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Office of the New York State Attorney General
c/o James Katz
120 Broadway, 25th Floor
New York, NY 10271

Testimony of Craig Holman, Public Citizen[1]

New York State Attorney General's Proposed Rules to Require Transparency of Electioneering Spending by Nonprofit Organizations

Public Citizen encourages the Office of New York State Attorney General to proceed with amending title 13 of the New York Codes, Rules and Regulations and adopt the proposed regulations requiring annual disclosure of electioneering activities by certain nonprofit organizations.

Public Citizen strongly supports the proposed electioneering disclosure rules for the following reasons.

- The disclosure system envisioned by the New York State Attorney General is narrowly drawn to require disclosure only of funds raised and spent by nonprofit groups for electioneering purposes, and does not require disclosure of funds used by nonprofit groups for other social welfare or non-election related activities.
- In just the past few years, undisclosed sources of campaign funds (known as "dark money") have overwhelmed federal and state elections, seriously endangering the integrity of our electoral process.
- Most of this dark money has been funneled through nonprofit groups.
- Without some reasonable level of transparency of electioneering activities by nonprofit groups, federal and state tax codes and campaign laws are easily evaded.
- Statutes are already on the books mandating transparency of electioneering activities by nonprofit groups, but some of the key regulatory agencies – most notably the Internal Revenue Service (IRS) and federal and state elections agencies – have failed to enforce the laws properly.
- Electioneering abuses by nonprofit groups not only undermine the integrity of the electoral process, but also foster evasion of the tax codes and threaten the credibility of the nonprofit sector and the business community.

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- Transparency regulations currently under consideration by the New York State Attorney General's Office, as well as litigation by the New York State Comptroller's Office and rulemaking by the Securities and Exchange Commission (SEC) at the federal level, are appropriate regulatory actions to ensure compliance with state and federal tax codes and campaign laws and to protect the interests of donors to nonprofit organizations, shareholders and investors in business enterprises, and the public.

Summary of the New York Attorney General's Proposed Transparency Rules

Under the proposed disclosure rules, nonprofit organizations registered with the New York State Attorney General, other than 501(c)(3) charities which are prohibited from campaign intervention, would file an additional "Electioneering Disclosure Schedule" in the annual financial activity reports filed with the state. This additional schedule would be made publicly available on the Attorney General's web page.

Specifically, the proposed rules include the following:

- Covered nonprofit organizations would be required to disclose the amount and percentage of total election related expenditures.
- Nonprofit organizations that make expenditures of more than $10,000 affecting New York state or local elections, including ballot measures, would be required to disclose itemized expenditures (including the amount, date, recipient and purpose of expenditures) and disclose the donors behind those election related expenditures of $100 or more (including name, address and employer of donors and date of donations).
- Nonprofit organizations could establish a distinct electioneering account from which all election related expenditures are made and disclose only the itemized expenditures and receipts made to those accounts.
- Electioneering activities subject to disclosure include most paid public advertisements, mass telephone communications, print materials and mailings that expressly advocate the election or defeat of candidates or ballot measures, or that clearly identify one or more candidates or ballot measures and are disseminated within 180 days of the election.
- Waivers from the donor disclosure requirements would be granted to covered organizations that could demonstrate undue harm or reprisals.

Fading Disclosure and the Dramatic Rise in Outside Campaign Spending

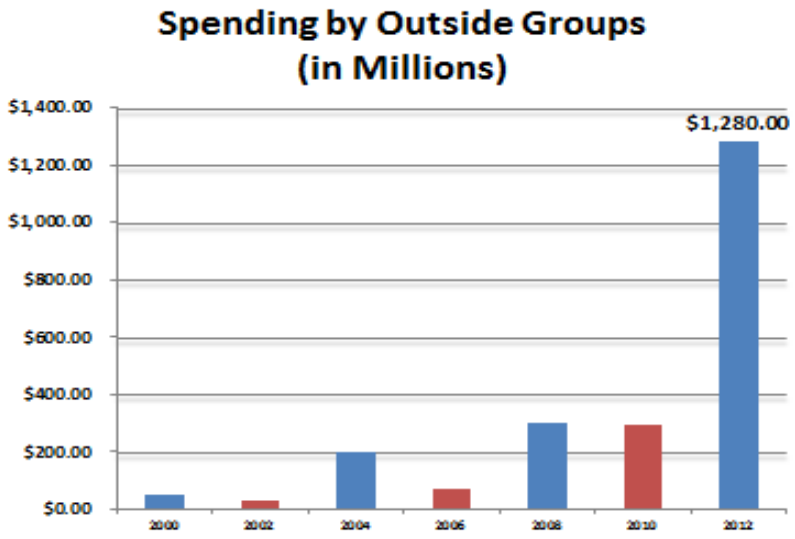
Fading disclosure of the sources of electioneering funds has plagued nearly all federal and state elections in the United States at an alarming rate since the U.S. Supreme Court's *Citizens United v. Federal Election Commission* decision. This was not the intent of the Court.

The *Citizens United* decision marked a radical break by the Roberts Court from long-standing American political tradition and court precedents. On January 21, 2010, the Supreme Court unleashed a flood of corporate money into federal, state, judicial and local elections by announcing that, contrary to long-standing political tradition, corporations have a constitutional right to spend unlimited amounts of money to promote the election or defeat candidates.

The Roberts Court explicitly overruled two existing Supreme Court decisions. In the 1990 *Austin v. Michigan Chamber of Commerce* decision,[2] the Court previously held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. The 2003 *McConnell v. Federal Election Commission* decision[3] applied that principle to uphold the federal Bipartisan Campaign Reform Act's restrictions on "electioneering communications," that is, its ban on corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. *Citizens United* overruled *Austin* and *McConnell*. The *Citizens United* decision also effectively negated parts of the same Court's 2007 ruling in *Federal Election Commission v. Wisconsin Right to Life.*[4]

By overruling these decisions, the Roberts Court opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

Immediately after Citizens United, outside spending in federal elections increased 427 percent in the 2010 elections over the previous 2006 congressional elections, and increased another four-fold in the 2012 presidential election cycle.[5]



But the Roberts Court never intended disclosure to be one of its victims. Even as the court struck down the limitation on corporate-funded campaign expenditures in the *Citizens United* opinion,

[2] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).
[3] McConnell v. Federal Election Commission, 540 U.S. 93 (2003).
[4] Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449 (2007).
[5] Data on outside spending in federal elections provided by the Center for Responsive Politics, analyzed by Public Citizen.

the Roberts Court upheld the constitutionality of BCRA's disclosure requirements relating to the funders of electioneering communications.

In addition, Justice Kennedy, who wrote the majority opinion, appeared to rely on the existence of strict disclosure laws as a rationale for lifting the ban on corporate-funded campaign expenditures.

> *"A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters*."[6]

Such disclosure, Kennedy wrote, would enable citizens to "see whether elected officials are 'in the pocket' of so-called moneyed interests."[7]

However, contrary to the Supreme Court's promise that voters would be able to "give proper weight to different speakers and messages," voters were left completely in the dark about who funded about half the messages that were blasted into their living rooms in the elections following *Citizens United*.

According to an analysis by Public Citizen,[8] among groups broadcasting electioneering communications in federal elections, nearly 100 percent disclosed their funders in the 2004 and 2006 election cycles (the first two election cycles after BCRA created this category of campaign ads). In the 2008 elections, the first after *Wisconsin Right to Life*, the share of groups disclosing their funders plummeted to less than 50 percent. In 2010, barely a third of electioneering communications groups disclosed their funders.

Disclosure by Groups Making Electioneering Communications, 2004-2010

Year	# of Groups Reporting ECs	# of Groups Reporting the Donors Funding ECs	Pct. of Groups Reporting the Donors Funding ECs
2004	47	46	97.9
2006	31	30	96.8
2008	79	39	49.3
2010	53	18	34.0

Source: Public Citizen's analysis of Federal Election Commission data.

[6] Citizens United v. Federal Election Comm'n, 130 S. Ct. 876, 916 (2010) (internal citations omitted).
[7] Id.
[8] Taylor Lincoln and Craig Holman, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (2011), available at: http://www.citizen.org/documents/Citizens-United-20110113.pdf

Among groups making independent expenditures (expenditures expressly intended to influence elections) in federal elections, disclosure of donors fell from 90 percent in 2004 and 97 percent in 2006 to only 70 percent in 2010.

Disclosure Among Top 30 Groups Making Independent Expenditures, 2004-2010

Year	Groups Disclosing Funders	Groups Not Disclosing Funders	Pct. Of Groups Reporting the Donors funding IEs
2004	26	3	89.7
2006	29	1	96.7
2008	25	5	83.3
2010	21	9	70.0

Source: Public Citizen's analysis of data from the Federal Election Commission and the Center for Responsive Politics

Combining the loss of donor disclosure behind electioneering communications with the loss of donor disclosure behind independent expenditures, the sources of only about half the funds spent by outside groups in the 2010 federal elections were disclosed to the public. There was a modest up-tick in donor disclosure in the 2012 elections, due almost entirely to the new prevalence of "super PACs,", which are registered political committees subject to federal disclosure laws. According to the Center for Responsive Politics, 24 percent of outside spending groups provided no donor disclosure, another 24 percent provided partial disclosure, and only about 52 percent of outside spending groups provided full disclosure of their funding sources.[9]

FEC Regulation, Not the Law, Gutted Federal Disclosure

This collapse of the disclosure regime at the federal level, which has been mirrored in states that have not unilaterally implemented new state disclosure laws or regulations, is primarily due to the Federal Election Commission (FEC).

At the federal level, the initial fading of campaign finance disclosure began from an errant rulemaking by the Federal Election Commission. In response to the 2007 *Wisconsin Right to Life* decision, in which the Roberts Court began the slippery slope to *Citizens United* and ruled that corporations could provide funds for electioneering communications as long as those political ads were issue oriented, With that first salvo at BCRA, the FEC revised the disclosure rule by exempting groups that made electioneering communications from disclosing contributors' identities except in special cases in which donors specifically earmarked money for that purpose.[10] Thus, trade associations and other nonprofit groups could spend money for issue oriented electioneering communications without disclosing the sources of those funds as long as the donors did not *specifically* give money to finance electioneering advertisements.

[9] Center for Responsive Politics, analysis of disclosure of donors by outside spending groups in the 2012 federal elections, available at: http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D

[10] 11 C.F.R. §104.20(c)(9).

Just before the 2010 elections, the three Republicans on the FEC issued a statement endorsing an even narrower interpretation of the disclosure rule. They opined that electioneering groups should only have to disclose those donors who specified that their money would be used for a specific ad, aired in a specific race.[11] When Ellen Weintraub, a Democratic commissioner on the agency who voted for the disclosure rule in 2007, read the Republican statement, she commented: "This is an unprecedented narrow reading of the regulation. It's certainly not what I intended when I voted for that regulation."[12]

Because few donors are apt to attach such specific instructions to their contributions, the effect has been to gut the disclosure requirement enshrined in BCRA – despite the fact that the federal statute calls for full donor disclosure. BCRA states that any group conducting electioneering communications must fully disclose the donors of $1,000 or more behind those expenditures.[13] But so far the regulators at the FEC have decided otherwise.

Laundering State and Federal 'Dark Money' through Nonprofits

Immediately following the C*itizens United* decision, what began as a crack in the dam against "dark money" quickly turned into a flood of undisclosed campaign money in both federal and state elections. The few remaining constraints on corporate and outside money in elections following the 2007 *Wisconsin Right to Life* decision were lifted when the Court ruled that any campaign ads, not just issue oriented ads, could be financed directly out of corporate treasury funds.

Most state disclosure regimes are not all that different from those at the federal level. If a corporation directly pays for a campaign ad, the company must be disclosed as the buyer. But if the corporation funnels money to a nonprofit group or trade association to buy that same campaign ad, the buyer will often only be disclosed as the nonprofit group, not the companies who actually provided the funds for the ad. Electioneering nonprofit groups will often cite the tax codes that allow donors to social welfare organizations and trade associations to remain anonymous as the basis for not disclosing the funding sources behind their electioneering expenditures.

Unfortunately, most state regulators have taken their cue for enforcement of the tax codes – or, more accurately, *lack* of enforcement of the tax codes – from the IRS. Despite the fact that the tax codes governing nonprofit organizations mandate that tax-subsidized nonprofits primarily, if not exclusively, serve non-electioneering purposes, the IRS and most state regulators have largely turned a blind eye to laws limiting the political activities of nonprofit groups.

This lack of monitoring the political activities of nonprofit groups by regulators used to be a problem. In the wake of *Citizens United*, it has become a nationwide scandal of unprecedented

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[11] Statement of Reasons for Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Freedom's Watch, Inc., MUR 6002 (Aug. 13, 2010), available at: http://eqs.sdrdc.com/eqsdocsMUR/10044274536.pdf

[12] Robert Wechsler, "Ethical Officials and Disclosure Rules," CityEthics.org (Sep. 16, 2010).

[13] 2 U.S.C. 434.

proportions – as shown by the startling rise in outside campaign spending and simultaneous collapse of donor disclosure.

The tax codes zealously protect the anonymity of the sources of funds for legitimate nonprofit charities, social welfare organizations and trade associations, as should be the case. However, in order to warrant such protections and nonprofit tax status, tax laws explicitly state that 501(c)(3) charity organizations may "not participate in, or intervene in" any political campaign. Furthermore, 501(c)(4) social welfare organizations are to be "operated exclusively for the promotion of social welfare," and 501(c)(6) trade associations are nonprofits in which "no part of the net earnings" benefit any private shareholder or individual.

Despite the statutory language restricting, if not eliminating, electioneering activities by nonprofit organizations, the IRS proffered a "major purpose" standard for nonprofits about 50 years ago. According to IRS regulations, social welfare organizations and trade associations may participate in some electioneering activity so long as campaign intervention is not their primary purpose.[14]

The IRS has never defined its "primary purpose" standard, leading to ambiguity in guidance as well as enforcement. Some claim that the primary purpose standard is violated only when a majority of an organization's resources is allocated to electioneering activities; others assert it means that no more than an "insubstantial amount" of resources may be used for campaign intervention. Several U.S. senators have recently submitted a letter to the IRS challenging the agency's regulation that defines the statutory term "exclusively" as "primarily."[15]

The ambiguity of the IRS regulation on campaign intervention by nonprofit groups is compounded by its 11-point facts and circumstances test as to whether a group's activities constitute electioneering. The facts and circumstances test applies a series of subjective standards as to whether the activity shows a "preference" for a particular candidate or political party. All this ambiguity and subjectivity in IRS regulations and compliance standards further allows for significant political gamesmanship over IRS actions. When it became publicly known that the IRS requested more information from some Tea Party organizations applying for 501(c)(4) status, the agency immediately came under criticism from some Republican members of Congress and appears to have stepped back from scrutinizing the Tea Party's tax status.

Enforcement actions for violating nonprofit tax exempt status are rare. The IRS audits only about 1 percent of nonprofits for compliance to the tax codes.[16] Numerous complaints have recently been filed with the IRS charging that such nonprofit organizations as Crossroads GPS, American Action Network, Priorities USA and several other nonprofit organizations are in violation of the tax code, but none of the nonprofit groups involved in the 2012 elections has yet faced

[14] See, Treas. Reg. §1.501(c)(4)-1(a)(2)(ii); Rev. Rul. 81-95, 1981-1 C.B. 332; and Gen. Counsel Mem. 34233 (Dec. 30, 1969).
[15] Diana Freda, "IRS Examining 70 Section 501(c)(4) Groups," *BNA Money and Politics Report* (Sep. 20, 2012).
[16] Andy Kroll. "IRS: Toothless. FEC: Thoroughly Broken," *Mother Jones* (Aug. 2, 2012).

revocation of its tax status. In only one public response to these complaints has the IRS indicated it may reevaluate its campaign intervention regulations.[17]

As a result, nonprofit organizations have blossomed since the *Citizens United* decision as reliable and fairly secure conduits for unlimited corporate and special interest money into elections, all the while keeping the sources of these funds secret. This laundering of "dark money" through nonprofit organizations is now the principal vehicle for masking the sources of funds flowing into federal and state elections.

These abuses of the tax code have become so widespread that the 2012 federal elections even saw some nonprofits collect secret campaign cash and then contribute the same funds to a political committee that must report its donors, preserving the anonymity of the original donors. Learning from the example of the nonprofit Crossroads GPS funneling secret money to its political committee wing, American Crossroads, the American Bankers Association (ABA) filed with the IRS an application to set up a 501(c)(4) social welfare organization largely for the purpose of raising secret campaign cash from banks and then laundering that money to super PACs to support or oppose candidates for U.S. Senate. According to ABA General Counsel Dawn Causey, one of the reasons for creating a nonprofit group to carry out this function is so that the sources of the electioneering expenditures will not be disclosed to the public.

General Counsel Causey emphasized the importance of using nonprofit tax status to conceal donors from the public on a September 4th, 2012, conference call briefing member firms. But she also warned members that the Internal Revenue Service or another agency could conceivably craft rules requiring disclosure of electioneering finances. "Today, we're OK; tomorrow, I don't know," she said. "There is a risk."[18]

Public Citizen filed a letter with the IRS two days later warning of the ABA plan but has received no response from the agency.

Once again, as with the federal election disclosure law, the statutes governing the electioneering practices of nonprofit groups are on the books. It is the regulatory agency charged with enforcing these laws that is missing-in-action.

Nonprofit Groups Becoming Increasingly Brazen in Electioneering, Deceptive in Purpose

Not only is the growing amount of dark money in federal and state elections startling, but many nonprofit organizations – realizing that regulatory authorities are not enforcing the tax codes when it comes to campaign intervention – are quite brazen in their incursions into the electoral arena. The quantity of their election messages is growing, and the tone of those messages is increasingly obvious, yet they frequently continue to assert to regulatory agencies and the public that the messages are nothing more than educational issue advocacy. A few nonprofit groups

[17] Diane Freda, "IRS Offers First Sign that 501(c)(4) Political Activity Rules May be Updated," *BNA Money and Politics Report* (July 24, 2012).
[18] Robert Schmidt and Phil Mattingly, "Banker Plan Would Fund Super-PACs to Sway Senate Races," *Businessweek* (Sep. 5, 2012).

specialized in funneling undisclosed money into politics during the early days of "soft money." Following *Citizens United*, such spending is becoming commonplace today, frequently engineered by the same political operatives of yesteryear. One such early example is Americans for Job Security (AJS).

1. Americans for Job Security

In 2007, Public Citizen filed a complaint with the IRS and the FEC against the nonprofit group, Americans for Job Security (AJS), for violating both the "primary purpose" standard of the tax code and the similar "major purpose" standard of federal election law.[19]

Public Citizen's complaint compiled a full evidentiary record of the electioneering abuses of AJS for the 2000, 2002 and 2004 election cycles. To judge the degree to which AJS engaged in influencing elections in the years covered in this complaint, we analyzed 32 of the organization's advocacy communications in the context of IRS Rev. Rule 2004-06. The rule, published in January 2004, included six factors that "tend to show" that an advocacy communication is for an exempt function under Section 527(e)(2) and five factors that "tend to show" that an advocacy communication is not for an exempt function under Section 527(e)(2).

Every single one – 32 out of 32 – of AJS's communications analyzed in this complaint satisfied a clear majority of the factors in favor of a communication being deemed an exempt function under Section 527(e)(2) and each satisfied only a slim minority, if any, of the factors pointing against a communication being deemed an exempt function under the section.

AJS's predilection for electioneering is manifest in other ways, including a common-sense reading of its ads. Consider these:

> *"Pennsylvania families relax a little more these days because Rick Santorum is getting things done every day ... Call and say thanks, because Rick Santorum is the one getting it done."*
>
> –Television commercial, November 2005

> *"[John] Kerry wants to repeal the prescription drug benefits seniors now receive.*
>
> *Kerry's prescription for failure: fewer choices; more government; more paperwork; higher costs. Call Senator Kerry ... and let him know that American*
>
> *Seniors deserve better."*
>
> –Direct mail message to a resident of Bradenton, Fla., October 2004

[19] Public Citizen's complaint to the IRS and FEC against Americans for Job Security for violating both the tax code and federal election law from 2000 through 2006 is available at: http://www.citizen.org/congress/article_redirect.cfm?ID=16408

> *"Are you taxed enough already? Not according to Al Gore."*
> *Gore's ideas for gas taxes are "so extreme, if they ever came to pass, Americans would truly be Gored at the pump."*
>
> –Television commercial, November 2000

AJS stated that it has a tax-exempt purpose of permitting "businesses to work together to promote a strong job-creating economy in which workers have good job opportunities and businesses can thrive" and lists "educating the public on economic issues with a pro-market, pro-paycheck message" as its sole program service accomplishment in furtherance of that purpose.[20] But the organization shows little fealty to its purported purpose in its communications. In fact, the sole common denominators of AJS's messages appear to be diminishing the electoral prospects of Democratic candidates for office or aiding the prospects of Republican candidates. In 2002, for example, the organization attacked Democratic candidates for breaking a promise not to run for a third term, taking money from special interests, being soft on crime, being anti-senior citizen, and getting "too comfortable in Washington."

AJS's practice of operating primarily as a political organization while filing under the less onerous disclosure rules that apply to nonprofit organizations posed adverse consequences for elections that are far greater than any tax avoidance the group may have realized. The organization used its tax status to pump $17.3 million into electioneering ads, out of a total budget over the same time period of $22.2 million, without affording the viewers, listeners and readers of these messages an opportunity to know who was behind them.

The organization acknowledged that keeping its donors' identities secret is part of its strategy. Former AJS President (and sole paid employee) Michael Dubke repeatedly said that the group did not reveal its donors' names because doing so would distract from its message.

AJS declared "0" political expenditures to the IRS on its Form 990s, and disclosed no electioneering receipts or expenditures to the FEC.

Public Citizen never heard from the IRS regarding this complaint. The Federal Election Commission deadlocked on the matter in a 3-to-3 vote and dropped any further investigation.

More recently, of the 107 nonprofit organizations studied by *ProPublica* that were active in the 2010 federal elections, several of these groups stand out for particularly blatant electioneering behavior while avoiding disclosure of funding sources – and remaining elusive about conducting electioneering activity to the IRS and the public.[21] These groups are discussed below.

2. American Future Fund

On March 19, 2008, the same day that a new group mailed in its application for 501(c)(4) status to the IRS, declaring on its Form 1024 that it would not conduct any electioneering activity, the group – American Future Fund – posted an Internet advertisement praising Sen. Norm Coleman

[20] Americans for Job Security, Form 990 (2003).
[21] Kim Barker and Al Shaw, "How Some Nonprofit Groups Funnel Dark Money Into Campaigns," *ProPublica* (Oct. 4, 2012).

(R-Minn.), who was expected to face a tough reelection race later in the year. In its application to be recognized as a social welfare organization, the group described that it would allocate 70 percent of its resources to educate the public and 30 percent to lobby on legislation.

On its web page, American Future Fund explains to the public that the organization is "formed to provide Americans with a conservative and free market viewpoint to have a mechanism to communicate and advocate on the issues that most interest and most concern them. Conservative and free market principles will be under direct attack in America. In light of that, it is imperative there be a voice for conservative principles that sustains free market ideals focused on bolstering America's global competitiveness." The web page goes on to explain that there is also an American Future Fund PAC whose purpose is to influence elections, but that the 501(c)(4) group is a separate organization focusing on nonpartisan education and issue advocacy.[22]

While there is indeed an American Future Fund PAC registered with the FEC, disclosing its donors, and making about $85,000 in campaign expenditures in 2010 and another $28,000 in campaign expenditures in 2012, it is the 501(c)(4) that made the bulk of electioneering expenditures in both election cycles and declined to disclose its donors. The nonprofit group began buying electioneering television ads in September 2010 and continued the expensive political advertising campaign all through the last election cycle.

In the 2010 election cycle, the nonprofit American Future Fund reported to the FEC that it made $7.4 million in independent expenditures expressly advocating the election or defeat of candidates and another $2 million in electioneering communications. The nonprofit also led the way over its PAC in campaign intervention activities in 2012 as well, spending $23.6 million on independent expenditures and $1.9 million in electioneering communications supporting and opposing candidates. The group disclosed none of the sources of its funds.

Electioneering ads sponsored by American Future Fund targeted candidates in at least 28 congressional districts in the 2010 elections, all in the form of attack ads except in one case, and the presidential contest and 27 Senate and House races in the 2012 elections.

American Future Fund television ads tended to be cookie-cutter ads, the same political message with just the name of the candidate changed, depending on where the ad aired. The American Future Fund ad against Martin Heinrich in New Mexico is representative of the group's express advocacy messages. The ad calls Heinrich a "Washington liberal" and slams him for voting for "Nancy Pelosi's agenda more than 97 percent of the time." The ad concludes: "This November, your vote can make Martin Heinrich disappear."[23]

Public Citizen, ProtectOurElections.org and the Center for Media and Democracy filed a complaint with the FEC in 2010 asserting that the nonprofit group's extensive electioneering

[22] American Future Fund, *About Us*, http://americanfuturefund.com/about-us

[23] Kyle Trygstad, "New Mexico: Conservative Group Targets Heinrich in Ad," *CQ Politics* (Sep. 9, 2010), available at: http://blogs.cqpolitics.com/eyeon2010/2010/09/new-mexico-conservative-group.html

activities surpass the major purpose standard for political committee status.[24] The FEC has not acted on the complaint to date.

3. Commission on Hope, Growth and Opportunity

The Commission for Hope, Growth and Opportunity was created on March 31, 2010, as a 501(c)(4) social welfare organization by Republican consultant Steve Powell and former National Republican Senatorial Committee counsel William Canfield. In its Form 1024 application for tax exempt status, the group told the IRS it will not conduct any electioneering activity.

Instead, the Commission asserted that it is a "public welfare organization created to advance the principle that sustained and expanding economic growth is central to America's economic future and the well-being of all Americans."[25] In order to fulfill this mission, "[t]he Commission will engage economists and other business experts to inform its understanding of the necessity for sustained economic growth and will bring the fruits of this expertise and research directly to the attention of decision makers at all levels of government. The Commission will communicate its public welfare message on the issue of sustained economic expansion to the public through all forms of mass communication…."[26]

Although the Commission did not report any electioneering expenditures to the FEC in 2010, and later told the IRS on its Form 990 after the election that it made no political expenditures during that year, the Campaign Media Analysis Group (CMAG) began picking up TV advertisements attacking Democratic congressional candidates sponsored by the group in September 2010. By mid-October, CMAG monitored a slew of similar electioneering ads sponsored by the group targeting congressional candidates in Colorado, Florida, Maryland, New Hampshire, New York and Pennsylvania. These ads also tended to be cookie cutter TV ads. One such ad right before the November 2010 election attacked Maryland Democratic Rep. 'Dutch' Ruppersberger for voting for the "Pelosi agenda an astounding 98 percent of the time," and concluded that the Republican challenger "Marcello Cardarelli has a better idea."[27]

It is estimated that the group spent about $5 million during the 2010 elections,[28] but reliable records are not available. The Commission did not report either electioneering expenditures or donors to the FEC or the IRS. Facing complaints for violations of federal campaign laws and the tax code, the group disbanded following the 2010 elections. "I still don't know who they are," said John Spratt, the former chairman of the House Budget Committee, who lost his 2010 re-election bid after facing a deluge from the group. "It's a classic case."[29]

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[24] Public Citizen's *et. al* complaint against American Future Fund to the FEC is available at: http://www.citizen.org/documents/FEC_Final_Complaint_AmericanFutureFund101510.pdf
[25] Commission on Hope, Growth and Opportunity, IRS Form 1024 (March 3, 2010), p. 2.
[26] Id.
[27] FactCheck.org, "Commission on Hope, Growth and Opportunity" (Oct. 19, 2010), available at: http://www.factcheck.org/2010/10/commission-on-hope-growth-and-opportunity/
[28] Id.
[29] Jonathan Weisman, "Tax Exempt Group's Election Activity Highlights Limits of Campaign Finance Rules," *New York Times* (July 16, 2012).

4. Center for Individual Freedom

Like many other nonprofit organizations extensively involved in federal and state elections, the Center for Individual Freedom also declared in its application to the IRS for tax exempt status that it would not conduct electioneering activity.[30] On its web page, the organization describes its mission as: "the Center for Individual Freedom is a non-partisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution. The Center seeks to focus public, legislative and judicial attention on the rule of law as embodied in the federal and state constitutions…. In addition, the Center seeks to foster intellectual discourse by bringing together independent thinkers to examine broad-ranging issues of individual freedom in our global society."[31]

The nonprofit Center for Individual Freedom states that it will pursue its mission through litigation, lobbying and education. The Center seeks contributions from individuals and groups on its web site to help finance these activities.

But in 2010, the Center decided to use much of that money for televised electioneering ads, reporting to the FEC $2.5 million in independent expenditures and electioneering communications attacking candidates in at least 10 congressional races. The nonprofit group spent another $1.9 million in the 2012 elections, attacking congressional candidates for their associations with President Obama and House Minority Leader Nancy Pelosi. All the expenditures were for attack ads.

One such electioneering ad by the group targeted Rep. Bill Owens (D-NY). Shortly before the 2012 elections, the Center paid for the following attack ad targeting Owens in his New York congressional district:

> *"Coupons, batteries, milk – all things with a longer shelf life than a Bill Owens campaign promise.*
>
> *He said he opposes Medicare cuts. But one day after taking office Owens voted for a government takeover of health care. He voted for Obamacare. Slashing Medicare by $700 billion. And it could give bureaucrats the power to cut Medicare spending even more.*
>
> *Bill Owens, he can't be trusted a day longer."*
>
> –Television commercial, September 2012

The Center for Individual Freedom did not disclose any of its donors to the FEC or the IRS, and declared to the IRS on its Form 990 that the group made no political expenditures.[32]

These are just a sampling of nonprofit groups and their electioneering ads that have proliferated to the point of frequently dominating campaign spending in federal and state elections. Conservative and liberal nonprofit groups alike routinely describe their mission as social welfare

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[30] Center for Individual Freedom, IRS Form 1024 (Feb. 4, 1999).
[31] Center for Individual Freedom, *About Us*, available at: http://cfif.org/v/index.php/about-cfif/mission
[32] Center for Individual Freedom, Form 990 (2010).

to the IRS, receive tax exempt status, solicit donations on their web pages to promote research and educational activities, and then use much of that money for blatant campaign attack ads – and exploit their tax status in order to avoid disclosing to the public the sources of funds behind their electioneering activities. Then, to appear true to their stated mission, many of these groups will follow up their costly electioneering campaigns for and against candidates with a declaration to the IRS that they made no political expenditures.

Conclusion:
Nonprofit 'Dark Money' So Rampant, It Can No Longer Be Ignored

Immediately following the 2010 *Citizens United* decision, nonprofit organizations have increasingly and dramatically become the favored vehicle for corporations, special interests and political operatives to funnel unlimited and undisclosed money into federal and state elections. There has historically always been somewhat of a problem of nonprofit groups abusing the tax codes for political purposes, but that problem has now turned into a crisis. More wealthy interests now seek to launder their campaign money through innocuous sounding groups and more political operatives tied to candidates, parties or campaign agendas exploit the ambiguous regulatory framework and loose enforcement of the tax codes for electoral gain.

The plague of nonprofit dark money in elections is extremely harmful to the donors, investors, shareholders and the public alike. The lack of transparency of nonprofit electioneering expenditures and sources of funds is harmful to:

- Nonprofit donors who may be deceived by an organization's mission statement and fundraising appeals, believing they are contributing to promote educational activities and the social welfare, without realizing the funds may be used for campaign ads supporting or opposing the election of specific candidates.
- Business investors and shareholders who routinely are not informed of a CEOs decision to transfer their company funds into the campaign warchests of electioneering nonprofits.
- The public who have to brave the barrage of campaign attack ads sponsored by nonprofit groups unwilling to disclose the sources of the campaign funds, concealing the interests behind the ads.

At the federal level and in many states, the statutes for ensuring the integrity of the campaign finance system and the nonprofit sector are already on the books. The single greatest factor allowing nonprofit "dark money" to become so rampant is the failure of appropriate regulatory agencies to monitor and enforce the laws.

But some regulatory agencies, such as the Office of New York State Attorney General, are considering taking actions within their own jurisdictions to rein in the abuses.

The New York Attorney General will not be alone in attempting to alleviate some of the damage caused by nonprofit dark money in elections. The New York State Comptroller's Office is also attempting to protect investors in the state pension fund system by casting light on how companies with pension fund investments are using that money for political purposes. And the Securities and Exchange Commission has just announced that it too will undertake rulemaking to

require publicly-traded corporations to disclose their political expenditures to shareholders and the public.

The proposed transparency regulations for nonprofit organizations registered in the State of New York are practical and a desperately needed protection for donors, shareholders and the public. Nonprofit groups that choose to participate in elections may do so; they need only to establish an electioneering account and disclose the sources of funds to that account. While relatively non-intrusive for nonprofit groups, such transparency regulations will mean a great deal in protecting the integrity of the nonprofit sector as a whole.

Public Citizen strongly encourages the New York Attorney General to move ahead with the proposed transparency regulations.