendment rejects the Supreme Court's idea that only *quid pro quo* corruption threatens our elections.

Our amendment overturns *Citizens United* and expands beyond the Supreme Court's narrow corruption framework laid out in *Buckley v. Valeo*. In that case, the Court wrongly presumed that limitless independent expenditures by individuals would not undermine our system of representative democracy.

Our amendment would correct the Court's missteps to level the electoral playing field, promote political equality, and protect the integrity of our government institutions and elections.

As of today, The Democracy for All amendment has earned the support of 210 cosponsors. I want to thank them all, including Congresswoman Jayapal and many members of this subcommittee, for their support. We understand that amending the constitution is a serious endeavor. It must be done very carefully and only to respond to problems that strike to the core structures of our democratic republic. That is what this amendment does, and it is supported by a movement that will see these important reforms through.

Millions of advocates around the country led by a coalition of over 150 reform groups support the Democracy for All Amendment. At the five-year anniversary of the *Citizens United* decision they sent over five million petition signatures to Congress calling for it to be overturned.

The American people also strongly support making this change. In 2018, the University of Maryland reported that 75 percent of Americans from both parties want their representatives to support an amendment to allow for limits on election spending, including 85 percent of

Democrats, 70 percent of Independents, and 66 percent of Republicans.⁴ This broad base of bipartisan support from grassroots advocates has helped pass resolutions supporting an amendment in 20 state legislatures and 800 local governments across the country.⁵

While millions support getting money out of our elections, a mere handful have dominated spending since *Citizens United*. The ten families who spent the most in our elections in the *Citizens United* decade spent a total of \$1.2 billion. If that spending should be viewed as an exercise of free speech rights—as supporters of *Citizens United* allege—those 10 billionaire couples would have the rights equal to 6 million Americans spending \$200 each in our elections.

What is now a “billionaire problem” was previously referred to in 1987 as a “millionaire problem.” That is when then-freshman U.S. Senator from Kentucky Mitch McConnell filed his own constitutional amendment to allow Congress to set limits on election spending. He said, “[Amending the constitution] would give the Congress an opportunity to level the playing field, eliminate the millionaire’s loophole, put everybody on the same footing, so that the meat-cutter and coal miner and taxicab driver and anybody else in American society who can go out and get a lot of support from a lot of people could still raise the money, use the television, get into the race and build the contest.”⁶

America has always been chasing the ideals we set at our nation’s founding. Progress has been defined by hard-fought steps toward the realization of equality under the law. The Democracy for All Amendment is one of those necessary steps because your status in our democracy should not reflect your status in our economy. Whether you work three jobs and barely get by or own three homes and barely work—the eyes of the law, our government, and our elections should see all Americans as equal.

⁴ Steven Kull, *Americans Evaluate Campaign Finance Reform: A Survey of Voters Nationwide*, University of Maryland School of Public Policy, Program for Public Consultation, (May 2018), http://www.publicconsultation.org/wp-content/uploads/2018/05/Campaign_Finance_Report.pdf

⁵ United For the People, State and Local Resolutions, <http://united4thepeople.org/state-local/> (Feb. 3, 2020).

⁶ Senator McConnell (KY). “The Dangerous Cliff of Campaign Spending” Congressional Record 133:132 (Aug. 6, 1987) p. 11338; Accessed: Feb. 2, 2020.

This amendment will take money out of our elections and put voters back in charge. The current system has this dynamic exactly backwards. Polling consistently shows that—contrary to Justice Kennedy’s prediction—money in politics has shaken Americans’ faith in our democracy. For example, 84 percent of Americans think that government works for special interests—not for the people.⁷

The toxic influence of money in our elections touches every issue we face as a nation. And makes it harder to solve problems. For example, over 90 percent of Americans want stronger background checks for gun purchases⁸ and 7 out of 10 want action to respond to climate change.⁹ When it comes to many of the most important issues we face as a nation, powerful special interests flood our elections with money to stand in the way of change.

In 2014, the Supreme Court further weakened campaign finance laws in *McCutcheon v. Federal Election Commission* by striking aggregate contribution limits. The decision permitted wealthy individuals to max out their donations to as many federal candidates as they wish. In his dissenting opinion, Justice Stephen Breyer warned, “Where enough money calls the tune, the general public will not be heard.” This amendment responds to that warning by getting high-dollar contributors and million-dollar spenders out of the ears of elected officials to reorient the priorities of lawmakers toward a broader and more representative cross-section of their constituencies.

Citizens United betrayed our fundamental American values, corrupted our elections, and elevated the interests of billionaires and corporations above the concerns of American voters. Ten years later, I urge all my colleagues to support the Democracy for All Amendment to put voters back in charge of Washington and restore the faith of the American people in our democracy.

⁷ Liz Kennedy, *Drain the Swamp: Conflicts of Interest, Lobbying, and Corruption Solutions to Restore Trust in Government that Works for Americans*, Center for American Progress, (Jan. 5, 2017), <https://www.americanprogress.org/issues/democracy/reports/2017/01/05/295947/drain-the-swamp/>.

⁸ Chris Abele, *90 percent of Americans “support universal background checks” for gun purchases*, Politifact, The Poynter Institute, <https://www.politifact.com/factchecks/2017/oct/03/chris-abele/do-90-americans-support-background-checks-all-gun-/>.

⁹ Yale Program on Climate Change Communication, *Poll: American Voters support Climate Action*, (Sept. 4, 2019), <https://climatecommunication.yale.edu/news-events/poll-american-voters-support-climate-action/>.

Mr. COHEN. Thank you, Mr. Deutch. Very well timed and very well delivered.

Ms. Jayapal is next. Representative Pramila Jayapal has been a leader in Congress on many, many progressive issues. She represents the 7th Congressional District of Washington State. She is a member of the House Judiciary Committee, where she sits on the Immigration and Antitrust Subcommittees. She is a senior Whip for the Democratic Caucus and Co-Chair of the Congressional Progressive Caucus and the Women's Working Group on Immigration. She is the sponsor of H.J. Res. 48, a proposed constitutional amendment providing that the rights protected by the Constitution of the United States are the rights protected of natural persons only.

Congresswoman Jayapal, you are recognized for 5 minutes. Thank you.

STATEMENT OF THE HON. PRAMILA JAYAPAL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Ms. JAYAPAL. Chairman Cohen, Ranking Member Johnson, and members of the subcommittee, thank you so much for the opportunity to testify on my bill, House Joint Resolution 48, the We the People Amendment.

Ten years ago, the Supreme Court issued its 5–4 landmark ruling in *Citizens United v. Federal Elections Commission*. The implications of *Citizens United* reach far beyond electoral politics and political donations. It has had a profound impact on our elections, our policymaking, and our daily lives.

And that is why I am proud to sponsor H.J. Res. 48, the We The People Amendment, a comprehensive solution to the *Citizens United* decision. Corporations and the few ultra-rich have hijacked our elections for far too long. The We The People Amendment would put power back to everyday people by ending corporate personhood and clarifying that money does not equal free speech.

Citizens United established political spending as protected speech under the First Amendment of the Constitution and further prevented the government from limiting corporations and other entities from spending money on candidates in elections. This established a dangerous precedent of corporate personhood that the We the People Amendment reverses by specifying that the rights provided by the Constitution are for real people, individuals, not corporations.

The Supreme Court's decision empowered the Federal Elections Commission to allow outside groups to accept unlimited political donations, giving corporations and the ultra-rich unrestricted power in elections. This created an enormous imbalance in power in which the average American's ability to influence elected officials is dwarfed by large corporations.

As we in Congress grapple with critical issues such as climate change, immigration, and an inequitable health care system, we must recognize the power that those with financial stakes in these industries such as the oil and gas, private prison, and insurance companies exert in our elections.

The We the People Amendment would regulate political donations and mandate public disclosure to ensure transparency and public accountability.

Yet, the impact of Citizens United is not limited to the role of money in politics. The freedom of expression granted to corporations in Citizens United led to the decision in *Hobby Lobby v. Sebelius*. The Court granted a corporation the ability to opt out of provisions of the Affordable Care Act in order to deny basic health care to women employees on the basis that a corporation has religious liberty. It puts corporate rights over a woman's right to make decisions about her own body, and it is one more reason why we must limit corporate personhood beyond elections.

Research has found, as my colleague Mr. Deutch said, that 77 percent of Americans believe that there should be limits on the amount that both individuals and groups can spend on campaigns. The time has come for Congress to intervene. I am a proud co-sponsor of H.R. 1, the For the People Act, and of Congressman Deutch's Democracy for All Amendment. I believe that Congress and the states must do the important work of regulating campaign contributions and distinguishing between people and corporations when creating campaign finance legislation.

The We the People Amendment goes further, to end corporate constitutional rights and ensure that our democracy is really of the people, by the people, and for the people. I believe our democratic values are worth more than what corporations can pay. In the Citizens United dissenting opinion Justice Stevens wrote, "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."

As members of Congress, we are here to serve the people, not to serve corporations. We are here to ensure that our democracy is sustained by We the People, and that we in Congress, the elected members, elected by our constituents, must listen only to We the People.

I look forward to working with my colleagues on this committee to reverse the harmful impacts of Citizens United and advance the goals set forth in this amendment, and I thank the movement around the country that has forced us to take on this issue.

I yield back.

[The statement of Ms. Jayapal follows:]

House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
“Citizens United at 10:
The Consequences for Democracy and Potential Responses by Congress”
February 6, 2020
Written Testimony of Congresswoman Pramila Jayapal

Ten years ago, the Supreme Court issued its 5-4 landmark ruling in *Citizens United v Federal Election Commission*.¹ The implications of the *Citizens United* ruling reach far beyond electoral politics and political donations—it expanded the notion of corporate personhood and brought in a new age of outside money in politics. In the ten years since the ruling, our nation has felt the profound impact of this decision in our elections, our policy making, and our daily lives.

I am proud to sponsor House Joint Resolution 48, the We The People Amendment, a strong, comprehensive solution to the *Citizens United* decision. Corporations and the ultra-rich have hijacked our elections for far too long. The We The People Amendment would bring that power back to everyday people by ending corporate personhood and clarifying that money does not equal free speech. Specifically, the resolution proposes a constitutional amendment that ends corporate personhood by providing that:

1. the rights protected by the Constitution are the rights of natural persons only;
2. artificial entities (such as corporations, limited liability companies, and other entities established by the laws of any state, the United States, or any foreign state) shall have no rights under the Constitution and are subject to regulation by the people, through federal, state, or local law; and
3. the privileges of such artificial entities shall not be construed to be inherent or inalienable.

The amendment further requires federal, state, and local governments to:

1. regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process and that no person gains, as a result of that person's money, substantially more access or ability to influence the election of any candidate for public office or any ballot measure; and
2. require that any permissible contributions and expenditures be publicly disclosed. The judiciary is prohibited from construing the spending of money to influence elections to be speech under the First Amendment.

Amending the Constitution is a grave matter, but the impact of *Citizen's United* on our democracy demands a serious response. Prior to the Supreme Court's decision in *Citizen's*

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

United, the majority of political donations were from individuals, in small amounts, and given directly to campaigns in a public and traceable fashion.² Then *Citizens United* established political spending as protected speech under the First Amendment of the Constitution, and further prevented the government from limiting corporations and other entities from spending money on candidates in elections. This established a dangerous precedent of corporate personhood that the We the People Amendment reverses by specifying that the rights provided by the Constitution are for real people, not corporations.

The Supreme Court's decision further empowered the Federal Elections Commission (FEC) to subsequently issue rulings that allow outside groups to accept unlimited political donations.³ These outside groups have morphed into Super PACs, political action committees that may accept unlimited donations and expend unlimited resources, so long as it is not in direct coordination with a specific candidate's campaign.⁴ This allowed corporations and the ultra-rich to exert their power in elections without any restrictions, and support candidates that further their corporate interests. This creates an enormous imbalance of power, in which the average American is outweighed in their ability to influence their elected officials. My We the People Amendment would regulate political donations and ensure that they are publicly disclosed to ensure transparency and public accountability.

Our nation cannot afford to wait any longer to take action. *Citizens United* resulted in a flood of money into politics at the federal, state, and local level. Since January 2010, every election has been more costly than the last as outside spending has ballooned. In the 2008 election—the last election prior to the *Citizens United* ruling—outside spending constituted only six percent of total election spending.⁵ Since 2010 outside spending has grown exponentially. In the 2010 elections, just months after the decision, outside spending grew to nine percent of total election spending.⁶ By the 2012 Presidential election, that number grew to 17 percent, nearly triple that of the 2008 Presidential election.⁷ In the 2016 Presidential election, outside spending constituted 22 percent of total election spending.⁸

This translates to a dizzying amount of money in our elections. Since January 2010, over 2,200 corporations have publicly disclosed \$313 million in donations to over 500 Super PACs.⁹ This is supplemented by \$226 million spent by 30 corporate trade groups that do not disclose

² Karl Evers-Hillstrom, et. al., *More money, less transparency: A decade under Citizens United*, Center for Responsive Politics (Jan. 14, 2020) <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>

³ Tim Lau, *Citizens United Explained*, Brennan Center for Justice (Dec. 12, 2019) <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>

⁴ Alan Zibel, *Oligarch Overload: How Ultra-Rich Donors Have Flooded American Politics With Cash Since Citizens United*, Public Citizen (Jan. 15, 2020) <https://www.citizen.org/article/oligarch-overload/?eType=EmailBlastContent&cid=33ce6cd2-22f1-49a4-bc83-d7f0ac5a1d41>

⁵ Karl Evers-Hillstrom, et. al., *More money, less transparency: A decade under Citizens United*, Center for Responsive Politics (Jan. 14, 2020) <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Rick Claypool, *Corporations United*, Public Citizen (Jan. 15, 2020) <https://www.citizen.org/article/corporations-united-citizens-united-10-years-report/>.

their donors.¹⁰ Yet it is individual donors who have taken true advantage of the *Citizens United* decision and the new ability to donate unlimited amounts into super PACs. Nearly \$1.4 billion has been donated by 25 individuals, constituting half of all super PAC donations.¹¹

As Congress grapples with the most crucial issues of our time such as climate change, immigration, and an inequitable health care system, we must recognize the power that those with financial stakes in these industries exert in our elections. Scientists are unanimous on the need to reduce our reliance on coal and oil immediately. Yet of the top 20 corporate political spenders between 2010 and 2020, a quarter were either oil/gas or coal corporations with a financial stake in electing candidates that will oppose policies to address climate change.¹² The number of migrants detained in for-profit detention facilities grew 442 percent between 2000 and 2016.¹³ The profiteers have taken notice. GEO Group, the largest private actor in immigration detention donated hundreds of thousands of dollars to PACs that supported Donald Trump and spent \$4 million in lobbying in Washington, DC on candidates that would support the expansion of detention.¹⁴ As Congress and Presidential candidates debate the role of private insurers in health care reform, insurance companies have already spent \$4.5 million in the 2020 election cycle.¹⁵

Yet the true impact of the *Citizens United* decision is not limited to the role of money in politics. It is also important to consider the dangerous precedent of corporate personhood in *Citizens United* that laid the foundation for the Supreme Court's 2013 decision in *Sebelius v. Hobby Lobby Stores*. In the decision before the 10th Circuit court, Judge Tymkovich writes, "We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."¹⁶ The freedom of expression granted to corporations in *Citizens United* directly led to the freedom of religious expression in *Hobby Lobby*. This decision granted a corporation the ability to opt out of provisions of the Affordable Care Act in order to deny basic health care to women employees, on the basis that a corporation has religious liberty.¹⁷ The We The People Amendment does not simply limit corporate personhood in the context of elections, but ensures that Constitutional rights are for the people not corporations in contexts similar to that of the *Hobby Lobby* decision and across the board.

¹⁰ *Id.*

¹¹ Alan Zibel, *Oligarch Overload: How Ultra-Rich Donors Have Flooded American Politics With Cash Since Citizens United*, Public Citizen (Jan. 15, 2020) <https://www.citizen.org/article/oligarch-overload/?eType=EmailBlastContent&cid=33ce6cd2-22f1-49a4-bc83-d7f0ac5a1d41>

¹² Rick Claypool, *Corporations United*, Public Citizen (Jan. 15, 2020) <https://www.citizen.org/article/corporations-united-citizens-united-10-years-report/>

¹³ Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, Center for American Progress (Aug. 30, 2019) <https://www.americanprogress.org/issues/democracy/reports/2019/08/30/473966/private-prisons-profit-trump-administration/>

¹⁴ Nick Schwellenbach, Katherine Hawkins, Adam Zagorin, *Private Prison Exec Pursues Federal Cash, Spends at Trump Hotel*, The Daily Beast (Nov. 18, 2019), <https://www.thedailybeast.com/private-prison-executive-at-geo-group-pursues-federal-funds-spends-at-trump-hotel>

¹⁵ Alex Gangitano, *Progressives raise red flags over health insurer donations*, The Hill (Jan. 16, 2020) <https://thehill.com/policy/healthcare/478511-progressives-raise-red-flags-over-health-insurer-donations>

¹⁶ *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir., 2013)

¹⁷ Jamie Raskin, *The Gospel of Citizens United: In Hobby Lobby, Corporations Pray For the Right To Deny Workers Contraception*, People for the American Way Foundation (March 2014) <http://www.pfaw.org/report/the-gospel-of-citizens-united-in-hobby-lobby-corporations-pray-for-the-right-to-deny-workers-contraception/>

Research has found that 77 percent of Americans believe that there should be limits on the amount that both individuals and groups can spend on campaigns.¹⁸ States and localities across the country have attempted to reel in the outsize power of corporations in elections. I am immensely proud to represent Seattle, the first city in the nation to adopt a policy to distribute “Democracy Vouchers” to support public campaign financing and establish contribution limits for lobbyists and contractors.¹⁹ And I was proud that my amendment to establish a national pilot for Democracy Vouchers passed as part of H.R. 1, the “For the People Act.” But there is so much more to do. The time has come for Congress to intervene and that is why I am so proud to be the House sponsor, with Senator Markey, of the We The People Amendment.

I am also a proud cosponsor of Congressman Deutch’s Democracy for All Amendment. This legislation takes a crucial step to ensure that Congress and the States may regulate and limit the amount for campaign contributions and expenditures and distinguish between natural persons and artificial entities when creating campaign finance legislation. But without a clear end to corporate personhood, Americans will still feel the impact of the dangerous precedent set by *Citizens United*. The We the People Amendment goes further to end corporate constitutional rights and ensure that our democracy are really of the people, by the people.

I believe our democratic values are worth more than what any corporation can pay. In the dissenting opinion in *Citizens United*, Justice Stevens wrote, “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.” As Members of Congress, we are here to serve the people; living, breathing people, not corporations. I look forward to working with my colleagues on this committee to reverse the harmful impacts of *Citizens United* and to advance the goals set forth in my We The People Amendment to ensure that Constitutional rights are for the people.

¹⁸ Bradley Jones, *Most Americans want to limit campaign spending, say big donors have greater political influence*, Pew Research Center (May 8, 2018) <https://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/>.

¹⁹ Democracy Voucher Program, Seattle.gov (accessed Feb. 1, 2020) <https://www.seattle.gov/democracyvoucher/about-the-program>.

Mr. COHEN. Thank you, Ms. Jayapal, for your representation and your testimony.

I thank the first panel for their testimony and their work, and dismiss them and call up our second panel of witnesses.

Can those of you in the back hear me any better, or is it still a problem? Good. Thank you.

Normally I do not have the witnesses sworn in or affirmed, because I think that we shouldn't put people in that particular position, and it is against the law, Section 1001 of Title 18 of the U.S. Code, to testify before Congress in an untruthful manner which could subject you to penalties and fines. I think that is sufficient.

Mr. Johnson, who unfortunately is not with us now, is a firm proponent of having the oath administered, and I had thought that people would always tell the truth knowing that they are subject to fine or imprisonment, or at least fine, to lie to Congress.

But yesterday Mitt Romney, what was an historic day in Congress, showed me that at least one person, at least one person, because they swore their oath to God, it made a difference. So in honor of Mitt Romney and showing that one person truly does have concern about not giving false witness because they swore an oath to God, I am going to ask the witnesses to stand and be sworn in.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Thank you.

Let the record show the witnesses have answered in the affirmative.

Our first witness is Ellen Weintraub. Ms. Weintraub is the Commissioner of the Federal Election Commission, a position she has held since 2002. She served as Chair of the FEC on three different occasions, most recently in 2019. She briefly served as Counsel to the House Ethics Committee.

Commissioner Weintraub received her J.D. from Harvard Law School and her B.A. from Yale.

Ms. Weintraub, you are recognized for 5 minutes. You know about the 5 minutes, the red light, the green light.

You are recognized.

TESTIMONIES OF ELLEN WEINTRAUB, COMMISSIONER, FEDERAL ELECTION COMMISSION; ROBERT WEISSMAN, PRESIDENT, PUBLIC CITIZEN; BRADLEY SMITH, JOSIAH H. BLACKMORE II/SHIRLEY M. NAULT PROFESSOR OF LAW, CAPITAL UNIVERSITY LAW SCHOOL; CIARA TORRES-SPELLISCY, PROFESSOR OF LAW, STETSON UNIVERSITY COLLEGE OF LAW

TESTIMONY OF ELLEN WEINTRAUB

Ms. WEINTRAUB. Chair Cohen, Ranking Member Johnson, and members of the subcommittee, thank you for inviting me to testify today. It is a pleasure to be part of such a distinguished panel, and a particular pleasure for me to appear with my old friend and former colleague, Brad Smith. I compliment the minority on selecting such an esteemed panelist.

In the decade since Citizens United, according to the Center for Responsive Politics, we have seen \$1.2 billion given to candidates, parties, and outside spending groups from just the top 10 contributors. We have not seen who is behind the nearly \$1 billion that has been spent by dark money groups that keep their donors secret. And there has been \$4.5 billion in non-party outside spending, 12 times as much per year as in the 20 years before Citizens United.

This spending floods to the most competitive races, where it has the biggest impact, especially where control of a chamber is up for grabs. From 2000 to 2006, pre-Citizens United, not surprisingly, candidate spending exceeded outside spending in the top 10 most expensive Senate races in every single race. But by 2014, after Citizens United, outside spending topped candidate spending in seven of those top 10 races. And in those races, the outside groups spent an average of 80 percent more than the candidates.

But even in the face of Citizens United, there are steps that Congress can take right now to reduce the risk of corruption, to address important issues like coordination, coercion, disclosure, and foreign national spending. Some of these solutions are well-known to members of this subcommittee: H.R. 1, which passed the House in 2019, contained many useful reform proposals, requiring better disclosure of large donors to political committees; clarifying that the foreign national political spending ban applies to ballot issues; creating a small-dollar matching public financing program; creating a Democracy Vouchers pilot program; reforming the financing of inaugural committees; requiring shell companies to disclose their beneficial owners; extending electioneering communications disclosure requirements to online ads; and requiring a public file of on-line political ads.

One reform that would aid in the important effort to exclude foreign money from our system was in an earlier version of H.R. 1. That provision would have required corporations that are spending in politics to certify that they are complying with the foreign national political spending ban. I urge you to restore it if the bill is introduced in a future Congress.

The Supreme Court, in upholding contribution limits in *Buckley v. Valeo*, recognized “the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.” But contribution limits have been undermined by joint fundraising committees that collect upwards of half-a-million dollars per donor; by so-called cronibus accounts, which allow contributors to give to the national party committees more than \$1.5 million per person per election cycle; and by outdated coordination standards that cannot bear the weight that Super PACs have placed on them.

Super PACs are premised on the fiction that they are entirely independent of candidates, and therefore the money raised by Super PACs supposedly cannot corrupt those candidates. In reality, candidates appear as special guests at fundraisers for the so-called “independent” Super PACs supporting them.

Super PACs are established by close family or current or former staff of the candidate. Candidates publicly announce which Super PACs they favor and encourage people to support it. Candidates

post videos of themselves for the apparent purpose of inviting Super PACs to use it in ads.

Congress should adopt new law making crystal clear that if we are going to have independent spending groups, they must be truly independent of the candidates.

In empowering corporations, Citizens United created opportunities for unscrupulous employers to pressure their employees to engage in political activity on behalf of management's favorite candidates. Congress should adopt new laws to protect employees from political coercion.

The proliferation of Super PACs in the post-Citizens United era has also given rise to new opportunities for con artists. Scam PACs have become an increasing problem that calls out for strengthening the anti-fraud provisions.

The chief concern when Citizens United unleashed corporate political spending was that Fortune 1000 companies would use their enormous financial might to dominate political discourse. That has not been the biggest impact. Instead, it is the billionaire mega-donors whose role has been super-charged in the Super PAC era. The top 1 percent of Super PAC donors accounted for an astonishing 96 percent of funding to these groups in 2018. No statute, no regulation, no FEC advisory opinion can touch this problem. Only a judicial or constitutional reversal of Citizens United can get at the root of it.

And while I know this is not within the House's purview, the FEC could really use some new commissioners to restore our quorum and let us do our job. So, tell your friends.

Again, thank you for inviting me here today, and I look forward to your questions.

[The statement of Ms. Weintraub follows:]



COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Written Testimony of Commissioner Ellen L. Weintraub
Before the Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties
U.S. House of Representatives

Citizens United at 10:
The Consequences for Democracy and Potential Responses by Congress

February 6, 2020

Chair Cohen, Ranking Member Johnson, and members of the subcommittee, thank you for inviting me to testify today.

Citizens United has distorted America's elections for a full decade now. During that time, according to the Center for Responsive Politics, we have seen \$1.2 billion given to candidates, parties, and outside-spending groups from just the top ten contributors. We have *not* seen who's behind the nearly billion dollars that have been spent by dark-money groups that keep their donors secret. And there has been \$4.5 billion in non-party outside spending – *12 times* as much per year compared to the 20 years before *Citizens United*.¹

This spending floods to the most competitive races, where it has the biggest impact. From 2000 to 2006, candidate spending outpaced outside spending in the top ten most expensive Senate races in every single race. But by 2014, after *Citizens United*, outside spending topped candidate spending in *seven* of those top-ten races – and in those races, the outside groups spent an average of 80% more than the candidates.²

Some of the most significant ills brought by *Citizens United* can only be fixed by a constitutional amendment, as you will hear detailed by other witnesses this morning, or by some future Supreme Court. But there is no shortage of problems wrought by *Citizens United* that Congress can address head-on right now.

¹ Karl Evers-Hillstrom, Doug Weber, Anna Massoglia, Andrew Mayersohn, Grace Haley, Sarah Bryner, Alex Baumgart, "More Money, Less Transparency: A Decade Under *Citizens United*," Center for Responsive Politics (Jan. 14, 2020), found at <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

² See "Most Expensive Races," Center for Responsive Politics, found at <https://www.opensecrets.org/overview/topraces.php?cycle=2018&display=allcandsout>.

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Some of these solutions are well-known to members of this subcommittee. H.R. 1, which passed the House in 2019, contained many useful reform proposals:

- Requiring better disclosure of large donors to political committees;
- Extending the foreign-national political spending ban to ballot issues;
- Creating a small-dollar matching public financing program;
- Creating a Democracy Vouchers pilot program;
- Reforming the financing of inaugural committees;
- Extending electioneering communications disclosure requirements to online ads; and
- Requiring a public file of online political ads to be kept.

In the post-*Citizens United* era, not all the news from the Supreme Court has been bad. In *Bluman v. FEC*, the Court affirmed an opinion holding that stringent restrictions on foreign-national political spending survive strict scrutiny and are constitutional. This ruling affirms Congress's power to take strong action to keep America's elections in the hands of Americans.

One reform that would aid in the important effort to exclude foreign money from our system was in an earlier version of H.R. 1. That provision would have required corporations that are spending in politics to certify that they are complying with the foreign-national political-spending ban. This was a disappointing loss in H.R. 1; I urge you to restore it if the bill is introduced in a future Congress.

All these reforms would be helpful. All would lift corners off the veil that *Citizens United* has thrown over our campaign-finance system.

But more can be done.

Congress should set real limits on coordination between candidates and the super PACs that support them. The only reason that courts allow super PACs to exist³ is that they are, by law, supposed to be entirely independent of candidates. But in reality, this is a corrosive fiction.

It is absurd when candidates appear as "special guests" at fundraisers for the so-called independent super PACs supporting them. That is obvious coordination.

It is absurd when the so-called independent super PACs supporting a given candidate are established by close family of that candidate or current or former staff of that candidate – or even the *candidate herself*, before declaring her candidacy. That is obvious coordination.

It is absurd when candidates publicly make known which so-called independent super PAC they favor, and encourage people to support it. That is obvious coordination.

³ Super PACs, also known as "independent expenditure-only political committees" or "IEOPCs," were created in the wake of *Citizens United by SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

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It is absurd when a so-called independent super PAC lifts high-definition video *of the candidate* from the campaign's website – video clearly created for the purpose of being repurposed – and uses it in its own ads.

While I have repeatedly found reason to believe that these types of activities already constitute unlawful coordination between candidates and super PACs, or unlawful republication of campaign materials, other commissioners have refused to investigate even the most egregious fact patterns. Congress should make crystal clear that if we are going to have independent spending groups, they must be truly independent of the candidates.

Joint fundraising committees are another problem exacerbated by *Citizens United* and the subsequent *McCutcheon* decision.⁴ These have blown a substantial hole in limits to candidates and parties. The Supreme Court, in upholding FECA's contribution limits in *Buckley v. Valeo*, recognized "the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed."⁵ This inherent risk is very real when candidates and parties are accepting more than half-million-dollar checks from individual donors to joint fundraising committees. And we have seen this loophole exploited by both sides.⁶

The proliferation of super PACs in the post-*Citizens United* era has also given rise to new opportunities for those who would defraud citizens seeking to exercise their First Amendment rights to support candidates. Scam PACs have become an increasing problem. The FEC has repeatedly and unanimously requested that Congress strengthen the FECA's anti-fraud provisions. I reiterate that request today.

Citizens United, in empowering corporations to spend in politics, opened the door to the use of anonymous shell companies to drop unlimited and untraceable money into our elections. I hope that Congress will pass legislation requiring corporations that spend in politics to disclose their beneficial owners.

In unleashing corporations, the *Citizens United* court also created opportunities for unscrupulous employers to pressure their employees to engage in political activity. Congress should adopt new laws to strengthen protections for employees from being coerced by their employers to support those employers' favored candidates.

One change Congress did make to the law it would be wise to revisit. What we call the "CROMnibus accounts," created in the dead of night on New Year's Eve 2014 and supposedly paying for building party headquarters, legal expenses, and convention expenses, are less well-

⁴ *McCutcheon v. FEC*, 572 U.S. 185 (2014) (holding election-cycle contribution caps unconstitutional).

⁵ *Buckley v. Valeo*, 424 U.S. 1, 28 (1976).

⁶ See, e.g., Statement of Reasons of Chair Ellen L. Weintraub, MURs 7304, 7331 (Hillary Victory Fund, et al.) and 7339 (Trump Victory, et al.) (May 31, 2019), found at https://eqs.fec.gov/eqsdocsMUR/7304_1.pdf.

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defined than would be ideal.⁷ They allow contributors to give hundreds of thousands of dollars to the national party committees – more than \$1.5 million per person per election cycle.⁸ Again, such large contributions pose the inherent risk of corruption. If Congress decides to keep them around, one improvement would be to allow the party headquarter building funds to be used to pay for cybersecurity defenses for parties and candidates.

In the wake of *Citizens United*, my repeated efforts to conduct a comprehensive rulemaking – a rulemaking that could address important issues like coordination, coercion, disclosure, and foreign national spending – have been thwarted.⁹ We have no regulations specifically addressing super PACs. None. And our coordination regulations, passed in an earlier era, were simply not designed to bear the weight that super PACs have placed on them.

As you know, the Commission, which should have six commissioners, is currently without the bare minimum of four required to conduct our most important business – launching investigations, penalizing those who violate the law, clarifying the law through regulations and advisory opinions. This is an unacceptable situation, particularly in a presidential election year. But the FEC's problems predate *Citizens United*. The history at the agency over the last 12 years highlights how much it matters not just that there are enough FEC commissioners in the building to do business at all, but also that there are enough commissioners appointed to the Commission who are interested in faithfully implementing the laws Congress passed and fulfilling the important mission of the agency. To shed light on money in politics. To ensure an informed electorate.

It is worth noting that none of the reforms discussed above touch the most impactful changes that *Citizens United* has unleashed upon our political system. The chief concern when *Citizens United* enabled corporations to spend freely in politics was that the Fortune 1000 would start to throw its weight around. By and large, this has not happened. Instead, it is billionaire megadonors who use the dark-money groups and super PACs that followed *Citizens United* to exert wildly

⁷ See, e.g., Carrie Levine, "Limits Unclear on New Political Party 'Slush Funds,'" Center for Public Integrity (Aug. 3, 2015), found at <https://publicintegrity.org/politics/limits-unclear-on-new-political-party-slush-funds/>.

⁸ R. Sam Garrett, "Increased Campaign Contribution Limits in the FY2015 Omnibus Appropriations Law: Frequently Asked Questions," Congressional Research Service (March 17, 2015) at 1, found at <https://fas.org/spp/crs/misc/R43825.pdf>.

⁹ See, e.g., FEC, Agenda Document No. 11-02 (Jan. 20, 2011), http://www.fec.gov/agenda/2011/mtgdoc_1102.pdf; Agenda Document No. 11-33 (June 15, 2011), http://www.fec.gov/agenda/2011/mtgdoc_1133.pdf; Petition for Rulemaking (June 8, 2015), https://www.fec.gov/resources/about-fec/commissioners/statements/Petition_for_Rulemaking.pdf; Agenda Document No. 15-65-A (Dec. 17, 2015), http://www.fec.gov/agenda/2015/documents/mtgdoc_15-65-a.pdf; Ellen L. Weintraub, "Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence," FEC (Sept. 9, 2016), found at https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/Weintraub-Foreign_Political_Spending_Rulemaking.pdf; Ellen L. Weintraub, "Revised Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Influence," FEC (Sept. 28, 2016), found at https://www.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf.

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disproportionate power in our political system.¹⁰ The top one percent of super PAC donors accounted for 96 percent of funding to these groups in 2018. Together, those 1,562 donors gave \$818 million.¹¹ No statute, no regulation, no FEC advisory opinion can touch this problem. Only a judicial or constitutional reversal of *Citizens United*, and potentially the 1976 case that paved the way for *Citizens United*, *Buckley v. Valeo*,¹² can get at the root of the problem.

Again, thank you for inviting me here today. I look forward to your questions.

¹⁰ See, e.g., “*Citizens United* 10 Years Later: 25 Ultrarich People Have Spent \$1.4 Billion on Elections,” Public Citizen (Jan. 15, 2020), found at <https://www.citizen.org/news/citizens-united-10-years-later-25-ultrarich-people-have-spent-1-4-billion-on-elections/>.

¹¹ Evers-Hillstrom, *et al.*, Center for Responsive Politics, *supra* n. 1.

¹² 424 U.S. 1 (1976).

Mr. COHEN. You are welcome. And thank you, Ms. Weintraub, for your testimony.

Our second witness is Mr. Robert Weissman. Mr. Weissman is President of Public Citizen. He is an expert on corporate and government accountability, including the effect of money in politics. Prior to joining Public Citizen, he worked as Director of the Corporate Accountability Organization of Central Action from 1995 to 2009. From 1989 to 2009, he was Editor of Multinational Monitor, a magazine that tracks multinational corporations.

Mr. Weissman received his J.D. from Harvard magna cum laude. He is recognized now for 5 minutes.

Where did you get your undergraduate degree?

Mr. WEISSMAN. Harvard.

Mr. COHEN. You had a long lease.

TESTIMONY OF ROBERT WEISSMAN

Mr. WEISSMAN. Thank you very much, Chairman Cohen and members of the committee.

Citizens United is the emblematic decision of the new Gilded Age in which we live. It represents, it ratifies, and it worsens the extreme wealth and income inequality that defines our current societal situation. It has empowered a very tiny number of people to have a disproportionate, a wildly disproportionate influence over who runs for office, who wins elections, what candidates say, what candidates don't say, and what officeholders do, what officeholders are even permitted to say and to be taken seriously when in office.

When I say a small number of people, I mean a very small number of people. Twenty-five individuals are responsible for half of all Super PAC contributions made since the Citizens United decision was handed down, 25 individuals; .01 percent of donors, .01 percent of donors, are responsible for roughly 40 percent of all campaign contributions now.

There is, of course, an important race component of this as well, given the tracking of race and wealth in our country. Almost all the top 100 Super PAC donors are white. Our analysis shows the majority of white zip codes contribute 20 times the amount to campaigns as majority minority zip codes do. It is not an abstract issue. It is a deeply-felt issue. It touches every single issue this Congress and our administration undertake.

To take one example, as mentioned by Representative Deutch, the American people overwhelmingly want action on drug pricing. President Trump himself just called for action on drug pricing. Ninety percent of people want aggressive action to deal with drug pricing. They have wanted it for a long time. It hasn't happened. It is no mystery why. It is due to the disproportionate political influence of Big Pharma.

To take another example, we face an existential crisis for humanity in catastrophic climate change. This Congress has been unable to do anything about it. Why? This traces directly back to the political power of the dirty energy industries.

This is true for issue after issue, whether Wall Street reform or food safety or living wage or commonsense gun safety, expanded Social Security, protecting consumer privacy, proposing appropriate corporate taxes, dealing with Pentagon spending, protecting clean

water. Almost anything you name is touched by this issue, and it traces back to the disproportionate influence of big money in our elections where the agenda that the American people want overwhelmingly is not furthered by this Congress because of the political power of these large entities.

It doesn't have to be so. Citizens United is rooted in a series of very significant flaws both in constitutional terms, historic terms, and commonsense terms. It is not just Citizens United, it is the entirety of modern campaign finance jurisprudence.

Citizens United itself famously rests on the illogical assertion that corporations have the same rights to influence election outcomes as do human beings. There are a series of other flawed notions that underlay the decision as well, including that spending on advertising should be given the same rights of political speech as speech itself. It required the Supreme Court to contort itself to come up with a very narrow conception of what amounts to corruption, nothing other than bribery effectively, yet they even understood how quid-pro-quo corruption itself would work. They adopted a needlessly cramped understanding of what corruption is, excluding concerns about excessive influence and access. And they ignored, most importantly, the systemic effects of their decision in modern campaign finance jurisprudence to empower the super-rich and distort the political system and deny the political equality that is at the core of what American democracy is all about.

Polling shows that Americans are furious at the state of affairs. They are outraged by what they perceive to be widespread corruption, and they overwhelmingly support fundamental campaign finance reform. Indeed, democratic legitimacy itself is at stake. Democratic legitimacy itself is at stake.

The Congress in the face of this must take action. H.R. 1 is a vitally important step. This House has passed it. The Senate should get on with the business of doing the same thing. But H.R. 1 is not enough. It cannot deal with the problem of outside spending. It cannot deal with the problem of self-financing. And the current trend of Supreme Court jurisprudence suggests that even elements of H.R. 1 itself might be threatened in the future by an endlessly creative Supreme Court majority.

There is overwhelming support for a constitutional amendment among the American people to overturn Citizens United and related decisions. It is not supported among Democrats only. As Representative Deutch said, it crosses party lines. It is felt throughout the country. It is overwhelming. It is reflected in 20 states that have passed resolutions calling for a constitutional amendment, more than 800 cities and towns that have called for a constitutional amendment. I can't strongly enough urge this Congress now to take action to pass H.J. Res. 2 and send it to the states for ratification to restore our democracy.

Thank you very much.

[The statement of Mr. Weissman follows:]

Robert Weissman Testimony: <https://docs.house.gov/meetings/JU/JU10/20200206/110456/HHRG-116-JU10-Wstate-WeissmanR-20200206.pdf>

Mr. COHEN. Thank you, Mr. Weissman.

Our next witness is Mr. Bradley Smith. Rarely is a witness thanked for coming and complimented by the other side, so you are special.

Bradley Smith holds the Josiah H. Blackmore II/Shirley M. Nault Professor of Law position at Capital University Law School. He is one of the nation's leading authorities on election law and campaign finance, and co-author of "Voting Rights and Election Law," a leading casebook in the field. He previously served for five years as a member of the FEC and Chair of the Commission in 2004.

He received his J.D. cum laude from Harvard Law School.

Do any of you ever get accepted at another school? [Laughter.]

And his B.A. from Kalamazoo College.

Professor, you are recognized.

TESTIMONY OF BRADLEY SMITH

Mr. SMITH. Thank you, Mr. Chairman and members of the committee.

I guess I would begin simply by saying that repeatedly calling a decision a disaster doesn't really make it so, and we haven't really heard much evidence that actually ties the idea that people can't enact their preferences to anything that has come about from Citizens United.

In fact, Citizens United has had a number of beneficial effects on American society. We were told that it would lead to an oligarchy, an entrenched group of people who would strangle American democracy. And yet instead, in the years since Citizens United, politics in America has been more fluid. Congressional incumbent reelection rates have declined. That may not be good news for all of you, but it cuts against certainly the argument that has been made against Citizens United.

We have seen that either Congress or the presidency has changed hands in four of the five election cycles since Citizens United. There are more newcomers in Congress by about 40 percent each time around. That may be good news for some of you who are among those newcomers.

Outsiders such as the President himself, such as at least a contender to the President in the general election, Senator Sanders, people such as Representative Ocasio-Cortez or former Representative Braut have been complete outsiders who have dramatically shaken up the system and defeated entrenched insiders, typically by spending far less money.

We find that the trend of more women being elected to office has continued, and there are other things that are just kind of interesting. For example, the rate of spending increase in American politics has actually declined considerably since Citizens United. I don't think that is because of Citizens United, but it certainly cuts against the notion that this is some disaster leading to this massive explosion in spending. It is just not really so.

We find that most money in politics, dramatically so, still comes from individuals in amounts limited under the law. The vast majority still comes in limited individual contributions. But corporate contributions, which make up at most—I don't know how we want

to calculate it and what we do with this small percentage of money, about 2 or 3 percent that is so-called “dark money,” how much we think that might be corporate money. If we take the worst case, so to speak, the highest case scenario, we are talking about 5 percent of spending, maybe 6 percent coming from for-profit corporations. That is hardly drowning anybody out. And, in fact, it is a good thing. The American people have a right to hear those voices, they should hear those voices, and polling data shows that they actually want to hear those voices and believe that business has a right to comment on issues of concern.

Finally, it is important to remember what the case was all about. It was the position of the United States Government that it could censor a book or a movie if that book or movie was at any stage produced or distributed with corporate funds, like every other book or movie you have ever bought on Amazon or in a book store or seen in a theater or seen on cable or streaming television. That was the position of the government, that you could censor this. In that respect, the position that four members of the Supreme Court actually endorsed that is the truly radical view that we saw in *Citizens United*.

We have heard a lot in both the opening panel and from my colleagues here about all these policy initiatives that have been blocked, and it is curious to me that they all happen to be policy preferences of the American political left. There is nothing wrong with the political left having policy preferences, but the idea that you are not able to enact your policy preferences unless you can kneecap people who oppose those is hardly something that the First Amendment endorses. Indeed, that is why we have a First Amendment, so you can’t kneecap your opponents in order to shut them up so that you can pass whatever policies you want.

I find it interesting. We had the NRA used as an example. The NRA has 3 to 5 million members. These are U.S. citizens, people who are out there, and they care intensely about these issues. They talk to their neighbors and they work on these issues, and that is why these things sometimes don’t come through.

I remind you, it is not impossible to pass legislation. Medicare, Social Security, the Voting Rights Act, the Civil Rights Act, these things all passed when contributions even from individuals were unlimited and almost never reported because there was no enforcement mechanism even on reporting.

So I think when we look at things more rationally, we see that while the American people certainly don’t like *Citizens United* when they are asked specific questions like “Do you think corporations should be able to speak in elections?”, when we ask “Do you think *Citizens United* should have been able to show its movie?”, we find that majorities, in some cases substantial majorities, do, in fact, favor those positions.

So again, I would say *Citizens United* has been good for the United States, but mostly it is really good for the First Amendment precisely because it does what the First Amendment is supposed to do. It is a check.

Thank you.

[The statement of Mr. Smith follows:]



INSTITUTE FOR
FREE SPEECH

**BEFORE THE
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND
CIVIL LIBERTIES
UNITED STATES HOUSE OF REPRESENTATIVES**

*Citizens United at 10:
The Consequences for Democracy and
Potential Responses by Congress*

TESTIMONY OF

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The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Founded in 2005 as the Center for Competitive Politics, the Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

Introduction

Thank you Chair Cohen, Vice Chair Raskin, Ranking Member Johnson, and Members of the House Committee on the Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties for inviting me to testify today on *Citizens United* and its impact on democracy ten years after the Supreme Court's landmark ruling.

As soon as the Court handed down its decision in *Citizens United*, howls of protest erupted. Critics assailed the Court for supposedly “thrust[ing] politics back to the robber-baron era of the 19th century”¹ and “giv[ing] a green light to a new stampede of special interest money in our politics.”² Others castigated the majority for “rul[ing] that corporations can buy elections”³ and creating “government of the CEOs, by the CEOs, and for the CEOs.”⁴ Later, one now-U.S. Senator compared the Court's decision in *Citizens United* to its infamous ruling in *Dred Scott v. Sandford* – a case which ruled that the Constitution's protections weren't afforded to African Americans.⁵

Hyperbole and charged rhetoric aside, what was *Citizens United* actually about? Quite simply, on January 21, 2010, the Supreme Court struck down a law that prohibited corporations and labor unions from independently voicing their support or opposition to federal candidates. That law, the Court correctly said, violated those organizations' First Amendment rights.

The case came before the Court after the government attempted to prohibit a nonprofit organization from advertising a film criticizing then-candidate Hillary Clinton during the 2008 election. During oral arguments, the government even claimed that it could prohibit the publication of a book containing a single line advocating for or against a candidate, if it was funded by a corporation. Unsurprisingly, the Court ruled that these actions violate the First Amendment right to free speech.

Citizens United set the stage for new ways of speaking about candidates, making it easier for Americans to learn both the good and the bad about the choices on their ballots. Federal campaigns, previously dominated by legacy media outlets and the candidates themselves, now include independent voices. The decision also coincided with an increase in political diversity and volatility, with more political newcomers finding paths to success.

Today, in these prepared remarks, I want to focus first on the facts underlying the case and the constitutional law that rendered the Court's decision in *Citizens United* the only correct outcome. Then, with ten years and five election cycles of hindsight, I will review what we can

¹ Editorial, “The Court's Blow to Democracy,” *The New York Times*. Retrieved on January 30, 2020. Available at: <https://www.nytimes.com/2010/01/22/opinion/22fri1.html> (January 21, 2010).

² Kenneth P. Vogel, “Court decision opens floodgates for corporate cash,” *Politico*. Retrieved on January 30, 2020. Available at: <https://www.politico.com/story/2010/01/court-decision-opens-floodgates-for-corporate-cash-031786> (January 21, 2010).

³ Charles Mahtesian, “Court rejects campaign spending limits,” *Politico*. Retrieved on January 31, 2020. Available at: <https://www.politico.com/story/2010/01/court-rejects-campaign-spending-limits-031794> (January 21, 2010).

⁴ U.S. Senator Sheldon Whitehouse, “Whitehouse Reacts To Supreme Court Decision On Campaign Finance,” Office of U.S. Senator Sheldon Whitehouse. Retrieved on January 31, 2020. Available at: <https://www.whitehouse.senate.gov/news/release/whitehouse-reacts-to-supreme-court-decision-on-campaign-finance> (January 21, 2010).

⁵ Elspeth Reeve, “What Dred Scott Has to Do with Citizens United (Hint: Nothing),” *The Atlantic*. Retrieved on January 30, 2020. Available at: <https://www.theatlantic.com/politics/archive/2013/02/what-dred-scott-has-do-citizens-united/318096/> (February 21, 2013).

learn from the effects of *Citizens United* on American campaigns. Far from a gift to large corporations and moneyed interests, the Court's decision was a sweeping victory for the First Amendment, Americans' political speech rights, electoral competition, and a robust, healthy democracy.

I. Constitutional Law 101: *The Government Cannot Ban Political Books or Movies.*

Most forgotten in the decade since *Citizens United* is the actual speech the Court protected. The case was about political speech in its purest form and the government's belief that it could regulate and prohibit that speech. *Citizens United* is a nonprofit corporation that, in 2008, wanted to advertise and sell on-demand a documentary critical of then-Democratic primary candidate Hillary Clinton. The Federal Election Commission said doing so would be illegal, because it was funded by a corporation, and under the statute any corporate spending that supports or opposes a candidate—or in the case of broadcast advertising, even mentions a candidate close to an election—is prohibited (unless the speaker is a media corporation). The government's position before the Supreme Court was that it could prohibit companies from publishing books that contained a single line advocating for or against a candidate.

This is not hyperbole. Here are portions from the *Citizens United* argument:

ALITO: What's your answer to Mr. Olson's point that there isn't any constitutional difference between the distribution of this movie on video demand and providing access on the Internet, providing DVDs, either through a commercial service or maybe in a public library, providing the same thing in a book? ...

STEWART: I think the -- the Constitution would have permitted Congress to apply the electioneering communication restrictions...

JUSTICE ALITO: That's pretty incredible. You think that if -- if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?

MR. STEWART: I'm not saying it could be banned. I'm saying that Congress could prohibit the use of corporate treasury funds ... --

JUSTICE ALITO: Well, most publishers are corporations. And a publisher that is a corporation could be prohibited from selling a book?

MR. STEWART: ... there would be a potential argument that media corporations, the institutional press, would have a greater First Amendment right. That question is obviously not presented here.

JUSTICE KENNEDY: Well, suppose it were an advocacy organization that had a book. Your position is that under the Constitution, the advertising for this book or the sale for the book itself could be prohibited within the 60 -- 90-day period -- the 60 -- the 30-day period?

MR. STEWART: If the book contained the functional equivalent of express advocacy. ...

JUSTICE KENNEDY: Is it the Kindle where you can read a book? I take it that's from a satellite. So the existing statute would probably prohibit that under your view?

MR. STEWART: Well, the statute applies to cable, satellite, and broadcast communications....

JUSTICE KENNEDY: Just to make it clear, it's the government's position that under the statute, if this kindle device where you can read a book which is campaign advocacy, within the 60-30 day period, if it comes from a satellite, -- it can be prohibited under the Constitution ...?

MR. STEWART: It -- it can't be prohibited, but a corporation could be barred from using its general treasury funds to publish the book and could be required to use -- to raise funds to publish the book using its PAC.

CHIEF JUSTICE ROBERTS: If it has one name, one use of the candidate's name, it would be covered, correct?

MR. STEWART: That's correct.

CHIEF JUSTICE ROBERTS: It's a 500-page book, and at the end it says, and so vote for X, the government could ban that?

MR. STEWART: ... Yes, our position would be that the corporation could be required to use PAC funds rather than general treasury funds.

CHIEF JUSTICE ROBERTS: And if they didn't, you could ban it?

MR. STEWART: If they didn't, we could prohibit the publication of the book.

Of course, every book you have ever purchased from a book store or on Amazon, every documentary movie you have ever seen in a theater, rented or purchased on a DVD, or watched on a video service such as Netflix, had a corporation using "general treasury funds" in the production or distribution of the product. A rule that bans this speech must be inconsistent with the First Amendment. As Justice Anthony Kennedy put it for the majority: "political speech must prevail against laws that would suppress it."⁶

Amazingly, four justices of the Supreme Court would have held that the government could indeed ban a book or movie if any portion of its production or distribution were financed by a corporation—again, as with every book you have ever purchased in a bookstore or on Amazon, and every movie you have ever seen in a theater or on cable, broadcast, or streaming service. What was radical in *Citizens United* was not the majority view, but the view of the dissenters, who would have upheld the government's position on the censorship of books and movies, not to mention pamphlets, advertisements, and other forms of communication.

⁶ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Thanks to the *Citizens United* ruling, companies like Netflix and Amazon don't have to worry about streaming political documentaries during election season, small publishing houses don't have to hire a campaign finance attorney before publishing political books, and the government is one step further removed from policing political speech. This is the most obvious benefit of *Citizens United*.

II. The “Dark Money” Issue

I next want to address the question of “dark money” post *Citizens United*.

“Dark money” is a term with no legal meaning, and little fixed meaning in ordinary discourse. However, to the extent it has meaning, it has historically meant independent expenditures made by organizations that do not, in turn, disclose the identities of all of their donors.⁷ Although it is sometimes claimed that we don't know how much “dark money” is spent, in fact we do, because the spending must be reported even when the identities of donors to organizations doing the spending is not.

The reality is that “dark money” is not “swamping” the system. Since *Citizens United v. Federal Election Commission* set off the current alarm about “dark money” in 2010, such spending has never reached even six percent of total political spending in an election cycle. In 2018, according to the numbers at the pro-regulation Center for Responsive Politics (CRP), it was between 2.2 percent and 5.2 percent, depending on how calculated.⁸ Moreover, many of those “dark money” spenders are hardly unknown to voters. For example, according to CRP, the largest “dark money” groups in 2018 included the U.S. Chamber of Commerce, the Environmental Defense Action Fund, Everytown for Gun Safety Action Fund, the National Association of Realtors, Planned Parenthood Action Fund, the Republican Jewish Coalition, the ACLU, and NARAL Pro-Choice America. It's highly doubtful that voters don't know what these organizations stand for without knowing the names of all their individual members.

There are, of course, costs to attempting to expose the members and donors to these organizations. The Supreme Court has long recognized that that excessive, mandated disclosure can intrude on the First Amendment rights of association, exposing donors to official and unofficial harassment and other violations of privacy.⁹ Furthermore, efforts to target the “real donor” lead to the added problem of “junk disclosure.” For example, a person may give to an organization because she supports its general principles and mission, but not be in favor of a particular ad the organization runs supporting or opposing a particular candidate. Yet the individual would be

⁷ Occasionally, efforts are made to sweep up as “dark money” funds spent by nonprofit organizations and others to promote discussion of public affairs separate from candidate elections. It should be understood that such spending has long existed and never been regulated by campaign finance laws. Efforts to regulate based on any such definition would be a dramatic expansion of federal regulatory authority and would likely be unconstitutional under Supreme Court precedent. See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

⁸ Approximately \$5.7 billion was spent on the 2018 midterms. The Center for Responsive Politics estimates that \$126 million was spent by “dark money” groups directly, and another \$176 million given to Super PACs, which disclose their donors, and may or may not have spent all of their funds.

⁹ See *NAACP v. Alabama*, 357 U.S. 449 (1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective [] restraint on freedom of association... This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.”).

disclosed as having helped fund that ad. This would be at best misleading to voters, not informative, and unfair to the donor.

The problem grows as legislation becomes more intrusive in seeking out the “true donor.” For example, a member may pay year-end dues to a local trade association in December of 2020, which in turn pays dues to a larger industry association in 2021, which in turn contributes to a Super PAC which makes expenditures in October of 2022. Those who claim that we must disclose the “true spender” would have to go back nearly two years, to a member that gave to a group which is itself two stages removed from the expenditure decisions. This is more likely to be confusing than enlightening to voters.

Efforts to dictate disclosure of these donors create constitutional problems as well. In *Buckley v. Valeo*, the Supreme Court held that disclosure of donors to such organizations was constitutionally limited to situations where the donors either “make contributions earmarked for political purposes or authorized or requested by a candidate or his agent,” or “when [the donors] make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”¹⁰ The question is whether that first clause allows for publication of all donors to such organizations, or only to those who contributed specifically for such expenditures—i.e., who “earmarked” their contributions for political purposes. Taking the term “earmarked” seriously, and concerned about the First Amendment and policy impacts of overly-broad disclosure, the FEC has, literally for decades, subscribed to the latter approach. Nevertheless, in 2018, for the first time, a federal district court ruled that the FEC should take the former, broader approach, requiring the junk disclosure of general donors to and members of the organization who may not have intended or known about such expenditures. That case is still being litigated.¹¹ No federal appellate court has made such a ruling.

In short, “dark money” is not a crisis swamping the system, but a small percentage of total political spending, primarily by well-known public interest organizations and associations. If one defines it as including spending on “electioneering communications—one common definition—it has always existed in the system. However one defines it, since 2010 it has not grown as a percentage of total political spending, continue to hover in the two-to-four percent range. As with almost any “zero tolerance” policy, the alleged benefits from attempting to squeeze out the last bit of juice can be and often are overtaken by the costs incurred.

III. The Foreign Money Issue

Complaints have also been voiced, most famously by President Obama, that *Citizens United* would allow foreign interests to influence elections. This, too, has proven unfounded.

First, since *Citizens United*, the Supreme Court has summarily and unanimously affirmed a lower court ruling upholding the ban on foreign contributions and spending in U.S. elections.¹² It is illegal for foreign citizens who are not permanent residents, including, of course, foreign corporations, to spend or contribute in U.S. elections. Further, any U.S. corporation that wishes to

¹⁰ 424 U.S. at 80.

¹¹ *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 316 F. Supp. 3d 349 (D.D.C. 2018).

¹² *Bluman v. Federal Election Commission*, 565 U.S. 1104 (2012).

spend funds on campaign activity must follow existing FEC rules requiring that (1) U.S. nationals make those decisions instead of foreign nationals, and (2) that any funds must come from the corporation's domestic activities (and, again, not from foreign sources).¹³ In other words, a foreign government or corporation cannot simply capitalize a U.S. corporation and have it start spending in political races. Similarly, nonprofit corporations may legally accept foreign contributions, but may not use those donations to influence elections, and must be able to demonstrate that any activities are funded by U.S. citizens and permanent residents. Corporate PACs, which are already funded solely by U.S. donors, must have only U.S. citizens in decision-making positions.¹⁴

Second, we know that so-called “dark money” constitutes a small percentage—typically about 3.5%—of total spending. Thus, unless people are breaking the law on their reporting of contributions and spending—something unrelated in any way to *Citizens United*—that is the outermost limit of foreign spending that could in any way be attributed to *Citizens United*. But in fact we know that the percentage is far, far less, unless we are prepared to argue that leading “dark money” groups such as Planned Parenthood Action Fund and NARAL Pro-Choice America are merely front groups funded entirely by foreign interests. Of course, there are always those willing to break the law,¹⁵ and foreign governments have long sought to influence U.S. politics.¹⁶ But even at the height of the Cold War, Americans refused to sacrifice our First Amendment rights, and in any event these are not problems related to the *Citizens United* case.

That emphasizes my third point on this topic. Foreign meddling in 2016 was unrelated to the decision in *Citizens United*. Foreign nationals, and all corporations and labor unions, whether or not they have foreign shareholders or members, are still prohibited from contributing to campaigns. To the extent there was any foreign influence in 2016, it wasn't because corporations or unions were using their rights under *Citizens United*. Meanwhile, foreign authors publish widely in the U.S.; foreign publications are widely available in print and on the internet;¹⁷ foreign citizens without U.S. permanent residency have owned major shares in U.S. publications, such as billionaire Carlos Slim, long the largest shareholder in the New York Times. Foreign corporations may lobby U.S. officials and members of this body. Campaign finance laws are ill-suited to counter Russian government interference in elections. Most of the proposals floated to as responses to *Citizens United* will burden American citizens far more than Russian state actors. We made it through the Cold War without sacrificing the First Amendment. We should not let the rump state of the Soviet Union scare us into passing laws that unduly burden the rights of Americans with no real gain in combatting foreign influence.

¹³ See e.g. AO 2006-15 (TransCanada); MUR 7081 (Floridians for a Strong Middle Class).

¹⁴ *Id.*

¹⁵ See e.g. Byron Tau, *Major Donor to Trump, Clinton to Plead Guilty in Campaign Finance Case*, Wall St. J., Oct. 22, 2019, available at <https://www.wsj.com/articles/major-donor-to-trump-clinton-to-plead-guilty-in-campaign-finance-case-11571787747>; U.S. Department of Justice, *Charlie Trie Pleads Guilty to Federal Campaign Finance Violations*, May 21, 1999, available at <https://www.justice.gov/archive/opa/pr/1999/May/201crn.htm>; Terry Frieden, *Former Democratic Fund-Raiser John Huang Pleads Guilty*, CNN, Aug. 12, 1999, available at <http://www.cnn.com/ALLPOLITICS/stories/1999/08/12/huang.sentence/>.

¹⁶ See Seth G. Jones, *Russian Meddling in the United States: The Historical Context of the Mueller Report*, Center for Strategic and International Studies, Mar. 27, 2019, available at <https://www.csis.org/analysis/russian-meddling-united-states-historical-context-mueller-report>.

¹⁷ For example, the Russian government subsidizes a U.S. cable news network, RT. See *About RT* (“RT is an autonomous, non-profit organization that is publicly financed from the budget of the Russian Federation.”), available at <https://www.rt.com/about-us/>.

IV. Six Reflections on *Citizens United* at Ten: More Speech, Better Democracy

In light of the extreme rhetoric and misinformation surrounding *Citizens United* – about both the decision and its effects – it’s worthwhile to take a fact-based approach to examining what what has happened since it was decided ten years ago. The following remarks highlight seven lessons about the decision and its beneficial impacts on democracy. These takeaways are adapted from a report by my organization, the Institute for Free Speech, “*Citizens United* After 10 Years: More Speech, Better Democracy.”¹⁸

1. *Since Citizens United, Politics Is More Diverse and Political Change Is Rapid.*

One common prediction about *Citizens United* was that it would fundamentally distort our elections in favor of wealthy interests. *The New York Times*, for example, wrote after decision, “With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century... If a member of Congress tries to stand up to a wealthy special interest, its lobbyists can credibly threaten: We’ll spend whatever it takes to defeat you.”¹⁹

But far from an era dominated by the wealthy, in the five election cycles since the decision, America has seen some of the most vibrant, diverse, and rapid political change in a generation. We have seen the re-election of the first black President, Barack Obama, a Democrat, over business favorite Mitt Romney. This was followed by a celebrity outsider Republican in Donald Trump emerging victorious over noted Washington establishment figure, Hillary Clinton.

The House of Representatives has seen similar rapid change with both Republicans and Democrats taking the House in populist waves. This is perhaps best exemplified by major establishment power brokers such as Eric Cantor and Joe Crowley being bested by political neophytes and outsiders David Brat and Alexandria Ocasio-Cortez, respectively.

It is impossible to ascribe any one electoral outcome solely to *Citizens United*, but the prevalence of new voices in the political arena since the decision is undeniable. At the very least, it seems highly unlikely that if powerful moneyed interests were putting their finger on the scale of elections to a greater degree post-*Citizens United*, these are the outcomes they would have sought.

2. *Incumbents and Challengers Have Both Benefited From Super PAC Support – but the Support Helps Challengers More.*

Supporters of *Citizens United*, far from believing the decision hindered democratic ideals, regarded it as a boon to democracy by allowing political outsiders to more easily challenge incumbents and the status quo. As famed First Amendment attorney Floyd Abrams put it, “We want, for example, more Gene McCarthys and Ross Perots and individuals to come upon the scene

¹⁸ See Scott Blackburn, “*Citizens United* After 10 Years: More Speech, Better Democracy,” Institute for Free Speech. Retrieved on January 31, 2020. Available at: https://www.ifs.org/wp-content/uploads/2020/01/2020-01-16_Issue-Brief_Blackburn_Citizens-United-After-10-Years-More-Speech-Better-Democracy.pdf (January 16, 2020).

¹⁹ Editorial, “The Court’s Blow to Democracy,” *The New York Times*. Retrieved on January 14, 2020. Available at: <https://www.nytimes.com/2010/01/22/opinion/22fri1.html> (January 21, 2010).

and have a chance to build a war chest and go on out and try to reform the country as they think best.”²⁰ The elections since the decision have certainly seen a significant amount of new blood in Washington, many of whom benefited from super PAC spending that was not tied to the traditional levers of party power. But incumbent politicians and insiders also quickly learned to take advantage of this new tool of campaigning.

The best example of this is perhaps Right to Rise, the super PAC organized by supporters of Jeb Bush heading into the 2016 Republican primary. That group spent over \$120 million peppering primary states with pro-Bush ads. But while Right to Rise bought a lot of ads, it failed to convince a lot of voters. Super PACs supporting newcomers have had better success, as groups like Independent USA PAC²¹ and Women Vote!²² were able to give key support to previously unknown candidates.

All told, the five election cycles since *Citizens United* saw an average of 79 freshmen members of Congress. The five cycles prior to the decision saw just 55.²³

Congress	Total Freshmen
107th Congress (2001–2003)	49
108th Congress (2003–2005)	56
109th Congress (2005–2007)	42
110th Congress (2007–2009)	64
111th Congress (2009–2011)	65
<i>Citizens United</i>	
112th Congress (2011–2013)	99
113th Congress (2013–2015)	82
114th Congress (2015–2017)	62
115th Congress (2017–2019)	65
116th Congress (2019–2021)	89

Again, we cannot say that this is clearly due to *Citizens United*, but we can say that the claims that *Citizens United* would lock in an oligarchy have been wrong.

3. For-Profit Corporations Are Not Big Spenders in Campaigns.

In the immediate wake of *Citizens United*, the main prediction from those opposed to the decision concerned corporate spending in elections. As one commentator put it, “today’s decision

²⁰ James Taranto, “The Media and Corporate Free Speech,” *The Wall Street Journal*. Retrieved on January 13, 2020. Available at: <http://www.jamestaranto.com/abrams.htm> (January 30, 2010).

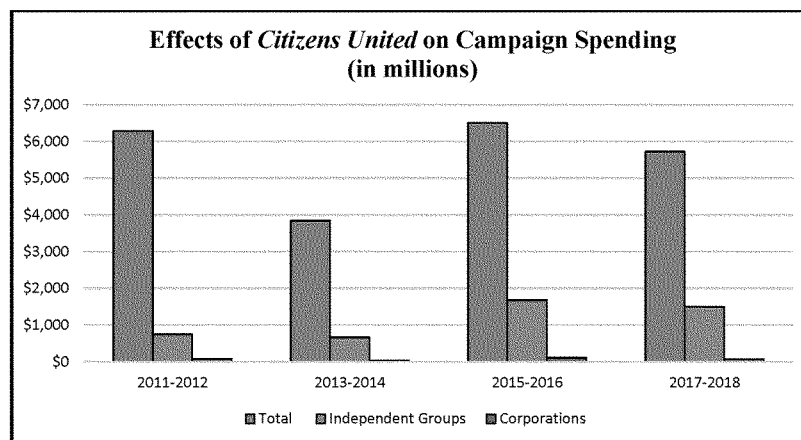
²¹ See “Independence USA PAC,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/pacs/indexpend.php?strID=C00532705&cycle=2018> (June 20, 2019).

²² See “Women Vote!,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/pacs/indexpend.php?strID=C00473918&cycle=2018> (June 20, 2019).

²³ “First-Term Members of the House of Representatives,” U.S. House of Representatives. Retrieved on January 13, 2020. Available at: <https://history.house.gov/Institution/First-Term/First-Term-Numbers/>. For data on the 116th Congress, see “Membership of the 116th Congress: A Profile,” Congressional Research Service. Retrieved on January 13, 2020. Available at: <https://fas.org/sgp/crs/misc/R45583.pdf> (January 14, 2020).

does far more than simply provide Fortune 500 companies with a massive megaphone to blast their political views to the masses; it also empowers them to drown out any voices that disagree with them.”²⁴ Simply put, this fear has not materialized.

Corporate political spending continues to be dwarfed by spending from other traditional sources. In the four cycles since the decision,²⁵ for-profit corporate political spending has averaged around 1% of spending from all sources. The following chart shows total campaign contributions²⁶ (to any entity – candidates, political parties, standard PACs, super PACs, and other groups) (*in blue*), total contributions to independent groups from any source (including individuals, PACs, corporations, and unions) (*in orange*), and for-profit corporate contributions to independent groups (predominantly super PACs) (*in red*).²⁷



Even the roughly 1% of corporate contributions to super PACs each cycle likely overstates the situation, at least in the common understanding of Fortune 500 companies. As the Sunlight Foundation reported in 2014, “As far as we can tell, one thing the [200 largest corporations] did not do, for the most part, was take advantage of the new opportunities to spend on politics that the *Citizens United* decision afforded them. The 200 corporate donors gave just \$3 million to super PACs, with the bulk of that amount a single \$2.5 million donation from Chevron” to one particular

²⁴ Ian Millhiser, “Citizens United Decision: ‘A Rejection Of The Common Sense Of The American People’,” *ThinkProgress*. Retrieved on January 13, 2020. Available at: <https://thinkprogress.org/citizens-united-decision-a-rejection-of-the-common-sense-of-the-american-people-d7b83c583b1b/> (January 21, 2010).

²⁵ This excludes the 2010 election cycle, which occurred both before and after *Citizens United*. Comparable data on corporate contributions for that cycle was not readily available.

²⁶ “Cost of Election,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/overview/cost.php?display=T&infl=N>.

²⁷ Karl Evers-Hillstrom, “In hyperpartisan political environment, major corporations stay away from controversial super PACs,” Center for Responsive Politics. Retrieved on January 13, 2020. Available at: <https://www.opensecrets.org/news/2019/04/major-corporations-stay-away-from-controversial-pacs20/> (April 12, 2019).

super PAC.²⁸ In 2018, *The Washington Post* looked at the top 50 donors for that election cycle and found similar results: just four were nonpersons, and they gave just 3% of the total donations from that group.²⁹ Of those four corporate donors, two were nontraditional. One was a group that advocates on behalf of hospitals, and one was the company of longtime political activist Ross Perot.

No matter how you slice it, *Citizens United* has not led to a flood of corporate money in our elections. It is good that corporations are not “drowning out” other voices. But it is also good that the public is able to hear their voices.

4. Money Still Can’t “Buy” an Election.

Despite a near constant drumbeat from some politicians and activist groups, in the post-*Citizens United* era, money still cannot buy elections. In fact, this point is conventional wisdom among most experts. As University of Missouri professor Jeff Milyo wrote:

[T]here is something of a scholarly consensus . . . stand[ing] in stark contrast to the popular wisdom so often echoed by pundits, politicians and reform advocates that elections are essentially for sale to the highest bidder (spender). Decades of social science research consistently reveal a far more limited role for campaign spending.³⁰

Since 2010, this truism has been demonstrated again and again, from the notable failure of deep-pocketed Jeb Bush³¹ to the meteoric rise of the heavily outspent Alexandria Ocasio-Cortez.³² It is true, both before and after *Citizens United*, that the candidate who spends more money usually wins, but while spending certainly helps campaigns, it cannot buy victory by itself. Rather, candidates who attract more voters typically also attract more donors. The inability of spending to “buy” votes on Election Day is easiest to see in the almost cliché trend of rich individuals self-funding lavish campaigns and underperforming when actual votes are counted, sometimes spectacularly so.³³ As Richard Lau, Professor of Political Science at Rutgers, put it, “I think where you have to change your thinking is that money causes winning. I think it’s more that winning

²⁸ Bill Allison and Sarah Harkins, “Fixed Fortunes: Biggest corporate political interests spend billions, get trillions,” Sunlight Foundation. Retrieved on January 13, 2020. Available at: <https://sunlightfoundation.com/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/> (November 17, 2014).

²⁹ Anu Narayanswamy, Chris Alcantara, and Michelle Ye Hee Lee, “Meet the wealthy donors pouring millions into the 2018 elections,” *The Washington Post*. Retrieved on January 14, 2020. Available at: <https://www.washingtonpost.com/graphics/2018/politics/supercpac-donors-2018/> (October 26, 2018).

³⁰ Jeff Milyo, “Campaign Spending and Electoral Competition: Towards More Policy Relevant Research,” *The Forum: A Journal of Applied Research in Contemporary Politics*. Vol. 11, No. 3 (October 2013), 437-454. Jeff Milyo is an Academic Advisor to the Institute for Free Speech. Milyo’s research was completed independently.

³¹ Zachary Mider, The Failure of Money to Buy the Presidential Nomination, in One Chart,” *Bloomberg*. Retrieved on January 13, 2020. Available at: <https://www.bloomberg.com/news/articles/2016-02-17/the-failure-of-money-to-buy-the-presidential-nomination-in-one-chart> (February 17, 2016).

³² Conor Lynch, “Alexandria Ocasio-Cortez proves that money doesn’t win elections: Are Democrats listening?,” *Salon*. Retrieved on January 13, 2020. Available at: <https://www.salon.com/2018/07/06/alexandria-ocasio-cortez-proves-that-money-doesnt-win-elections-are-democrats-listening/> (July 6, 2018).

³³ See Joe Albanese, “Failure of Campaign Self-Funders Highlights Once Again that Money Doesn’t Buy Elections,” Institute for Free Speech. Retrieved on January 13, 2020. Available at: <https://www.ifs.org/blog/failure-of-campaign-self-funders-highlights-once-again-that-money-doesnt-buy-elections/> (March 20, 2017).

attracts money.”³⁴ Money helps candidates be heard, and it appears that more viewpoints and candidates are being heard after *Citizens United*.

5. The Substantial Majority of Campaign Spending Still Comes From Limited Contributions by Individuals to Candidates and Traditional PACs.

The emergence of super PACs³⁵ – political groups that exclusively make independent expenditures and therefore can accept contributions of any size – has been the largest and most significant innovation of the *Citizens United* decision. (Though technically it was a different case – *SpeechNow.org v. FEC* – that permitted the creation of super PACs, that unanimous decision followed the reasoning of *Citizens United*.³⁶) And it is true that super PAC spending has been increasing, as more and more groups see the advantages of independent speech.

Nevertheless, the overall impact of super PACs has been overstated. At the time of the decision, its detractors argued that, “[those] players with the deepest pockets will be able to pay premium prices for as many ads as they want, easily dominating the airwaves.”³⁷ But significantly more political spending is funded by donors that must abide by strict contribution limits, namely those who give to candidates and political parties. Contributions to super PACs have ranged from 12% to 26% of total political contributions over the four cycles since *Citizens United*. Candidates and political parties continue to outspend super PACs by at least three-to-one.

Total Election Spending vs. Spending from Independent Groups			
	Total Spending	Independent Spending	Percent of Total
<i>2011-2012</i>	\$6,286	\$746	11.9%
<i>2013-2014</i>	\$3,845	\$667	17.3%
<i>2015-2016</i>	\$6,511	\$1,680	25.8%
<i>2017-2018</i>	\$5,725	\$1,496	26.1%

It’s also worth remembering that federal law automatically gives candidates the lowest cost rates for a political ad on TV or radio,³⁸ meaning a dollar of super PAC spending buys less air time than the same dollar of candidate spending.

³⁴ Maggie Koerth, “How Money Affects Elections,” FiveThirtyEight. Retrieved on January 13, 2020. Available at: <https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/> (September 10, 2018).

³⁵ See Luke Wachob, “Super PACs: Expanding Freedom of Speech,” Institute for Free Speech. Retrieved on January 13, 2020. Available at: https://www.ifs.org/wp-content/uploads/2017/10/2017-10-30_Issue-Brief_Wachob_Super-PACs-Expanding-Freedom-Of-Speech.pdf (October 30, 2017).

³⁶ See Luke Wachob, “*SpeechNow.org v. Federal Election Commission*: Protecting the First Amendment Rights of Americans,” Institute for Free Speech. Retrieved on January 13, 2020. Available at: https://www.ifs.org/wp-content/uploads/2018/03/2018-03-26_Issue-Brief_Wachob_SpeechNow.org-v-FEC-Protecting-The-First-Amendment-Rights-of-Americans.pdf (March 26, 2018). The Institute for Free Speech represented the plaintiffs in *SpeechNow*.

³⁷ Ron Gettelfinger and Larry Cohen, “Why the Citizens United decision undermines democracy,” *The Hill*. Retrieved on January 13, 2020. Available at: <https://thehill.com/opinion/op-ed/79373-why-the-citizens-united-decision-undermines-democracy> (February 2, 2010).

³⁸ David Oxenford, “Political Broadcasting Reminder Part 1 – The Basics of Lowest Unit Charges,” Broadcast Law Blog. Retrieved on January 13, 2020. Available at: <https://www.broadcastlawblog.com/2012/09/articles/political-broadcasting-reminder-part-1-the-basics-of-lowest-unit-charges/> (September 10, 2012).

6. *There is More Speech About Candidates Now Than Before.*

By legalizing corporate and union independent expenditures and paving the way for super PACs, *Citizens United* opened up new and useful avenues for speech. Americans are speaking more now than before.

This is true in monetary terms – campaign spending is up, as candidates and independent groups attempt to persuade voters through the airwaves and over the internet. It is also true in human terms. The Supreme Court’s ruling has allowed Americans to innovate new ways of organizing and speaking to promote their shared ideas. Challengers and newcomers, in particular, have found unexpected and sometimes highly persuasive ways to speak, providing them the opportunity to catch-up and compete both with incumbent politicians and established political powerbrokers. And research shows that all of this speech, from mailers to TV ads, make voters more informed and more engaged.³⁹

Conclusion

While *Citizens United* hasn’t resulted in a flood of corporate cash “drowning out” ordinary voices, it has allowed new, often very important, voices to be heard. The decision not only protects the right to speak, but it protects the right of Americans to hear those voices. Citizens, rather than the government, decide what arguments are worthwhile. For these reasons, *Citizens United* is one of the most important decisions of the century for protecting, fostering, and benefiting American democracy.

As a former member and Chair of the Federal Election Commission who has devoted my academic life to questions of campaign finance and my professional life to protecting Americans’ political speech freedoms, I am happy to answer any questions you may have about these remarks.

Thank you.

³⁹ See Paul Freedman, Michael Franz, and Kenneth Goldstein, “Campaign Advertising and Democratic Citizenship,” *American Journal of Political Science*. Vol. 48, No. 4 (October 2004), 723–741.

Mr. COHEN. Thank you, sir.

Finally, our last witness is Ms. Ciara Spelliscy. She is a Professor of Law at Stetson College of Law in Florida. She teaches election law, corporate governance, business entities, and constitutional law. Prior to joining Stetson's faculty she was Counsel to the Democracy Program at the Brennan Center for Justice at NYU School of Law, where she provided guidance on the issue of money in politics. She was a staffer for Richard Durbin up here on the Hill.

She received her J.D. from Columbia University and her A.B. from Harvard.

Professor, you are recognized for 5 minutes.

TESTIMONY OF CIARA TORRES-SPELLISCY

Ms. TORRES-SPELLISCY. Thank you. Good morning. My name is Ciara Torres-Spelliscy. I live in a swing district in the swing state of Florida. My law students are Republicans, Democrats, and Independents, and I am here to tell you that American voters are worried about the state of our elections after the attacks on our democracy in 2016.

What American voters see from Congress and from the Federal Election Commission is not reassuring. It looks like they cannot get out of their own way to protect the integrity of American elections. This was true before 2016, but after 2016 it is nothing short of excruciating to watch Congress and the FEC not act in the face of eager enemies.

Now without a quorum, the FEC is more powerless than ever at a time when the 2020 election already has candidate debates, large-scale rallies, primary votes, and big political fundraising to the tune of over \$2 billion already.

Nearly a decade ago, I told Congress right after Citizens United that I could predict two problems with inviting corporate money into our democracy: a lack of shareholder consent, and a lack of transparency. And I wish my prediction had not come true, but it did.

Today I will focus on the lack of transparency, which is better known as the dark money problem. Dark money has blanketed our elections since 2008. To date, over a billion dollars in dark money has been spent in Federal elections alone. With dark money you can see the public dance, but you can't see the puppeteer. And after the 2016 election, Americans really deserve to know whether any of those puppeteers were foreign nationals or foreign governments.

As I note in my book, *Political Brands*, we know from the redacted Mueller Report, as well as indictments of Russians by the Special Counsel's Office, that Russians were trying to influence the 2016 election, including by purchasing political ads on Facebook with rubles. In nearly any other area of the law, what happens with dark money would be akin to money laundering. But in election law, most dark money is actually legal.

The FEC is the primary regulator with the ability to stop dark money, and instead they have basically done nothing. The FEC could have started rulemakings to end dark money even before Citizens United, because the problem appeared before 2010. The typical way that dark money is created is by spending through an

opaque non-profit, like a 501(c)(4) or a 501(c)(6), and the porous rules at the FEC have allowed donors to remain anonymous. The only change that has come was at the order of a Federal court in *CREW v. FEC*.

One thing American voters still do not know is whether dark money is hiding illegal foreign money. And because the FEC has largely been stuck in deadlocks, even investigations or punishment for foreign spending has largely been lacking.

As I discussed in my first book, *Corporate Citizen*, in a particularly colorful episode, a foreign pornographer spent in a Los Angeles election in 2012. This spending violated longstanding bans on foreign money in American elections, whether they are Federal, state, or local. But the FEC would not enforce the law against the foreign pornographer. If the FEC is not going to stand up to a foreign pornographer, it begs the question who would they stand up against?

This general lack of enforcement against foreign spending has sent a terrible message to anyone who was paying attention. The message is that campaign finance laws are basically not being enforced at the Federal level by the FEC, and as American voters face 2020, the Department of Justice is the only cop left on the beat. But DOJ can only enforce willful and egregious violations of law. This leaves a vast wasteland of unenforced campaign finance laws where cheating and corner-cutting is all but invited.

And this happens as American voters are asked to choose the next president, all of the members of the House, a third of the Senate, 11 governors, and 45 state legislatures.

Given the experience of 2016 with Russians breaking American election laws with abandon, the lesson for North Korea, China, Iran, or any other hostile nation is that interference in our elections can be done with little consequence.

So the FEC needs a full complement of commissioners so that they can at least act. And if you are serious about reform, you need to add an additional seat to the FEC so that, like every other Federal agency, they have an odd number of commissioners so that they can enforce the law instead of ending in a deadlock.

And you can improve disclosure by either changing election laws or changing securities laws, or possibly both. And, of course, you could expand what Congress can constitutionally regulate if the Constitution is amended to address *Citizens United* and other campaign finance cases like *Buckley*.

But in our constitutional system, the fate of the nation is in your hands. Thank you.

[The statement of Ms. Torres-Spelliscy follows:]



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Testimony of Professor Ciara Torres-Spelliscy¹
Before the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Regarding the Tenth Anniversary of *Citizens United v. FEC*
February 6, 2020

Honorable Chair, Ranking Member and Members of the Committee,

Taking Stock of *Citizens United v. FEC*

Thomas Mann of the Brookings Institution wrote contemporaneously in 2010, “[t]he 5-4 conservative majority decision in *Citizens United vs. the Federal Election Commission* that struck many decades of law and precedent will likely go down in history as one of the Supreme Court’s most egregious exercises of judicial activism.”² Ten years later Mr. Mann’s assessment still stands. As Former Justice of the Montana Supreme Court Nelson stated recently in 2020, “[o]n January 21, 2010, the Supreme Court of the United States handed down one of its worst and most activist decisions ever. Indeed, in terms of harm caused and likelihood for future harm, the Court’s decision in *Citizens United* is, likely, the most pernicious Supreme Court decision ever issued in our nation’s history.”³

Nearly a decade ago, I told Congress after *Citizens United v. FEC* that I predicted two problems with inviting corporate money into our democracy: a lack of consent⁴ and a lack of transparency,⁵ which is sometimes known as the dark money problem.⁶ I regret to say that both of these problems remain as unsolved as they were ten years ago.

¹ Ciara Torres-Spelliscy is a Professor of Law at Stetson University College of Law and a Fellow at the Brennan Center for Justice at NYU School of Law. The Brennan Center for Justice at NYU School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. My testimony does not purport to convey the views, if any, of the New York University School of Law.

² Thomas E. Mann, *Citizens United vs. Federal Election Commission is an Egregious Exercise of Judicial Activism*, BROOKINGS (Jan. 26, 2010), <https://www.brookings.edu/opinions/citizens-united-vs-federal-election-commission-is-an-egregious-exercise-of-judicial-activism/>.

³ Jim Nelson (Former Montana Supreme Court Justice), *The Citizens United Decision: Another Date That Will Live in Infamy*, ACS EXPERT FORUM (Jan. 21, 2020), <https://www.acslaw.org/expertforum/the-citizens-united-decision-another-date-that-will-live-in-infamy/>.

⁴ Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARVARD LAW REVIEW 83, 83-85 (2010).

⁵ *Ciara Torres-Spelliscy’s Testimony for the Committee on House Administration Hearing*, BRENNAN CENTER FOR JUSTICE (Feb. 2, 2010), <https://www.brennancenter.org/analysis/ciara-torres-spelliscys-testimony-committee-house-administration-hearing>; for more information on corporate political spending see Ciara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 30(2) CONSTITUTIONAL COMMENTARY 431 (Summer 2015).

⁶ Abby Wood, *Citizens United turns 10 today. Here’s what we’ve learned about dark money.*, WASH. POST (Jan. 21, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money/> (“...when a super PAC is supported by dark money groups, the donor list may not contain any individuals at all. For example, the pro-Trump super PAC Get Our Jobs Back reported over \$50 million in independent expenditures during the 2016 primary. Its filing lists only four donors: the New York Post, Statware, “Other Firms” and TowersInvestors.com. Because three of these donors are dark money groups that do not need to report their donors, observers cannot follow the money to its original source.”).



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The tenth anniversary of *Citizens United* has prompted many scholars and non-profits that specialize in campaign finance and corporate governance to look back at the decision and the intervening decade. I canvass some that new data and analysis here.

Measuring Money by the Billion

President Obama predicted in his 2010 State of the Union that *Citizens United* would “open the floodgates for special interests — including foreign corporations — to spend without limit in our elections.”⁷ What scholars and activists could not know for certain the day that *Citizens United* was decided was whether spending patterns would actually change in elections after the opinion. But with the passage of time, it is apparent that as documented by Open Secrets, who keep meticulous records of spending in federal elections, that outside political spending exploded in the intervening ten years. To wit, “outside spending is the primary consequence of *Citizens United*, with non-party groups now dominating presidential elections and the most tightly contested House and Senate contests. Non-party outside groups have spent nearly \$4.5 billion influencing elections since the 2010 cycle. Over the previous two decades, they spent a combined \$750 million.”⁸

Citizens United led to the D.C. Circuit decision *SpeechNow*, which in turn allowed for the creation of Super PACs.⁹ Super PACs have been mega-spenders in federal elections which were also funded by a handful of mega-donors. As *ABC News* reported, “[d]uring the 2016 campaign, more than 2,300 Super PACs spent \$1.1 billion — nearly 17% the \$6.5 billion amount spent by all parties involved in the election cycle at all levels. Most of that money came from just 100 donors...”¹⁰ Moreover, according to Open Secrets, “[j]ust 10 donors accounted for more than \$1 billion over the decade.”¹¹ One measure of how impactful outside spending was post-*Citizens United* is that in 126 races the outside spending dwarfed what the federal candidate himself or herself spent.¹²

Another development in the post-*Citizens United* era was the price tag for federal elections continued to trend upwards. Each midterm election between 1998 and 2018 was more expensive than the midterm election that preceded it. And every presidential election cycle, including congressional

⁷ Remarks by the President in State of the Union Address, WHITE HOUSE (Jan. 27, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address>; see also Jesse Lee, President Obama on Citizens United: “Imagine the Power This Will Give Special Interests Over Politicians”, WHITE HOUSE BLOG (July 26, 2010 at 3:07 PM ET), <https://obamawhitehouse.archives.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit>.

⁸ Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs>.

⁹ *SpeechNOW.Org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

¹⁰ Devin Dwyer, *10 years after landmark Citizens United Supreme Court decision, record cash flooding US elections*, ABC NEWS (Jan. 20, 2020, 5:07 AM), <https://abcnews.go.com/Politics/10-years-landmark-citizens-united-supreme-court-decision/story?id=68099167>; see also David M. Shribman, *Ten years on, Citizens United ruling has changed U.S. politics — but not in the way many feared*, LOS ANGELES TIMES (Jan. 12, 2020, 4:00 AM), <https://www.latimes.com/world-nation/story/2020-01-12/citizens-united-ruling-anniversary-how-it-changed-american-politics> (“the 100 top donors [of the last midterm election] were responsible for two-thirds to three-quarters of all the money raised by super PACs...”).

¹¹ OpenSecrets.org, *Everything you need to know about Citizens United on its 10th anniversary*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/2020/01/citizens-united-on-its-10th-anniversary/>.

¹² Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs> (“In some of the most competitive races, outside groups wage ad wars of their own, battling for spending superiority to influence voters. Since the 2010 midterms, outside spending has surpassed candidate spending in 126 congressional races. In the five cycles prior, that phenomenon occurred just 15 times.”).



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races between 2000 and 2016 was more expensive than the presidential election cycle that preceded it, though the cost of the 2016 presidential race (Trump/Clinton) alone was slightly down from 2012 (Obama/Romney).¹³ Contributing to the upward trajectory were costly congressional races. In my home state of Florida, we experienced the most high-priced Senate race in history between Rick Scott and Bill Nelson. “Eight of the top 10 most expensive Senate races ever occurred after *Citizens United* with inflation factored in. With \$213 million spent — including \$97 million in outside spending — the hotly contested 2018 Florida Senate race is the most expensive ever.”¹⁴ So far, as of February 1, 2020, presidential candidates had already raised over \$1 billion with billionaire candidates President Trump, Mayor Bloomberg and Tom Steyer all raising over \$200 million.

While the press has focused on the explosion of small donors in recent federal elections including the last midterm, as the Brennan Center for Justice at NYU School of Law has documented, “[t]o be sure, 2018 was a banner year for small donations. Donors who gave \$200 or less contributed \$1.4 billion to campaigns and political committees, a more than 50 percent increase over the last midterm cycle. But donors who gave more than \$100,000 together contributed almost \$2 billion, well over twice the total from 2014, resulting in a much greater portion of election funding coming from them than small donors.”¹⁵

Mega-Donors Play in State Elections Too

Citizens United also impacted state and local elections. It is worth noting that outside political spending also mushroomed in these elections. According to the National Institute on Money in Politics which tracks political spending in all 50 states, “[a]t the state level, Americans have seen a marked increase in independent spending after *Citizens United*, and some states have experienced exponential growth. For instance, in Colorado’s 2006 election, independent spending totaled less than \$400,000. The next post-*Citizens United* comparable election, 2014, saw \$33.8 million spent independently. Most recently, 2018’s election had a remarkable \$136.9 million of independent spending. *It boggles the mind.*”¹⁶

Not unlike what happened in federal elections where rich individuals took center stage, a similar thing happened in state electoral spending as well. According to Campaign Finance Institute, “[i]n the years before the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission* (CU), independent expenditures (IEs) in state elections were dominated by formal state and local party organizations and labor unions. In the years since then, ... ascendant have been national, party-affiliated organizations (such as the Republican and Democratic Governors Associations) and

¹³ *Total Cost of Election (1998-2018)*, CENTER FOR RESPONSIVE POLITICS

<https://www.opensecrets.org/overview/cost.php> (last visited Feb. 1, 2020).

¹⁴ Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs>.

¹⁵ Ian Vandewalker, *The 2018 Small Donor Boom Was Drowned Out by Big Donors, Thanks to Citizens United*, BRENNAN CENTER (Jan. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/2018-small-donor-boom-was-drowned-out-big-donors-thanks-citizens-united>.

¹⁶ Stacy Montemayor, *10 years after Citizens United: State races transformed by explosive growth in independent spending*, NATIONAL INSTITUTE ON MONEY IN POLITICS (Jan. 21, 2020), <https://www.followthemoney.org/research/institute-reports/10-years-after-citizens-united-state-races-transformed-by-explosive-growth-in-independent-spending> (emphasis added).



— most dramatically — single-issue organizations funded by wealthy mega-donors.”¹⁷ Simultaneously, there’s a dark money problem in state and local elections.¹⁸

Millions of Other People’s Money

As I and other scholars have noted, the Supreme Court in *Citizens United* displayed a surprising lack of appreciation of how corporate governance actually works in the real world. As the Chief Justice of the Delaware Supreme Court noted, “the Supreme Court ignored, or misunderstood, the traditional corporate law concept of the corporation and thereby subjected millions of American investors to suffer the involuntary use of their entrusted capital for speech that has no rational connection to their decision to buy stock. That is bad corporate law making bad constitutional law.”¹⁹

In the previous presidential election in 2016, the top donor to Jeb Bush’s Super PAC Right to Rise was a corporation called CV Starr & Co, a private subsidiary of the Starr Companies, an insurance firm. CV Starr gave Right to Rise \$10 million. Many corporations, LLCs and business partnerships also gave.²⁰ An additional \$2.3 million came from Rooney Holdings Inc. Another in the \$1 million club was Jasper Reserves LLC. Yet another million-dollar donor to Right to Rise was NextEra Energy Inc. NextEra is a horse of different color because it is a publicly traded company (NYSE ticker: NEE).²¹

That is just a snap shot of corporate spending in one election through one candidate’s Super PAC. According to Open Secrets, looking over the past decade, “36 companies on the S&P 500 contributed \$25,000 or more to super PACs since 2012. The largest donors on that list are Republican-backing oil & gas companies such as Chevron and NextEra Energy. Corporations gave \$301 million to super PACs and hybrid PACs from the 2012 to 2018 cycles, 87 percent of which went to conservative groups. These contributions made up 10 percent of funding to these groups in the 2012 cycle, a high water mark. That figure dipped to just 5 percent in 2018.”²² I tracked publicly

¹⁷ Press Release, *Independent Spending in State Elections, 2006-2016 The big winners were single-issue organizations funded by wealthy mega-donors*, CAMPAIGN FINANCE INSTITUTE NIMP (Sept. 18, 2018), http://www.cfinst.org/Press/PReleases/18-09-18/Working_Paper_Independent_Spending_in_State_Elections_2006-2016.aspx.

¹⁸ Chisun Lee & Douglas Keith, *How Semi-Secret Spending Took Over Politics*, THE ATLANTIC (June 28, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-rise-of-gray-money-in-politics/489002/>; see also Tiffany Muller, *Citizens United: The Court Ruling That Sold Our Democracy*, COMMON DREAMS (Jan. 22, 2020), <https://www.commondreams.org/views/2020/01/22/citizens-united-court-ruling-sold-our-democracy> (“Now, almost half of all outside spending is dark money that has no or limited disclosure of its donors.”).

¹⁹ Jonathan R. Macey & Leo E. Strine Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451 (2019); see also Skaife, H.A., Werner, T., *Changes in Firms’ Political Investment Opportunities, Managerial Accountability, and Reputational Risk*, JOURNAL OF BUSINESS ETHICS (2019), <https://doi.org/10.1007/s10551-019-04224-6>; Geeyoung Min & Hye Young You, *Active Firms and Active Shareholders: Corporate Political Activity and Shareholder Proposals*, 48:1 THE JOURNAL OF LEGAL STUDIES 81-116 (2019), <https://www.journals.uchicago.edu/doi/abs/10.1086/700846>; Michael Hadani, Jonathan P. Doh & Marguerite Schneider, *Social movements and corporate political activity: Managerial responses to socially oriented shareholder activism*, 95 JOURNAL OF BUSINESS RESEARCH 156-170 (Feb. 2019), <https://doi.org/10.1016/j.jbusres.2018.10.031>.

²⁰ Daniel Nasaw, *Which Candidates’ Super PACs Are Getting Most Corporate Money?*, WALL ST. J. (Aug. 20, 2015 10:52 am ET), <https://blogs.wsj.com/washwire/2015/08/20/which-candidates-super-pacs-are-getting-most-corporate-money/>.

²¹ Gira Torres-Spelliscy, *Corporate America’s Wasted Investment in Jeb Bush*, BRENNAN CENTER BLOG (Feb. 29, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/corporate-americas-wasted-investment-jeb-bush>.

²² Karl Evers-Hillstrom, *More money, less transparency: A decade under Citizens United*, CENTER FOR RESPONSIVE POLITICS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united#super-pacs>.



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traded company spending in my book *Political Brands* and I found that publicly traded companies had spent \$37.9 million between *Citizens United* and 2018.²³ This is a problem because when corporate managers spend money from the treasuries of publicly traded companies they are using what Justice Brandeis once called “other people’s money.”²⁴

It’s Getting a Little Dark in Here

As I discuss in my first book, *Corporate Citizen*, dark money has plagued American elections in the intervening years between 2010 and today:

The impact of *Citizens United* was immediately clear. Roughly \$450 million in outside money was spent in [the 2010 midterm] federal election, and \$131 million of that spending was from dark money sources. “Dark money,” means political spending where the original source is impossible for the public to discover. As the Chair of the Federal Election Commission (FEC) Ann Ravel noted, “[t]here are circuitous ways to spend. We have the nesting doll problem with dark money.” Because much of that dark money was funneled through trade associations like the U.S. Chamber of Commerce, there is a deep suspicion that much of this dark money came from corporations exercising their new *Citizens United* rights to spend. But because the money is dark, the public may never know for sure. As prominent political lawyer Trevor Potter explained, “[w]e only know corporate funding of most political ads when it is inadvertently disclosed.”²⁵

In fact, over \$1 billion dollars in dark money has been spent in federal elections alone since 2008.²⁶ In the 2018 election, over \$147 million in dark money was spent.²⁷ Dark money is money spent in elections which cannot be traced to its real source.²⁸ With dark money, the voting public only knows the last entity that spends in an election, but not the identity of underlying donors. The typical way dark money is created is by spending through an opaque non-profit like a 501(c)(4) (a social welfare organization) or 501(c)(6) (a trade organization). And then porous rules at the FEC have allowed donors to these nonprofits to remain anonymous, even if they spend millions during elections to influence voters.²⁹

²³ CIARA TORRES-SPELLISCY, *POLITICAL BRANDS* 71-75 (Elgar 2019) (\$3,350,000 in 2010, \$4,250,000 in 2012, \$5,206,925 in 2014, \$6,975,000 in 2016 and \$18,192,930 in 2018).

²⁴ LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* (1914).

²⁵ CIARA TORRES-SPELLISCY, *CORPORATE CITIZEN: AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE* 14 (Carolina 2016) (internal citations omitted).

²⁶ Anna Massoglia, *State of Money in Politics: Billion-dollar ‘dark money’ spending is just the tip of the iceberg*, CENTER FOR RESPONSIVE POLITICS (Feb. 21, 2019), <https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/>.

²⁷ *Dark Money Basics*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 2, 2020), <https://www.opensecrets.org/dark-money/basics> (showing \$147.7 million in dark money spent in 2018).

²⁸ Michael E. Hartmann, *The Etymology of “Dark Money” Where did the phrase originate, and what does it mean?*, Capital Research Center (July 15, 2019) (Bill Allison at the Sunlight Foundation coined the phrase ‘dark money.’).

²⁹ *Instructions for Preparing FEC FORM 9 (24 Hour Notice of Disbursements/Obligations for Electioneering Communications)*, Federal Election Commission (Jan. 2018), <https://www.fec.gov/resources/cms-content/documents/fecform9i.pdf> (“Schedule 9-A [listing donors] must be filed only if the donations received for the purpose of furthering electioneering communications aggregate \$1,000 or more per donor since the first day of the preceding calendar year. ... 11 CFR 104.20(c)(9).”).



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An Agency Asleep

A functioning and effective Federal Election Commission could have crafted rules to prevent dark money even before *Citizens United* because the phenomenon started before 2010.³⁰ But to date, the FEC has not promulgated any rules to make dark money transparent for American voters.³¹

The only slight improvement on the dark money front has come at the order of a federal court, not through the normal notice and comment rule making process.³² The D.C. District Court in *CREW v. FEC* in 2018 mandated that those entities who buy independent expenditures must actually name their donors.³³ The FEC provided guidance on how to comply with the court's order for political ads purchased after September 18, 2018 directing the listing of donors over \$200 in filings with the Commission.³⁴ The Supreme Court let the ruling in this case stand for the purposes the 2018 election.³⁵ Troublingly, the Campaign Legal Center found that many groups were not complying with the new required transparency on the eve of the 2018 midterm election.³⁶ Moreover, *CREW v. FEC* is still being litigated, so the ultimate result in the federal courts is unknown.³⁷

CREW v. FEC won't solve the dark money problem completely because it only applies to independent expenditures which contain *Buckley v. Valeo*'s magic words of express advocacy (such as "vote for" or "vote against").³⁸ Yet many political ads fall into a different category called "electioneering communications." These are broadcast ads that never use the magic words, but feature a federal candidate in the days leading up to a federal election.³⁹ The *CREW v. FEC* case doesn't apply to electioneering communications. Thus, those ads are more likely to be funded by dark money.

³⁰ Steve Weissman, *Press Release New CFI Report Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election*, Campaign Finance Institute (Feb. 25, 2009), http://www.cfinst.org/press/releases_tags/09-02-25/Soft_Money_Political_Spending_by_Nonprofits_Tripled_in_2008.aspx.

³¹ Office of Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Federal Election Commission (Feb. 2017) ("Due to the bloc's ideological opposition to campaign finance law, major violations are swept under the rug and the resulting dark money has left Americans uninformed about the sources of campaign spending."); Megan R. Wilson, *FEC deadlocked on 'dark money'*, The Hill (Feb. 11, 2015), <https://thehill.com/homenews/campaign/232582-fec-deadlocked-on-dark-money>; Daniel I. Weiner, *The FEC Deadlocks (Again) on Dark Money*, BRENNAN CENTER BLOG (Aug. 1, 2014), <https://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.

³² Ciara Torres-Spelliscy, *The 2018 Elections Have \$100 Million in Dark Money and Counting Voters are more in the dark than ever about who's funding political ads*, Brennan Center Blog (Oct. 22, 2018), <https://www.brennancenter.org/blog/2018-elections-dark-money>.

³³ *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018).

³⁴ Press Release, *FEC provides guidance following U.S. District Court decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), FEDERAL ELECTION COMMISSION (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

³⁵ Dave Levinthal & Sarah Kleiner, *Supreme Court Lets Stand a Decision Requiring 'Dark Money' Disclosure*, The Atlantic (Sept. 18, 2018), <https://www.theatlantic.com/politics/archive/2018/09/supreme-court-lets-stand-a-decision-requiring-dark-money-disclosure/570670/>.

³⁶ Brendan Fischer & Maggie Christ, *How the FEC is Still Allowing Dark Money Groups to Remain Dark*, Campaign Legal Center (Oct. 17, 2018), <https://campaignlegal.org/update/how-fec-still-allowing-dark-money-groups-remain-dark>.

³⁷ Citizens for Ethics in Washington, *CREW V.S. FEC – CROSSROADS GPS* (last visited Feb. 2, 2020), <https://www.citizensforethics.org/lawsuit/crew-vs-fec-crossroads-gps/>.

³⁸ *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976), see also *Writing Reform*, Brennan Center for Justice at VII-5 - VII-7 (2010).

³⁹ *The Nuts and Bolts of Electioneering Communications*, CENTER FOR RESPONSIVE POLITICS (last visited Feb. 2, 2020), <https://www.opensecrets.org/527s/electioneering.php>.



However, Congress should know that the Supreme Court has been consistent in decisions over the past four decades that disclosure of money in politics is perfectly constitutional.⁴⁰

On-line political ads that lack magic words present a significant problem as they fundamentally fall into a no-mans-land and thereby escape traditional campaign finance reporting requirements.⁴¹ Essentially, if an on-line political ad that attacks or supports a federal candidate yet avoids *Buckley*'s magic words, it is not a reportable expenditure under current federal law. States are stepping up to fill this void in transparency for on-line political ads by expanding campaign finance reporting requirements to on-line platforms for state elections, but that is only a patchwork solution that calls out for a national resolution.⁴² In meantime, Congress could provide more clarity in legislation that dark money is not allowed in federal elections, specifying reasonable donor disclosure thresholds for campaign ads including those that appear on-line.

Rubles, Renminbi & Malaysian Ringgit

Faith in the integrity of American elections was shaken after the American Intelligence Community informed the public in 2016 and in 2017 that the 2016 election was attacked by Russians.⁴³ This assessment was then reinforced by indictments in 2018 from the Special Counsel against Russians for hacking during the 2016 election, as well as a large Russian social media disinformation campaign.⁴⁴ And evidence of foreign interference was further articulated in the redacted version of the Special Counsel's Report in 2019.⁴⁵

⁴⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 915-917 (2010) (upholding BRCA's disclosure requirements); *McConnell v. FEC*, 540 U.S. 93, 191-193 (2003) (upholding BRCA's disclosure requirements); *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (upholding FECA's disclosure requirements).

⁴¹ Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, CENTER FOR RESPONSIVE POLITICS (Mar. 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>.

⁴² Kelly Born, *How states are experimenting with digital political advertising regulation: Interview with Campaign Legal Center's Erin Chlopak*, Hewlett Foundation (May 28, 2019), <https://hewlett.org/how-states-are-experimenting-with-digital-political-advertising-regulation-interview-with-campaign-legal-centers-erin-chlopak/> ("Vermont, Washington, and Wyoming each amended their campaign finance laws to extend reporting and disclaimer requirements to online political ads."); *id.* ("Maryland, California, and New York have enacted legislation that requires the creation of digital archives of information about online ads relating to candidates and ballot initiatives.").

⁴³ *Joint Statement from the Department Of Homeland Security and Office of the Director of National Intelligence on Election Security*, Department of Homeland Security (Oct. 7, 2016), <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> ("The U.S. Intelligence Community (USIC) is confident that the Russian Government directed the recent compromises of e-mails from US persons and institutions, including from US political organizations."); Director of National Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections*, ICA 2017-01D (Jan. 6, 2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf ("We assess Russian President Vladimir Putin ordered an influence campaign in 2016 aimed at the US presidential election. Russia's goals were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency. We further assess Putin and the Russian Government developed a clear preference for President-elect Trump. We have high confidence in these judgments.").

⁴⁴ U.S. v. Viktor Borisovich Netyksho, 1:18-cr-215 at 7-8 (D.D.C.) (Indictment July 13, 2018), www.documentcloud.org/documents/5021502-Indictment-as-to-Viktor-Borisovich-Netyksho-Et-Al.html ("on or about July 27, 2016, the Conspirators attempted after hours to spearfish for the first time email accounts at a domain hosted by a third-party provider and used by Clinton's personal office."); U.S. v. Internet Research Agency LLC, 1:18-cr-32 (D.D.C.) (Indictment Feb. 16, 2018).

⁴⁵ Special Counsel Robert S. Mueller, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Department of Justice (Apr. 18, 2019), www.justice.gov/storage/report.pdf (redacted version).



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In light of these revelations about the 2016 election, which I write about in my book Political Brands, American voters need to know that all hands are on deck to prevent or catch the next foreign effort to interfere with our elections.⁴⁶ But instead, what Americans have seen from the Federal Election Commission (FEC) is an inability to investigate Russian interference including the purchase political ads on Facebook with rubles,⁴⁷ the failure to make any new rules that would address foreign interference, and the failure to address dark money which could provide cover for foreign meddling.⁴⁸

As I explain in my book Political Brands, one thing that the American public still doesn't know is whether dark money is hiding illegal money, including money from foreign nationals:

As Lisa Gilbert of Public Citizen notes ... “One of our biggest concerns about our system of money in politics is that it can flow in a very secretive way. And because dark money flows behind the scenes, foreign nations are able to take advantage of the lack of transparency, and influence our politics.”⁴⁹

Campaign finance reform advocates have long worried that dark money could be hiding illegal foreign money. Recent events show that this fear was not far-fetched. As Professor Abby Wood noted in the *Washington Post*, “[Dark money hiding foreign influence] is the hardest point to study systematically. Consider the indictments of Igor Fruman and Lev Parnas, figures in the Trump impeachment case, for violating campaign finance laws. A lawyer at a nonprofit carefully matched Fruman's and Parnas's addresses to that of a dark money donation from a shell corporation to a super PAC that supported Trump — and found that the pair were laundering over \$1 million from foreign countries to support Trump. That's illegal under our laws, which forbid foreign nationals to donate to U.S. elections and forbid anyone to donate under someone else's name.”⁵⁰

Are foreigners spending in U.S. elections? Largely, we don't know because many of those that would be sophisticated enough to spend in U.S. elections, likely know how to spend in a secretive way. But there have been examples of foreign spending in U.S. elections that has been caught red-handed. For example, a Chinese company, American Pacific International Capital, Inc. (APIC), gave \$1.3 million to the pro-Jeb Bush Super PAC Right to Rise in the 2016 presidential election. In a rare instance of the FEC enforcing the ban on foreign spending in U.S. elections, a complaint against Right to Rise resulted in FEC fines against the Super PAC and the Chinese company.⁵¹

In other cases, the FEC has been passive about enforcing the law against foreign spending. As I discussed in Corporate Citizen, in a particularly colorful episode, a foreign pornographer spent in a Los Angeles election in 2012 in favor of President Obama's reelection. This spending violated a

⁴⁶ TORRES-SPELLISCY, POLITICAL BRANDS.

⁴⁷ Josh Dawsey, *Russian-funded Facebook ads backed Stein, Sanders and Trump*, POLITICO (Sept. 26, 2017), <https://www.politico.com/story/2017/09/26/facebook-russia-trump-sanders-stein-243172>.

⁴⁸ See *infra*.

⁴⁹ TORRES-SPELLISCY, POLITICAL BRANDS at 304 (quoting Lisa Gilbert).

⁵⁰ Abby Wood, *Citizens United turns 10 today. Here's what we've learned about dark money*, WASH. POST (Jan. 21, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money/>.

⁵¹ Kate Sullivan, *FEC fines Jeb Bush super PAC and a Chinese company \$1 million over foreign interference in 2016 election*, CNN (Mar. 11, 2019) (“The FEC fined the Jeb Bush super PAC Right to Rise \$390,000 for soliciting a contribution from a foreign national and the American Pacific International Capital \$550,000 for making the contribution...”).



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longstanding ban on foreign money in any American election (federal, state or local).⁵² Nevertheless the FEC would not enforce the federal law against the foreign pornographer. This spending also violated California law, and fortunately for the rule of law, California enforced its law against him.⁵³

In another case which is ongoing, Pras Michel of the musical group The Fugees has been indicted by the U.S. Department of Justice (DOJ) for allegedly facilitating political spending from a foreign donor in the 2012 presidential election. As soon as these actions were discovered, campaign finance experts complained about Mr. Michel's alleged behavior to the FEC, which, again, did nothing about it.⁵⁴ Thankfully the DOJ picked up the ball that the FEC dropped in this case, which allegedly involved over \$21 million in foreign money.⁵⁵

As demonstrated above, because the FEC has largely been nonfunctional, or stuck in deadlocks, even investigations of foreign spending or punishment for foreign spending has been lacking.⁵⁶ The FEC also has not made new rules to better deter foreign spending post-2016.⁵⁷ Though I should note that the current Chair of the FEC has put out strong statements reminding the public that foreign spending in U.S. elections is illegal, especially when the spending is from foreign governments.⁵⁸

The ban on foreign spending is not controversial and the Supreme Court has upheld the foreign ban.⁵⁹ Yet the lack of enforcement by the FEC against foreign spending in the two notable cases mentioned above, among others, has sent a terrible message to anyone paying attention: the message is campaign finance law is basically not enforced at the federal level to keep foreign money at bay. Given the experience of 2016 with Russians' breaking U.S. election laws with abandon, the lessons for North Korea, China, Iran or any other hostile foreign actors is that interference in our elections can be done largely without legal consequences from the primary regulator—the FEC.

⁵² 52 U.S.C. § 30121 & 11 CFR 110.20.

⁵³ CORPORATE CITIZEN at 121-122.

⁵⁴ Megan McAllen, *Delay, Deadlock, Dismiss: Pras Michel indictment exposes how FEC dysfunction opens our elections to foreign meddling*, Campaign Legal Center (May 15, 2019), <https://campaignlegal.org/update/delay-deadlock-dismiss-pras-michel-indictment-exposes-how-fec-dysfunction-opens-our>.

⁵⁵ Press Release, *Entertainer/Businessman and Malaysian Financier Indicted for Conspiring to Make and Conceal Foreign and Conduit Contributions During 2012 U.S. Presidential Election*, Department of Justice (May 10, 2019), <https://www.justice.gov/opa/pr/entertainerbusinessman-and-malaysian-financier-indicted-conspiring-make-and-conceal-foreign>.

⁵⁶ Rick Hasen, *Breaking: Republican FEC Commissioners Block Investigation into NRA Russian Ties in 2016 Election*, Election Law Blog (Aug. 16, 2019 11:54 AM), <https://electionlawblog.org/?p=106940>.

⁵⁷ Jordan Muller, *FEC rejects proposal to consider new rules on foreign spending in US elections*, CENTER FOR RESPONSIVE POLITICS (May 25, 2018), <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>.

⁵⁸ Chair Ellen L. Weintraub's Statement Regarding Illegal Contributions From Foreign Governments, FEDERAL ELECTION COMMISSION (June 14, 2019), <https://go.usa.gov/xv381j>.

⁵⁹ *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (upholding the federal foreign political spending ban).



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Resistance to *Citizens United*

Citizens United has so angered many Americans that they have organized to overturn it using the Article V amendment process outlined in the U.S. Constitution.⁶⁰ “As of last year [2019], 20 states and 800 municipalities had passed resolutions calling for *Citizens United* to be overturned.”⁶¹

Meanwhile, many shareholders have also used their rights under the securities law to push back and ask for more transparency of corporate political spending.⁶² Shareholder proposals about corporate dark money have been one of the most frequently filed topics in the past few years.⁶³ The Forum for Sustainable and Responsible Investment (US SIF) reported, “[i]n the 2014 season, the bulk of the 130-plus resolutions on political spending and lobbying asked companies to report on their lobbying expenditures, including through indirect channels such as trade associations and non-profit organizations that do not have to report their donors.”⁶⁴ The trend remained the same years later according to the Sustainable Investment Institute (SI2), which tracked these types of shareholder proposals in 2018, “80 resolutions ask[ed] companies to disclose political activity spending”⁶⁵ The result of this activism is that the number of publicly traded companies that have chosen to adopt best practices for transparency jumped from 70 to 173 over the past decade.⁶⁶ However, there are two rule makings pending at the Securities and Exchange Commission (SEC) which could gut the ability of shareholders to hold corporations accountable on a range of issues including spending dark corporate money in elections.⁶⁷

⁶⁰ Jeffrey D. Clements, “But It Will Happen”: A Constitutional Amendment to Secure Political Equality in Election Spending and Representation, 13.2 HARVARD LAW & POLICY REVIEW 373 (2019).

⁶¹ Chris Kromm, *Citizens United at 10: Why fighting corruption is a racial justice issue*, FACING SOUTH (Jan. 17, 2020), <https://www.facingsouth.org/2020/01/citizens-united-10-why-fighting-corruption-racial-justice-issue>.

⁶² Julie N.W. Goodridge & Christine Jantz, *Corporate Political Spending: Why Shareholders Must Weigh In*, 5(2) JOURNAL OF VALUES-BASED LEADERSHIP Article 3 (2012), <https://scholar.valpo.edu/jvbl/vol5/iss2/3>.

⁶³ Eliza Newlin Carney, *Shareholders Demand Disclosure -- and Republicans Push Back*, AMERICAN PROSPECT (May 4, 2017), <https://prospect.org/power/shareholders-demand-disclosure-republicans-push-back/>.

⁶⁴ *Shareholder Resolutions*, US SIF (2015), <http://www.ussif.org/resolutions>.

⁶⁵ Sustainable Investment Institute, *Proxy Preview Climate, Politics, and Women Top Shareholder Issues for Proxy Season 2018* (Mar. 8, 2018), https://siinstitute.org/press/2018/Proxy_Preview_2018_PressRelease.pdf.

⁶⁶ Press Release, *CPA Statement on 10th Anniversary of Citizens United*, CENTER FOR POLITICAL ACCOUNTABILITY (Jan. 17, 2020), <https://politicalaccountability.net/hifi/files/Citizens-United-Ten-Years-Later.pdf> (“By January 2010, 70 major companies had already adopted CPA’s corporate governance model for political disclosure and accountability. Today, that number has more than doubled to 173, as more companies have recognized the risks and benefits of disclosure and corporate board oversight. These companies recognize their duty as responsible stewards of other people’s money to refrain from hiding in the dark corners of politics. In addition, three-fifths of the S&P 500 companies, the dominant source of corporate political money, have some form of disclosure, as measured by a CPA-Wharton School annual benchmarking of those companies’ political disclosure and accountability policies.”)

⁶⁷ Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, SEC Release No. 34-87457 & File No. S7-22-19, <https://www.sec.gov/rules/proposed/2019/34-87457.pdf>; Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, SEC Release No. 34-87458 & File No. S7-23-19, <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>; Commissioner Robert J. Jackson Jr., Statement on Proposals to Restrict Shareholder Voting, SEC (Nov. 5, 2019), <https://www.sec.gov/news/public-statement/statement-jackson-2019-11-05-open-meeting>; Ciara Torres-Spelliscy, *A Trump Administration Plan that Could Boost Corporate ‘Dark Money’ in Elections*, BRENNAN CENTER BLOG (Nov. 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/trump-administration-plan-could-boost-corporate-dark-money-elections>; Ciara Torres Spelliscy, *How Corporate Law Can Help Democracy Post-Citizens United*, BRENNAN CENTER BLOG (Jan. 21, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/how-corporate-law-can-help-democracy-post-citizens-united>.



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Conclusion and Solutions

There's much that could be done to mitigate the damage caused by *Citizens United* including:

- (1) Amend the Constitution to overturn the *Citizens United v. FEC* decision.⁶⁸
- (2) Work within the existing constitutional structure to pass legislation to address the case's fallout:
 - a. Pass better disclosure rules for elections including disclosure of paid advertising on-line through the federal election laws.⁶⁹
 - b. Pass better disclosure rules for publicly traded corporations' spending in politics through the securities laws.⁷⁰
 - c. Provide for a consent mechanism for investors in publicly traded companies like the one that exists in the U.K.⁷¹
 - d. Improve and expand public financing of elections so that candidates have an alternative to the privately-funded dialing-for-dollars free-for-all that we have now in federal elections.⁷²

Thank you again for considering my testimony.

⁶⁸ Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235 (2010-2011).

⁶⁹ Heather Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903 (2013-2014); Ciara Torres-Spelliscy *Congress could hardwire dark money into our democracy*, THE HILL (Dec. 4, 2017), <https://thehill.com/opinion/campaign/363144-congress-would-hardwire-dark-money-into-our-democracy>.

⁷⁰ Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112(6) HARVARD LAW REVIEW 1197 (Apr., 1999); Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12(2) CONNECTICUT PUBLIC INTEREST LAW JOURNAL 361 (2012-2013), <https://ssrn.com/abstract=2184554>.

⁷¹ Ciara Torres-Spelliscy & Kathy Fogel, *Shareholder-Authorized Corporate Political Spending in the United Kingdom*, 46 U. OF SAN FRANCISCO L. REV. 479 (Spring 2012).

⁷² Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 (2) SETON HALL LEGISLATIVE JOURNAL 271 (2018); Gareth Fowler & Daniel I. Weiner, *H.R.1's public finance reforms represent the best hope for bringing about the transformative changes that voters demanded in 2018*, BRENNAN CENTER (Sept. 20, 2019); Ian Vandewalker & Kevin Morris, *The Reform Law Needed to Counter Citizens United: H.R. 1*, BRENNAN CENTER (Jan. 21, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/reform-law-needed-counter-citizens-united-hr-1> ("The flood of big money in politics unleashed by the Supreme Court keeps growing. Public campaign financing offers candidates a way to run without chasing megadonors.").

Mr. COHEN. Thank you very much.

We will now have a round of questioning by the members of the committee, and I will start with myself. We have 5 minutes as well.

Mr. Weissman, you have a lot of history in corporate involvement. Give me a little primer on corporations and their involvement in politics and their ability to spend money. Have they always been able to spend money in politics? Is it unique to America? Do different countries allow them to spend money in politics? And what is the growth or diminution of that?

Mr. WEISSMAN. I think that the statement that was correctly read from Justice Scalia in his decision that the original text permits corporations to spend, the original text of the First Amendment permits corporations to spend money, is inaccurate. I think Justice Stevens gave a much richer and more correct reading. The Framers never intended corporations to spend money, and there are a lot of reasons to think that they explicitly did not want them to. Justice Scalia's only argument, really, is the lack of evidence, not that there was affirmative evidence to enable corporations to spend money.

As you do know, we do have a history of corporations spending money. It varies by state. In the original Gilded Age, we had corporations and the robber barons overwhelming elections and really running as party bosses. There were reforms put in place to curb that activity, and those reforms worked relatively effectively throughout much of the 20th century.

Corporate spending itself really had not been given—there had been a series of restrictions on corporate spending, and the Supreme Court itself in an important decision, *Austin*, had recognized that the unique nature of corporations, their unique ability to gather enormous sums meant it made a lot of sense for the Congress or localities and states to have the ability to restrict corporate outside spending. That was thrown to the wind in *Citizens United*.

Mr. Smith is correct, we have not seen the torrents that were anticipated. We calculate that about half-a-billion dollars have been spent by corporations since the *Citizens United* decision was handed down, not a small amount, much of it in really significant ways in local and state elections, as well as in referenda. We see corporations increasingly exerting an overwhelming effect with great harm. That is probably more than I can do right now to give you a cross-cultural story about it.

But *Citizens United* really was a break from precedent, both historic jurisprudential precedent, but also from the previous 100 years of American experience.

Mr. COHEN. You expressed how much money has been put into campaigns through these Super PACs since *Citizens United*, the \$7 billion figure I think George mentioned as distinguished from the \$700 billion figure, whatever, the previous 20 years. Is there any data you have to show if that has affected Americans' belief that their government is not responsible to them?

Mr. WEISSMAN. In my written testimony I have extensive information, and the polling on this is really overwhelming, about Americans' deep concern with corruption. Asked by one pollster to rate 22 different attributes of American life, the campaign spending system comes in last. Only 20 percent of people are satisfied in

that poll with the current campaign system. That actually is a pretty high number compared to other pollsters.

The New York Times found that with near unanimity—their quote—Americans want to replace the current finance system. The only dispute among Americans they found was whether they believe that the current system needs fundamental change or should be completely rebuilt. It is hard to know which one is the more fundamental thing they are trying to get at.

But we also see very deep concerns about corruption generally and dissatisfaction with American government, and really I think a fear that calls into question whether the government works for them. They are not wrong being skeptical about that.

Mr. COHEN. Let me ask you, because I only have a little time left. You said there are 25 top individuals. Can you give me the top 10 names?

Mr. WEISSMAN. Well, the two top names now are Sheldon Adelson and Michael Bloomberg. The top 10 I can't give you off the top of my head.

Mr. COHEN. Thank you.

Ms. Jayapal's bill is different from Mr. Deutch's. Mr. Deutch's strictly deals with campaign finance, and hers deals with other issues. I can see a theory that corporations—I hate to say it because I don't even like the word anymore, but a Dershowitz theory that if it is good for the corporation and it is good for the stockholders, then they have a duty to see that the business goes further and whatever, putting money into politics that might affect their businesses. But how can you say that a corporation can express a religious opinion, like in Hobby Lobby? Is there any basis to think that a corporation should have a right? They are formed partially so they don't have to be responsible for liability, immune from liability. Why should they be able to have a right on what insurance covers?

Mr. WEISSMAN. Well, I agree and support Representative Jayapal's bill. It seems extraordinary to me. But to be clear, that was what the Supreme Court held in *Citizens United* as well. If you read the majority's decision, there is a lot of concern about discriminated-against minorities not having the right to express their feelings, hopes, and aspirations. The discriminated-against minorities they are discussing in the majority decision are corporations. That is the people they thought were being discriminated against in not having the ability to express what they feel.

As you say, they don't have feelings, as Justice Stevens expressed in great detail. They don't have feelings, they don't hurt, they don't care about the future, they care about profit. That was lost entirely in the Supreme Court's decision there, and as well as in the Hobby Lobby case and others.

Mr. COHEN. Thank you, sir.

Mr. Armstrong is sitting in as ranking member, and I will recognize Mr. Armstrong now for 5 minutes.

Mr. ARMSTRONG. Thank you, Mr. Chair.

Corporations in my town sponsor baseball fields, youth teams, charities, other things. I am incredibly proud of the corporate citizens that exist, and without them we would not have a lot of the

services that exist in my local community, and I think that is very accurate with small towns all across the country.

Professor Smith, Citizens United not only allowed corporations to spend, but unions too. Is that correct?

Mr. SMITH. Yes.

Mr. ARMSTRONG. And did the AFL-CIO file a brief in the lawsuit?

Mr. SMITH. Yes, it did.

Mr. ARMSTRONG. It has been suggested by Commissioner Weintraub that the existence of any foreign shareholder in a corporation—the one-drop rule—should prohibit that corporation from making political expenditures. How would that affect unions?

Mr. SMITH. Well, there has been a certain effort to whip up—I will be very blunt here—I think a kind of shameful effort to whip up hysteria against this idea that foreigners are coming in to influence our elections. But it is worth noting that the AFL-CIO, for example, has at least two dozen affiliates that have the term “international” right in their name, plus many other affiliates that take international members as well, and those all pay dues to the AFL-CIO. AFSCME has Canadian affiliates and so on. So, yes, to adopt that kind of extreme position would essentially shut labor unions out of political discussion as well.

Mr. ARMSTRONG. Do you know how many?

Mr. SMITH. How many members?

Mr. ARMSTRONG. How many unions?

Mr. SMITH. I don’t know the total. Again, AFSCME has at least 24 affiliates, at least two dozen affiliates. I remember calculating it a few years back. It was like 29 or 30 that just had the term “international” in the name. In terms of the number who have international members, it could be larger.

Mr. ARMSTRONG. Thank you.

Do Super PACs disclose their donors?

Mr. SMITH. Super PACs do disclose their donors, the same as any other PAC that has any contributor in it who contributes in the aggregate over \$200 is disclosed.

Mr. ARMSTRONG. And did Citizens United change any disclosure laws?

Mr. SMITH. No, it did not. Those laws were upheld, in fact. Some of those laws were challenged and they were upheld in the decision.

Mr. ARMSTRONG. I will go to my next question. You say in your prepared testimony that dark money is typically around 3.5 percent of total spending. How do we know that if it is not disclosed?

Mr. SMITH. Sure, that is a good question. You know, we keep hearing these huge numbers thrown out. “Oh, it has been \$100 billion or \$1 billion,” or whatever. That sounds like a lot. But if we think about it, it is 2.5 or 3 or 3.5 percent. That doesn’t sound quite so threatening. And we know that sometimes people say, well, we don’t know how much there is because it is “dark.” But, in fact, we do, because spenders have to report all that they spend. So we can look at the total amounts that are spent. All that dark money means is that an organization doesn’t have to report the names of each and every donor to that organization.

So even if we assumed all of that were dark money, and some of it is not—many of these spenders do disclose donors—we get up to that small figure that has been consistently under 5 percent. And we also find that many of those spenders, by the way, are very well known to the public. For example, leading dark money groups include groups like the Environmental Defense Fund, Planned Parenthood Action Fund, NAACP Action Fund, the U.S. Chamber of Commerce, the National Association of Realtors. I just don't think that most Americans are sitting around going, "The National Association of Realtors, what are they about?" I think most Americans understand the points of view that are being represented in those cases.

Mr. ARMSTRONG. After Citizens United, are there still constitutional limits on what disclosures can be mandated?

Mr. SMITH. There are. Citizens United did uphold existing law, but too many people have suggested that gives a green light to any kind of disclosure. In *Buckley v. Valeo*, the landmark campaign finance case, and also in numerous other cases over the years, *McIntyre v. Ohio Election Commission*, in cases outside of the direct political arena such as *Thomas v. Collins*, the Supreme Court has limited the ability of the government to force disclosure of memberships as something that infringes of First Amendment rights of association, petition, and speech.

Mr. ARMSTRONG. Where does the majority of speech about candidate spending on campaign ads come from, both before and after Citizens United?

Mr. SMITH. The vast majority, as I indicated in my opening comments, does indeed come from individual contributions to campaigns, and also to PACs. Some people seem to think that PACs are corporate money, but they are also individual contributions. It is better to say that a corporation sponsors a PAC into which employee shareholders can contribute. But again, that is individual money and not money from the corporate treasury.

Mr. ARMSTRONG. And what role do you think Citizens United plays in the trend of billionaire candidates like President Trump in the last election, and in this one Michael Bloomberg and Tom Steyer, self-funding candidates in expensive campaigns?

Mr. SMITH. Well, one thing is that, of course, that was authorized. Individuals prior to Citizens United, individuals had the right to spend as much as they wanted. So that really didn't change by Citizens United. Given the short time, I would just say that I think we can see that it hasn't really worked. I mean, Mr. Steyer spent a great deal of money and doesn't have very much to show for it. You still have to have a winning message, and all that money does is let the American people hear, and that is a good thing. The American people have a right to hear. But it doesn't cause them in some way to vote.

Mr. ARMSTRONG. With that, I will be interested to see if Mr. Bloomberg is still second now that he is actually running for president. That will be interesting to follow.

Thank you, Mr. Chair.

Mr. COHEN. Thank you, sir.

Mr. Raskin, you are recognized for 5 minutes.

Mr. RASKIN. Mr. Chairman, thank you.

Welcome to all of our distinguished witnesses today, and all of the natural persons who have come to participate in today's proceeding.

The first thing that I want to point out is that Citizens United did not enlarge the free speech rights of any citizen in the United States, not even CEOs or corporate executives who could spend already whatever they wanted as independent expenditures under *Buckley v. Valeo*. All that Citizens United did was to transform every corporate treasury in America into a potential political slush fund and thereby authorize and empower the CEOs of the corporations to spend whatever they wanted of other people's money in the corporate treasuries in political campaigns.

This declaration did transform, to my understanding, two centuries of jurisprudential understanding of what a corporation is. You can go back to Chief Justice John Marshall's opinion in 1819 in the *Dartmouth College v. Woodward* case, where he said that a corporation is an artificial entity, invisible, intangible, existing only in contemplation of law, possessing only the rights conferred upon it by the state legislature and not the constitutional rights of the people. And yet the Roberts court in *Citizens United* endowed private corporations, these invisible, intangible, artificial entities, with the political rights of the people, essentially arming the CEOs with the power to spend other people's money, as Justice Brandeis termed it, in political campaigns. And for all of the reasons stated by the witnesses, that has occasioned a dramatic change in the character and the quality of American politics.

Now, I favor a constitutional amendment for the same reason that I support all the constitutional amendments that have reversed reactionary jurisprudence by the Supreme Court. That is how we got women's suffrage in the 19th Amendment which toppled the Supreme Court's decision in *Minor v. Happersett*, saying that women did not get the right under the 14th or 15th Amendment. The 14th Amendment, and the 15th and 13th, of course, reversed the Supreme Court's reactionary decision in the *Dred Scott* case before the Civil War. It is how we got the 26th Amendment. It is how we got the 24th Amendment. Most of our amendments have been democracy-deepening, suffrage-enlarging, democracy-perfecting amendments where the people have to overturn pinched and reactionary understandings of the Supreme Court.

But until we get there, I wanted to take up an issue that comes out of *Citizens United*, because Justice Kennedy's conceit in his majority opinion is that the corporations are speaking for the shareholders, the corporations derive their First Amendment political rights from the First Amendment rights of the human beings who actually own stock in the corporation. But there is a problem, which is that the corporations are spending all of this money and putting money into political campaigns and dark money channels and so on without ever consulting the shareholders themselves; and, in fact, in most cases not even notifying the shareholders. And they have been doing everything in their power to fight in both the SEC and the FEC efforts to get just notice to people of how their money in the corporation is being spent.

I introduced a measure which became part of H.R. 1 which I call Shareholders United. Shareholders United says that no corporation

shall be allowed to spend any money in politics until you have first notified the shareholders of the proposal and they are authorized in advance by majority vote that their money be spent in a political campaign.

I am wondering if each of you, if you could go quickly—and forgive us because we have our 5-minute stricture here. But would you agree that as long as we are living under the regime of Citizens United, that the shareholders should have the right to be apprised of proposed political spending by corporations of their money, and they should have the right to vote on it? I know there is an argument that there should have to be a 100 percent vote, but at the very least there should be a majority vote before the corporation goes ahead and spends their money.

And I could start with you, Madam Chair.

Ms. WEINTRAUB. Yes.

Mr. WEISSMAN. Absolutely. And as you know, more than a million people have requested the SEC to issue a rule to do exactly what you are suggesting.

Mr. RASKIN. Professor Smith, do you agree?

Mr. SMITH. No. This is a complex question of corporate governance and there are many things corporations do, including things that affect politics, that they don't require shareholder approval for.

Mr. RASKIN. Okay. And Professor Spelliscy?

Ms. TORRES-PELLISCY. I wholeheartedly endorse your bill. I think shareholders should have the right to consent to corporate political spending, and that would bring American law in line with the U.K., where shareholders in U.K. companies do have the right to pre-approve corporate political spending.

Mr. RASKIN. Okay.

Mr. COHEN. Thank you, Mr. Raskin.

Mr. RASKIN. I yield back, Mr. Chairman.

Mr. COHEN. Mr. Cline, you are recognized for 5 minutes.

Mr. CLINE. Thank you, Mr. Chairman, appreciate it.

I would note that one of the things that we have that the U.K. doesn't have is the First Amendment.

The majority in Citizens United maintain that political speech is indispensable to a democracy, which is no less true because the speech comes from a corporation. The majority also held that the BCRA's disclosure requirements as applied to the movie were constitutional, reasoning that disclosure is justified by a governmental interest in providing the electorate with information about election-related spending resources.

The Court also upheld the disclosure requirements for political advertising sponsors and upheld the ban on direct contributions to candidates from corporations and unions.

What it did not do is overturn centuries of law. Rather, it overturned portions of McCain-Feingold which had become law in 2002, another law that went into effect in the 1940s, and two Supreme Court decisions in whole or in part, *Austin v. Michigan Chamber of Commerce* from 1990 and *McConnell v. FEC* from 2003.

So I would ask Professor Smith, in your prepared testimony you quote part of the oral argument in *Citizens United* in which the government argues that as a matter of constitutional law it can

ban books or movies if corporate resources are used in their production or distribution. Is that correct?

Mr. SMITH. Yes.

Mr. CLINE. And can we talk about whether this is really a danger?

Mr. SMITH. Yes. Citizens United was rescheduled after that first oral argument, and in the second oral argument then-Solicitor General Kagan argued, well, we would never actually do that. But, in fact, the FEC from time to time has done that. In a little-noticed 1987 advisory opinion, the FEC informed U.S. News and World Report that their publication of a book would not be exempt under the press exemption because it was not a periodical, that it would therefore be potentially illegal to distribute a book.

Now, maybe that wasn't noticed so much because in the end U.S. News wasn't really going to do that. It was dismissed on other grounds. But the FEC made that point.

Just in the last decade, in 5642, the FEC spent almost two years investigating publication and distribution of a book, one that was written by George Soros, and it was eventually dismissed. But it should be noted that the General Counsel in that case recommended that the FEC find a violation due to distribution of a book about policy, a book called *The Bubble of American Supremacy*, because it included such radical statements as "It is not enough to defeat President Bush at the polls," and "We can regain the moral high ground only by rejecting President Bush when he stands for reelection," and that was considered enough that that book could have been potentially banned.

So I do think it is a real issue.

I would also note that when Justice Kagan, or now-Justice Kagan, then-Solicitor General Kagan, was asked what about pamphlets, she said pamphlets we ban, we definitely go in for pamphlets.

I have here a copy of *Common Sense*, the great revolutionary tract by Thomas Paine. It is 54, 58 pages. That includes a couple of cover pages here. Is this a book or a pamphlet? I will ask you all to vote for it because you are the legislators who will get to decide whether or not this can be published or whether or not this can be banned as a pamphlet.

Mr. CLINE. Thank you.

Some of our Democratic colleagues in the Senate have previously introduced a constitutional amendment to undo or overturn Citizens United. The amendment would allow Congress to regulate the giving and spending of money on political advocacy but explicitly carves out the press. Do you have any views on that approach?

Mr. SMITH. Well again, if I may, Mr. Cline, I want to briefly address something that my old colleague—we were law professors going back. You got your J.D. from Harvard, too; is that right?

I think, Mr. Chairman, that we should probably note that again.

But in any case, one thing I did want to comment, though, is that who has benefitted—we haven't seen this torrent of money from Fortune 100 companies. The corporations that have benefitted are small corporations, and most of those corporations can't afford to operate a PAC, they can't afford to have a lobbyist here, and those are the corporations that are really benefitting from this, and

those are closely held corporations where I think we can usually find the shareholder benefits.

Now, your specific question regarding the press, I think the Supreme Court has never really held that the press has rights that other American citizens do not, and there is polling data that shows if you ask people should we limit spending but the press is exempt, support for limiting spending drops dramatically. People don't think the press should have exemptions. In fact, less than 50 percent support restricted spending if the press is exempt. They don't see any reason why these guys, just because they are members of the National Press Club, get to talk about politics, spend a ton of money, Jeff Bezos can buy a newspaper and spend a ton of money, but everybody else could not. Again, the Supreme Court has never recognized some specific right. The press, in other words, is the ability of all Americans to speak. It is not a right that adheres to a certain group of people who got a degree from Columbia Journalism School.

Mr. CLINE. Thank you, Mr. Chairman.

Mr. COHEN. Thank you, sir.

Ms. Scanlon, you are recognized for 5 minutes.

Ms. SCANLON. Thank you very much.

I wanted to focus on something that Commissioner Weintraub mentioned earlier, and that is presidential inaugural funds. I introduced a bill which was folded into H.R. 1 called the Inaugural Fund Integrity Act, because of concerns that have come out about donations to and spending by these funds. Those funds have grown exponentially during the time since Citizens United came out. So the Obama inauguration fund in 2012, I guess, set a \$53 million record, and the Trump inaugural fund just back in 2016 raised over \$107 million. So 250 people or corporations gave 91 percent of those funds, and 47 people or corporations gave more than \$1 million.

There are concerns about these inaugural funds because, in a way, if you are donating to a candidate you are making a bet. There is no guarantee they will get in. But if you are donating to an inaugural fund, that person has already been elected, and it raises some really serious concerns about transparency and quid pro quo, et cetera.

I would like to ask unanimous consent to enter into the record an Open Secrets article entitled "Companies That Funded Trump's Inauguration Came Up Big in 2017."

Mr. COHEN. Without objection.

[The information follows:]

MS. SCANLON FOR THE OFFICIAL RECORD

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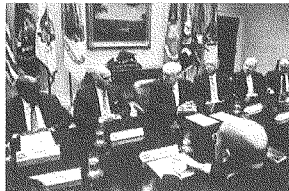
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OPENSECRETS NEWS

Companies that funded Trump's inauguration came up big in 2017

By [Alex Baumgart](#) | [January 19, 2018](#)

(Photo by Aude Guerrucci-Pool/Getty Images)

President Donald Trump's inaugural committee raised a record \$107 million with the help of wealthy benefactors but also through donations from more than 200 corporations and anonymous LLCs, some of which held government contracts.

On the one-year anniversary of Trump's inauguration, [OpenSecrets took a look](#) at the 63 federal contractors that collectively contributed \$16.3 million to finance the festivities to see how they've fared in the first year of his presidency.

Some have received lucrative contracts; others have shed executives who now sit among Trump's political appointees; and still others have earned an unprecedented level of access to the new administration.

Contracts and the pay-to-play loophole

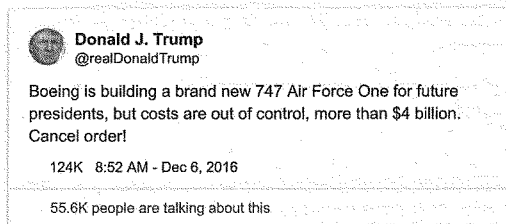
Of the 63 federal contractors that donated to the inauguration, more than half won multimillion-dollar bids in 2017, federal records show. Six companies earned contracts last year after not receiving any awards in 2016.

Federal law forbids government contractors from making contributions to candidates and political action committees. However, there is no such rule against contributions to post-election activities like

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Companies that funded Trump's inauguration came up big in 2017

Boeing, the second-largest government contractor, ran into early opposition from Trump in December 2016 when Trump tweeted the following about Boeing's Air Force One contract, which he claimed was over budget.



In September 2017 Boeing ultimately won the bidding process for the \$600 million contract to build the Air Force One replacements.

Contributions to the inaugural fund didn't necessarily guarantee lucrative government awards, however. For instance, BP America, saw a 58 percent reduction in government contracts in Trump's first year despite contributing a sizable \$500,000 to his inauguration.

In total, just over half of the companies that gave to the inauguration saw an increase in contract money from 2016 to 2017.

Perks

Some companies that donated to Trump's inauguration didn't secure government contracts last year but benefited in other ways.

In 2016, Dow Chemical was awarded both a \$1.9 million federal grant for bioenergy research and \$1 million as part of an ongoing agreement with the Energy Department. The company gave \$1 million to Trump's inauguration but didn't receive federal contracts or grants last year.

However, Dow benefited tremendously last year in two major ways: First, the DOJ approved their \$130 billion merger with DuPont in spite of a number of antitrust concerns that had previously delayed the merger.

The new entity, DowDuPont, has prospered in the last year as the result of an amenable EPA, which includes business friendly leadership in Scott Pruitt and Nancy Beck, the top deputy of the toxic chemicals division. Beck is a former executive at the American Chemistry Council, the trade association that represents companies in the chemical industry like DowDuPont.

The EPA recently rejected a recommended ban on chlorpyrifos, a Dow pesticide that studies suggest has adverse effects on humans. The agency also appears to be streamlining the chemical approval process, which will allow companies such as DowDuPont to get its products to market faster.

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trends in elections. Alex is a former CRP intern who has also spent time interning in both the district and DC offices of a US Representative. Alex graduated from the University of Colorado at Boulder with degrees in Political Science and Economics.

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Mr. COHEN. And let me ask, was that a quid pro quo in Sondland? Was that in connection with giving money to the—

Ms. SCANLON. I believe he gave \$1 million.

Mr. COHEN. Yes, and that was a quid pro quo. Thank you.

Ms. SCANLON. But generally, the purpose in drafting the Inaugural Fund Integrity Act was to put some limits on both contributions to and spending by these inaugural funds to try to block foreign corporations and foreign nationals from giving money, and we have certainly heard of some issues with that with respect to Mr. Parnas, to block straw donors and to limit contributions by corporations.

So in your experience, Commissioner Weintraub, can you tell us what kinds of issues you are seeing with respect to transparency and donations in these inaugural funds?

Ms. WEINTRAUB. Well, as you know, Congresswoman, there really is not that much law governing inaugural funds, which is interesting in light of the point that you just made, that people have already been elected, so there is no risk there, you know who you are giving the money to.

I am concerned that there is, for example, no limitation on contributions in the name of another, which is a core provision of the rest of the Federal Election Campaign Act, and that is not part of the restrictions on inaugural funds. There is a limit that says you are not supposed to get foreign money, but then there is no way of really getting behind that because you don't have a restriction on contributions in the name of another. So how do you know that the people who say they are giving the money are actually giving their own money and that it is not coming from a foreign source or some other source?

So I think there are big transparency problems with the current regime, and I applaud you for your efforts to try to fill some of those holes.

Ms. SCANLON. So basically, if we did some of what the Inaugural Fund Integrity Act tries to do, which is apply the restrictions that apply to other campaign finance to inaugural funds, that would help the process?

Ms. WEINTRAUB. Absolutely.

Ms. SCANLON. Okay. And it just seems like that is important this year given the fact that someone will be elected president and we will be dealing with another inaugural fund, so now might be a good time to put some brakes on what is going on.

Mr. Weissman, do you have anything to add there?

Mr. WEISSMAN. First to applaud you for the effort, and also to sort of elaborate on it. We don't know where the money is spent, for one thing. So in terms of the quid pro quo analysis, or more generally a richer corruption analysis, there is worry about issues of self-enrichment. If a donor knows that not just a committee but the president or people around the president may benefit, as, in fact, was the case, because we know that some of that money was wasted at the Trump Hotel, that is a real incentive to give the money in expectation of some policy coming out of it.

That Open Secrets article that you entered into the record I believe refers to, for example, a million-dollar contribution from Dow Chemical. Dow Chemical soon found that it was able to get benefits

on specific regulatory matters on pesticides out of the Trump EPA. It was exactly the kind of corruption that should be intolerable in our system, and we do need safeguards to prevent this from going forward.

Ms. SCANLON. Okay. Thank you.

I yield back.

Mr. COHEN. Ms. Dean, you are recognized for 5 minutes.

Ms. DEAN. Thank you, Mr. Chair. I appreciate the chance to hear from the testifiers to talk about this important issue.

I think I will start, please, with Commissioner Weintraub, and this reflects some of the comments we just heard from Professor Smith.

Some say that the proliferation of private money in our politics is not the result of Citizens United. Citizens United held that corporations have a First Amendment right to spend sums independently to support or oppose candidates for office, yet few for-profit corporations spend money on political campaigns in their own names, so Citizens United can't be all that bad they say.

However, a simple review of the numbers shows that there is a problem, and it is tied directly to the Supreme Court's ruling. In the pre-Citizens United 2008 presidential election, outside spending totaled about \$338 million. We saw that within your testimony. And in the 2012 presidential election, the first after the Supreme Court's decision, outside spending totaled over \$1 billion.

Can you speak to how Citizens United, which is the premise of this underlying hearing, changed the influence of money in the political process despite a dramatic increase in overt corporate expenditures?

Ms. WEINTRAUB. Well, there are a variety of ways that Citizens United has had this huge impact, which I think everybody gets that. In the first place, when corporations spend—and corporations can give to Super PACs. Super PACs disclose their donors, but the corporations often will be a shield against disclosing who really is behind the money. So you'll get the ABC Super PAC reporting that they have a million-dollar contribution from the ABC 501(c)(4), and who is giving money to the ABC 501(c)(4)? Well, we don't know that. So there is a huge transparency problem that arises immediately from letting corporations give.

But as I said, really I think the biggest impact of Citizens United is that it really took the gloves off with the broad language in Citizens United about how ingratiation and access can't possibly be corrupting. First of all, I think that flies in the face of most people's commonsense understanding. If it is corrupting to give \$3,000 directly to your campaign account, how could it not be corrupting to give \$3 million to a Super PAC that is doing nothing but trying either to elect you or to defeat you? How does that not have any potential for corruption? I think most people really don't get that and think it doesn't really make sense, and that is part of why it is such an unpopular decision, because it flies in the face of how people think about corruption.

But this broad language really emboldened a lot of folks who I think before were thinking, well, boy, somebody might think this is corrupting if I gave a million dollars to try and defeat a candidate or to elect a candidate, so maybe I shouldn't do that. Now

they find out, whoa, I can't possibly be held accountable for that, so therefore I am going to up my giving. All this freedom, it only affects this very narrow band of people who have a million dollars to put into a campaign, or in some cases multi-million dollars. That is not freedom for most Americans. Most Americans aren't going to be able to partake of that additional liberty that the Supreme Court has granted them, and it does reframe the debate. It does involve billionaires just sort of dominating the political discourse in ways that are sometimes not transparent.

We have seen folks go through incredible permutations of moving money from one organization to another organization to another organization because they are afraid we might pierce the first veil, but then we won't get through the second or the third or the fourth veils. There is somebody who is litigating this up to the Supreme Court right now to try and hide the money. So there has been an explosion in the role of these mega-donors, and I think that really has been the biggest impact.

Ms. DEAN. I have just a little bit of time left. There is so much more I would like to ask you, but I did take a look at what you said in your testimony about how the impact of H.R. 1 would be helpful in this area. Quickly, on the issue of coordination, you just described very logically how things are non-transparent and hidden. How about the notion of if I say it publicly, we didn't coordinate? Can you speak to the problem of that Super PACs cannot coordinate with candidates, and yet how we so easily see folks getting around that?

Ms. WEINTRAUB. Well, the coordination rule was written before Super PACs existed, and despite my repeated efforts to launch a rulemaking to update them in light of Citizens United, I have never been able to get the four votes to do that at the FEC. I feel compelled to say that all of the things that Professor Torres-Spelliscy was complaining about at the FEC, I was on the other side and trying to get those things done. We have candidates who show up at Super PAC events and tell their supporters that is my favorite Super PAC, you can go ahead and support them and you will be supporting me, and people post things publicly and try to get around it. Well, it is not a secret conversation. I am telling the world that I love that Super PAC, I am telling the world that here is what would be useful to me, I am posting this video on my webpage.

Some of it is silent. There is no purpose in having this roll up on anybody's webpage other than for somebody else to just lift it and incorporate it into a campaign commercial on their behalf.

Ms. DEAN. Thank you very much.

Has my time expired, Mr. Chairman? Thank you very much for your indulgence.

Mr. COHEN. Thank you, Ms. Dean.

Ms. Escobar, you are recognized.

Ms. ESCOBAR. Thank you, Mr. Chairman.

And thanks so much to our panelists, really appreciate you all today.

Ms. Weintraub, I have some questions about the Commission, just some things that I am really curious about.

When was the last time the Commission met with a quorum?

Ms. WEINTRAUB. That would have been August, August of 2019.

Ms. ESCOBAR. Okay. And how many cases are awaiting a hearing?

Ms. WEINTRAUB. We have roughly 300 enforcement matters, and right now over 100—last time I checked it was 119 of those were awaiting some kind of decision from the commissioners, which it requires us to have four commissioners to make that decision.

Ms. ESCOBAR. And how far back in terms of the cases that are waiting to be adjudicated by you all, how far back do those complaints go in terms of when they were first reported to the FEC? Do you know?

Ms. WEINTRAUB. There are a variety of beginning dates for the complaints. There is a five-year statute of limitations, and particularly in the reporting area sometimes there is a continuing violation even after the event that you are reporting happened, you have an ongoing obligation to report what money came in and what money went out. So sometimes we are able to extend. Sometimes we get tolling agreements. But for the most part, we are limited to a five-year statute of limitations, and the clock is ticking on a number of the cases that are sitting in front of us right now.

Ms. ESCOBAR. And I will give you an example of why there is probably no incentive for the President and others to ensure that we have a functioning FEC. In my community of El Paso, Texas, the President came and had a campaign rally, and he owes the City of El Paso over half-a-million dollars for all of the services that the city, that the local government had to provide. The Center for Public Integrity back in June actually reported that this is not a single instance where a campaign has failed to pay its bills, its outstanding debts. In fact, for the Trump Campaign this is a pattern, and there are a number of local governments.

So it is a vicious cycle, unfortunately. There is no incentive for the President to want accountability by having a fully seated, fully functioning FEC because he might be held accountable, and we know how he feels about accountability.

Ms. WEINTRAUB. I don't want to comment on any particular case, but let me just say that when we lost the quorum last August when one of my colleagues decided to resign, I had two other colleagues who resigned two years ago and three years ago, respectively. So there was a very long run-up to this when we had two vacancies, one D, one R, when this could have been fixed so that we wouldn't have been in this situation last August when the most recent commissioner left. Why those seats weren't filled for two and three years, I really can't tell you.

Ms. ESCOBAR. Yes, we can only wonder why.

Thank you so much for your response, Ms. Weintraub.

Mr. Weissman, we have seen incredible, hugely consequential involvement from Russia in our elections, and this meddling in our elections is not limited to Russia. We now know after what happened yesterday, the acquittal, that there will not be accountability for inviting foreign assistance into our elections. At least for the President, there is no accountability.

So many of us are obviously very concerned about outside involvement in our elections. You mentioned that Citizens United al-

lows foreign actors to influence those elections as well. Is that correct?

Mr. WEISSMAN. Not legally, but yes.

Ms. ESCOBAR. Can you expand on what that involvement might be?

Mr. WEISSMAN. The reporting that has come out from the Lev Parnas tape is really instructive about how this all might go down. That tape, where most of the attention was focused on the conversation about Ukraine, it was really a donor event. It was a Super PAC donor event, actually, where the donors were given direct access to the President. The New York Times reported they were given access to go and pitch, as if they were on Shark Tank, their preferred policy preferences. A couple of those donors were Lev Parnas and Igor Fruman, who, according to the indictment against them, had donated money from a foreign source that they had laundered through an LLC.

In this instance it was discovered. You have to assume that in most instances it is not going to be discovered.

Also present at the event was a Canadian steel mogul who is not permitted to give money to affect U.S. elections but was able to use his U.S. subsidiary to run money to U.S. elections. So there are a lot of mechanisms, some of which are legal and some of which are not legal but have been super-powered by Citizens United, and we have to assume it is happening much more than we know.

Ms. ESCOBAR. Thank you so much.

I am out of time. I yield back. I appreciate it.

Mr. COHEN. Thank you.

Ms. JACKSON LEE.

Ms. JACKSON LEE. I want to thank all of the witnesses for their commentary today.

Let me say that I am a proud co-sponsor of H.R. 1, which I hope the Senate turns on the light and allows us to pass that legislation, because some of this will change. Some have argued that the Court should revisit the question, but we know the skewing of the Court now, unfortunately.

I am just going to ask a brief question and then a pointed question to the Commissioner. Thank you for your leadership.

After Citizens United, can you state or re-state what you think about, very briefly, the amount of money that is now in the political process?

Ms. WEINTRAUB. Well, the amount of money always goes up, so let's start there. But I think what we are seeing is a shifting of money. As I pointed out in my testimony, in the most competitive Senate races, particularly in years where it looks like control of the Senate is up for grabs, that is where all the outside spending goes. And the outside spending in six out of ten, seven out of ten, depending on which year you look at, has dwarfed the amount the candidates are spending themselves, which is really kind of astonishing if you think about it. You are out there campaigning, and then somebody else is out-spending you.

Ms. JACKSON LEE. Meaning it dwarfs the amount that the candidate is spending?

Ms. WEINTRAUB. Yes.

Ms. JACKSON LEE. It is more than what the candidate is spending.

Ms. WEINTRAUB. Yes.

Ms. JACKSON LEE. Okay. And therefore the voice of the candidates, plural, may be silenced or blocked out because of some special-interest undercover PAC that one has never heard of, but they are coming after you, whoever that is.

Ms. WEINTRAUB. And because the rules on PAC disclosure were designed for a time when these Super PACs didn't exist, the PACs aren't on the same disclosure schedule as the candidates are, and some of them have been very clever about making sure that they don't have to report up until after the election itself.

Ms. JACKSON LEE. Thank you. Thank you for your service.

Let me use this example. A day or two ago we heard a very passionate statement on the floor of the United States Senate from a senator who offered his religious beliefs and his heartfelt analysis on his decision to vote for the conviction of the President of the United States under Article 1. Soon thereafter, he received an onslaught of attacks. One, Trump Jr. tweeted after Romney announced his decision that he was too weak to beat the Democrats, so he is joining them now, he is officially a member of the resistance and should be expelled from the GOP. Trump Jr. then started tweeting "#ExpelMitt" and later tweeted that Romney should be expelled from the AtSenateGOP. Ingraham called Romney "the ultimate selfish, preening, self-centered politician. If he were up for reelection this year, the people of Utah would have their own payback against him because they were defrauded by Romney."

Now, people have argued that Citizens United provides for free speech. Certainly, the Senator has a right to free speech. My question quickly to Mr. Weissman and the Professor, to answer the question if this individual was up for reelection in 2020, having exercised free speech, free speech Citizens United, how do you think that would be skewed with this kind of onslaught so that his voice could not truly be heard? If you would answer that question, my time is running and I would like to share it between you and the Professor. Thank you.

Mr. WEISSMAN. Yes. So very quickly, it is entirely appropriate for the people of Utah to make a judgment about what Senator Romney did. It is not entirely appropriate for giant Super PACs to come in and out-spend him, which, as you are implying, is a virtual certainty were he up for reelection in this coming term.

Ms. JACKSON LEE. Silencing his voice.

Mr. WEISSMAN. Overwhelming it at least.

Ms. JACKSON LEE. Professor?

Mr. SMITH. I will note first I served as counsel—

Ms. JACKSON LEE. I'm sorry.

Mr. SMITH. I'm sorry, the other professor.

Ms. TORRES-SPELLISCY. Thank you. So, if I may, since I have not had many chances to talk, pay-to-play hurts honest business people because the honest business person wants to be judged by the metric of the quality of their goods and services. But pay-to-play skews that entire system by privileging those who will stay at the Trump Hotel or pay an emolument, and that is a skewing not only of the political system but of the economic system as well.

Ms. JACKSON LEE. So do you have an answer about Mitt Romney and the amount of money?

Ms. TORRES-SPELLISCY. Because I work with a non-partisan non-profit, I am going to demure on that.

Ms. JACKSON LEE. Well, let me thank the gentleman from Public Citizen for giving me the answer, and I thank all of you for providing your insight to this very important question.

Mr. Chairman, I yield back.

Mr. COHEN. Thank you, Ms. Jackson Lee.

Mr. Swalwell I believe is next.

Mr. SWALWELL. Thank you, Chairman, for hosting this panel. And thank you to our panelists.

I believe, having been in Congress now for seven-plus years, that it is dirty money and dirty maps that keeps us in Congress from reaching the consensus that our constituents have reached. On most issues, the American people are actually not really divided. They think we should have background checks, over 80 percent. They believe we should do overwhelmingly something about climate. They want to have universal access to health care. Yet, when we convene in Washington, we find people that cannot work and meet that consensus.

Having been here and seen the power of the outside groups, I know that the single reason we can't find that consensus is the fear that if you were to speak out against your party—particularly I see this on my Republican colleagues' side—you will be primaried. You are not going to lose your job to a Democrat. You are going to lose your job to someone who is more conservative, and that is the power of outside money. And it is also the power of dirty maps drawn by politicians to protect themselves and their friends, and we are interested in doing all we can to reduce the influence of that.

Now, both Republicans and Democrats have gone to online platforms that encourage small-dollar contributors, and I think that is great that smaller dollars can be empowered. But I do wonder if anyone could address whether you see ways, considering that foreign money is flowing into our elections, that because of the reporting requirements for smaller-dollar contributions are not as transparent, that that could be manipulated to allow foreign contributions to come in.

Commissioner, I will let you take a crack at that first.

Ms. WEINTRAUB. Well, of course, the committees have an obligation to ensure that they are not taking foreign money. I would argue that that obligation goes up with a larger donation. So if you are getting a million-dollar donation, then you had better make darn sure, if you are a Super PAC, that that money is coming from a good place. In fact, we saw an example of this just recently with a Super PAC that was supporting Jeb Bush in the 2016 election that took a \$1.3 million donation from a domestic subsidiary of a Chinese company, and it was the Chinese board members who had requested it, at the request of Neil Bush, who was also on the board.

So we are seeing foreign money come in through corporate entities. I do worry about what is behind the small donors. We don't see the names on the small donations.

Mr. SWALWELL. I am talking about—Super PACs are their own issue. I am talking about the candidates' campaign committees, because I am worried that because of the lack of transparency requirements for small-donor contributions—I believe it is \$200 and less—that that could be a way, if you have a campaign that is not checking, confirming, or even if they are in on it, that is a back door around the rules and that foreign contributions could make their way in. Is that a concern that you share?

Ms. WEINTRAUB. It is, because we don't see those names, so we don't know where the money is coming from.

Mr. SWALWELL. Also I wanted to raise a concern about foreigners working with U.S. campaigns, as you saw in 2016. In 2016, Congress had not imagined prior to that election that campaigns would take assistance from foreign governments and not at least report the outreach. I have since introduced legislation that was included and passed in the House of Representatives that puts a duty to report on an individual if they receive campaign assistance, or even an offer of dirt on your opponent who you should know to be an agent of a foreign power.

Is there anything else you think we could do to put a duty on people where we otherwise saw people in the past rely on the honor code and just do the right thing? What can we do now to ensure that the FBI would be notified of something like that? For anyone who wants to take a crack at that.

Ms. WEINTRAUB. As I said in my earlier testimony, one thing that I think would help would be putting a responsibility on a U.S. citizen to sign under penalty of perjury that they have checked and they have verified that there is no foreign money coming into the campaign accounts.

Mr. SWALWELL. Thank you, and I yield back.

Mr. COHEN. Thank you, Mr. Swalwell.

We are not going to have a second round, but I will do this. Normally if we have a second round, it is 5 minutes. If any member wants to ask a question, not make a statement but ask a question, we will entertain one question per member so we can tie up loose ends.

Does anybody want to ask a question?

Mr. Raskin, you are recognized for a question.

Mr. RASKIN. Give me a second to compose my interrogatory thought, Mr. Chairman.

Given that we live in an age of propaganda and fake news and disinformation, I am wondering, for any of the majority witnesses—forgive me, Mr. Smith—to what extent Citizens United figures into the spending of money to confuse the public and to add to the propaganda? Is there something about the way that money has been spent under Citizens United that contributes to the thick fog of propaganda that overhangs our politics today?

Ms. Weintraub.

Ms. WEINTRAUB. I think anything that undermines disclosure makes it harder for us to find out who is behind what we are seeing online. I mean, people get all sorts of information online, and I don't think anybody wants to get their news from a Russian troll farm, but people didn't realize that is where they were getting the information from last time. So to the extent that Citizens United,

as I have said, has undermined disclosure, I think it has also contributed to that problem.

Mr. RASKIN. Dr. Fiona Hill in her testimony described to us that Russia is the world's largest Super PAC today, that it basically operates like a Super PAC in terms of funneling money and propaganda into our politics, and other societies too.

Mr. COHEN. We will call that a question, and then we are going to let Mr. Weissman respond, if he wants to.

Mr. WEISSMAN. I am ready. I think two points come to mind. One, as Commissioner Weintraub said, there is an intersection between the general cultural impact of Citizens United and the rise of online advertising, particularly as it relates to lack of disclosure. So the system we have for disclosure is basically based on focusing on TV ads, and now we have moved to where TV ads are being competed with in importance for online advertising, huge amounts of money coming in. The disclosure system is really totally inadequate, and I think people are being confused by that.

There is another component of this. I wouldn't want to call it propaganda necessarily, because there is a role for negative advertising and conflictual advertising in speech for sure. But what Citizens United has done—and Professor Smith's data I think are misleading but all correct. What it has done is lead to a rise, a significant rise in outside spending. Outside spenders are different than candidate spenders in a variety of ways.

But most significantly perhaps is that they focus overwhelmingly on negative attack ads. So about 85 percent of outside spending is devoted to negative attack ads; half or way less by candidates. Again, there is an appropriate role for drawing distinctions. I think most Americans feel like we have way tipped the balance in terms of that kind of advertising. It is highly emotional in appeal, not really very communicative around policy or substance, and I think not that that kind of speech should be censored, but if we are looking at the overall effect, it has been unhelpful and an unhealthy effect for our democracy, and it has certainly contributed to the deep skepticism about how our politics work and the future and reliability of our democracy.

Ms. TORRES-SPELLISCY. I guess I would just add that one of the things that you could have done in 2010 in the Disclose Act is clarify what counts as foreign for corporate purposes. That clarity is still needed in the law.

And I would also add that Lev Parnas made a calculated risk that his corporate spending wouldn't send off any warning signs when he spent through a Super PAC. The indictment alleges against him that he has funneled at least \$1 million of foreign money into both state and Federal elections, which I will reiterate is illegal, whether that money is going into a state election or a Federal election.

Mr. COHEN. Thank you.

Ms. Scanlon, you are our closer.

You are good? Okay.

Thank you very much to all of our witnesses.

This concludes today's hearing.

We have statements for the record from Citizens United Action Fund and a letter from Free Speech for People, which we would like to submit for the record.

Without objection, so done.

[The information follows:]

MR. COHEN FOR THE OFFICIAL RECORD

END CITIZENS UNITED — ACTION FUND —

February 5, 2020

The Honorable Steve Cohen
Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Chairman Cohen,

Thank you for holding this hearing, "Citizens United at 10: The Consequences for Democracy and Potential Responses by Congress," and your commitment to ending the dominance of big money in politics and creating a government that works for all of us.

Ten years ago last month, the Supreme Court released its disastrous *Citizens United v. FEC* decision that unleashed billions of dollars in special interest money into our elections, drowning out the voices of everyday Americans. It has skewed the policymaking process in Washington and blocked progress on so many issues Americans care about, from lowering the cost of prescription drugs to protecting the environment for our children's future.

We fully support the bipartisan Democracy for All constitutional amendment (H.J. Res. 2) that would overturn the *Citizens United* decision by giving Congress and state legislatures the ability to set common sense limits on campaign fundraising and spending. Over the past decade, Congressman Ted Deutch (D-FL) has shown incredible leadership as he built support for measures to overturn *Citizens United*, and H.J. Res. 2 now has over 200 cosponsors. It would ensure our elections aren't dominated by wealthy special interests and corporations with different priorities than most Americans.

While a constitutional amendment is critical to overturning the decision, we also support other remedies to blunt its impact. Last year, the House passed the For the People Act (H.R. 1), the most comprehensive package of anti-corruption reforms since Watergate. The bill will end the dominance of big money, protect and expand the right to vote, and ensure public officials are working in the public interest. The House also passed the SAFE Act (H.R. 2722) to shore up our voting systems, the SHIELD Act (H.R. 4617) to protect our elections from foreign interference, and the Voting Rights Advancement Act (H.R. 4) to ensure every eligible voter can cast their ballot free from discrimination.

All of these measures are critical to restoring the public's faith in their elected officials and ensuring our government is truly of, by, and for the people.

We applaud you, Chairman Cohen, Congressman Deutch, and the entire Democratic Caucus for your commitment to strengthening our democracy.

Sincerely,

A handwritten signature in black ink, appearing to read "Tiffany Muller". The signature is fluid and cursive, with the first name "Tiffany" written in a larger, more prominent script than the last name "Muller".

Tiffany Muller
President, End Citizens United Action Fund

Mr. Cohen for the record – letter from Free Speech for the People:

<https://docs.house.gov/meetings/JU/JU10/20200206/110456/HHRG-116-JU10-20200206-SD003.pdf>

Mr. COHEN. This concludes today's hearing. I want to thank everybody.

Without objection, every member will have 5 legislative days to submit additional written questions for the witnesses, which we will submit to you.

With that, we are done. Thank you.

[Whereupon, at 11:52 a.m., the hearing was adjourned.]

APPENDIX



Ten Years Since *Citizens United*: The Growth of a Movement

January 15, 2020

Introduction

Citizens United vs. FEC, handed down by the Supreme Court on January 21, 2010, has proven to be one of the most consequential decisions in our country's recent history. This case and those that are related have unleashed a torrent of spending on our elections, including a huge jump in outside spending that has been used to influence races on the local, state and national levels for the last decade.

This campaign finance landscape, coupled with other methods of using financial resources to influence politics and public policy, has created a system in which the voices of individuals and their communities are often drowned out by private interests whose agendas diverge significantly from that of the average American. Certainly, American democracy was already plagued by self-serving powerful interests well before *Citizens United*, but the increase in outside money spent in elections since then has exacerbated the overwhelming challenge of creating an equitable democracy.

During a time when our country faces innumerable threats both foreign and domestic, a government and electoral process that is stymied by unlimited special interest money is dangerous and calls for urgent action.

We know the American public is driving those calls for action, with polls consistently showing 70% to 80% of the population in support of reforms to counterbalance the influence of big money in politics, including strong majorities of Republicans and Democrats. And in 2019, we saw an aggressive response to that call with passage in the House of Representatives of H.R. 1, the For The People Act, and the introduction of its companion measure in the Senate, S. 949, co-sponsored by every member of the Democratic caucus.

The For the People Act is the biggest and boldest package of reforms to pass in decades. In addition to a broad spectrum of important provisions pertaining to voting rights, redistricting, ethics in government and campaign finance reforms, the For the People Act includes findings on the need for a constitutional amendment to overturn Supreme Court decisions such as *Citizens United*. The For the People Act recognizes that in order to definitively address the rise of outside spending and the influence of money in politics writ large, there must be a constitutional amendment to overturn such decisions and establish a constitutional framework supporting reasonable regulations around the raising and spending of money on elections.

As a matter of law, aside from an amendment, the only other means to wholly address the threat of unchecked money in politics is for the Supreme Court to revisit and overturn its decision in *Citizens United v. FEC*, an increasingly unlikely prospect given the current makeup of the Court.

In fact, to the contrary, a series of decisions that occurred both prior to and following *Citizens United*, such as *Buckley v. Valeo* (1976), *SpeechNow v. FEC* (2010) and *McCutcheon v. FEC* (2014), suggest that this matter, so central to the integrity of our elections, cannot be simply left to the courts to decide. For our democracy to strive toward our founders' vision of greater political equality, Congress and state legislatures must be able to enact laws that establish commonsense restrictions on political spending.

Fortunately, in the 10 years since *Citizens United*, advocates have made significant progress toward an amendment at the local, state and federal levels, bringing together a broad and diverse coalition to advance its ultimate passage and ratification. Ten years ago, harnessing a national movement for a constitutional amendment seemed like a nearly insurmountable task. Yet over the past decade, through the efforts of a few dedicated organizations and our collective millions of members, by the metrics of public opinion, grassroots organizing, electoral and legislative victories, a movement for an amendment to get big money out of politics – part of an even broader movement focused on a range of reforms to create a democracy that works for everyone – has emerged and become a force to be reckoned with.

By the numbers: Money in Federal Elections

The overall amount of money spent on elections has ratcheted up in each successive cycle. At first glance, while the increases are significant, they only tell part of the story. Given the loopholes around political advocacy, untold amounts can and have been spent to influence elections, through television ads, online ads, mailers, robocalls and other means, without being disclosed publicly to the Federal Election Commission (FEC).

Midterm elections¹

- Total cost of election 2006 (midterm): \$2,852,658,140
- Total cost of election 2010 (midterm): \$3,631,712,836
- Total cost of election 2014 (midterm): \$3,845,393,700
- Total cost of election 2018 (midterm): \$5,725,183,133

Presidential elections

- Total cost of election 2008 (presidential): \$5,285,680,883
- Total cost of election 2012 (presidential): \$6,285,557,223

¹ These figures include money spent by presidential candidates, Senate and House candidates, political parties and independent interest groups reported as trying to influence federal elections.

- Total cost of election 2016 (presidential): \$6,511,181,587
- Total cost of election 2020 (presidential): TBD

By the numbers: Outside Spending

While the overall rise in electoral spending may be significant, *Citizens United* led to a drastic increase in outside spending. Every new cycle, more outside money is spent in our elections. That spending in the 2010 midterm election was approximately \$205.5 million, compared to \$1.1 billion spent in 2018 – a whopping 435% increase in just eight years.

Midterm elections

- Outside spending in 2006 election (midterm): \$37.8 million
- Outside spending in 2010 election (midterm): \$205.5 million
- Outside spending in 2014 election (midterm): \$549.4 million
- Outside spending in 2018 election (midterm): \$1.1 billion

Presidential elections

- Outside spending in 2008 election (presidential): \$143.7 million
- Outside spending in 2012 election (presidential): \$1 billion
- Outside spending in 2016 election (presidential): \$1.4 billion
- Outside spending in 2020 election (presidential): TBD

Outside Spending

Citizens United and its progeny have fueled the rise of entities' ability to spend unlimited sums to influence our elections because of the Court's determination that such limitless spending – referred to as independent expenditures – “do not give rise to corruption or the appearance of corruption,” provided there is no coordination with the candidates' campaigns. The decision is based on the fundamentally flawed premise that candidates will not be improperly influenced by unlimited money spent on their behalf if they or their campaigns have not coordinated in that spending. In addition, the troubling fact is that regulating the coordination has proven difficult to achieve, effectively adding more fuel to the explosion in outside political spending.

In addition to allowing unlimited spending from corporate and union treasuries to influence elections, *Citizens United* has given rise to extensive spending by 501(c)4 organizations, nonprofit organizations whose primary purpose is to benefit “social welfare.” Such organizations cannot spend more than 50% of their total annual budgets on political activities – and do not have to disclose their donors, i.e., the source of the money that they are spending. Moreover, in seeking to stay under this threshold, special interests seeking to maximize the influence of their money in elections can use a range of tactics to circumvent the rules surrounding the “social

welfare” primary purpose requirements. For instance, a 501(c)4 can issue grants to other 501(c)4s and have that money count toward the requirement of using more than half of their annual budget toward furthering social welfare. Virtually no details are required in granting money to other social welfare organizations.

A special interest group can therefore create a network of 501(c)4 organizations that can donate to each other, without disclosing who the original donors are, passing money around that counts toward their “primary purpose” requirement, while allowing a greater percentage – if not all – of that money to ultimately be used for political purposes, since each time it changes hands it can count as a nonpolitical expenditure. This is made possible because disclosure requirements mandate that 501(c)4 groups need only report direct political expenditures to the FEC, whereas expenses listed as “educational” or “membership-building” fall under the organization’s primary purpose, allowing for this activity to occur without any reporting.

Citizens United also led to the creation of a new type of political action committee (PAC) that can raise unlimited sums of money from wealthy donors, without the restrictions placed on traditional PACs, which are limited in the amounts that they can accept, and who they can accept them from. These super PACs can accept money from any corporation, union or other entity without limitation. Super PACs cannot donate directly to candidates, making them “independent expenditure only committees,” but they are free to raise and spend unlimited sums of money. While super PACs are required by the FEC to disclose their donors, they can receive donations directly from 501(c)4s, which as mentioned, do not need to disclose their donors. Thus, taken together, 501(c)4s and super PACs can be used in a coordinated fashion to funnel unlimited, undisclosed sums of money into elections.

Impact on Frontline Issues

The influence of big money in politics, exacerbated by Supreme Court cases like *Citizens United*, makes it more difficult to address many of the most pressing frontline issues. This is in part why such a broad and diverse coalition of organizations has come together to support a constitutional amendment to undo the harm caused by the Supreme Court’s flawed rulings. Virtually any issue can be traced back to the influence of unlimited special interest money in politics, here are just a few examples and statistics compiled by our partners at End Citizens United.

Health Care

An estimated 80% of Americans blame corporate greed and the pharmaceutical industry for rising costs of prescription drugs, while one in four Americans say it’s difficult to afford their prescribed medications. Meanwhile, drug companies give hundreds of millions of dollars to political campaigns. Since 1990, the industry has spent nearly \$204 million on campaign contributions, and the trade association for Big Pharma has given at least \$13 million to dark money groups, including efforts to try and defeat the Affordable Care Act.

And that's not all. These campaign contributions are also backed by billions of dollars spent on lobbying the same public officials they help get elected. The industry spent a staggering \$3.7 billion lobbying Congress and the executive branch from 1998-2018. In 2018 alone, the pharmaceutical and health products industries had three lobbyists for every member of the House on their payroll. While lobbying is not a direct result of *Citizens United*, the industry can use campaign contributions and outside spending to leverage the influence of its lobbyists, many of whom used to work in government themselves, to help push deregulation and tax cuts to maximize profitability for their shareholders. The Republican tax bill of 2017 alone gave the 10 biggest pharmaceutical companies a \$76 billion tax cut.

Gun Violence

A significant, bipartisan majority of Americans are concerned about the epidemic levels of gun violence in this country, and support reforms to address it. An full 90% of Americans support proposals to expand background checks. However, the NRA has spent millions on lobbying and political campaigns to stymie these efforts. From 1998-2017, the NRA contributed \$144.3 million in outside spending, and 88% of campaign contributions from gun rights groups since 1990 have gone to Republicans. Just since 2016, the NRA put at least \$54 million into outside spending, including \$34 million through its dark money arm. Additionally, pro-gun groups have spent upwards of \$76 million on lobbying since 2013, which has included efforts to oppose legislation that would require greater transparency in political spending.

Climate Change

An estimated 70% of Americans understand climate change is happening and consider it to be an important issue. Moreover, 69% of Americans – including a majority of Republicans – believe the U.S. needs to take aggressive measures to address it. But again, millions of dollars in political spending from the fossil fuel industry are preventing any action. Since the *Citizens United* decision, the energy sector has made \$685 million in contributions, and in 2018, 10 of the 17 biggest corporate donations to outside groups were from oil and gas companies. This big money system has effectively turned climate change into a partisan wedge issue. Since *Citizens United*, zero Senate Republicans have supported major climate change legislation, compared to 14 such instances occurring in the seven years prior to the Supreme Court decision. Meanwhile, as a return for their investment, the 2017 Republican tax bill disbursed \$25 billion in benefits to just 17 oil and gas companies.

Milestones of the Movement

Passing and ratifying an amendment to the United States constitution is a herculean task that is only possible with a massive social movement exerting sustained pressure across the country. Such a movement for an amendment to address the influence of big money in politics has come into existence and has seen incredible growth and development over the past decade, catalyzed in

part by a network of organizations that have invested in the infrastructure to mobilize public support, shape public opinion, organize voters and work with elected officials.

When the Supreme Court first handed down its decision in *Citizens United* in 2010, a number of organizations began working to amend the Constitution to correct the harm done by the Court. In just a few short years, the landscape went from speculating about a range of different approaches in terms of amendment language to a broad consensus across the reform community.

By building on the framework established through previous amendment efforts that began after the *Buckley* decision in 1976, it took intensive relationship-building and perseverance to fashion a consensus among a growing coalition around proposed language for an amendment, one that a critical mass of groups could support. That process produced the Democracy For All amendment, sponsored by Senators Tom Udall (D-N.M.) and Jeanne Shaheen (D-N.H.) and Representatives Ted Deutch (D-Fla.) and John Katko (R-N.Y.), which gives Congress and state legislatures the ability to enact reasonable restrictions on the raising and spending of money in elections.

By 2014, the Democracy For All amendment already enjoyed broad support in both chambers (although almost entirely Democrats) and was even brought to the Senate floor for a week of debate, followed by 54 senators voting in favor. While not the two-thirds majority needed for a constitutional amendment, achieving this sizeable majority of the Senate was a historic milestone for the movement.

The community of organizations that have come together to work on an amendment has grown significantly since 2010. By 2014, when the Democracy For All amendment was debated on the Senate floor, 25 different organizations had collaborated to collect more than three million petition signatures in support of an amendment to overturn *Citizens United*, which were delivered on the Capitol steps during the week of the vote. By the next year, the 5th anniversary of the decision, more than 60 organizations had come together to gather more five million petition signatures in support of an amendment. Now, as we enter the 10th year since *Citizens United* we have built a network of more than 120 organizations that support not just an amendment, but specifically the Democracy For All amendment. We have generated countless calls into Congress, letters to the editor, and grassroots events in support of an amendment, and our efforts are beginning to show.

At the time of this writing, the Democracy For All amendment has the support of all 47 Democrats in the Senate, as well as over 200 members of the House of Representatives. The coalition of groups that has come together to build support for the Democracy For All amendment is currently working with members of the House of Representatives to hold hearings on the amendment this year, with the broader goal of a vote on the House floor before the end of the term.

Support for an amendment to overturn Citizens United is reflected by a robust effort in states and localities around the nation to pass resolutions in support of amending the constitution to address the harm caused by Citizens United. In the past 10 years, 20 states and more than 800 localities have passed measures supporting a constitutional amendment. And these measures consistently pass with anywhere from 60% to 80% in support. More than 141 million Americans – 46% of the population – live in a state or locality that has supported an amendment. This includes red states, blue states, and swing states.

And perhaps most importantly of all, public support is there. In fact, polling shows that framing the problem broadly and in terms of political equality, as the amendment does, serves as an entry point for the public to consider a full range of money in politics solutions. While Republicans in Congress have by and large yet to come out in support of an amendment to overturn Supreme Court cases like Citizens United, the population broadly supports an amendment, including self-identified conservatives. This being the case, it may only be a matter of time until Republicans, in Congress and in state legislatures alike, realize that it is firmly the desire of their constituents to support and pass an amendment to get big money out of politics.

Conclusion

The past 10 years have seen a drastic evolution in the relationship between big money, outside spending and elections enabled by the Supreme Court in *Citizens United* and related decisions. The emergence of the Democracy For All Amendment and the widespread support for an amendment at the state and local levels signify that the movement to overturn Supreme Court decisions like *Citizens United* has reached a critical mass, where the political momentum will only continue to grow. To nurture this movement, we must keep working together to make the case for a constitutional amendment, by continuing to build our coalition and by connecting the issue of money in politics to other fights of our time.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 6, 2020

Ciara Torres-Spelliscy
Professor of Law
Stetson University College of Law
Gulfport, Florida 33707

Re: Testimony before the U.S. House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Dear Professor Torres-Spelliscy:

I write in response to your presentation at today's hearing before the House Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties. In support of your claim that the Federal Election Commission does not enforce the law against foreign spending in U.S. elections, the *only* example you gave was, as you put it, "a particularly colorful episode" in which "a foreign pornographer spent [money] in a Los Angeles election in 2012."¹ You stated that this "spending violated longstanding bans on foreign money in American elections . . . but the FEC would not enforce the law against the foreign pornographer." And you posed the rhetorical question, "If the FEC is not going to stand up against a foreign pornographer, . . . who would they stand up against?"

It appears you were attempting to refer to the Commission's Matter Under Review 6678 (MindGeek), in which a foreign national spent money in connection with a local ballot measure — not an election. As a law professor, I am sure you recognize the distinction under campaign finance law between an election, which involves the nomination or election of candidates to office,² and a ballot measure, which does not. The foreign national ban at 52 U.S.C. § 30121 addresses elections, not ballot measures.

Because MUR 6678 (MindGeek) pertained to a ballot measure, and the Commission's Office of General Counsel found "no information to suggest that any of those candidates [who

¹ *Citizens United* at 10: The Consequences for Democracy and Potential Responses by Congress, House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties, <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2781> (remarks of Professor Ciara Torres-Spelliscy at 1 hour 21 minutes); see also Testimony of Professor Ciara Torres-Spelliscy Before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Regarding the Tenth Anniversary of *Citizens United v. FEC* at 8-9 (Feb. 6, 2020) (incorrectly describing spending by foreign national as "in favor of President Obama's reelection").

² See 11 C.F.R. § 100.2(a).

Prof. Ciara Torres-Spelliscy
February 6, 2020
Page 2

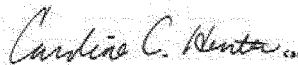
appeared on the same ballot as the ballot measure] were involved in any way whatsoever with the Ballot Measure Committee or [the ballot measure],³ the Commission's dismissal of MUR 6678 (MindGeek) was legally correct. Your description of the "episode" in your testimony, however "colorful" it may have been, was legally and factually incorrect.

Today is not the first time MUR 6678 (MindGeek) has been mischaracterized in congressional testimony. Your September 2019 testimony before the Committee on House Administration contained the same misrepresentation.⁴ Nor are you the first person to have erred by describing MUR 6678 (MindGeek) in this way.⁵

Please find attached my statement on MUR 6678 (MindGeek), which provides further information about the facts and applicable law.⁶ I invite you to review the Commission's closed enforcement files on the Commission's website, where you will find that I have repeatedly voted to investigate and punish violations of the foreign national ban, as well as other information about the Commission's longstanding enforcement of the law against foreign spending in U.S. elections.⁷

If you have any questions, please do not hesitate to contact me.

Sincerely,



Caroline C. Hunter
Chair

³ MUR 6678 (MindGeek), First General Counsel's Report at 17.

⁴ Testimony of Professor Ciara Torres-Spelliscy before the Committee on House Administration at 5 (Sept. 25, 2019), <https://www.congress.gov/116/meeting/house/109983/witnesses/HHRG-116-HA00-Wstate-Torres-SpelliscyC-20190925-U1.pdf>.

⁵ Statement of John Pudner, Take Back Our Republic, Forum: Corporate Political Spending and Foreign Influence Hosted by Commissioner Ellen L. Weintraub at 7 (June 23, 2016), <https://www.fec.gov/resources/about-fec/commissioners/weintraub/text/Pudner.pdf>.

⁶ Respected practitioners agreed with my interpretation of the law. See, e.g., Bob Bauer, *FEC Conflicts: the Choices of the Chair and the Responsibility for Non-Enforcement*, More Soft Money Hard Law (May 4, 2015), <http://www.moresoftmoneyhardlaw.com/2015/05/fec-conflicts-choices-chair-responsibility-non-enforcement/> ("A regulatory position that puts less emphasis on legal authority and conventional legal analysis, and more on policy and public opinion, . . . would not be the answer supported by the best reading of the law."); Frederika Schouten, *Condoms-in-porn initiative spurs concern about foreign money in elections*, USA Today (May 18, 2015), <https://www.usatoday.com/story/news/politics/elections/2015/05/18/federal-election-commission-foreign-donations-ballot-initiative-condoms-adult-films/27530379/> (stating, "[s]everal election lawyers agree with the Republican commissioners" and quoting former Commission Associate General Counsel Kenneth Gross).

⁷ See, e.g., MUR 7122 (American Pacific International Capital) (conciliating violations of foreign national ban); MUR 6184 (Skyway Concession Company, LLC) (same); MUR 6093 (Transurban) (same).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
MindGeek S.A.R.L. f.k.a.) MUR: 6678
Manwin Licensing International S.A.R.L.;)
Fabian Thylmann)
Andrew Link)
Froytal Services Limited)
No on Government Waste/No on Measure B)
—Major funding by Manwin USA)

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND
COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN**

This matter presented a straightforward question: does a state or local ballot initiative¹ constitute an “election” under the Federal Election Campaign Act of 1971, as amended (the “Act”)? The Act’s text and relevant Commission interpretation, as well as court precedents, clearly demonstrate that the answer is *no*. Because the complaint in this matter involved alleged contributions by foreign nationals to a local ballot measure committee, we agreed with the Office of General Counsel’s recommendation and voted to dismiss this matter.²

The Act prohibits donations by foreign nationals “in connection with a Federal, state, or local election,” as well as the solicitation, acceptance, or receipt of such donations.³ The term “election” encompasses only candidate elections.⁴ Accordingly, for over three decades the Commission has recognized a limit on the Act’s scope: activities in connection with elections of

¹ We use the terms “ballot measure,” “ballot referenda,” and “ballot initiative” interchangeably.

² See generally MUR 6678 (MindGeek), Compl.; see also *id.*, Certification (March 17, 2015). The ballot measure committee was formed under California law in 2012 to oppose the electorate’s passage of a ballot initiative known as Measure B, “Safer Sex in the Adult Film Industry Act,” which proposed enactment of a local health ordinance relating to adult films shot in Los Angeles County. The ballot measure committee engaged in activities related only to the ballot initiative. See MUR 6678 (MindGeek), First General Counsel’s Report at 18.

³ 52 U.S.C. § 30121(a) (formerly 2 U.S.C. § 441e(a)).

⁴ See 11 C.F.R. § 100.2(a) (defining “[e]lection” as “the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office”).

candidates fall under the Act's purview, but activities in connection with votes on ballot initiatives do not.⁵

Indeed, as explained in *Bluman v. FEC*⁶ — a decision summarily affirmed by the Supreme Court⁷ — the Act “does not bar foreign nationals from issue advocacy” or other forms of civic engagement in this country, such as lobbying.⁸ This includes financial support or opposition of ballot initiatives, which directly implement the electorate’s public-policy preferences. *Bluman* specifically addressed ballot initiatives and accepted that the Act does not regulate that type of foreign national participation in the political process.⁹

Our colleagues, in explaining why they did not support dismissing this matter, largely ignore Commission precedents and the relevant judicial analysis in *Bluman*. Rather, they make policy arguments focused on perceived vulnerabilities of the ballot-initiative process to advocate for FEC regulation in this area.¹⁰ Such arguments are irrelevant as a legal matter. Unless and until Congress expands the Act’s foreign national ban to encompass state and local ballot initiatives, we are constrained by the law Congress actually has written. The Commission has no authority to otherwise interpose itself as arbiter of who can participate in state and local ballot initiatives.¹¹

In short, dismissal of this matter was required as a matter of law. Accordingly, we supported the Office of General Counsel’s recommendation and disposed of this matter.

⁵ See, e.g., Advisory Op. 1984-62 (B.A.D. Campaigns), at 1 n.2 (“[C]ontributions or expenditures exclusively to influence ballot referenda issues are not subject to the Act.” (citing Advisory Op. 1980-95 (First Nat’l Bank of Fla.))). No developments in the intervening years — including passage of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) — have altered this understanding of the Act’s scope. Cf. Concurring Op. of Vice Chairman Michael E. Toner & Commissioner David M. Mason, Advisory Op. 2005-10 (Berman/Doolittle), at 1 (“Commission regulations . . . define election as limited to candidate elections.” (citing 11 C.F.R. § 100.2(a)). Indeed, after passage of BCRA, the Commission continued to advise the public that ballot measures are not elections covered by the Act and that the Act does not regulate foreign nationals’ participation in such elections. FEC, *Foreign Nationals* (July 2003), available at <http://www.fec.gov/pages/brochures/foreign.shtml>.

⁶ 800 F. Supp. 2d 281 (D.C. Cir. 2011).


⁷ 132 S. Ct. 1087 (2012) (Mem.).

⁸ *Bluman*, 800 F. Supp. 2d at 292; see also Foreign Agents Registration Act of 1938, 22 U.S.C. § 611–621 (imposing registration and disclosure requirements on individuals or organizations who lobby on behalf of “foreign principals,” which include foreign governments, political parties, organizations, and individuals).


⁹ See *Bluman*, 800 F. Supp. 2d at 291 (analyzing and rejecting plaintiffs’ argument that 52 U.S.C. § 30121 (formerly 2 U.S.C. § 441e) is unconstitutionally “underinclusive and not narrowly tailored because it permits foreign nationals to make contributions and expenditures related to ballot initiatives”).

¹⁰ See generally MUR 6678 (MindGeek), Statement of Reasons of Chair Ann M. Ravel; MUR 6678 (MindGeek), Statement of Reasons of Commissioner Ellen L. Weintraub.

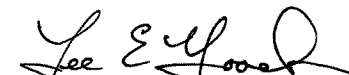
¹¹ We note that, although not addressed by federal law, a California statute in effect for over fifteen years appears to prohibit the donations at issue in this matter. See Cal. Gov’t Code § 85320 (“No . . . foreign principal shall make, directly or through any other person, any contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, any state or local ballot measure.”).


 MATTHEW S. PETERSEN
 Vice Chairman

4/30/2015
 Date


 CAROLINE C. HUNTER
 Commissioner

4/30/15
 Date


 LEE E. GOODMAN
 Commissioner

April 30, 2015
 Date

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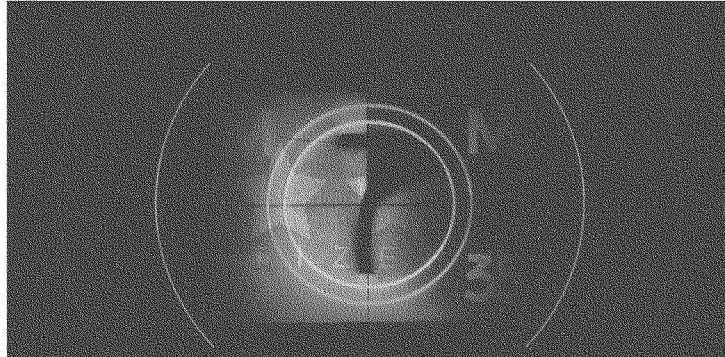
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On the 10th anniversary of our Supreme Court victory, the Left is still committed to silencing you - The American People - by restricting and controlling the freedom of speech.

That's why the 1st Amendment is so important and it's what motivates Citizens United to lead the fight to protect it.

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Citizens United

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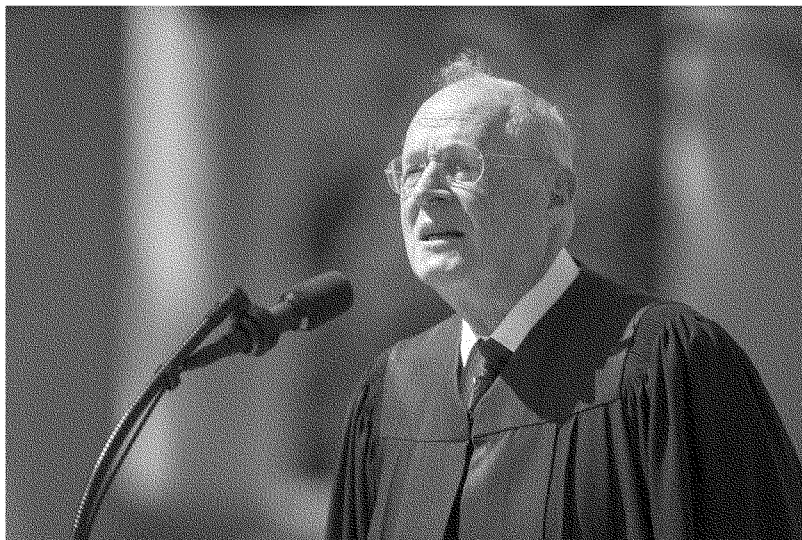
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OPINION

Citizens United was a triumph for free speech

No speech is as protected under the First Amendment as political speech and no political speech is as important as speech advocating whom to vote for, or against, for president.

By **Floyd Abrams** . Updated January 16, 2020, 5:09 a.m.



Former Supreme Court Justice Anthony Kennedy wrote, in the *Citizens United* decision, that "political speech must prevail against laws that would suppress it." He was right. NYT

The *Citizens United* case after 10 years? Let's recall first what that case was about and why a number of First Amendment aficionados such as myself have been drawn to

2/6/2020

Citizens United was a triumph for free speech - The Boston Globe

support what has become one of the most maligned Supreme Court cases in American history.

In 2008, Citizens United was a conservative organization with a yearly budget of about \$12 million. A small portion of that money was contributed by for-profit corporations. Citizens United prepared a film harshly denouncing Hillary Clinton at a time when she seemed to be the most likely Democratic nominee for president. (Barack Obama was later nominated and elected.)

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2/6/2020

David Bossie: Supreme Court 'Citizens United' decision still protects the First Amendment 10 years later

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David Bossie: Supreme Court 'Citizens United' decision still protects the First Amendment 10 years later

By David Bossie

Published January 21, 2020

[Fox News](#)

On the 10th anniversary of Citizens United's landmark [Supreme Court](#) victory for free speech, its incredible impact and legacy has come into focus. At its core, the Citizens United decision encourages more participation in America's political process.

Much to the dismay of the left, Citizens United v. Federal Election Commission was a case about free speech and whether the [First Amendment](#) protected the American people from government attempts to limit speech. Nothing more, nothing less.

The origins of the case begin with Citizens United's ability to produce a film and run advertisements for a film critical of Hillary Clinton. At that time, the McCain-Feingold campaign finance regime would have jailed me for doing just that — a fact that the left purposefully omits from their flawed arguments against the Supreme Court's [opinion](#).

RICKY GERVAIS DEFENDS FREE SPEECH: PEOPLE BEING OFFENDED IS 'THE LESSER OF TWO EVILS'

In 2004, I recognized that liberal activist and filmmaker Michael Moore had produced a documentary, "Fahrenheit 9/11," a film highly critical of then- President George W. Bush. While the film had a huge impact on the campaign, it was Moore's television trailers supporting the film — produced with corporate Hollywood money — that truly affected the Bush reelection effort.

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I simply asked the Federal Election Commission if I could do what Michael Moore was doing. The FEC told me "no." If I moved forward anyway, I could face five years in jail for each count, as well as tens of thousands in fines. To this day, I still can't believe that our federal government was going to jail me for making a movie and running advertisements for a film.

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David Bossie: Supreme Court 'Citizens United' decision still protects the First Amendment 10 years later

Hollywood had one set of rules and I had a different set of rules, but I wanted to be treated equally under the law, so four years later, Citizens United sued the FEC. As former U.S. Solicitor General Ted Olson reflected in our new film about the case, what could be closer to the heart of the First Amendment than an explanation of a point of view as to whether someone who was running for president was qualified for that job?

The left would have you believe that I went to court in hopes of unleashing the flood gates of corporate money to drown out the voice of the little guy. This is a lie. The Citizens United case was about censorship and fundamental fairness.

Let's recall that during oral arguments for our case at the Supreme Court, the deputy solicitor general stated in response to a question from Justice Samuel Alito that the logical extension of McCain-Feingold is that if the government can ban movies, then it could also ban books. This is the story of the case the left doesn't want the American people to know about.

The left would have you believe that I went to court in hopes of unleashing the flood gates of corporate money to drown out the voice of the little guy. This is a lie. The Citizens United case was about censorship and fundamental fairness.

And, the left's apocalyptic predictions about corporate money never happened. In fact, a recent op-ed that appeared in the Los Angeles Times stated, "The notion that the *Citizens United* decision opened the donation floodgates to 21st century corporations is a myth."

Another charge from the left is that the *Citizens United* decision has allowed too much money into our political system. A recent report by the Center For Responsive Politics found that "election-related spending from non-party independent groups ballooned to \$4.5 billion over the decade." What the report fails to mention is the amount of money spent on television advertising in other areas. For instance, \$18 billion was spent on automobile advertising in 2018 alone.

So what's more important: Spending money on a debate about who should be president of the United States or on a debate over pick-up trucks? I believe that a robust political debate in the marketplace of ideas is the essence of what makes our constitutional republic exceptional. If people want to band together to spend money to influence an election, it's their First Amendment right to do so.

The Citizens United decision has leveled the playing field for conservatives. Before Citizens United, the left had a massive advantage because of the support they received from labor unions and media corporations such as The New York Times and Washington Post. During Trump administration, many media corporations are showing their true colors and behaving more like Democratic Super PACs than objective journalists and this calls into question why they receive special exemptions under the law.

While the Citizens United decision does make it easier to participate in our political process -- big corporations have not hijacked the process in any way shape or form, nor did the decision allow foreign money to flow into our elections. One of the main reasons why the Citizens United decision is vilified by the left to this day is because President Obama lied about the decision at his 2010 State of the Union address just after the decision came down. Obama warned the American people that foreign money would now be a threat to our elections even though our case had nothing to do with foreign money.

If Obama was trying to fire up his base of support by demagoguing the facts of our case, he succeeded. The liberal assault on the Citizens United decision continues to this day. The left's main policy goal is to pass a 28th Amendment to the Constitution that would destroy the protections we cherish under the First Amendment.

What I knew in 2010 and continue to see to this day is that the left wants to silence speech that they don't agree with. Look at the attacks on the *Citizens United* case. Look at the attacks on conservative speech on college campuses. The difference between conservatives and liberals is that we support more speech, even if it's speech we disagree with. By contrast, the left wants to rid the public square of speech they don't agree with.

2/6/2020

David Bossie: Supreme Court 'Citizens United' decision still protects the First Amendment 10 years later

Sen. Ted Cruz, R-Texas, was on to something when he said in our film that free speech used to be something that was a bipartisan commitment, but unfortunately that's no longer the case. In 2010, groups like the ACLU, AFL-CIO, and Reporters Committee for Freedom of the Press, all filed amicus briefs in support of Citizens United. Sadly, this would not be the case today.

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The highly respected constitutional lawyer Floyd Abrams wrote in a recent op-ed: "As Justice Kennedy put it in Citizens United, speech is 'the means to hold officials accountable to the people' and 'political speech must prevail against laws that would suppress it by design or inadvertence.' That was true a decade ago and it remains true today." I could not agree more.

I believe that without the rights guaranteed in the First Amendment, there are no others. As Citizens United moves into its second decade, we must be as vigilant as ever in our defense of free speech.

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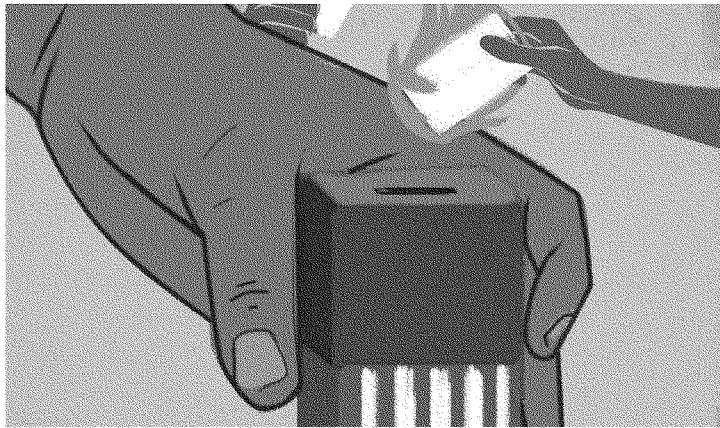
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